Court File No. 35678

**IN THE SUPREME COURT OF CANADA**
**(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**HER MAJESTY THE QUEEN**

Appellant
(Respondent)

- and -

**HUSSEIN JAMA NUR**

Respondent
(Appellant)

- and -

**ATTORNEY GENERAL OF CANADA**

Appellant
(Party Intervener)

- and -

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**ATTORNEY GENERAL OF BRITISH COLUMBIA**
**ATTORNEY GENERAL OF QUÉBEC**
**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**
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**CANADIAN BAR ASSOCIATION**
**CANADA'S NATIONAL FIREARMS ASSOCIATION**

Interveners

- and -

**AFRICAN CANADIAN LEGAL CLINIC**

Intervener

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(Pursuant to Rule 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## INDEX

## PART I – OVERVIEW

### A. OVERVIEW

***"Just sanctions are those that do not operate in a discriminatory manner."***[1]

1. The African Canadian[2] Legal Clinic ("ACLC") submits that the three year mandatory jail sentencing provision in s. 95(2) of the *Criminal Code* results in grossly disproportionate sentences, because it prohibits sentencing judges from accounting for relevant factors of systemic discrimination and historic disadvantage that have contributed to the offending behaviour and which could lead to a reduction in the sentence. To derive a proportionate sentence, these factors must be considered.

2. Further, the ACLC submits that because African Canadians are disproportionately sentenced under this section, systemic and contextual factors that often contribute to their involvement in the offence should be part of a responsible and reasonable hypothetical analysis.[3]

3. This sentencing provision will also have a discriminatory impact and this should inform the Constitutional analysis. This legislation is disproportionately applied to African Canadians and therefore will elevate already unacceptable levels of incarceration rates and the duration of jail sentences for African Canadians.

### B. STATEMENT OF FACTS

4. The following evidence accepted by the sentencing judge establishes that the Respondent, and similarly situated African Canadians, experience systemic discrimination and disadvantage that may contribute to their connection to the offence. These relevant factors are prohibited from consideration due to the three year mandatory minimum, yet they were canvassed by Code J. as follows:

i) The Respondent Nur is an African Canadian male who was born in Somalia. He and his family escaped armed conflict, were found to be Convention Refugees, and have lived as

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[1] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] at 68.

[2] The ACLC defines the term "African Canadian" as including any person of African ancestry, descent or heritage, who self-identifies as such, including indigenous Black Canadians, people whose ancestry is indigenous to the African continent, African Caribbean and Afro-Latin American peoples, and all individuals of the African Diaspora who are in Canada and their dependants, regardless of their immigration status.

[3] In addition to the Court of Appeal's reasonable hypothetical(s), the ACLC submits that there are both real and hypothetical circumstances where the application of section 95(2) will consistently result in disproportionate and unjust sentences for African Canadians.

permanent residents in an impoverished neighbourhood in Toronto since Nur was five years old. He has a large and very supportive family.[4]

ii) At the time of the offence, Nur had recently turned nineteen years old. He was a first offender with no criminal antecedents, who pleaded guilty. He was denied bail.[5]

iii) Although Nur and his family found refuge in Toronto, like other African Canadian refugees, they lived in a neighbourhood characterized by higher rates of poverty, crime, unemployment, poor housing and weak family structures. These factors increased the Respondent's exposure to negative peer influence, gang culture and gun crime.[6]

iv) The community in which Nur lives is subject to heavy police attention, which leads to the laying of large numbers of section 95 charges. Anti-Black discrimination "undoubtedly" contributes to many of these underlying societal causes. Furthermore, the most recent census data indicate that approximately 8.4% of the Toronto population is African Canadian. The fact that 62.1% of all section 95 firearms possession charges in Toronto are laid against African Canadian is "undoubtedly" a disproportionately high number.[7]

v) Despite this profound systemic disadvantage, Nur has "considerable potential". Up until the time of the offence, he had successfully navigated many barriers facing young African Canadian males in his community. He received good grades in school, excelled at basketball and planned to attend university. He was active in extra-curricular clubs and volunteer work, in addition to having part time and summer jobs.[8]

vi) The Crown did not prove that Nur brought the gun to the Community Centre or that he participated in any threats. The facts are open to the reasonable possibility that Nur arrived after the threats had been made by the tall man with a bandana around his face, and that Nur was given the gun after his arrival. In other words, Nur's case is exemplary of the fact that similarly situated African Canadians may come to possess a restricted loaded firearm for a brief period due to negative peer pressure in circumstances in which a marked imbalance of power likely exists by virtue of being confronted by a peer with a gun.[9]

vii) Code J. would have concluded that two and one-half years imprisonment was the fit sentence for Nur, but for the mandatory minimum. Code J. could not factor the above noted experience of Nur (or that of his community) which faces systemic disadvantage.[10]

viii) The Ontario Crown Policy Manual places significant constraints on the power to elect summarily in section 95 cases. The effect of the two-year "gap" in subsection 95(2) is to further

