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Ignoring the *Golden* Principle of Charter Interpretation?

David M. Tanovich*

I. INTRODUCTION

One consistent and disturbing trend since the birth of the *Canadian Charter of Rights and Freedoms*¹ in 1982 is that race has been and continues to be, with a few notable exceptions, erased from the factual narratives presented to the Supreme Court of Canada and from the constitutional legal rules established by the Court in criminal procedure cases. Understanding the etiology of this erasing is not easy. In earlier pieces, the author has explored the role of trial and appellate lawyers.² This paper focuses on principles of judicial review and the failure of the Supreme Court to consistently consider the impact on Aboriginal and racialized communities of the constitutional rules it creates or interprets. What makes the silence so problematic is that the Court gave itself the tool in 2001 to address part of the identified problem when it established an anti-racism principle of Charter interpretation in *R. v. Golden*.³ This paper seeks to address a number of questions focused on the legacy of *Golden*. What is the origin and content of the *Golden* principle of judicial review. Part II examines the evidence from subsequent cases and academic commentary that this is indeed an accepted principle of constitutional interpretation. Part III discusses the cases from the 2007 Supreme Court term that would have benefited from a critical race analysis. Part IV discusses how consideration of *Golden* would have impacted the Court's analysis in *R. v. Clayton*⁴ in particular? Finally,

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² See David M. Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 S.C.L.R. 655; and David M. Tanovich, "The Further Erasure of Race in Charter Cases" (2006) 38 C.R. (6th) 84.

³ [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679 (S.C.C.) [hereinafter "*Golden*"]. I was counsel for Mr. Golden in the Supreme Court of Canada.

⁴ [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.).

Part V explores how the *Golden* principle should be applied in future cases.

II. THE *GOLDEN* PRINCIPLE

On January 18, 1997, Ian Golden, a suspected drug dealer, was subjected to multiple strip searches in a restaurant on a Saturday night in downtown Toronto. There were a number of individuals present in the restaurant during his ordeal. One of the searches took place in a narrow stairwell. The second took place in the back of the restaurant. After he was strip searched, he was restrained by numerous officers who tried to dislodge a small baggie from his buttocks. During this attempted seizure, Golden had an involuntary bowel movement. The police continued their search using gloves that were used in the restaurant to clean the toilets. Golden was subjected to a third strip search at the police station which was a few blocks away. The issue before the Supreme Court of Canada was what limits section 8 of the Charter imposed on this very intrusive and humiliating police power.⁵ Golden was African-Canadian and the Supreme Court had the benefit of the submissions of both the African-Canadian Legal Clinic, which characterized Golden's ordeal as a public lynching, and Aboriginal Legal Services of Toronto.

In their majority judgment, Iacobucci and Arbour JJ. recognized the critical race submissions of the intervenors and set out, albeit very briefly, what I have characterized as the *Golden* principle:

... [W]e believe it is important to note the submissions of the ACLC and the ALST that African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches (Report of the Aboriginal Justice Inquiry of Manitoba (1991), vol. 1, *The Justice System and Aboriginal People*, at p. 107; Cawsey Report, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (1991), vol. II, p. 7, recommendations 2.48 to 2.50; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996), at pp. 33-39; Commission on Systemic Racism in the Ontario Criminal Justice

⁵ A majority of the Court held that the police must have reasonable and probable grounds to conduct a strip search and that absent exigent circumstances, it must never be conducted "in the field": *supra*, note 3, at para. 102. The majority also imposed other standards to ensure a reasonably conducted strip search, such as authorization from a senior officer: *id.*, at para. 101.

System, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995)). *As a result, it is necessary to develop an appropriate framework governing strip searches in order to prevent unnecessary and unjustified strip searches before they occur.*⁶

While it would have been helpful for the Court to expand on its analysis, the message is clear. The Charter must be interpreted with a critical race or anti-racist lens to give effect to systemic racism in the criminal justice system including the over-policing of Aboriginal and racialized communities. It is an approach that ensures that police powers are limited or Charter standards established to shield these communities from the negative effects of systemic racism, such as racial profiling.

Golden was not the first time that the Supreme Court applied equality principles in the interpretation and application of the Charter. In *R. v. Mills*,⁷ the Court applied a feminist lens in determining the constitutionality of *Criminal Code* provisions (sections 278.1 to 278.91) limiting an accused's access to the therapeutic records of a sexual assault complainant. Justices McLachlin and Iacobucci, for the majority, held that:

Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play. In this respect, an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence.⁸

Moreover, a critical race approach to Charter interpretation is an integral part of the Supreme Court's own approach to substantive

⁶ *Id.*, at para. 83 (emphasis added).

⁷ [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.).

