FALCONERS
LLP

Racism and Policing

GUEST LECTURE AT QUEENS LAW (OCTOBER 20, 2025)

PRESENTED BY JULIAN FALCONER AND SHELBY PERCIVAL

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PART 1:

Falconers LLP and Our Work in Policing

- Who We Are and What We Do
- Challenges Facing Racialized Individuals
- Falconers LLP Opens Office in the North

Who We Are










"Litigation with a conscience."

- Falconers LLP provides legal expertise in a variety of areas of law, with particular experience in human rights litigation.
- The team at Falconers, led by partners Julian Falconer and Asha James, along with a talented group of senior and junior associates, focuses our work on state accountability and policing.
- Falconers LLP provides extensive legal support for First Nations community safety and policing, as well as holding policing actors accountable for their actions.

- Race and racial profiling continue to be an issue in the Canadian criminal justice system.

- Black Canadians and First Nations peoples continue to face challenge as a result of misconceptions, stereotyping, and outrate discrimination and racism that continues to pervade in institutional structures.

- Given that these challenges are institutional and historical; in order to properly advocate for our clients, our office has learned how to find unique solutions using the existing tools of the colonial legal system.

Challenges Facing Racialized Individuals in Canada

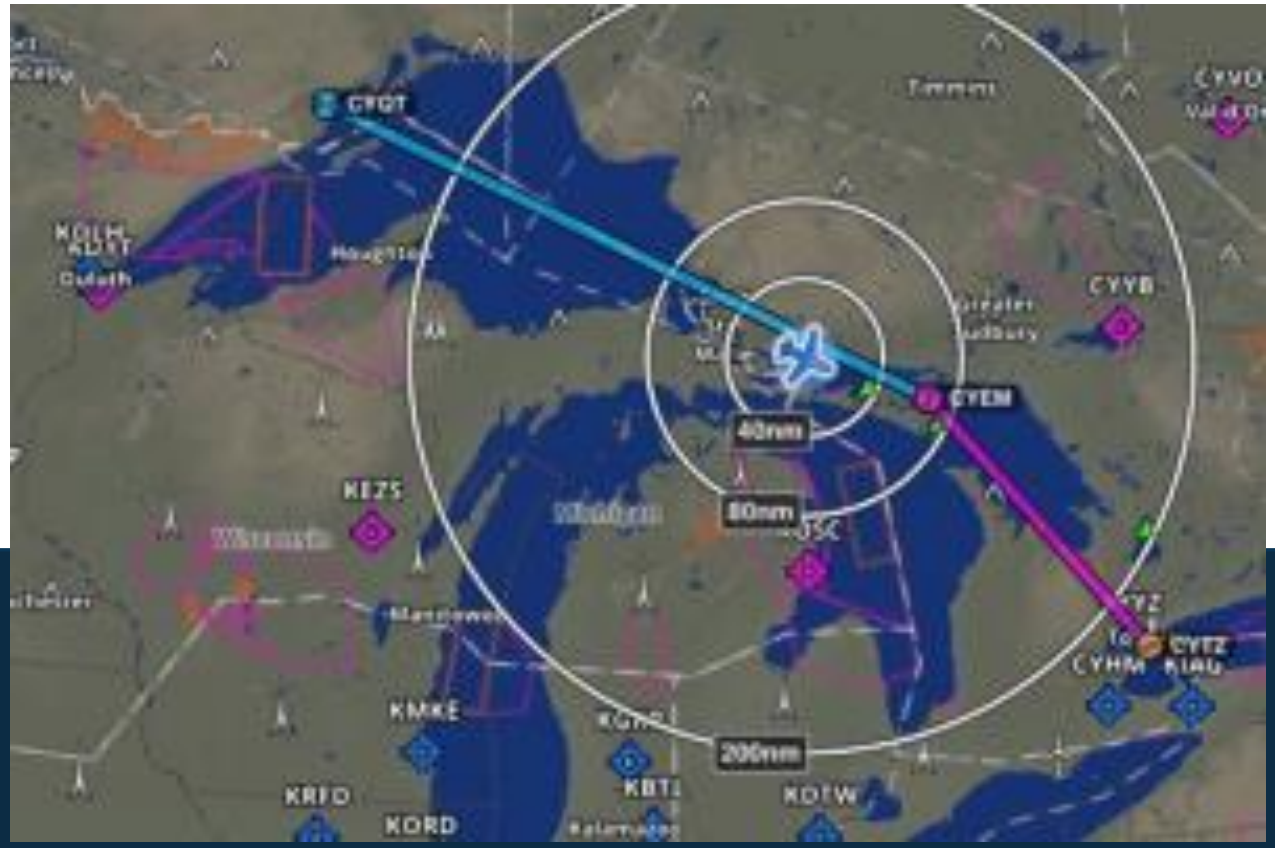
Falconers LLP Opens Office in Thunder Bay (2008): “We the North”

From Toronto (Pearson Airport) to: **Iskatewizaagegan First Nation – 1,349.42 km (838.49 mi)**

Atlanta, Georgia – 1,170.53 km (727.33 mi)

Nashville, Tennessee – 1,030.50 km (640.32 mi)

Jacksonville, Florida – 1,494.70 km (928.76 mi)



An Example of the Area We Cover

PART 2:

Marshalling Evidence on Racial Profiling

Her Majesty the Queen v. Brown

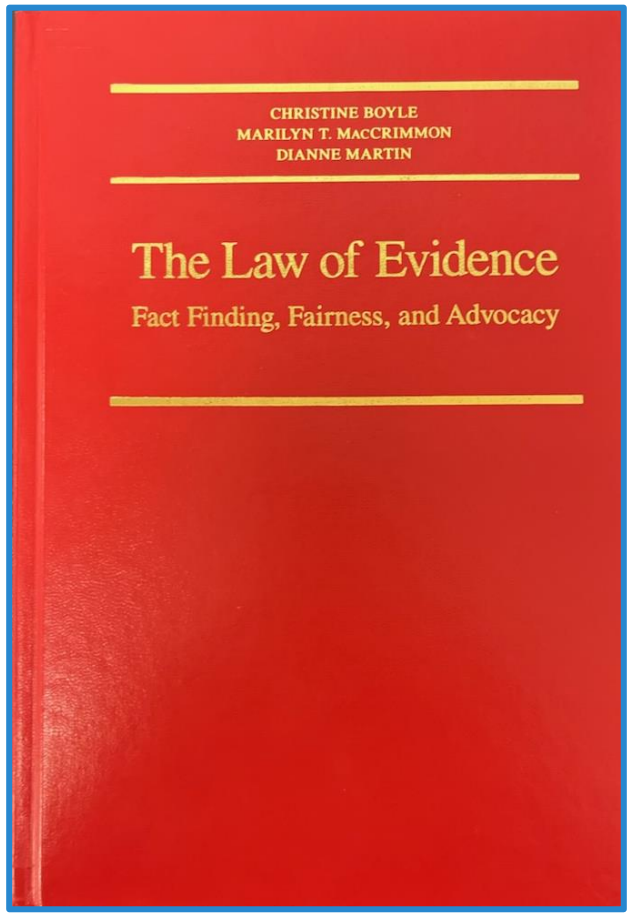
[Indexed as: R. v. Brown]

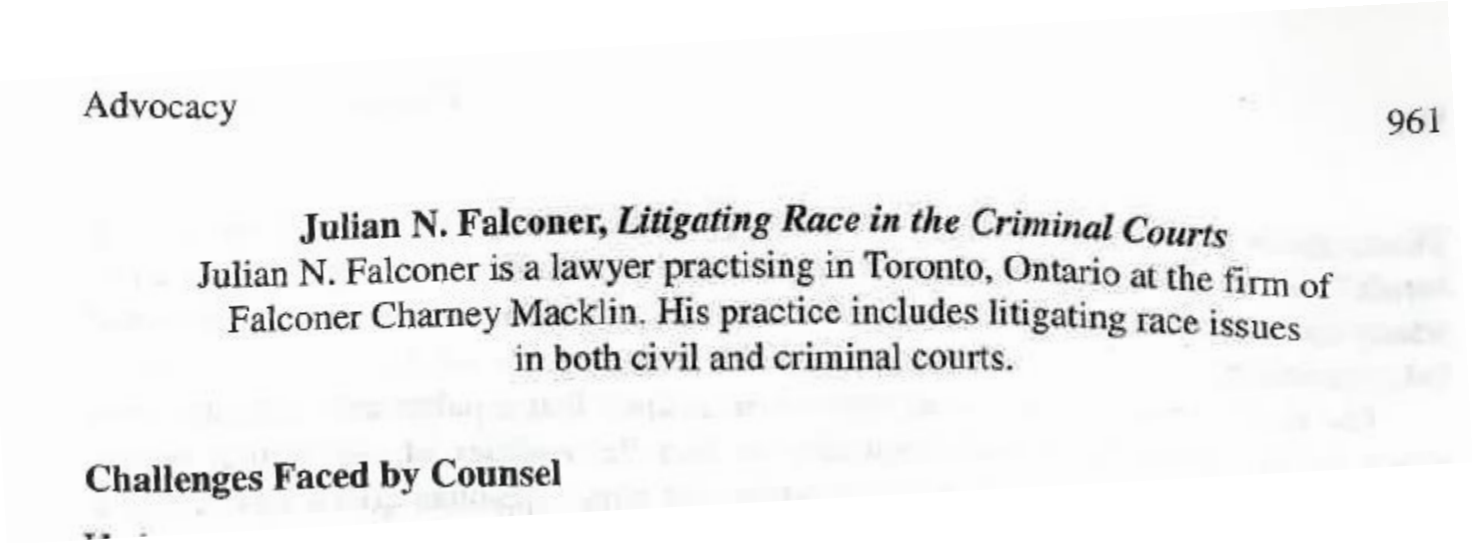
64 O.R. (3d) 161
[2003] O.J. No. 1251
Docket No. C37818

Court of Appeal for Ontario
Morden, Laskin and Feldman JJ.A.
April 16, 2003

Criminal law -- Bias -- Reasonable apprehension of bias -- Defence counsel bringing application at trial to exclude evidence on basis that accused was arbitrarily detained because of racial profiling -- Evidence in support of application being capable of supporting finding of racial profiling -- Trial judge expressing displeasure at bringing of application based on racial profiling and making comments which suggested that he

- *R v Brown* (2003)





Advocacy 961

Julian N. Falconer, *Litigating Race in the Criminal Courts*

Julian N. Falconer is a lawyer practising in Toronto, Ontario at the firm of Falconer Charney Macklin. His practice includes litigating race issues in both civil and criminal courts.

Challenges Faced by Counsel

- In the 1999 version of *The Law of Evidence*, the article, "Litigating Race in the Criminal Courts" shines light on the different approaches that can be taken when raising evidence of racial profiling before the courts, including the timing for making such submissions.

Boyle, C., MacCrimmon, M., & Martin, D. (1999). *The Law of Evidence: Fact Finding, Fairness and Advocacy*. Emond Montgomery Publications.

