Racial Profiling and the HRTO: A Case for the Standard of Correctness on Judicial Review

by

Ernest J. Guiste, Trial & Appeal Lawyer (Ontario)

Advocating for a standard of correctness in the review of administrative tribunal decisions in Ontario and particularly those of the Human Rights Tribunal of Ontario (HRTO) at the Divisional Court and elsewhere is a steep, uphill climb for even the most able advocates. The advent of the Supreme Court of Canada's decision in Dunsmuir v. New Brunswick [2008] 1 S.C.R. 190 has witnessed a new era of judicial deference to the decisions of administrative tribunals. Lawyers, legal scholars and jurists alike have all thrown themselves at the altar of political correctness to welcome this new era of judicial deference. While the language of preliminary questions going to jurisdiction(see for example – Bell v. OHRC [1971] S.C.R. 756) and patent unreasonableness (C.U.P.E. v. New Brunswick Liquor Corp. [1979] 2 S.C.R. 77 have come and gone the supervisory function of the superior courts over inferior tribunals like the HRTO remains firmly in place post Dunsmuir.

In this article it is my objective to demonstrate that this new-found deference to the decisions of administrative tribunals based on Dunsmuir(supra) is based on an incorrect interpretation of the Supreme Court of Canada's holding in that case. In addition, with reference to the adjudication of cases involving racial profiling in which individuals are arrested and or charged with a criminal offence, the HRTO must be held to a standard of correctness. It is my contention that this legal conclusion is expressly prescribed by the Supreme Court of Canada in Dunsmuir (supra) and is not something invented by this writer.

What Does Dunsmuir Tell Us:

Dunsmuir(supra) tells us that there are two standards of review: correctness and reasonableness. This is what the Supreme Court of Canada said on the correctness standard:

> "When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not the court will substitute its own and provide the correct answer."

On the other hand, the Supreme Court of Canada had this to say about reasonableness in Dunsmuir(supra):

> "A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. It is a deferential standard which requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian system."

When is a Correctness Standard called for ?

The Supreme Court of Canada tells us very clearly in Dunsmuir(supra) that decision-makers like the HRTO and others must be held to a standard of correctness in the following three circumstances:

1. Questions of law that are of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision maker;

2. Questions regarding the jurisdictional lines between two or more competing specialized tribunals; and

3. Constitutional questions regarding the division of powers in the Constitution Act, 1867.

What is Racial Profiling ?

Racial profiling or racial profiling/denial of equality as I prefer to call it refers to the law enforcement practice of using race as a basis to target individuals for arrest and charge in the criminal law context. By this definition inherent in any act of racial profiling is a denial of equality in the application of the law under section 15 of the Charter of Rights and Freedoms. Racial profiling in this context is clearly not within the area of expertise of the HRTO. A Proper adjudication of a racial profiling case in this context calls for a sound knowledge of the Criminal Code and criminal law generally along with a sound knowledge of the Charter of Rights and Freedoms and the fundamental rights it provides to individuals in the context of the enforcement of the criminal and quasi-criminal law.

HRTO'S Lack of Expertise:

How can we reasonably expect an HRTO adjudicator who knows nothing about the Criminal Code, the Controlled Drugs and Substances Act or the Charter to properly adjudicate a case involving racial profiling in the context of a street-level police undercover drug operation ? Without this fundamental knowledge the best that such an adjudicator can do is to make conclusionary and arbitrary findings supporting the police action or denouncing it. Such a practice is dangerous because it makes for a conflict in our jurisprudence on racial profiling in the broader criminal context and deprives the litigants who chose that forum for adjudication of a fair hearing of their dispute on its merits. A careful review of the HRTO's decisions shows a glaring lack of consistency and the absence of a serious policy position on discrimination and especially discrimination as it affects African-Canadians. Some HRTO adjudicators assess the credibility and reliability of evidence and some do not. (see for example Clennon v. Toronto East General Hospital 2009 HRTO 1242 and McKay v. Toronto Police Service 2011 HRTO 499) In adjudicating cases involving racial profiling some adjudicators refer and apply binding authorities such as R v. Brown 2003 Canli 522142 (Ont.C.A.) and others do not. In Phipps v. Toronto Police Services Board et al 2009 HRTO 877 – which I submit is not a racial profiling case as defined herein – R v. Brown (supra) is applied.

However, in Dungus v. Toronto Police Services Board et al 2010 HRTO 2419 where an African-Canadian man who was on his way home from work was entangled in a police drug sting operation conducted at the corner of Church and Carlton Street and arrested and charged with trafficking in cocaine no reference was made to R v. Brown(supra). The charges against Mr. Dungus were withdrawn but Mr. Dungus suffered lasting and permanent injury from the forceful takedown by police and he lost his job with the Department of Defencc when police called his employer to confirm his employment. The police officer reasoned that he had never encountered a drug-trafficker who worked for the Department of Defence. The adjudicator's approach in adjudicating this very serious infringement of Mr. Dungas' rights provides splendid evidence in support of my thesis that the HRTO has no expertise in this area and must be held to a standard of correctness when adjudicating these issues:

> "**It is not my role to evaluate the conduct of the police in general, or to determine whether the complainant was treated fairly**"….

Interestingly, the adjudicator went even farther. She went on to conclude that the undercover nature of the police work immunized them from liability for racial profiling. This is what she said:

> "I find there is insufficient evidence to find race a factor. The evidence was that Chapman both approaches individuals and in some cases they approach her. In this case, the complainant was standing around having a cigarette. It seems apparent from subsequent events that the complainant was interested in Chapman. In light of this, I find it more probable than not that the complainant nodded at Chapman or otherwise

> expressed interest in her. However, even if he did not express interest, **I am not convinced that approaching the complainant in these circumstances would necessarily amount to profiling him on race given the nature of the officer's undercover work**."

Ernest J. Guiste – is a trial and appeal lawyer and blogger. His practice involves trial and appeal work in both criminal and civil litigation. His blog – E.J. GUISTE ON LAW AND JUSTICE can be found on google blogger.