

IN THE COURT OF APPEAL FOR ONTARIO

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

KEVIN MORRIS

Respondent

- and -

THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CRIMINAL
LAWYERS' ASSOCIATION, ABORIGINAL LEGAL SERVICES, SOUTH ASIAN
LEGAL CLINIC OF ONTARIO, CHINESE AND SOUTHEAST ASIAN LEGAL
CLINIC AND COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK,
THE BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES
ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, URBAN
ALLIANCE ON RACE RELATIONS AND CANADIAN ASSOCIATION OF
BLACK LAWYERS

Interveners

JOINT FACTUM OF THE INTERVENERS,
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PART I – OVERVIEW AND FACTS

1. This appeal raises important public interest issues on how courts should approach the task of sentencing racialized offenders. SALCO/CSALC/COP-COC agree with the Appellant that this case “provides an opportunity for this court to develop a clear analytical framework that provides guidance to trial judges on how systemic and background factors may be properly applied to the sentencing of racialized, non-Indigenous offenders.”¹

PART II – SALCO/CSALC/COP-COC POSITIONS ON THIS APPEAL

2. SALCO/CSALC/COP-COC advance three positions to assist the court:

- I. Courts ought to consider systemic discrimination and systemic barriers when sentencing all racialized offenders;**
- II. Sentencing judges ought to situate police *Charter* violations against racialized offenders in the social context of systemic discrimination within which those violations take place;**
- III. A court’s proper assessment of mitigating and aggravating circumstances in sentencing a racialized offender is only as good as the court’s proper appreciation for and use of evidence of systemic discrimination and systemic barriers**

PART III – STATEMENT OF ARGUMENT

OVERVIEW

3. The Appellant’s overarching complaint on this appeal is that the sentencing judge imposed a manifestly unfit sentence because of his “overwhelming focus on systemic discrimination.”² While the Appellant recognizes that “systemic discrimination demands judicial attention, and is a relevant sentencing factor in this case,” the Appellant argues that “it cannot eclipse the controlling sentencing principles for firearms offences, particularly those on the true crime end of the spectrum.”³ General deterrence and denunciation are the controlling principles the Appellant will argue the sentencing judge failed to give proper effect to.

¹ Appellant’s Factum at para 4

² Appellant’s factum at para 2

³ *Ibid.*

4. SALCO/CSALC/COP-COC submit that when sentencing racialized offenders, proper consideration of the principles of general deterrence and denunciation, proper consideration of *Charter* breaches, and proper consideration of mitigating and aggravating circumstances, are all a function of a court's proper consideration of evidence of systemic discrimination. This is what Justice Nakatsuru did in the court below when he sentenced the Respondent as he did. All judges tasked with sentencing a racialized offender ought to take a similar considered approach.

I. COURTS OUGHT TO CONSIDER SYSTEMIC DISCRIMINATION AND SYSTEMIC BARRIERS WHEN SENTENCING ALL RACIALIZED OFFENDERS

5. The Appellant accepts that nothing forecloses background and systemic factors from consideration when sentencing non-Indigenous offenders and acknowledges the relevance of social context evidence in sentencing. However the Appellant appears to limit the applicability of "*Gladue* principles" in sentencing to racialized offenders "who hail from groups that have been the subject of centuries long discrimination,"⁴ which implies that only some groups are worthy of the Courts' thoughtful considerations in sentencing. SALCO/CSALC/COP-COC disagree.