⁸ *Id.*, at para. 90. It should be pointed out that the language of s. 278.7(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, demands that equality considerations be factored into the decision whether or not to produce the records. The Supreme Court has also applied a critical race perspective when interpreting statutory provisions that specifically demand an anti-discriminatory approach to jury selection and sentencing. See *R. v. Williams*, [1998] S.C.J. No. 49, [1998] 1 S.C.R. 1128, at para. 47 (S.C.C.) (challenge for cause and s. 638(1)(b) of the *Criminal Code*); *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.) (sentencing and s. 718.2(e) of the *Criminal Code*). In the context of challenges for cause and s. 638(1)(b), McLachlin C.J.C. in *Williams* observed (at para. 48) that:

[the right] may also be seen as an anti-discrimination right. The application, intentional or unintentional, of racial stereotypes to the detriment of an accused person ranks among the most destructive forms of discrimination. ... The right must fall at the core of the guarantee in s. 15 of the Charter....

equality under section 15(1).⁹ As the Chief Justice recognized in her extra-judicial article entitled “Racism and the Law: The Canadian Experience”:

This new paradigm [of substantive equality] is directly applicable to racial and ethnic discrimination. It requires us to recognize the context of historical, racial and ethnic inequality and the myths and stereotypes that this context has produced. It requires us to disabuse ourselves of these preconceived notions, acknowledged or unacknowledged, to understand the reality that disadvantaged groups face, and to examine the claim of unequal treatment afresh on the basis of this understanding.¹⁰

The Chief Justice further exhorted “the importance ... of adapting the law to combat the problem of widespread racism in society” and of acknowledging that “courts can and should take proactive steps to recognize racism and prevent it from compromising ... justice.”¹¹

III. THE LEGITIMACY OF THE *GOLDEN* PRINCIPLE: DOES IT EXIST BEYOND PARAGRAPH 83?

Following *Golden*, the Supreme Court applied a race-conscious lens again, without citing *Golden*, in *Sauvé v. Canada (Chief Electoral Officer)*.¹² The issue was whether the limitation on the right to vote for individuals serving penitentiary sentences was a reasonable limit on section 3 of the Charter. In her proportionality analysis, McLachlin C.J.C., for the majority, held:

The negative effects of s. 51(e) upon prisoners have a disproportionate impact on Canada’s already disadvantaged Aboriginal population, whose overrepresentation in prisons reflects “a crisis in the Canadian criminal justice system”: *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 64, *per* Cory and Iacobucci JJ. To the extent that the disproportionate number of Aboriginal people in penitentiaries reflects factors such as higher rates of poverty and institutionalized alienation

⁹ See *Andrews v. Law Society of British Columbia*, [1989] S.C.J. No. 6, [1989] 1 S.C.R. 143 (S.C.C.); *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.); and *Lovelace v. Ontario*, [2000] S.C.J. No. 36, [2000] 1 S.C.R. 950 (S.C.C.).

¹⁰ (2002) 1 J.L. & Equality 7, at 20.

¹¹ *Id.*, at 21-22. See also the discussion in Richard Devlin & Matthew Sherrard, “The Big Chill?: Contextual Judgment after *Hamilton and Mason*” (2005) 28 Dalhousie L.J. 409.

¹² [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.).

from mainstream society, penitentiary imprisonment may not be a fair or appropriate marker of the degree of individual culpability.¹³

An anti-racist approach to Charter interpretation has also been applied post-*Golden* in appellate and trial courts. In *R. v. Harris*,¹⁴ for example, the Ontario Court of Appeal recognized the need for factoring in systemic racism in the context of assessing the seriousness of, in that case, a section 9 violation under section 24(2) of the Charter. Justice Doherty, for the Court, held:

I cannot accept the Crown's characterization of this breach as "minimally intrusive". The use of the broad powers associated with *Highway Traffic Act* stops to routinely investigate passengers who have nothing to do with the concerns justifying those stops must have a significant cumulative, long-term, negative impact on the personal freedom enjoyed by those who find themselves subject to this kind of police conduct. While for persons in some segments of the community, these stops may be infrequent, this record suggests that for others the stops are an all too familiar part of their day-to-day routine. Viewed from the perspective of those who are most likely to find themselves stopped and questioned by police, I think this form of interrogation is anything but trivial. It seems to me at some point it must become provocative.¹⁵

What is significant about *Harris* is that racial profiling was not argued in the case and yet the Court was still prepared to factor the problem into the constitutional analysis. In *R. v. Khawaja*,¹⁶ Rutherford J. struck down the motive clause¹⁷ of the anti-terrorism provisions of the *Criminal Code*,¹⁸

¹³ *Id.*, at para. 60. This kind of recognition of limited culpability because of systemic racism could be applied in cases that challenge mandatory minimum sentences, particularly for firearm possession cases under s. 12 of the Charter. See *R. v. Ferguson*, [2008] S.C.J. No. 6, 2008 SCC 6 (S.C.C.), where the Court dismissed a constitutional challenge to s. 236(a) of the *Criminal Code* which sets a minimum sentence of four years for manslaughter cases involving firearms.

¹⁴ [2007] O.J. No. 3185, 225 C.C.C. (3d) 193 (Ont. C.A.).

¹⁵ *Id.*, at para. 63.

¹⁶ [2006] O.J. No. 4245, 214 C.C.C. (3d) 399 (Ont. S.C.J.) [hereinafter "*Khawaja*"].

¹⁷ This motive clause forms part of the definition of "terrorist activity" in the *Criminal Code*, R.S.C. 1985 c. C-46, s. 83.01(1)(b)(i)(A), and provides that the impugned act must be committed "in whole or in part for a political, religious or ideological purpose, objective or cause".