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[4] *R v Nur*, 2011 ONSC 4874 (CanLII) [Code J. ruling in *Nur*] at 28, 30, 31 and 35.
[5] Code J. ruling in *Nur*, supra at 2, 28 and 35.
[6] Pre-Sentence Report February 1, 2011 at 182, 183, 185.
[7] Code J. ruling in *Nur*, supra at 77 and 79.
[8] Code J. ruling in *Nur*, supra at 34 and 35.
[9] Code J. ruling in *Nur*, supra at 61 and 68. See the hypothetical proposed at 8 and case law cited at 9.
[10] Code J. ruling in *Nur*, supra at 71.

constrain Crown discretion and results in more African Canadians receiving three or more years in jail.[11]

ix) The impugned mandatory minimum sentence in this case acts as a complete bar to any appeal of Nur's automatic deportation pursuant to the *Immigration and Refugee Protection Act* on grounds of "serious criminality".[12]

## PART II: POSITION ON THE APPELLANT'S ISSUES

### A. DOES S. 95(2)(A)(I) OF THE *CRIMINAL CODE*, R.S.C. 1985, C. C-46 INFRINGE S. 12 OF THE *CHARTER OF RIGHTS AND FREEDOMS*?

5. Yes, the three-year mandatory minimum jail sentence pursuant to s. 95(2)(a)(i) of the *Criminal Code* amounts to cruel and unusual punishment.

## PART III: STATEMENT OF ARGUMENT

### A. ROLE OF THE JUDICIARY IS TO ACCOUNT FOR INDIVIDUAL AND SYSTEMIC FACTORS IN SENTENCING

6. Post-dating Code J.'s ruling, this Court in *Ipeelee*[13] recognized that in order for a sentencing judge to determine a proportionate sentence, it is essential that they consider all relevant contextual factors, and in particular, whether systemic discrimination contributed to the offender's conduct. This Court also held that the sentencing process is an appropriate forum to address Aboriginal overrepresentation in prisons.[14] It is submitted that African Canadians are deserving of the same consideration expressed in the majority judgment delivered by Lebel J.: "Just sanctions are those that do not operate in a discriminatory manner."[15]

7. *Ipeelee* instructed sentencing judges that in the absence of a mandatory minimum, the courts must review the influence that historical and current discrimination may have had on the offender's conduct to ensure the sentence is not disproportionate. Common sense dictates that the determination of whether a mandatory prison sentence is grossly disproportionate (including reasonable hypotheticals) must factor those same principles. In other words, this Court should consider the potential nexus between systemic discrimination and an individual's offending behaviour to determine if section 95(2) may result in grossly disproportionate sentences for disadvantaged groups, such as African Canadians.

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[11] Code J. ruling in *Nur*, supra at 118 and 129.
[12] Code J. ruling in *Nur*, supra at 36.
[13] *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] at 38, 54, 60, 73, 77. *See also R v Borde*, 2003 CanLII 4187 (ON CA) [*Borde*] at 32 and 35
[14] *Ibid Ipeelee* at 70.
[15] *Supra* Note 12 at 68

8. The ACLC submits that a contextually responsible analysis of whether the penalty in question would offend s. 12 of the *Charter* in reasonable hypothetical circumstances, should reflect the manner in which systemic factors may reasonably influence African Canadian offenders. One instructive reasonable hypothetical is as follows:

An 18 year old African Canadian youth works part-time as a Community Youth Worker at a community centre in Toronto, Ontario. He is a first year university student who attends York University. He has no criminal record. He has a number of acquaintances that he grew up with that are linked to gangs and whom he regularly comes into contact with by virtue of living, working and going to school in a lower income community. His family cannot afford to live elsewhere. One evening, while walking to his vehicle to drive to the community centre, an acquaintance of his, who is also a user of the community centre, asks him for a ride there. While en route to the community centre and inside the car, the acquaintance shows he has a loaded prohibited or restricted firearm. To bide extra time to think about how to avoid bringing the acquaintance to the community centre, he tells the acquaintance that he wants to get something to eat first. The acquaintance agrees to this and they take a short detour in the direction of a nearby McDonald's. Before arriving at the McDonald's, the police pull over the vehicle. During their investigation, they locate the firearm underneath the passenger seat. The young man and the acquaintance are both charged and prosecuted with possession of a restricted firearm contrary to section 95(2). Both men are later convicted. The trial judge concludes the young man's knowledge and control was brief and his conduct otherwise mitigating.

9. The ACLC submits that the application of the three-year mandatory jail sentence to the reasonable hypothetical scenario posited above gives rise to a grossly disproportionate punishment towards the driver. Also, forcing the judge to sentence both the driver and passenger to at least three years in jail despite their distinguishable circumstances and involvement results in unreasonably similar sentences, a distortion of the parity principle, and a sense of injustice.[16]

10. There is no doubt that criminal courts in Toronto consistently deal with trials involving allegations of two or more African Canadian persons charged with joint or constructive possession of a loaded firearm in vehicles with evidence of the occupants having differing degrees of knowledge of or involvement with the firearm.[17] Moreover, those cases consistently deal with African Canadians whose experiences with systemic discrimination and historic disadvantage are tied to their involvement in the offence.

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[16] *R v Berry* (1984), 6 OAC 237 (C.A) at 237-238, *R v Douglas*, 1996 CanLII 666 ONCA, 91 O.A.C. 224 at 9.

[17] *R v Humphrey*, 2011 ONSC 3024 at 140-146, 149-151, 154-155; *R v Bonilla-Perez*, 2014 ONSC 2031 at 51-52, 56; *R v Johnson*, 2013 ONCJ 11 at 4, 14, 16; *R v Mullings*, 2012 ONSC 103 at 126-129; *R v Bacchus*, 2012 ONSC 5082 at 7, 10,.40, 138, 152.

## B. SOCIAL CONTEXT - EXCEPTIONAL CIRCUMSTANCES OF AFRICAN CANADIANS

11. The consideration of three particular social realities is essential to properly contextualize the disproportionate impact that this mandatory minimum three-year jail sentence has on African Canadians. Each of these realities is a manifestation of systemic anti-Black racism.

12. The first contextual factor is that African Canadians disproportionately receive this mandatory minimum sentence, particularly in Toronto.[18] Research also suggests that African Canadians are more prone to receiving mandatory minimums based on disparities in being detained before trial. African Canadians have more charges initially laid against them and are more likely to be detained before trial than are Whites.[19] Male accused are more likely to be detained than female accused, and young accused are more likely to be detained before trial than older accused. The reason that African Canadians are more likely to be detained does not have to do with bona fide legal factors, but is related to actions that are influenced by racial bias in the subjective assessments by police officers of accused individuals' moral character. Further, detained accused are considerably more likely to plead guilty than are accused who are not remanded to pre-trial custody.[20]

13. Since the Crown policy is to elect by indictment at an early stage (absent exceptional circumstances) without full information about the relevant facts, issues, defences, or circumstances of the accused's involvement that are later revealed at trial, detained African Canadians are more likely to be proceeded against by indictment. Due to this flaw in the procedure, if the African Canadian offender's conduct and background circumstances are later found to be significantly mitigating, the trial judge has no discretion and must impose the mandatory three-year jail sentence.[21] The prospect of a three-year jail sentence combined with the inability of the trial judge to factor their circumstances upon conviction, also pressures African Canadians to plead guilty and forgo their right to trial if they are offered a deal for a lesser sentence.

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[18] Code J. ruling in *Nur*, *supra* at 77 and 79.

[19] Scot Wortley, Julian Tanner, "Discrimination or "Good" Policing? The Racial Profiling Debate in Canada" in *Our Diverse Cities*, ed Caroline Andrew (2004) 1 Metropolis 197-201 at 197.

[20] Expert Evidence of Scot Wortley, 9 December 2010, transcript p. 77, lines 5-23 and 13 December 2010, transcript p. 276, lines 1-15; p. 277, lines 3-23; p. 287, lines 11-25; p. 289, lines 5-8.