6. Systemic discrimination against Indigenous people and black people in Canada has a deep and varied history. Systemic discrimination and its effects that have historically and continue to affect Indigenous and black people in Canada may differ from those faced by other racialized groups. This does not mean that evidence of systemic discrimination faced by non-Indigenous and non-black racialized individuals is less relevant when sentencing those offenders. Further, Indigenous and black peoples are not the only groups who have a long history of experiencing systemic discrimination and racism in Canada. Legislation and policy have long institutionalized systemic racism against the Chinese and South Asian communities. For example:

- i. The *Electoral Franchise Act* (1885) explicitly excluded persons of Chinese/Mongolian descent from voting;
- ii. The introduction and subsequent increase of the Chinese Head Tax (1885-1903);
- iii. The *Municipality Incorporation Act* (1907) excluded voting for all people of Indian descent in Vancouver followed by large anti-Asian riots in Western Canada, the

⁴ Appellant's factum para. 21

amendments to the *Immigration Act* (1910) aimed at specifically stopping South Asian immigration;

- iv. The Continuous Journey Regulation (1908) to deter Indian immigrants and the 1914 denial of Indian immigrants who arrived to Canada via a ship called the Komagata Maru;
- v. The *Chinese Exclusion Act* (1923) that excluded almost all immigration of Chinese people to Canada; and
- vi. Most recently, the introduction of Bill 21 in Quebec, which aims to prevent many South Asians from wearing religious attire when accessing public services or working in the public sector.

7. Courts should be wary to endorse an approach that creates a ranking of relevance in regard to evidence of systemic discrimination targeting racialized groups. Such an approach risks further implicating the criminal justice system as an active (or passive) participant in perpetuating systemic discrimination against racialized individuals and groups deemed to fall lower in that ranking.

8. Where an offender is racialized, sentencing judges should approach sentencing through a lens that considers systemic discrimination. To that end, the relevant racialized group(s) must be appropriately defined. In defining the relevant racialized group(s), courts should adopt a racial equity lens that respects the offenders' self-identity as well as perceived identity and does not perpetuate pre-existing stereotypes about the racialized group to which the claimant belongs or is perceived to be a member of. To give an obvious example, Asian Canadians do not represent a single, monolithic group.⁵ Viewing them as such risks perpetuating the prejudicial "model minority myth." The "model minority myth" suggests that Asian Canadians are free from discrimination.⁶ They are not. Certain East and Southeast Asian Canadian communities are over-

⁵ See *R. v. Nguyen*, 2006 ONCJ 95, where De Filippis J. stated, at paras. 22-23: "The [information to obtain], as presented, suggests that since all previous cases involved Asians, all Asians or Vietnamese are involved in this crime, and, therefore, the home in question must contain a marihuana grow operation. This suggestion is erroneous and offensive...As any standard Atlas will show, Asia is the largest of the seven continents. Its many countries are home to three-fifths of the world's population. There is an enormous cultural diversity in this region." See also The Honourable Michael H. Tulloch's "Report of the Independent Police Oversight Review", (Queen's Printer for Ontario, 2017), Recommendation 4.2, at para. 53, which recommends implementing training for police oversight bodies to develop greater social and cultural competency regarding the communities they serve, including South Asian and East Asian communities.

⁶ See the U.S. literature on Asian Americans: Harvey Gee, "Asian Americans and Criminal Law and Criminal Procedure: A Missing Chapter from the Race Jurisprudence Anthology" (2011), 2 Geo. J.L. & Mod. Crit. Race Persp. 185, at p. 192; Rhoda J. Yen, "Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case", (2000) 7 Asian L.J. 1, at pp. 2-4. See also John Huey-Long Song, "Attitudes of Chinese Immigrants and Vietnamese Refugees toward Law Enforcement in the United States", (1992) 9 Just. Q. 703, at pp. 712, 715, which discusses the differences between Chinese and Vietnamese Americans in their dealings with the criminal justice system.

represented among the low income population⁷ and experience systemic discrimination within the criminal justice system.⁸ For example, the 2016 York University Traffic Stop study examined incidences of traffic stops among different racial groups in Ottawa, and tracked the reasons for and outcomes of the stops.⁹ Compared with white drivers, East-Asian drivers experienced disproportionately high incidences of stops based on perceived criminal offences or suspicious activities.¹⁰