¹⁸ *Criminal Code*, s. 83.01(1)(b)(i)(A) is part of Part II.I, which was enacted as part of Bill C-36, *An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism*, S.C. 2001, c. 41 [hereinafter "*Anti-terrorism Act*"]. It came into force on December 24, 2001.

in part, because of a concern that it would enable racial and ethnic profiling.¹⁹ As he put it:

It seems to me that the inevitable impact to flow from the inclusion of the “political, religious or ideological purpose” requirement in the definition of “terrorist activity” will be to focus investigative and prosecutorial scrutiny on the political, religious and ideological beliefs, opinions and expressions of persons and groups both in Canada and abroad.²⁰

And, most recently, in *R. v. Samuels*,²¹ Nakatsuru J. specifically referred to *Golden* in support of his conclusion that a stay of proceedings was necessary in a case involving an unconstitutional strip search of an African Canadian charged with driving over the legal limit.²² He held that:

Mr. Samuels is Afro-Canadian. It is his community that the Supreme Court of Canada was acutely concerned about in ensuring that a framework be established to prevent strip searches from occurring. ... From the perspective of individuals like Mr. Samuels, they may well feel that their race has something to do with being subjected unnecessarily to this humiliating procedure. ... such a feeling, given what was expressed by the Supreme Court of Canada, is not without some validity from a systemic viewpoint.²³

Finally, academic commentators have recognized the existence and validity of the *Golden* anti-racism principle of Charter interpretation. In a paper commemorating the 25th anniversary of the Charter, Professor Paciocco included *Golden* as one of the most significant Charter cases ever decided “given that it purports to include the impact that laws and practices can have on racialized communities as a constitutional

¹⁹ *Khawaja*, *supra*, note 16, at paras. 52-58.

²⁰ *Id.*, at para. 58.

²¹ [2008] O.J. No. 786 (Ont. C.J.).

²² *Id.*, at para. 67, wherein he noted that “[a] second significant consideration in determining the appropriate remedy in this case is the recognition there are larger systemic issues involved in assessing the effects of strip searches.

²³ *Id.*, at para. 90. See also *R. v. G. (P.F.)*, [2005] B.C.J. No. 1161 (B.C. Prov. Ct.) where para. 83 of *Golden* was relied on, in part, to find that a strip search of an Aboriginal woman in custody was unreasonable. See paras. 35, 36, 41-44. In *R. v. F. (E.)*, [2007] O.J. No. 1000 (Ont. C.J.), defence counsel relied on *Golden* in arguing that s. 42(5)(a) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 violated s. 15(1) of the Charter. See paras. 117-18. Section 42(5)(a) excludes serious violent offences from eligibility for deferred custody and supervision. The argument was rejected by the trial judge.

consideration ...”²⁴ In his criticism of the Supreme Court decision in *R. v. Hall*²⁵ and its decision to uphold the the constitutionality of the tertiary bail ground (section 515(10)(c) of the *Criminal Code*), Professor Stuart observed:

A surprising and disappointing feature of the majority judgment in *Hall* is the failure of the majority to consider the issue of context. ... In *Golden*, for example, the majority of the Court considered it important to develop standards for strip searches by taking into account Commission reports that African Canadians and Aboriginal people are over-represented in the criminal justice system and are therefore likely to be disproportionately arrested and subjected to personal searches, including strip searches.²⁶

Similarly, in his piece on the failure of the Supreme Court to address race in the investigative detention case of *R. v. Mann*,²⁷ Professor Berger noted, referring to *Golden*, that “the Court has used equality values to inform their rulings concerning legal rights in other cases.”²⁸

IV. THE SILENCING OF THE *GOLDEN* PRINCIPLE DURING THE 2007 TERM

The 2007 term provided the Supreme Court with a number of opportunities to further develop and apply the *Golden* principle.²⁹ In

²⁴ David Paciocco, “The Top Ten and the Tetherball”, paper presented at *25 Years of the Charter* (Toronto: Criminal Lawyers Association Conference, 2007), at 33.

²⁵ [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.) [hereinafter “*Hall*”].

²⁶ Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 2005), at 415. See also Don Stuart, “The Ontario Court of Appeal Blinks and Flutters: Less Exclusion and Inconsistency in Stop Cases” (2007) 49 C.R. (6th) 282.

²⁷ [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.) [hereinafter “*Mann*”].

²⁸ Benjamin Berger, “Race and Erasure in *R. v. Mann*” (2004) 21 C.R. (6th) 58, at note 25 [hereinafter “Berger”]. See also Steve Coughlan, “Search Based on Articulable Cause: Proceed with Caution or Full Stop?” (2002) 2 C.R. (6th) 49, at note 80.

²⁹ Prior to 2007, there were a number of instances where the Court could have applied the *Golden* principle. These include *Hall*, *supra*, note 25, and *Re Application Under s. 83.28 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248 which considered the investigative hearing provisions in s. 83.28 of the *Criminal Code*. Another instance was *Mann*, *supra*, note 27, where the Court recognized a police power in s. 9 to detain individuals for investigation on reasonable grounds to suspect their involvement in a recent or ongoing crime. The case involved an Aboriginal accused. The Court further recognized a power to frisk search detained individuals where there are reasonable grounds to believe they are in possession of a weapon. While the Court’s concern about monitoring street encounters is consistent with ensuring protection against racial profiling, the Court failed to address how racial profiling operates in this context, failed to address the implications for a narrow approach to detention in race-cases and failed to address whether Mann himself had been the victim of racially biased policing. See further the discussion in David M.