[21] Prosecutorial discretion to potentially withdraw the charge prior to registering a conviction is no answer to a sentence that contravenes section 12. See *R v Smith*, [1987] 1 SCR 1045 at 1078-1079. A prosecutor would more likely agree to a significantly reduced sentence for the driver but also has no discretion due to the procedure and law.

14. A second contextual factor essential to consider is that the over-representation of African Canadians in prisons will be increased along with their average time spent in jail should section 95(2) continue to stand. The incarceration of African Canadians is at an unprecedented disproportionate rate. Related, African Canadians serve harsher jail sentences. The Annual Report of the Office of the Correctional Investigator, 2012-2013 has confirmed the following:

> In the 10 year period between March 2003 and March 2013, the incarcerated population has grown by close to 2,100 inmates, which represents an overall increase of 16.5%. [...] Black inmates have increased every year, growing by nearly 90% over the last 10 years. Meantime, Caucasian inmates actually declined by 3% over this same period.
>
> Black inmates are one of the fastest growing sub-populations in federal corrections. Over the last 10 years, the number of federally incarcerated Black inmates has increased by 80% from 778 to 1,403. Black inmates now account for 9.8% of the total prison population (up from 6.3% in 2003/04) while representing just 2.9% of the general Canadian population. While many Black inmates reported interactions with other inmates and staff that were considerate and respectful, nearly all Black inmates interviewed for the case study reported experiencing discrimination by correctional officials.
>
> Despite being rated as a population having a lower risk to re-offend and lower need overall, [footnote omitted] Black inmates are 1.5 times more likely to be placed in maximum security institutions.[22]

15. Also, the United Nations Committee on the Elimination of Racial Discrimination expressed concern over the over-representation of African Canadians in prisons in its March 2012 Canadian periodic report:

> The Committee is concerned at reports that African Canadians, in particular in Toronto, are being subjected to racial profiling and harsher treatment by police and judicial officers with respect to arrests, stops, searches, releases, investigations and rates of incarceration than the rest of the population, thereby contributing to the overrepresentation of African Canadians in the system of criminal justice of Canada.[23]

16. The Committee recommended that Canada "take necessary steps" to prevent over-incarceration, and train actors in the criminal justice system including police and judges on the principles of the *International Convention on the Elimination of All forms of Racial Discrimination* of which Canada is a signatory.[24]

17. The Constitutional analysis of this mandatory minimum jail term can no longer ignore the stark data that proves that the over-incarceration of African Canadians is at unacceptable levels. It is important to note that this information is not a new trend in African Canadian sentencing. In

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[22] Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: OCI, 28 June 2013) at 3-4, 6-7 9. *See also* Office of the Correctional Investigator, *Annual Report 2013-2014* Ottawa: OCI, 27 June, 2014) at 2.
[23] Committee on the Elimination of Racial Discrimination, Report on the Eightieth Session, UNCERD, 2012, Supp No 18, UN Doc A/67/18 (2012) at 10.
[24] *Ibid.*

its review of criminal justice statistics from 1986/1987 to 1992/1993, the Report of the *Commission on Systemic Racism* revealed large disparities between the White and African Canadian prison populations. The number of African Canadian admissions to Ontario prisons increased by 204%, while the number of White admissions increased by 23%. In 1992/1993, African Canadians accounted for 15% of Ontario's prison admissions while only representing 3% of the province's population. More recent federal statistics display a similar trend. In 2004/2005, African Canadian offenders composed 6.3% and 8% respectively of the total incarcerated federal offender population, while accounting for only about 2% of the Canadian population.[25]

18. Third, African Canadians share with Aboriginals a legacy of slavery[26], colonialism, segregation and racism that has led to historic patterns of disadvantage, including their overrepresentation in prison, involvement in certain offences, being denied bail and receiving longer jail sentences. These experiences of African Canadians are documented in studies and case law:

i. Anti-Black racism is pervasive and results in discriminatory outcomes in criminal justice;

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[27]

ii. Historical and current discrimination against African Canadians in the criminal justice system has perpetuated African Canadians' distrust of the justice system. [28] The extent of anti-Black discrimination experienced by African Canadians within the criminal justice system is well documented in more recent legal and socio-legal academic research[29];

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[25] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole) [*Commission Report*] at 70-75; Parole Board of Canada, *Performance Monitoring Report 2008-2009* at 41 online < http://pbc-clcc.gc.ca/rprts/pmr/pmr_2008_2009/5-eng.shtml>; Shelley Trevethan & Christopher Rastin, *A Profile of Visible Minority Offenders in the Federal Canadian Correction System* (Ottawa: Correctional Service of Canada, 2004) at 3, 10 .