9. This court and others have taken judicial notice of widespread systemic discrimination in Canadian society against racialized groups other than Indigenous and black peoples especially in *Challenge for Cause* cases, including South Asian, Southeast Asians and East Asians.¹¹ Further, courts are increasingly finding specific instances of racial profiling by law enforcement.¹² Additionally, racialized communities – including East, South and Southeast Asians – experience ongoing disproportionate levels of poverty. Racialized people are more likely to fall below the Low Income Cut-Off/Low Income Measure and to have related problems like poor health, lower education, and fewer job opportunities, than non-racialized people. The 2016 Census showed that 20.8% of peoples of colour are low-income, including 23% of the Chinese community and 18% of the South Asian community, compared to 12.2% of non-racialized people. While it is possible for anyone to experience low income and reduced opportunities, individual and systemic discrimination plays a significant role in creating disadvantaged conditions and barriers for

7 Michael Polanyi, Beth Wilson, Jessica Mustachi, Monali Ekra, and Michael Kerr, "Unequal City: The Hidden Divide Among Toronto's Children and Youth" (2018), available online: <<http://torontocas.ca/sites/torontocas/files/CAST%20Child%20Poverty%20Report%20Nov%202017.pdf>>, at p.11, 15.

8 *Report of the Commission on Systemic discrimination in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) at p. i, ix, 4, 12, 13-14, 16-17, 35, 44-45, 93-95, 120, 172, 182-183, 228-229, 231, 235, 251, 262, 337-341, 351-357, 367, 397, 409.

9 Dr. Lorne Foster, Dr. Les Jacobs, and Dr. Bobby Siu, "Race Data and Traffic Stops in Ottawa, 2013-2015: A Report on Ottawa and the Police Districts" (2016), available online: <https://www.ottawapolice.ca/en/about-us/resources/TSRDCP_York_Research_Report.pdf>.

10 Similarly, Criminal Intelligence Service Canada's annual reports have referred to "Vietnamese-based groups" as being extensively involved in "residential marihuana grow operations" that are "widespread" throughout Canada. See Tanovich, *supra*, at p. 363.

11 *R. v. Spence*, [2005] 3 S.C.R. 458; *R. v. V.P.*, [1999] O.J. No. 3294 (ONCA); *R. v. Koh*, [1998] O.J. No. 5425 (ONCA); *R. v. Ho*, [1996] O.J. No. 5344 Ontario court of Justice (General Division); *R. v. Seenivasam*, [2004] O.J. No. 4888 (ONSC); *R. v. Rajput*, [2018] A.J. No. 942 (Alberta court of Queen's Bench);

12 In *R. v. Lam* (2010 BCPC 336, at paras. 22-23), after a minimal opportunity to observe Mr. Lam in the passenger seat of a car, police stopped the car to question him on the basis that he might be another Asian male who was wanted by police. The court held that Mr. Lam was detained in the absence of reasonable suspicion. The court found an "astounding lack of understanding as to cross-race identification dangers" on the part of police. In *R. v. Huang* (2014 ONSC 3538, at paras. 196, 207-209), an officer stopped Mr. Huang's vehicle because he was Asian, and the officer assumed he was therefore involved in the production of marijuana. The court found that the officer was "personally very angry at a particular group of people of Asian extraction – those who are associated with organized crime, particularly the production and trafficking of marijuana and other drugs. He demonstrates enmity to that group of people. Further, he assumes that Mr. Huang is part of that group." In *R. v. Nguyen* (2006), (139 C.R.R. (2d) 65 (S.C.J.), at paras. 25-28), the court found that police had commenced an investigation into marijuana trafficking against Mr. Nguyen by looking for properties Vietnamese persons owned and applying the erroneous racial stereotype that Mr. Nguyen may be involved in criminal activity because he was Vietnamese. The court excluded the evidence that was ultimately seized. In *R. v. Mac*, [2005] O.J. No. 527 (S.C.J.), at paras. 2-6. In *Mac*, the court struck references to "East Asian, Asian and Vietnamese" from an Information to Obtain to avoid the risk of an issuing Justice of the Peace "jumping to conclusions which are based on stereotypical assumptions and not on hard evidence." The court held that "[u]nless it is essential for the race of an individual to be referred to for purposes of explaining the evidence it should not be done because of the risk of colouring the approach of the judicial officer reading the Information to Obtain."