The Law of Evidence – Fact Finding, Fairness and Advocacy (1999)

- The article references the then recent decision of the Supreme Court of Canada in the 1998 case of *R v Williams*. *R v Williams* was on appeal from the British Columbia Court of Appeal.

- In *R v Williams*, Victor Daniel Williams, an Indigenous man, was charged with the robbery of a Victoria pizza parlour in October 1993. Mr. Williams pleaded not guilty and elected a trial by judge and jury. His defence was that the robbery had been committed by someone else, not him. The issue on this appeal is whether Mr. Williams has the right to question (challenge for cause) potential jurors to determine whether they possess prejudice against aboriginals which might impair their impartiality.

- Our office appeared at the SCC for the intervener the Urban Alliance on Race Relations.

R v Williams, 1998 CanLII 782 (SCC), [1998] 1 SCR 1128

- At the British Columbia Court of Appeal level, Justice McFarlane said:
  - “There is no doubt how Aboriginal persons perceive the justice system. But the question is how prospective jurors may perceive an Aboriginal accused. The stereotype upon which Parks was based is that, of a Black person, who, in the light of American and Canadian experience, is perceived as being linked with serious urban crime. The stereotype that arises from this evidence in this case is that of a disadvantaged person, often in conflict with the law, but no more inclined to serious criminal activity than any other similarly disadvantaged person.” (para 62)

Comments of Justice McFarlane of the BCCA

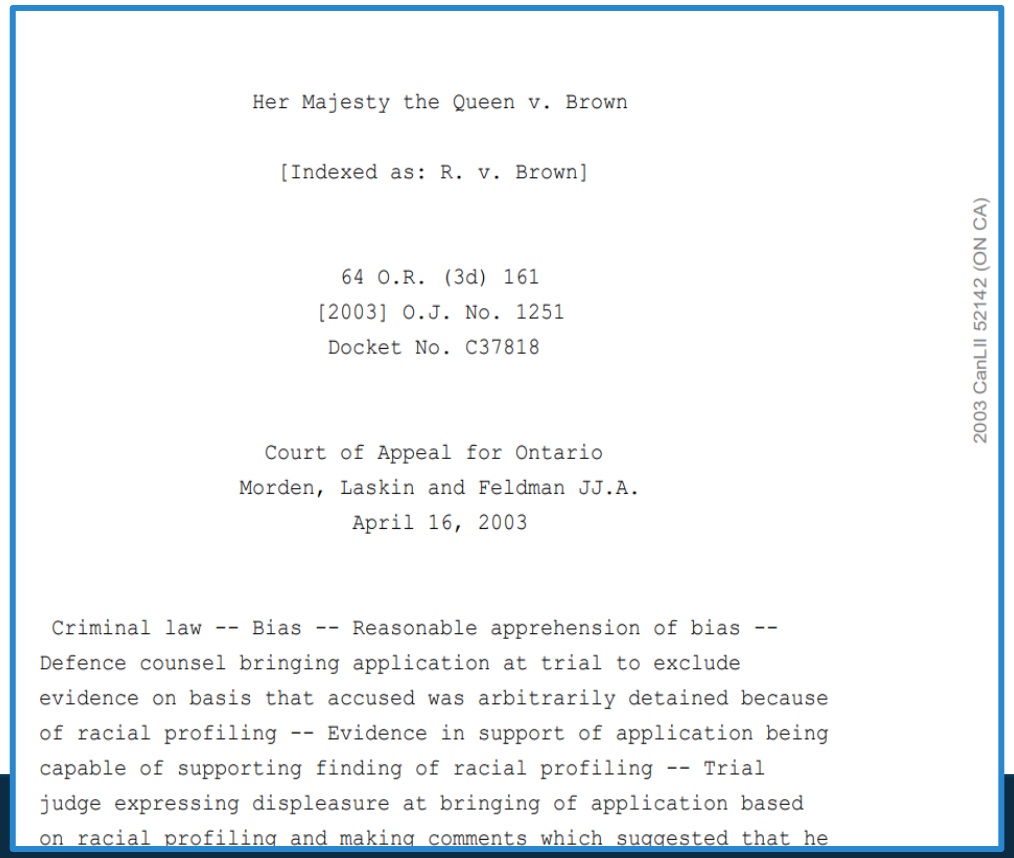
- Our office encouraged the SCC to reject racism in the justice system by denouncing the comments made by Justice McFarlane. The courts recognition and acceptance of such racial biases against an accused can only feed the perception that the court itself had, in effect, accepted a degree of racial bias in the justice system (Falconer article pg. 966).

- At para 58 of the decision, the SCC found recognized the impact of widespread prejudice against Indigenous peoples:
  - Although they acknowledged the existence of widespread bias against aboriginals, both Esson C.J. and the British Columbia Court of Appeal held that the evidence did not demonstrate a reasonable possibility that prospective jurors would be partial. In my view, there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity.

- The SCC determined that the potential for prejudice was increased by the failure of the trial judge to instruct the jury to set aside any racial prejudices that they might have against aboriginals.

The SCC's Acknowledgment of Racism and Stereotypes

- The accused, Decovan Brown, was a young black man and a professional basketball player.
- He was stopped by a police officer while driving an expensive motor vehicle. The officer claimed that he stopped the accused because the accused was speeding, but there was evidence that called this claim into question.
- Brown was ultimately charged with driving over 80. Defence counsel brought an application at trial to exclude evidence on the basis the detention was based on racial profiling.
- The Court of Appeal made several comments on racial profiling and how such claims can be supported by evidence.