[26] Marcel Trudel, *Canada's Forgotten Slaves: Two Hundred Years of Bondage* (Montreal: Véhicule Press, 2013) at 254-271.

[27] *R v Parks* (1993), 15 OR (3d) 324 (CA) [*Parks*] at 13-14, 16; *R v Williams*, [1998] 1 SCR 1128 at 21-22 and 28. See also *R v S (R.D.)*, [1997] 3 SCR 484 [*S (R.D.)*] at 47 and 57, and *R v Brown* (2003), 64 OR (3d) 161, 2003 CanLII 52142 (ON CA) [*Brown*] at 7-9.

[28] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole) [*Commission Report*] at 17, 43, 51 and 100.

[29] David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 1-5, 37-39; Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) 14-18.

iii. African Canadians represent a disproportionate number of individuals in the criminal justice system and are more prone to be the recipients of mistreatment[30];

iv. Like Aboriginals, African Canadians continue to struggle to have the judiciary recognize as, a principle of sentencing, their systemic discrimination and historic disadvantage as a fundamental principle of sentencing[31];

v. The history of African Canadians is also one of de-facto segregation in housing, schooling, employment and exclusion from public places such as parks, theatres, bars and restaurants. The courts and the justice system re-enforced these racist practices.[32]

## C. SECTION 95(2) PERPETUATES SYSTEMIC DISADVANTAGE OF AFRICAN CANADIANS

19. Code J. agreed that African Canadians distinctly experience discrimination and disadvantage within Canadian society. However, his Honour failed to appreciate how the mandatory minimum induces grossly disproportionate sentences by prohibiting sentencing judges to factor those circumstances for African Canadians. In other words, these relevant socio-economic traits can only be factored into the sentencing analysis for first time African Canadian offenders in the unlikely event that the disposition exceeds three years.[33]

20. Further, Code J. recognized that discrimination and disadvantage contribute to a disproportionate number of African Canadian offenders being charged for possession of a loaded firearm, yet declined to consider whether the net effect of section 95(2) imposed a burden on African Canadians that is not imposed on others or whether this imposition contributes to unjust sentences.

21. Under this sentencing regime, even where entirely appropriate, there is no opportunity for the sentencing judge to reduce the sentence. The existence of the mandatory minimum in combination with the Crown policy prevents a sentencing judge from fashioning a less onerous and more appropriate sentence reflective of a promising young African Canadian man, with lesser moral blameworthiness and criminal culpability.[34]

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[30] *R v Golden*, [2001] 3 SCR 679, 2001 SCC 83 at 83.
[31] *Borde, supra* at 27 and 32; *Ipeelee, supra* at 73.
[32] James Walker, *"Race" Rights and the Law in the Supreme Court of Canada* (Canada: Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997) at 122-181; Expert Evidence of Scot Wortley, 9 December 2010, transcript p. 48, lines 1-10 and p. 49, lines 1-7; *Christie v The York Corporation*, [1940] SCR 139 at 145; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto: University of Toronto Press, 1999) at 226-230 and 281.
[33] *Nur, supra* at 79.
[34] *Nur, supra* at 36 and 71.

22. Finally, the African Canadian Legal Clinic submits that the grossly disproportionate impact of the impugned provision will seriously exacerbate the multiplicity of socio-economic disadvantages faced by African Canadians,[35] while contributing to the unfortunate role that Canadian law and actors within the criminal justice system play in perpetuating historic disadvantage and systemic anti-Black racism in Canada.[36]

**PART IV: COSTS**

23. It is requested that no costs be ordered against the ACLC.

**PART V: REQUEST FOR ORAL SUBMISSIONS**

24. The ACLC requests permission to make oral submissions and 15 minutes of time.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**DATED** at Toronto, Ontario, this 21 day of October, 2014.

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[35] *R v Spence*, 2005 SCC 71 at 32, 52; Expert Evidence of Scot Wortley, 13 December 2010, transcript p. 330, lines 1-20 and p. 331, lines 1-23, p. 332, lines 9-21; Akwatu Kenti, "The Canadian War on Drugs: Structural Violence and Unequal Treatment of Black Canadians" (2014) 25 International Journal of Drug Policy 190 at 190-193.