Charkaoui v. Canada (Citizenship and Immigration),³⁰ the Court failed to apply a critical race lens despite evidence before it that the security certificate process is having a disproportionate impact on Arab and Muslim men.³¹ In their intervenors factum, the Canadian Council on American-Islamic Relations (CAIR-CAN) and the Canadian Muslim Civil Liberties Association (CMCLA) framed the equality issue as follows:

Charter claims must be analyzed in the larger social, historical and political context in which they arise. The issues in this case must therefore be examined in the context of the Canadian social reality, in which selected minority communities have historically been targets of discrimination in times of public fear over real or perceived threats to national security. In the current context, the Muslim community is the target group.³²

While it is true that the Court did find that the judicial approval process of the security certificate was fundamentally flawed under section 7 because of its heightened secrecy requirements, there is no

Tanovich, "The Colourless World of *Mann*" (2004) 21 C.R. (6th) 47; Tim Quigley, "*Mann*, It's a Disappointing Decision" (2004) 21 C.R. (6th) 41; and Berger, *supra*, note 28.

³⁰ [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.). At issue was the constitutionality of ss. 77-85 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [hereinafter "IRPA"], entered into force June 20, 2002. The IRPA permits the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada because that person is a security threat. Once the certificate is issued, the named person is detained. If a judge determines that the certificate is reasonable, the person is subject to a removal order. However, the detainee is not entitled to see any of the information in the possession of the Ministers and must rely on summaries provided by the judge. For a discussion of the process, see Marianne Davies, "Unequal Protection Under the Law: *Re Charkaoui* and the Security Certificate Process under the *Immigration and Refugee Protection Act*" (2006) 69 Sask. L. Rev. 375; Benjamin Berger, "Our Evolving Judicature: Security Certificates, Detention Review and the Federal Court" (2006) 39 U.B.C. L. Rev. 101; and Colleen Bell, "Subject to Exception: Security Certificates, National Security and Canada's 'War on Terror'" (2006) 21 Can. J. Law & Society 63.

³¹ As the Canadian Council on American-Islamic Relations (CAIR-CAN) and the Canadian Muslim Civil Liberties Association (CMCLA) noted at para. 36 of their intervenor factum:

Since the adoption of the *IRPA* in 2002, the impugned sections have been used specifically to target Muslims. While terrorism is known to exist globally and to be carried out by individuals of all religions and ethnicities, security certificates under the *IRPA* — with the sole exception of the notorious German hate-monger Ernst Zundal (who is not an accused terrorist) — have been applied exclusively against Muslim men from Arab countries.

(On file with the author and available online at: <http://www.caircan.ca/downloads/SCC_factum.pdf>.) For a discussion of racial profiling in the war on terrorism, see Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism" (2003) 41 Osgoode Hall L.J. 293; and David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006), at chapter 7 [hereinafter "*The Colour of Justice*"].

³² CAIR-CAN and CMCLA factum, *supra*, note 31, at para. 10 (footnote omitted).

discussion or even acknowledgment of the broader social context of racial profiling or stereotyping and Islamophobia.³³ Nor did the Court adequately address the issue of differential treatment of permanent residents/foreign nationals and citizens.³⁴ By failing to address these issues, the Court failed to engage in whether or not a security certificate process is even necessary in light of relevant *Criminal Code* provisions which would apply to everyone equally regardless of immigration status, or to ensure that Parliament would include sufficient safeguards to address the problem in the new regime it puts in place.³⁵

The Court could have also considered the *Golden* principle in *R. v. Singh*,³⁶ a case which raised the issue of whether there should be an obligation on the police to cease questioning under section 7 when an accused asserts his or her right to remain silent. Singh, a South Asian accused, had asserted his right to remain silent 18 times. Given the heightened vulnerability of Aboriginal and racialized individuals in custody not only to violence but to waive their constitutional rights, a bright line rule would have gone some way in ensuring protection against one manifestation of systemic racism in the criminal justice

³³ The Court limited its analysis to procedural fairness and the failure of the process to give detained individuals sufficient information or a substitute for that information in order to ensure an ability to make full answer and defence. *Charkaoui*, *supra*, note 30, at paras. 28-87. The Court also found that the inability of foreign nationals to have a review until 120 days had passed from the date of judicial confirmation of the certificate was arbitrary under ss. 9 and 10(c) of the Charter: *id.*, at paras. 91-94.

³⁴ The Court simply relied on the fact that s. 6 of the Charter permits differential treatment based on citizenship (*i.e.*, s. 6(1) gives only citizens the right to enter, remain in and leave Canada): *id.*, at para. 129. An argument justifying differential treatment based on immigration status was made and accepted by the House of Lords in *A. (F.C.) v. Secretary of State for the Home Department*, [2005] 2 A.C. 68 (H.L.).

³⁵ Parliament responded to *Charkaoui* with Bill C-3 which received Royal Assent on February 22, 2008: *An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act*, S.C. 2008, c. 3. The Bill leaves the process largely unchanged with the exception of uniform detention review periods (s. 82), an exclusionary rule for evidence obtained by torture or cruel, inhuman or degrading treatment or punishment (s. 83(1.1)), a limited right of appeal (s. 79), and the creation of a special advocate process to address the case to meet concerns raised by the Supreme Court (s. 83(1.2) and 85). For criticisms of Bill C-3, see Maude Barlow, Roch Tassé & Sameer Zuberi, "Rushing Injustice Through the Senate" *Toronto Star*, February 13, 2008; and, Ziyaad Mia, "Bill C-3 Doesn't Deliver Justice" *Ottawa Citizen*, February 11, 2008.