racialized people. Discrimination means that they are less likely to get jobs when equally qualified, and are likely to make less income than their non-racialized peers. They are more likely to live and work in poor conditions, have less access to healthcare, and be victims of police violence.

10. In view of the historical and present day discrimination faced by racialized groups, courts ought to recognize race as a relevant consideration that may impact sentencing all racialized offenders, just as courts recognize non-Indigenous and non-black racialization as a relevant factor to obtaining balance and fairness in jury selection, in the proper assessment of police conduct in *Charter* challenges,¹³ and under proposed changes to the bail provisions in the *Criminal Code* via Bill C-75 in determining pre-trial release on bail¹⁴. It would be absurd for courts to not consider systemic discrimination based on race when it comes to sentencing all racialized offenders.

II. SENTENCING JUDGES OUGHT TO SITUATE POLICE *CHARTER* VIOLATIONS AGAINST RACIALIZED OFFENDERS IN THE SOCIAL CONTEXT OF SYSTEMIC DISCRIMINATION WITHIN WHICH THOSE VIOLATIONS TAKE PLACE

11. The Appellant complains that the sentencing judge erred when he reduced the Respondent's sentence by a further three months (from 15 months to 12 months) because the police had breached the Respondent's section 7 and section 10(b) *Charter* rights. According to the Appellant the trial judge erred because i) the police misconduct against the Respondent "did not inform the circumstances of the offence or the offender" and ii) the sentencing judge, according to the Appellant, "made a factual finding of racial bias" that fell short of the persuasive burden proof.

12. SALCO/CSALC/COP-COC submit that social context evidence of systemic discrimination is an important consideration to a sentencing court's determination of the weight it ought to give police *Charter* violations against a racialized offender when sentencing that offender.

13. The Appellant submits that "Declarations of *Charter* non-compliance by the state and public rebuke of the relevant officers would have been sufficient in the instant case" and that the

¹³ See *R. v. Grant*, [2009] 2 S.C.R. 353, *R. v. Suberu*, [2009] S.C.J. No. 33, *R. v. Golden*, [2001] 3 S.C.R. 679

¹⁴ Bill C-75 (Third Reading)

Charter breaches against the Respondent did not warrant a reduction in sentence.¹⁵ SALCO/CSALC/COP-COC disagree. Such declarations and so-called public rebuke of officers are rarely remedial in the eyes of the *Charter* violation's victim, especially in cases where police misconduct is against racialized defendants/offenders and where race may have been a factor underlying the misconduct.

14. As Justice McLachlin (as she then was) wrote in *Dunedin*, "...a [*Charter*] right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach."¹⁶ In *Doucet-Boudreau v. Nova Scotia (Minister of Education)* Justices Iacobucci and Arbour (as they then were) expounded further in regard to the importance of remedies for Constitutional breaches, that:

A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.¹⁷

Judges ought to craft a remedy that "meaningfully vindicates the rights and freedoms" of the *Charter*.¹⁸

15. A sentence reduction will often be a meaningful remedy in the criminal justice system because of the critical role that sentencing plays in this system. As this court said in *R. v. Gardiner*, sentencing is "to the trial what the bullet is to the powder". The sentencing process "poses the ultimate jeopardy to an individual enmeshed in the criminal process".¹⁹ The ability of the courts to grant *Charter* remedies within this context is crucial.²⁰ While full restoration of the

¹⁵ Appellant's factum at para. 42

¹⁶ *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81 ("*Dunedin*") at para. 20

¹⁷ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62 at para. 25

¹⁸ *Ibid.* at paras. 55-57

¹⁹ *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 413, 415 (S.C.C.)