[36] Michelle Y. Williams, "A Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 420 at 420-436; *supra* Note 29; *supra* Note 32.

## PART VI: TABLE OF AUTHORITIES

### CASE LAW

1. *Christie v. The York Corporation*, [1940] SCR 139
2. *R v Bacchus*, 2012 ONSC 5082
3. *R v Berry* (1984), 6 OAC 237 (CA)
4. *R v Bonilla-Perez*, 2014 ONSC 2031
5. *R v Borde*, 2003 CanLII 4187 (ON CA)
6. *R v Brown* (2003), 64 OR (3d) 161, 2003 CanLII 52142 (ON CA)
7. *R v Douglas*, 1996 CanLII 666 ONCA, 91 OAC 224.
8. *R v Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83
9. *R v Humphrey*, 2011 ONSC 3024
10. *R v Ipeelee*, 2012 SCC 13
11. *R v Johnson*, 2013 ONCJ 11
12. *R v Mullings*, 2012 ONSC 103
13. *R v Nur*, 2011 ONSC 4874 (CanLII)
14. *R v Parks* (1993), 15 OR (3d) 324 (CA), 1993 CanLII 3383 (ON CA)
15. *R v S (R.D.)*, [1997] 3 SCR 484
16. *R v Smith*, [1987] 1 SCR 1045
17. *R v Spence*, 2005 SCC 71
18. *R v Williams*, [1998] 1 SCR 1128

## COURT DOCUMENT FROM THE RECORD

19. Pre-Sentence Report February 1, 2011

## EXPERT EVIDENCE

20. Expert Evidence of Scot Wortley, 9 December 2010

21. Expert Evidence of Scot Wortley, 13 December 2010

## GOVERNMENT REPORTS

22. Committee on the Elimination of Racial Discrimination, Report on the Eightieth Session, UNCERD, 2012, Supp No 18, UN Doc A/67/18 (2012).

23. Office of the Correctional Investigator, *Annual Report 2012-2013* (Ottawa: OCI, 28 June 2013)

24. Office of the Correctional Investigator, *Annual Report 2013-2014* Ottawa: OCI, 27 June, 2014)

25. Parole Board of Canada, *Performance Monitoring Report 2008-2009* online < http://pbc-clcc.gc.ca/rprts/pmr/pmr_2008_2009/5-eng.shtml>

26. *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-chairs: M. Gittens and D. Cole)

27. Trevethan, Shelley & Rastin, Christopher, *A Profile of Visible Minority Offenders in the Federal Canadian Correction System* (Ottawa: Correctional Service of Canada, 2004)

## ACADEMIC AUTHORITIES


28. Aylward, Carol, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999)
29. Backhouse, Constance, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto: University of Toronto Press, 1999)
30. Kenti, Akwatu, "The Canadian War on Drugs: Structural Violence and Unequal Treatment of Black Canadians" (2014) 25 International Journal of Drug Policy
31. Tanovich, David, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006)
32. Trudel, Marcel, *Canada's Forgotten Slaves: Two Hundred Years of Bondage* (Montreal: Véhicule Press, 2013)
33. Walker, James, *"Race" Rights and the Law in the Supreme Court of Canada* (Canada: Osgoode Society for Canadian Legal History and Wilfrid Laurier University Press, 1997)
34. Williams, Michelle Y. "A Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 420
35. Wortley, Scot & Tanner, Julian, "Discrimination or "Good" Policing? The Racial Profiling Debate in Canada" in *Our Diverse Cities*, ed Caroline Andrew (2004) 1 Metropolis 197-201

# PART VII: STATUTES AND RULES

Possession of prohibited or restricted firearm with ammunition

**95.** (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(*a*) an authorization or a licence under which the person may possess the firearm in that place; and

(*b*) the registration certificate for the firearm.

Punishment

(2) Every person who commits an offence under subsection (1)

(*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

(ii) in the case of a second or subsequent offence, five years; or

(*b*) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

Possession d'une arme à feu prohibée ou à autorisation restreinte avec des munitions

**95.** (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois :

*a*) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;

*b*) du certificat d'enregistrement de l'arme.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

*a*) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

(i) de trois ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

*b*) soit d'une infraction punissable, sur déclaration de culpabilité par procédure sommaire, d'un emprisonnement maximal de un an.