³⁶ [2007] S.C.J. No. 48, 2007 SCC 48 (S.C.C.) [hereinafter "*Singh*"]. For criticism and discussion see, Don Stuart, "Annotation" (2007) 51 C.R. (6th) 201; Lisa Dufraimont, "Annotation" (2007) 51 C.R. (6th) 203; Dale Ives & Christopher Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2007) 51 C.R. (6th) 250; and Timothy Moore and Karina Gagnier, "'You can talk if you want to': Is the Police Caution on the 'Right to Silence' Understandable?" (2007) 51 C.R. (6th) 233.

system. This vulnerability was discussed at length by the 1991 Manitoba Justice Inquiry report, a report cited in *Golden*:

... Aboriginal people, particularly those in remote communities and those whose primary language is not English, appear to have special problems in exercising their rights to remain silent and to refrain from incriminating themselves. Their statements appear to be particularly open to being misunderstood by police interrogators and, as a result, may convey inaccurate information when read out in court. Their vulnerability arises from the legal system's inability to break down the barriers to effective communication between Aboriginal people and legal personnel, and to differences of language, etiquette, concepts of time and distance, and so on. This matter has been considered in a number of courts, but perhaps the fullest explanation was given in an Australian court. This issue is so central to the role of the police in questioning suspects and taking statements that we quote in full the explanation given by Justice Forster in setting forth what are now called the Anunga Rules.³⁷

Rule 8 of the Anunga Rules specifically provides that "if an Aboriginal person states he does not wish to answer further questions or any questions the interrogation should not continue."³⁸ Unfortunately, Charron J., for a slim 5:4 majority in *Singh*, declined to limit the ability of the police to interrogate even after repeated assertions of a request to remain silent and dismissed the appeal. In her view, the state interest in the effective investigation of crime was more important than the certainty and additional protection against self-incrimination that a bright line rule would provide.³⁹ The majority decision has effectively removed the right of suspects to remain silent during police questioning.⁴⁰

Perhaps the most disappointing omission of the *Golden* principle occurred in *R. v. Clayton*,⁴¹ a case concerning the creation of a police

³⁷ *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1 (Winnipeg: Queen's Printer, 1991), at chapter 16. The Manitoba Justice Inquiry recommended that the Anunga Rules be adopted in Canada. See also *Justice on Trial: Report of the Task Force on the Canadian Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (Edmonton: The Task Force, 1991), at 2-57. For a further discussion of the Anunga Rules, see *R. v. Moneyas*, [1995] A.J. No. 1310 (Alta. Prov. Ct.).

³⁸ See *R. v. Anunga* (1976), 11 A.L.R. 412.

³⁹ *Singh*, *supra*, note 36, at paras. 42-53.

⁴⁰ The decision does not impact on situations where the individual is unaware of the fact that he or she is speaking to a person in authority.

⁴¹ [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.). For a discussion of the case, see Steve Coughlan, "Arbitrary Detention: Whither — or Wither? — Section 9" (2008) 40 S.C.L.R.

power to erect a roadblock upon receipt of a “gun call”. I say most disappointing because it was a case where the Court created a new police power and because of the evidence that the war on guns is having a disproportionate impact on racialized communities in Canada.⁴²

V. SECTION 9 AND POLICE ROADBLOCKS IN GUN CASES:
R. V. CLAYTON

1. The Facts of *Clayton*

At approximately 1:22 a.m., the police received a 911 call from an individual who reported seeing a group of 10 Black men outside a strip club in Brampton, four of whom publicly displayed their guns. According to the caller, “they had them and took them out and they put them back in all together.”⁴³ The caller provided very specific information about the group. He was able to describe in great detail the vehicles they used to get to the club:

- a black GMC Blazer;
- a black Jeep Cherokee;
- a tan-coloured Lexus LS; and
- a white two-door Acura Legend.⁴⁴

He described their clothing as “regular street wear”.⁴⁵ He was able to describe the guns. He told the dispatcher that they were not revolvers but fired bullets from clips like a “glock”.⁴⁶

The police responded to the call within minutes. A car that did not match the description was permitted to leave. After that, the police decided to set up, on their own initiative, a roadblock at both entrances to the club. Their intent was to stop every car coming from “that area

(2d) 147 [forthcoming]; Steve Coughlan, “Common Law Police Powers and the Rule of Law” (2007), 47 C.R. (6th) 266; Don Stuart, “Annotation” (2007) 47 C.R. (6th) 222; and, Gerry Ferguson & Benjamin Berger, “Recent Developments in Canadian Criminal Law” (2007) 31 Crim. L.J. 369, at 377-79.

⁴² See Tanovich, *The Colour of Justice*, *supra*, note 31, at chapters 4 and 6.

⁴³ *Clayton*, *supra*, note 41, at para. 2.

⁴⁴ See the trial judgment of *Clayton*, reported at [2001] O.J. No. 2393 at para. 6 (Ont. S.C.J.) and the S.C.C. judgment, *supra*, note 41, at para. 2.

⁴⁵ See *Clayton*, Court of Appeal decision, [2005] O.J. No. 1078, 194 C.C.C. (3d) 289, at para. 8 (Ont. C.A.).