Her Majesty the Queen v. Brown

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R v Brown, 2003 CanLii 52142 (ON CA)

"A racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence." (para 44)

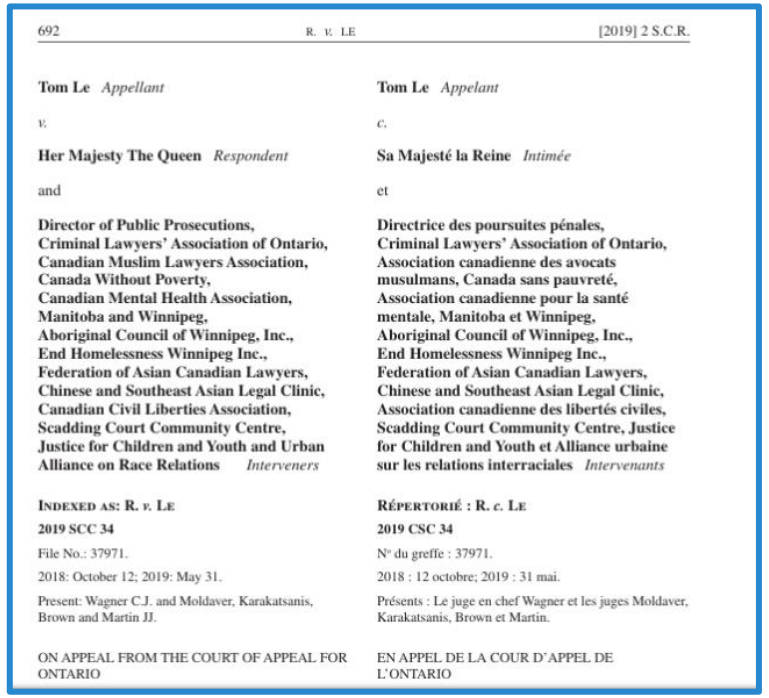
"(…) where the evidence shows that the circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling." (para 45).

"In the present case, in addition to submitting that the facts (a young black person wearing a baseball hat and jogging clothes driving an expensive new car) fit the phenomenon of racial profiling, the respondent refers to several features of the evidence which support the argument that the officer was not being truthful about the real reasons for the stop" (para 46).

R v Brown – Proving Racial Profiling

- Since *R v Brown* over 20 years ago, there has been a series of case law in Ontario both at the Human Rights Tribunal of Ontario ("HRTO") as well as the Ontario Court of Appeal. More recently, in 2019, the case of *R v Le* came before the Supreme Court of Canada.

- In *R v Le*, three police officers noticed four Black men and one Asian man in the backyard of a townhouse at a Toronto housing co-operative. They appeared to be just talking. Without a warrant, consent, or any warning to the young men, two officers entered the backyard and immediately questions the young men about "what was going on, who they were, and whether any of them lived there". The police officers demanded identification.



692 R. *v.* LE [2019] 2 S.C.R.

Tom Le *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Director of Public Prosecutions, Criminal Lawyers' Association of Ontario, Canadian Muslim Lawyers Association, Canada Without Poverty, Canadian Mental Health Association, Manitoba and Winnipeg, Aboriginal Council of Winnipeg, Inc., End Homelessness Winnipeg Inc., Federation of Asian Canadian Lawyers, Chinese and Southeast Asian Legal Clinic, Canadian Civil Liberties Association, Scadding Court Community Centre, Justice for Children and Youth and Urban Alliance on Race Relations *Interveners*

Tom Le *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Directrice des poursuites pénales, Criminal Lawyers' Association of Ontario, Association canadienne des avocats musulmans, Canada sans pauvreté, Association canadienne pour la santé mentale, Manitoba et Winnipeg, Aboriginal Council of Winnipeg, Inc., End Homelessness Winnipeg Inc., Federation of Asian Canadian Lawyers, Chinese and Southeast Asian Legal Clinic, Association canadienne des libertés civiles, Scadding Court Community Centre, Justice for Children and Youth et Alliance urbaine sur les relations interraciales *Intervenants*

INDEXED AS: R. *v.* LE

2019 SCC 34

File No.: 37971.

2018: October 12; 2019: May 31.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

RÉPERTORIÉ : R. *c.* LE

2019 CSC 34

N° du greffe : 37971.

2018 : 12 octobre; 2019 : 31 mai.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown et Martin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Case Law Post *R v Brown:* *R v Le*, 2019 SCC 34

- An officer questioned the appellant, Tom Le and demanded he produce identification. Tom Le responded that he did not have any on him. The officer asked him what was in the satchel and at that point, Tom Le fled, was pursed, and arrested. He was found to be in possession of a firearm, drugs, and cash (para 1 and 2).

- The SCC found that the circumstances of the police entry into the backyard effected a detention that was both immediate and arbitrary. This was serious *Charter*-infringing police misconduct, with a correspondingly high impact on Mr. Le's protected interests. The court allowed the appeal, and excluded the evidence seized from Mr. Le, set aside his convictions and enter acquittals.

Case Law Post *R v Brown:* *R v Le,* 2019 SCC 34

- In the decision, the SCC clearly pointed out that there is a difference between the consideration of race in a detention analysis and how it differs from the concept of racial profiling (para 74). Specifically, the court stated that:

> *" (…)The s. 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. " (para 75).*

- The court also discusses what evidence can be marshalled in racial profiling cases, including **direct evidence, admissions, and judicial notice.**

Case Law Post *R v Brown:* *R v Le,* 2019 SCC 34

- The court also speaks to the realities of Charter litigation and that social context evidence is of fundamental importance but can be difficult to prove through testimony or exhibits. The social context evidence is a type of "social fact" evidence, which has been defined as ""social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case" (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 57)."
- In essence, *Le* demonstrates that there is a broader race-based inquiry that can be triggered and is relevant that is separate from that of racial profiling. Instead of what motivates the officers (racial profiling) what the is the racial context for the interaction from the standpoint of the individual complainant.