²⁰ Of course, a more drastic remedy such as a stay of proceedings or exclusion of evidence will often be necessary to remedy the *Charter* breach. This is particularly so with exclusion of evidence under s. 24(2), which is less drastic than a stay of proceedings and, unlike a stay, not limited to the "clearest of cases". Thus, it is important to emphasize that the availability of sentence reduction should not be a substitute for a rigorous s. 24(2) analysis where incriminating evidence has been obtained in a manner that infringes the *Charter*. In such cases, exclusion of evidence is the more meaningful remedy and, therefore, the courts should first undertake a thorough s. 24(2) analysis to determine whether the admission of the evidence would bring the administration of justice into disrepute. Only when the court has concluded such an analysis should it then go on to determine whether a sentence reduction should be granted. As Professor Roach has written, the remedy of sentence reduction "will be hollow if it is used to avoid a more effective remedy such as a stay of proceedings or exclusion of evidence."

Roach, Kent, *Constitutional Remedies in Canada*, *supra* at 9.950

individual is not always possible, the sentencing process can be used to “mitigate the effect” of any *Charter* breaches that have occurred.²¹

16. Meaningful remedies for *Charter* violations are especially important to racialized offenders and the disadvantaged communities they often come from. The over-representation of racialized communities among those living in poverty is well-established. These communities are over-policed and, consequently, over-represented in the justice system.²² They are more vulnerable to constitutional breaches as a result. Justice Binnie explicitly recognized these realities in his concurring judgment in *R v Grant* when he observed that “[a] growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified “low visibility” police interventions in their lives.”²³

17. More recently, in his dissenting opinion in this court’s decision in *R v Le*, Lauwers J.A. concluded that police in that case had violated the Appellant’s section 8 and section 9 *Charter* rights when police unlawfully entered the backyard of a friend’s house that the Appellant was visiting. In concluding that the contraband firearm, drugs and cash ought to be excluded Lauwers J.A wrote:

[162] Perhaps the officers were emboldened by the sense they were doing the right thing in trying to root out criminality in the community. They seem to have assumed the young men in the backyard were up to no good and decided to confront them suddenly. **I doubt that the police would have brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community...**

[163] As I stated as the outset, **the kind of casually intimidating and oppressive misconduct involved in the unlawful police entry into a private backyard must be condemned by the court.**²⁴ (Emphasis added)

18. A sentencing judge’s appreciation for the context within which police *Charter* violations occur is critical to her understanding of not only the damage that *Charter* violations do to individuals psychologically (by fostering alienation and constituting affronts to dignity) and sometimes physically, but also to the racialized and disadvantaged communities the offender comes from. Equally important is recognition of the damage done to the individual’s and his

21 *Omar Ahmed Khadr v. The Prime Minister of Canada, et al.*, 2009 FC 405 at paras. 77-78 (F.C.)

22 Suzanne Bouclin, “Identifying Pathways to and Experiences of Street Involvement through Case Law” (2015) 38:1 Dal LJ 345 at 357-358; *Report of the Aboriginal Justice Inquiry of Manitoba* (Manitoba: The Inquiry, 1991), ch 16; *Report of the Commission on Systemic discrimination in the Ontario Justice System* (Toronto: Queen’s Printer for Ontario, 1995) at 358; *R v Jackson*, 2018 ONSC 2527 at para 46; *McKay v. Toronto Police Services Board*, 2011 HRTO 499 at para 103; *R v Brown* (2003), 64 OR (3d) 161 at para 9, [2003] OJ No 1251 (ONCA); *R v Golden*, *supra* at para 93; *R v S (RD)* [1997] 3 SCR 484 at para 47.