⁴⁶ *Id.*

because it was a gun call”.⁴⁷ The second vehicle to leave the parking lot, approximately five minutes after the 911 call was made, was a “sporty black” Jaguar. It did not resemble in any way the cars that had been described by the tipster. Farmer was driving while Clayton was in the passenger seat. The car was detained by Constables Robson and Dickson. Although there did not appear to have been any plan in place about what they would do once a car was stopped, the trial judge was satisfied that Constable Robson’s intention was to at least search the vehicle while Constable Dickson’s intention was to have the occupants get out of the car and then to search both them and the car.⁴⁸

After stopping the car, the officers advised Clayton and Farmer about why they had been stopped and asked them to get out of the car. According to the officers, their suspicions were raised by the appellants’ demeanour (*e.g.*, nervous and no eye contact), reluctance to get out of the car, their answer to the question whether they had seen anything (*i.e.*, “we just got here”), and the fact that Clayton was wearing gloves when it did not seem like “glove weather”. Once outside, Clayton fled when Constable Robson placed his hand on his shoulder to direct him to the back of the car. He was tackled by other officers near the club and identified by one of the bouncers as one of the gunmen. Clayton admitted having a gun in his pants pocket and was arrested. Farmer was arrested and a search incident to the arrest revealed a gun lodged in his belt. The arrests took place six minutes after the 911 call was made.

The central issue was whether the police had lawful authority to conduct a roadblock in these circumstances. The problem for the police and courts was that there was no recognized common law power to authorize the roadblock implemented by the police in this case. The only two available powers were the *Mann* and *Murray* powers.⁴⁹ However, neither applied in this case.⁵⁰

⁴⁷ See *Clayton*, trial judgment, *supra*, note 44, at para. 11.

⁴⁸ *Id.*, at paras. 57-61.

⁴⁹ See *R. v. Murray*, [1999] Q.J. No. 1037, 136 C.C.C. (3d) 197 (Que. C.A.).

⁵⁰ The *Mann* power to conduct investigative detentions requires reasonable grounds to suspect that an individual is implicated in a recently committed or ongoing crime. In *Clayton*, *supra*, note 41, the police set up a roadblock to stop and search all cars regardless of whether they matched the information in the possession of the police. See *Mann*, *supra*, note 27. The *Murray* power authorizes a roadblock to be set up following the commission of a serious offence along an obvious avenue of escape in situations where the perpetrators pose a significant danger to public safety. In *Murray*, the men were armed and one was known to be extremely dangerous and capable of firing on pursuing officers. See *Murray*, *supra*, note 49. Such an emergency or imminent danger situation did not exist in this case as recognized by the Court and, in particular, by Binnie J. See *Clayton*, *supra*, note 41, at para. 84.

2. The Supreme Court Decision

Justice Abella, for a six-person majority, turned to the common law ancillary powers doctrine first articulated in the English case of *R. v. Waterfield*.⁵¹ In her view, if the roadblock is authorized by the ancillary powers doctrine and consistent with Charter values, then it is lawful and, therefore, not arbitrary under section 9. According to the majority, the “justification for a police officer’s decision to detain ... will depend on the ‘totality of the circumstances’ underlying the officer’s suspicion that the detention of a particular individual is ‘reasonably necessary’”.⁵² The “totality of the circumstances” include the seriousness of the offence, the information known to the police about the suspect or the crime, and the extent to which the detention was reasonably responsive or tailored to these circumstances, including its geographic and temporal scope.⁵³ The critical task involves

balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.⁵⁴

Applying this analysis, the majority held that the *Waterfield* balance authorizes the police to erect a reasonably tailored roadblock when investigating a serious crime and where it would be an effective way to apprehend the perpetrators. It also authorizes the police to order the occupants out of the vehicle and to conduct a pat-down for officer safety where there are reasonable grounds to conclude that one or more of them are armed. On the facts of the case, Abella J. was satisfied that the roadblock was reasonable and effective given the nature of the risk and the geographic and temporal proximity to the 911 call. She further held that the continued detention and pat-down search of the appellants was lawful because the officers had reasonable grounds to suspect that they were in possession of guns. Those grounds included geographic and temporal proximity to the 911 call, the use of the rear exit, the

⁵¹ [1963] 3 All. E.R. 659 (C.A.).

⁵² *Supra*, note 41, at para. 30.

⁵³ *Id.*, at para. 31.

⁵⁴ *Id.*

occupants' race, Farmer's reluctance to exit the vehicle, Clayton's suspicious answers to the officers' questions and his wearing gloves.⁵⁵

3. Commentary

While this case was not, as Doherty J. so emphatically put it in his Court of Appeal decision, a racial profiling case,⁵⁶ there were a number of aspects of the decision that would have greatly benefited from an anti-racist analysis. Indeed, a critical race perspective may have led the Court to affirm the decision of the Ontario Court of Appeal.⁵⁷

(a) *Adding to the Officer's Discretionary Arsenal*

Discretion is the breeding ground of racial profiling and *Clayton* adds to the discretionary arsenal of the police. While the dangers of racial profiling or over-policing are greatly reduced on the facts of this case because of the geographic and temporal proximity of the police response, they become more evident if we move from the parking lot of a strip club to a largely racialized neighbourhood or apartment complex. What if the next 911 caller reports seeing two Black men with guns