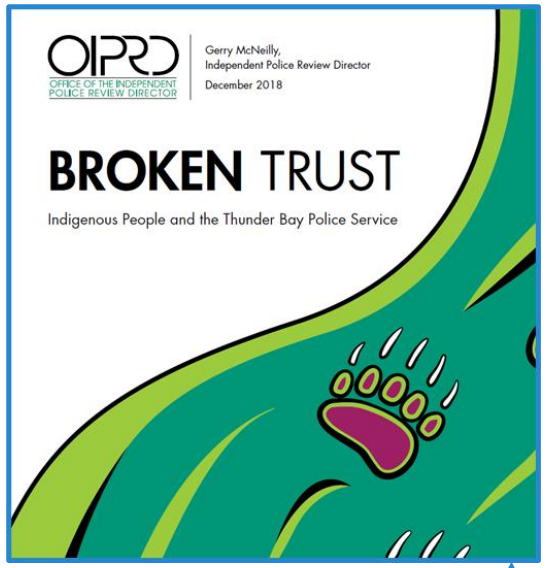
Case Law Post *R v Brown:* *R v Le,* 2019 SCC 34

PART 3:

Case Studies

Dafonte Miller

Seven Youth Inquest



The Death of Stacy DeBungee and the Broken Trust Report

- On December 28, 2016, Dafonte Miller and two of his friends were walking around a sub-division in Whitby. Dafonte and his friends were ultimately chased by Toronto Police Service (TPS) Constable Michael Theriault (PC Theriault) and his brother Christian Theriault (CT).
- When PC Theriault and CT caught up with Dafonte, they brutally assaulted him, including repeatedly striking him with an aluminum pipe. Dafonte ultimately lost the sight in his left eye and had to have it removed. Dafonte soon lost consciousness.
- PC Theriault arrested Dafonte and restrained him until Durham Regional Police Service (DRPS) arrived.
- Despite the injuries that Dafonte had suffered, he was placed in handcuffs and charged criminally. Neither Durham Regional Police nor Toronto Regional Police notified the Special Investigations Unit as they are legally obligated to do.

Case Study #1: Dafonte Miller

Dafonte Miller: Before and After

“It was not a cover-up’”

Toronto Chief of Police faces mounting questions over Dafonte Miller case
(CBC News, July 26,2017)

A Cover Up? A Conspiracy?

- Despite the injuries that Dafonte had suffered, he was placed in handcuffs and charged criminally. Neither DRP nor TPS notified the Special Investigations Unit as they are legally obligated to do.
- On Dec. 28, 2016, Dafonte was charged with:
  - Theft not exceeding $5000; two counts of assault with a weapon; possession of a weapon; and possession of a Schedule II substance. Dafonte has never been convicted of a crime.
- Timeline Post Arrest:
  - **Apr. 11, 2017**: Falconers LLP files formal notification with the SIU regarding the incident;
  - **May 5, 2017**: Charges dropped against Dafonte;
  - **July 19, 2017**: SIU charges PC Theriault; and
  - **July 21, 2017**: SIU charges Chris Theriault.
- Michael and Christian Theriault were jointly charged with aggravated assault. They were also each separately charged with attempting to obstruct justice by lying to members of the Durham Regional Police Service.

Charges Against Dafonte and Notifying the SIU

- Michael and Christian Theriault were jointly charged with aggravated assault. They were also each separately charged with attempting to obstruct justice by lying to members of the Durham Regional Police Service.
- Their trial took place over the span of three weeks between October and November of 2019, with closing submissions provided in January 2020.
- In his reasons for decision, Justice Di Luca was quick to point out that his task was “not to conduct a public inquiry into matters involving race and policing” (para 11).
- However, Justice Di Luca also stated that he was “mindful of the need to carefully consider the racialized context within which this case arrives…. And that this cases raises significant issue involving race and policing that should be further examined” (para 11).

Dafonte Miller (left) and Toronto Police Constable Michael Theriault (right)

Criminal Trial against Theriault Brothers

- Justice Di Luca made a further comment about racialized individuals and the context of this case in his decision:
  - In assessing Mr. Miller's credibility, I am also mindful that I must assess his evidence in a fair context and with a sensitivity to the realities that racialized individuals face in society (para 246).
- However, despite this, Justice Di Luca found **PC Theriault guilty of assault only.** Christian Theriault was found not guilty of both charges whereas PC Theriault was found not guilty of obstruction of justice.
- Justice Di Luca found that while PC Theriault's initial intent was not to arrest Dafonte but capture and assault him, t could not be excluded that there was a reasonable possibility that his intent was also to arrest him. Justice Di Luca further comments that it was "**probably** an assault as Michael **probably** intended only to capture and assault Mr. Miller at this stage" but that "probability is not a sufficient stand of proof" (para 315).