23 *R v Grant* at para 154. See Also paras. 119, 155, 172-177

24 *R v. Le* 2018 ONCA 56 (CanLII), see also *R. v. Le*, 2019 SCC 34 (CanLII)

community's perceptions of and relationships with the police and state. In this way *Charter* violations may be said to be part and parcel of the circumstances of the offender and offence.

19. Support for these considerations on sentencing can be found in *Nasogaluak*. The court in that case recognized the broad discretion conferred on sentencing judges by the sentencing provision of the *Criminal Code*. Justice Lebel (as he then was) writing for the court noted:

[48] Indeed, the sentencing regime under Canadian law must be implemented within, and not apart from, the framework of the *Charter*. Sentencing decisions are always subject to constitutional scrutiny. A sentence cannot be "fit" if it does not respect the fundamental values enshrined in the *Charter*.

A sentence that takes account of a *Charter* violation is therefore able to communicate respect for the shared set of values expressed in the *Charter*. In the words of Professor Allan Manson:

The communicative function of sentencing is all about conveying messages. The messages are directed to the community. They are about the values which ought to be important to the community. ("*Charter* Violations in Mitigation of Sentence" (1995), 41 C.R. (4th) 318, at p. 323)

Indeed, s. 718 of the *Criminal Code* describes the fundamental purpose of sentencing as that of contributing to "respect for the law and the maintenance of a just, peaceful and safe society". This function must be understood as providing scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Provided that the impugned conduct relates to the individual offender and the circumstances of his or her offence, the sentencing process includes consideration of society's collective interest in ensuring that law enforcement agents respect the rule of law and the shared values of our society. (Emphasis added)²⁵

20. By taking into account the context of systemic discrimination in policing against racialized offenders, sentencing judges can better use sentencing as a means to apportion just punishment on the offender pursuant to community values, but also acknowledge the harm done by police to the individual offender and community values protected and embodied by the *Charter*.

Social Context Evidence of Systemic Discrimination is Relevant to a Court's Determination of the Weight It Ought to Give to Police Charter Violations When Sentencing Racialized Offenders

22. Courts must strive to satisfy themselves that race did not influence police misconduct against a racialized individual. Social context evidence of systemic discrimination ought to be an

²⁵ *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at paras 48-49

important consideration when sentencing judges strive to determine the weight that police-driven *Charter* breaches should be given in a racialized offender's case, and the quantum by which to reduce a sentence by.

23. SALCO/CSALC/COP-COC propose that where the police misconduct (that may or may not constitute a *Charter* violation) takes place in a context suggestive of racial profiling, sentencing judges should begin with the presumption that there is *some evidence* of the influence of racialized stereotypes in the exercise of police discretion. The analysis would then turn to whether there is evidence of other indicators of profiling that would support a finding that race likely, or probably, influenced police action that led to the violation.²⁶ According to Professor Tanovich, such an approach would ensure “what Justice Doherty referred to in *Peart* as “a sensitive appreciation of the relevant social context in which racial profiling claims must be assessed” in order to “[provide] further protection against the failure of meritorious claims as a result of the allocation of the burden of proof.”²⁷

24. SALCO/CSALC/COP-COC submit that the proposed approach assists courts to situate police misconduct beyond just the social context of discriminatory over-policing. Importantly, it allows courts to hone in on the systemic motives that may influence police actions when dealing with racialized individuals. It also allows courts to properly weigh *Charter* breaches and the deleterious effects they have on racialized offenders and communities from a perspective informed by their experiences with racism. A presumption that there is some evidence that police misconduct was influenced by race permits a judge to take that into account when considering the *Charter* violation in the sentencing calculus. If the sentencing judge accepts evidence of other indicators of profiling that would support a finding that racial profiling likely, or probably, occurred then the weight allocated to the *Charter* breach in the sentencing calculus would be greater.