⁵⁵ Justice Binnie, on behalf of two other Justices, took a different approach although he came to the same conclusion. He acknowledged the existence of a power under the ancillary powers doctrine to conduct a roadblock but concluded that the power violated s. 9 because of the absence of any criteria for vehicle selection: *id.*, at para. 103. He then turned to s. 1 and concluded that the limit was a reasonable one in the context of gun cases. What Binnie J. effectively did was to create a limit prescribed by law for the purposes of s. 1 and then went on to justify the limit as reasonable: *id.*, at paras. 108-122. It is suggested that the Abella J. approach of interpreting the common law in a constitutional fashion is much less doctrinally confusing. It is also more consistent with the approach the Court previously took in *R. v. Godoy*, [1999] S.C.J. No. 85, [1999] 1 S.C.R. 311 and *Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.). In neither case did the Court engage in a s. 1 analysis.

⁵⁶ He was responding to the argument raised by Farmer's counsel for the first time on appeal. See *Clayton* (Ont. C.A.), *supra*, note 45, at para. 7.

⁵⁷ The Court of Appeal concluded that the roadblock was not reasonably tailored because the appellants' vehicle did not match those described by the 911 caller. As Doherty J.A. put it:

A roadblock tailored to the information provided to the police may have been justified under that doctrine. However, a roadblock stop of any and all persons leaving the parking area regardless of whether they or their vehicles matched or even resembled the description provided by the caller went beyond what could be justified under the ancillary power doctrine. The police could not rely on the information provided by the 911 caller to establish the roadblock stop and then ignore the details of that information on the assumption that the caller may have been mistaken in his identification of the individuals or vehicles involved.

Clayton (Ont. C.A.), *id.*, at para. 62.

walking down a busy street in St. Jamestown in Toronto on a Saturday night. Will the police be able to close off the streets and detain and search all Black men on the street or in a vehicle within the vicinity?⁵⁸ For how long would such a power last? What if the caller reports seeing four Black men enter an apartment building? Will the police be able to conduct a sweep of the apartment building? These examples are far more realistic, probable and troubling than the Skydome example given by Binnie J. in his concurring opinion.⁵⁹ The concern about the disproportionate impact of the *Clayton* or other newly created police power on racialized communities particularly given the heavily publicized link between race and guns is a relevant consideration under the *Waterfield* balancing and the Court should have identified it as such in the case-by-case approach it utilized.

(b) The Impact of Over-policing on Racialized Communities

Disproportionate impact does not just refer to who is subjected to a police detention or search. It is also relevant to assessing the nature and scope of the liberty interest interfered with. The evidence is overwhelming as to the impact that over-policing has on Aboriginal and racialized communities. These effects which include psychological trauma, alienation, and mistrust were documented in the 2003 Ontario Human Rights Commission report on racial profiling.⁶⁰ The Court should have recognized this as a relevant consideration particularly as the appellants were Black. Had they done so, it is unlikely that Binnie J. would have characterized roadblock stops as of “relatively short duration and slight inconvenience”.⁶¹

⁵⁸ In *R. v. William*, [2006] O.J. No. 5330 (Ont. S.C.J.), a stop of a vehicle that did not match the colour of a vehicle linked to a gun call was found to be arbitrary. *William* was decided pre-*Clayton*. Given the temporal and geographic proximity to the gun call which involved the reporting of 10 shots being fired, the case would likely be decided differently under *Clayton*.

⁵⁹ *Clayton*, *supra*, note 41, Binnie J. posits (at para. 92):

Of course, hypotheticals can be invented to test the outer limits of this approach. Suppose, instead of the Million Dollar Saloon, the police received a similar 911 gun call from the Toronto Skydome at a time when 5,000 cars were attempting to leave the parking areas all at once after a ball game.

⁶⁰ Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (October 21, 2003). Available online at: <http://www.ohrc.on.ca/en/resources/discussion_consultation/RacialProfileReportEN>.

⁶¹ *Supra*, note 41, at para. 99.

(c) *Using Race as Part of a Suspect's Description*

Race is a very unreliable marker of identification contrary to what Binnie J. observed in his concurring opinion wherein he noted "... the 911 caller must be presumed to be less error prone in dealing with a person's appearance, which calls for less specialized knowledge and less sophisticated powers of observation."⁶² Moreover, we have seen many incidents where race becomes the dominant characteristic of the investigation thereby subjecting many innocent individuals to police scrutiny.⁶³ Since the Court specifically relied on race as one of the relevant factors in determining whether to further detain the appellants, it should have issued a strong warning about the dangers associated with race-based suspect descriptions. It could have, for example, warned that race should only be used where it is part of a detailed description and there are other safeguards present to ensure that race does not become the primary basis of suspect selection.⁶⁴ In this case, those limiting features included the spatial and temporal aspects of the roadblock.

(d) *Drawing Incriminating Inferences from Equivocal Behaviour*

One of the hallmarks of racial profiling is the turning of innocuous or equivocal conduct into suspicious behaviour because the officer is relying on a stereotypical lens in drawing his or her conclusions.⁶⁵ In this case, the appellants' failure to make eye contact, utterances such as "you gotta be kidding" or "this is ridiculous" and nervousness were equally consistent with either their fear of the police because of their own individual or community experiences and/or a history of harassment. In this case, however, there were other factors that minimized the likelihood of misinterpretation, including the objectively suspicious response given by Clayton (*i.e.*, "we just got here"); the use of the rear exit; Clayton's gloves; and the fact that they were stopped five minutes after the 911 call. Nevertheless, the Court could have warned against too

⁶² *Id.*, at para. 122.