Justice Di Luca

Conviction Reasons of Justice Di Luca

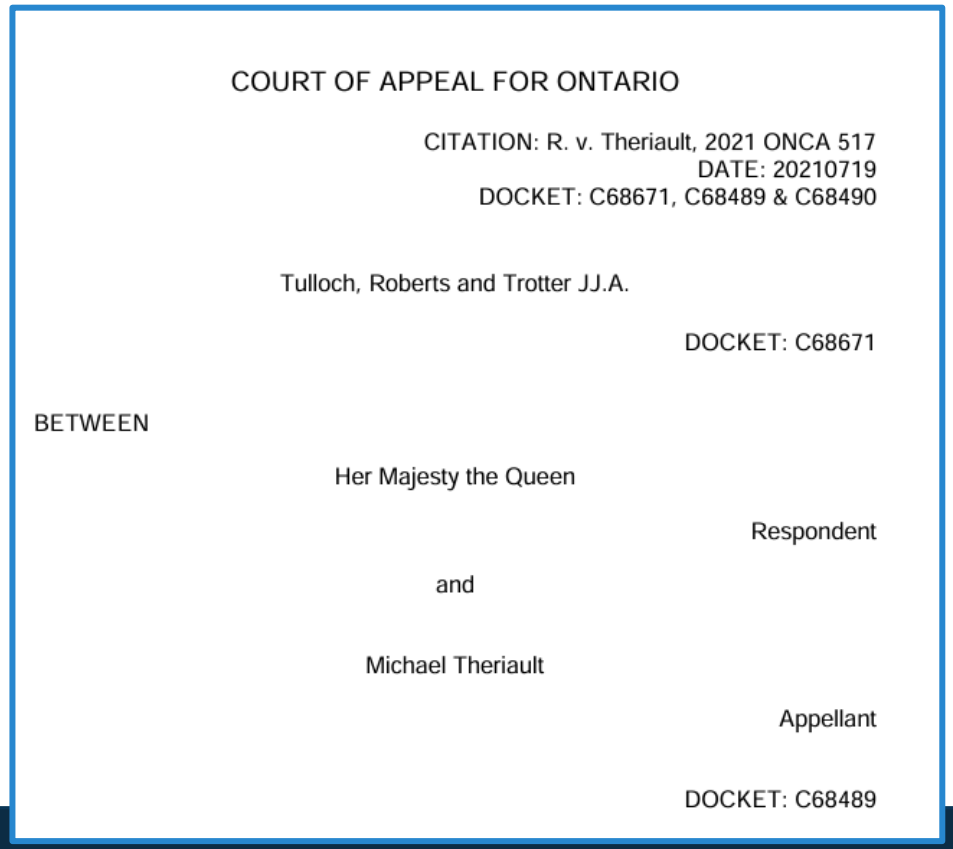
- Justice Di Luca sentenced Michael Theriault to a nine-month jail sentence. Justice Di Luca stated that he must consider the "broader racialized context within which this offence took place, but that he must be mindful to punish Mr. Theriault only for the crime he committed and not the crimes of others" (para 9).
- Further, Justice Di Luca recognized the social context and circumstances in which this case took place, stating that "the trial in this matter took place at a time when the community's concern with race relations is at an all time high. Indeed, it is fair to say that for many members of the community, the tipping point has been reached. The Black community has suffered deep wounds due to years of overt and systemic racism. The broader impact of this crime must be understood within that context" (para 6).
- Di Luca additional emphasized the need for denunciation in this case and that it "must be calibrated in accordance with a current understanding of the deep and widespread impact caused by offences committed by police officers against racialized minorities, particularly the Black community" (para 56).

Sentencing Reasons of Justice Di Luca

- In the conviction reasons of Justice Di Luca, the term "**race**" only appears three times in a single paragraph at the beginning of the decision, whereas the word "**racialized"** only appears an additional 2 times. This is in sharp contrast to Di Luca's sentencing reasons, in which race plays a central role.
- This is because the Court approaches the issue of race in a completely different manner at the time of trial and then at the time of sentencing. Where guilt and innocence are at issue, the Court remains neutral to the issue of race and blind to ethnicity of the individuals involved.
- The courts are more comfortable taking racism and the impact of cases involving racial profiling on communities in sentencing than the Court is in terms of working race into the trial stage.

Discomfort of the Court with Racism

- Michael Theriault appealed his conviction and jail sentence to the Ontario Court of Appeal. The Court of Appeal dismissed the appeal and upheld his conviction and sentence.
- The Court of Appeal decision made broad and significant pronouncements on the topic of systemic racism in Canada, including the over-policing of Black people and disproportionate incidents of violence during interactions with the police.
- The Court also found that the matter of judicial notice of the existence of anti-Black racism in Canadian society is beyond reasonable.



COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Theriault, 2021 ONCA 517
DATE: 20210719
DOCKET: C68671, C68489 & C68490

Tulloch, Roberts and Trotter JJ.A.

DOCKET: C68671

BETWEEN

Her Majesty the Queen

Respondent

and

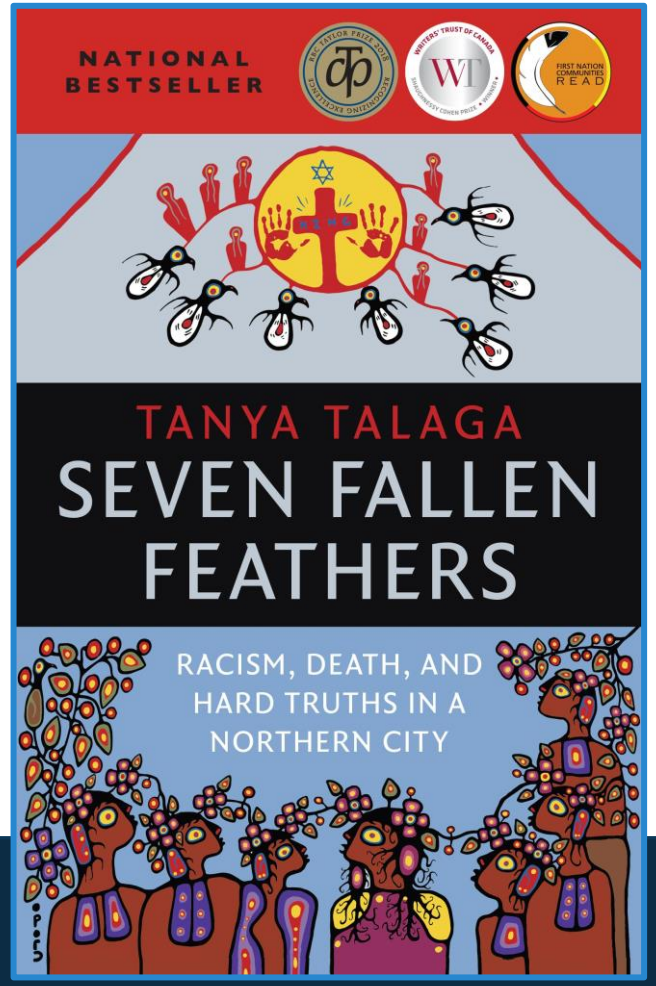
Michael Theriault

Appellant

DOCKET: C68489

Court of Appeal Upholds Theriault Conviction and Sentence

- Between 2000 and 2011, seven First Nations youths, Jethro Anderson, Curran Strang, Paul Panacheese, Robyn Harper, Reggie Bushie, Kyle Morriseau, and Jordan Wabasse, died while attending school in Thunder Bay. The death of each of the students was investigated by the Thunder Bay Police Service ("TBPS"). Five of the students were found in the McIntyre or Kaministiquia Rivers.
- The Inquest into the Death of Seven First Nations Youth ("Seven Youth Inquest") was originally an inquest into the loss of only one of these students, Reggie Bushie. However, his inquest was stalled in 2008, due to concerns regarding the lack of First Nations representation on jury rolls.
- In May 2012, Nishnawbe Aski Nation wrote to the Chief Coroner of Ontario with an application to hold a Joint Inquest into the Deaths of all Seven Youths. This application was granted.



Talaga, Tanya. *Seven Fallen Feathers: Racism, Death, and Hard Truths in a Northern City*. House of Anansi Press, 2017.

Case Study #2 – Seven Youth Inquest

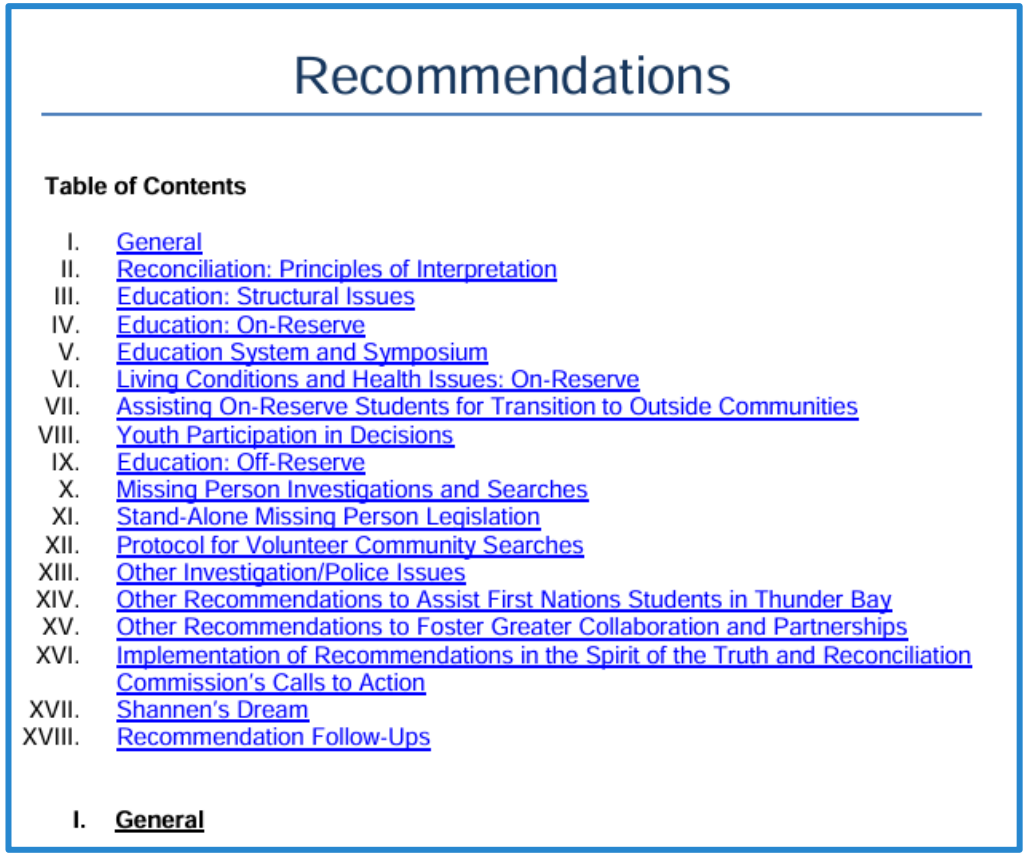
- The Seven Youth Inquest was held in Thunder Bay between October 5, 2015, and June 28, 2016.
- On July 13, 2016, after more than 7 months of testimony from approximately 150 witnesses, the jury delivered its verdict and recommendations.
- Most significantly, the jury found that four of the seven deaths were undetermined.

Office of the Chief Coroner
Bureau du coroner en chef

Verdict of Coroner's Jury
Verdict du jury du coroner

The *Coroners Act* – Province of Ontario
Loi sur les coroners – Province de l'Ontario

Seven Youth Inquest Verdict



Recommendations

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I. General

- The Seven Youth Inquest resulted in 145 recommendations including recommendations regarding the need to ensure timely reporting to police of all missing person matters that involve a student (Recommendation #91(i)) and the establishment of a working group to review issues relating to ground searches for missing persons and missing persons investigations (Recommendation #92).