⁶³ See *The Colour of Justice*, *supra*, note 31, at chapter 9. See further Bela August Walker, "The Color of Crime: The Case Against Race-Based Suspect Descriptions" (2003) 103 *Columbia L. Rev.* 103; and Richard Banks, "Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse" (2001) 48 *U.C.L.A. L. Rev.* 1075.

⁶⁴ See David M. Tanovich, "Moving Beyond 'Driving While Black': Race, Suspect Description and Selection" (2005) 36 *Ottawa L. Rev.* 315.

⁶⁵ See *The Colour of Justice*, *supra*, note 31, at 135-37.

readily drawing negative inferences when interpreting the conduct of Aboriginal and racialized individuals to protect against racial profiling.

While the last two points (*i.e.*, (c) and (d)) would not have likely changed the Court's conclusion given the unique facts of the case, the first two (*i.e.*, (a) and (b)), which, in this case, were more relevant to the issue of roadblock jurisdiction than post-roadblock conduct, may very well have led the Court to pause before concluding that extending *Waterfield* on these facts was reasonably necessary.

VI. CONCLUSION

Given the systemic problem of racial profiling, the Supreme Court will have no shortage of cases in the coming years to acknowledge and further develop the *Golden* principle of Charter interpretation.⁶⁶ A proper application of the *Golden* principle in these and other Charter cases would require the Court to use the following framework:

1. Does the existing power or law (or will the proposed new police power) have a disproportionate impact on Aboriginal or racialized individuals?
 - (a) In *Golden*, the Supreme Court took judicial notice of the fact that the effects of police powers are disproportionately felt by these communities.⁶⁷
2. If yes, are there safeguards or enhanced Charter standards that can be put (or already are) in place to minimize the disproportionate negative effects or to address the effects of over-policing?⁶⁸ These safeguards or standards might include creating a reverse onus of proof,⁶⁹ a presumption of racial profiling in cases where there are no

⁶⁶ One such case is *R. v. Grant*, [2007] S.C.C.A. No. 99 (S.C.C.), which will address when street encounters with the police trigger s. 9 and the proper approach to exclusion of evidence under s. 24(2).

⁶⁷ Similarly, in *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457, 43 C.R. (6th) 175, at para. 94 (Ont. C.A.) [hereinafter "*Peart*"], the Court noted that courts have accepted "that racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it".

⁶⁸ For a further discussion of using enhanced Charter standards to address racial profiling, see *The Colour of Justice*, *supra*, note 31, at 138-49; and David M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002) 40 *Osgoode Hall L.J.* 145, at 178-86.

⁶⁹ This would put the onus on the state to prove that racialized stereotypes did not impact the exercise of discretion. See *The Colour of Justice*, *supra*, note 31, at 144-47. A reverse onus was rejected in the civil case of *Peart*, *supra*, note 67, at paras. 136-55, although Doherty J.A. did leave the door open should better evidence of the scope of the problem come before the Court.

objectively reasonable grounds for the detention or search,⁷⁰ the implementation of a data collection system,⁷¹ or finally, proof of enhanced anti-racial profiling police training.⁷² If there are no safeguards or standards in place, the power or law should be abolished or not recognized.⁷³

3. Are enhanced Charter standards necessary to ensure that racialized litigants will have meaningful access to Charter litigation?⁷⁴

⁷⁰ See *The Colour of Justice*, *supra*, note 31, at 135-37.

⁷¹ For a discussion of the Kingston Police Service data collection project, see William Closs & Paul McKenna, "Profiling a Problem in Canadian Police Leadership: The Kingston Data Collection Project" (2006) 49 Can. Public Admin. 143. See also *The Colour of Justice*, *supra*, note 31, at 78-82 and 173-77.

⁷² See *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120, at para. 157 (S.C.C.). See the discussion of anti-racial profiling police training in *Nassiah v. Peel Regional Police Services Board*, [2007] O.H.R.T.D. No. 14 (Ont. H.R.T.).

⁷³ Had the Court considered this question in *R. v. Marmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) (s. 7 challenge to the marijuana possession law), the Court might have come to a very different conclusion given the impact of the "war on drugs" on racialized communities in Canada. See *The Colour of Justice*, *supra*, note 31, at chapter 5.

⁷⁴ Access can be limited or denied when the Court takes a narrow approach to the triggering mechanisms to ss. 8, 9 and 10 (*e.g.*, reasonable expectation of privacy or detention) thereby denying standing to those litigants who fall outside the Court's approach. The issue of ensuring access to Charter litigation was very much a live issue in *R. v. Belnavis*, [1997] S.C.J. No. 81, [1997] 3 S.C.R. 341 (S.C.C.), for example, where the Supreme Court refused to recognize that a passenger in a motor vehicle has a reasonable expectation of privacy in the car and therefore standing to challenge a vehicle search. See also the discussion of this issue in David M. Tanovich, "The Further Erasure of Race in Charter Cases" (2006) 38 C.R. (6th) 84, at 93-96.