Seven Youth Inquest Recommendations

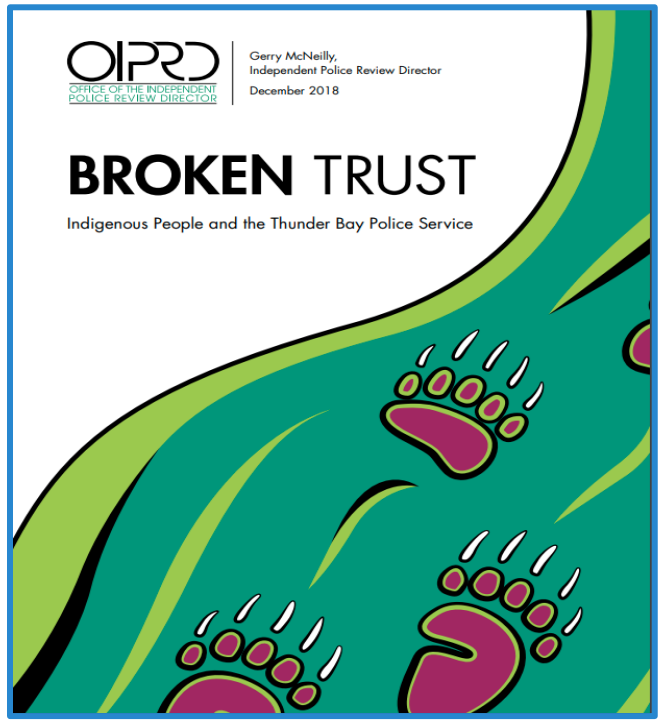
- Stacy DeBungee was an Indigenous man born on April 14, 1974.
- While the DeBungee family is from the Rainy River First Nation, Stacy had been living in Thunder Bay since 1979. Stacy's family described him as happy go lucky, a person who always had a smile on his face.
- Sadly, Stacy's body was recovered from the McIntryre River in Thunder Bay at 9:30 am on October 19, 2015.
- The Thunder Bay Police Service ("TBPS") declared his death not to be 'suspicious' within 3 hours and deemed it non-criminal by the next day.
- The same message was given to the public:
  - "Just an accident"
  - "Not suspicious"
  - "No evidence of potential foul-play"
  - "No public concern"

Case Study #3 – the Death of Stacy DeBungee and the Broken Trust Report

- Stacy's family, including his brother Brad DeBungee hired a private investigator to look into Stacy's death.
- The private investigator found four failings of the Thunder Bay Police Service:
  - **1. No proper examination**
    - No forensic truck on scene
    - Scene was not held
  - **2. No background check:**
    - DeBungee family wasn't contacted or interviewed
  - **3. Not questioning the physical trauma:**
    - Marks on body weren't questioned
  - **4. Not investigating physical evidence:**
    - Missing (but used) debit card
    - TBPS refused to speak with Dave Perry or Brad DeBungee

Stacy's Family Hires a Private Investigator

- As a result of the lack of a thorough investigation into Stacy's death, on March 18, 2016, Stacy's family and the leadership of Rainy River First Nation filed a complaint to the Office of the Independent Police Review Director ("OIPRD") in respect of the Thunder Bay Police Service.
- As a result of this complaint, the OIPRD undertook a systemic review of all of the death investigations by the TBPS. 37 cases were investigated, and interviews conducted with 39 current and past officers, including former Chiefs of Police.
- In December 2018, the OIPRD released its systemic review entitled *Broken Trust* finding **systemic failures** on the Thunder Bay Police Service to conduct adequate investigations, and that the premature conclusions drawn in these cases is, at least in part, attributable to **racist attitudes and racial stereotyping.**



Brad DeBungee Files Complaint re Stacy's Death

- **The Report also found that the TBPS officers specifically:**
  - lacked experience and knowledge in conducting death investigations;
  - failed to find out the results of autopsies that were completed;
  - thought that 'drowning' as a cause of death meant not suspicious;
  - there was no care in investigating how the drownings occurred;
  - denied racism/discrimination existed **at any level** of the Thunder Bay Police Service
- Further, the report found that "**systemic racism** exists in Thunder Bay Police Service at an institutional level" (page 184).

Gerry McNeilly, author of *Broken Trust*

Findings of the Broken Trust Report (2018)

S. Sgt Shawn Harrison

- The same findings of the *Broken Trust* Report resulted in a *Police Service Act* hearing for the officers that were responsible for the lack of investigation into Stacy's death.
- Staff Sergeant Harrison was charged with (and was found):
  - Count #1: Neglect of Duty (Guilty)
  - Count #2: Discreditable Conduct (Guilty)
- Sergeant Whipple was charged with (and was found):
  - Count #1: Neglect of Duty (Not Guilty)
  - Count #2: Discreditable Conduct (Not Guilty)

Discipline for Lack of Investigation

- Overall, it was determined that "**Staff Sergeant Harrison failed to treat or protect the deceased and his or her family equally and without discrimination because the deceased was Indigenous; there are no explanations that account for the failings in this case; the failure to conduct an adequate investigation including the premature conclusion that the death was nonsuspicious is, at least in part, attributable to an unconscious bias**."
- Staff Sergeant Harrison was demoted in rank from staff sergeant to sergeant for a term of 18 months. Staff Sergeant Harrison was also required to attend Indigenous Cultural Competency Training.

Guilty Verdict for Officer Harrison

FALCONERS
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Miigwetch!

Litigation with a conscience.

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