26 This is a variation of an approach suggested by Professor David Tanovich in his paper, *Applying the Racial Profiling Correspondence Test*, (2017) 64 *Criminal Law Quarterly* 359-383. Professor Tanovich pointed to Justice Doherty ruling in *Peart v. Peel (Regional Municipality) Police Services Board* (2006), 43 C.R. (6th) 175, 217 O.A.C. 269, 39 M.V.R. (5th) 123 (Ont. C.A.), where Doherty J rejected an intervenor's proposal that in cases where a defendant alleges racial profiling as the basis for a *Charter* violation (example: arbitrary detention) the burden of proof should fall to the police/crown to disprove racial profiling. Doherty J rejected the proposal because he did not have the evidentiary basis to conclude that racial profiling was the rule and not the exception. In his paper Professor Tanovich contends that the recent “carding” data that clearly demonstrates disproportionate targeting of racialized groups by police furnishes a sufficient evidentiary basis to, at a minimum, “change where we start on the evidentiary scale for adjudication” if not reverse the burden of proof when a *Charter* violation is alleged.

27 *Applying the Racial Profiling Correspondence Test*, (2017) 64 *Criminal Law Quarterly* 373-374.

25. If inquiry of systemic discrimination is relevant to sentencing, the courts should take a broad approach to the type of evidence that is admissible and probative to the determination of whether race played a part in police conduct. Courts should take judicial notice of the fact that there is a long history of discrimination against racialized persons in Canada.²⁸ Beyond this, offenders should be able to augment their claim by adducing evidence of systemic discrimination by police directed at racialized groups. This can include empirical studies such as the 2016 York University Traffic Stop study, as well as reports by human rights commissions.

26. In addition, the courts should consider evidence that the *Charter* claimant has been the subject of racially influenced police (mis)conduct on the facts of the specific case. Of course, police officers will rarely testify that racial stereotypes influenced their decisions.²⁹ *Charter* claimants must therefore draw from circumstantial or other evidence.³⁰

27. To that end, this Court should consider what Professor David M. Tanovich has called the “varied manifestations of racial profiling” — factors to assess whether an individual was racially profiled.³¹ These factors include, among other things: explicitly using race to justify a criminal profile;³² engaging in heightened surveillance of racialized or low-income neighbourhoods;³³ using highly discretionary or minor statutory powers to justify a detention;³⁴ interpreting ambiguous, or even innocuous, behaviour as incriminating;³⁵ using race to target an individual based on an alleged match with the race of a known suspect;³⁶ and undertaking unjustifiable measures, or using excessive force, to respond to purported dangers. Applied consistently, these factors assist courts to engage with racial profiling in a more robust, and less speculative, way. Where some or all of these factors are present, it should be open to a court to make a finding of racial profiling

28 *Koh, supra* (Ont. C.A.), at para. 41.

29 See, for example, *Huang, supra* (B.C.P.C.), at paras. 5, 35, where the court found that a police officer was not truthful with the court about his motivation for stopping Mr. Huang’s vehicle.

30 *Brown, supra* (Ont. C.A.), at paras. 16, 44-45.

31 *Tanovich, supra*, at p. 369. See also *Neyazi, supra*, (Ont. S.C.J.) at para. 198, where Smith J. discussed several factors indicative of racial profiling.

32 See, for example, *Nguyen, supra* (S.C.J.), where the court found that police commenced an investigation based on a Vietnamese name.

33 In the Appellant’s case, part of the reason for entering Mr. Dixon’s backyard was to “investigate whether the young men were entitled to be in the backyard or were trespassing on the property”: 2014 ONSC 2033 (“Ruling on *Charter* Application”), at para. 23. In his dissenting opinion in the court below, Lauwers J.A. observed that police would not likely have “brazenly entered a private backyard and demanded to know what its occupants were up to in a more affluent and less racialized community”: *Le, supra* (Ont. C.A.), at para. 162.

34 See, for example, *Huang, supra* (B.C.P.C.), at para. 9 where an officer stopped Mr. Huang’s vehicle “because it swerved twice in its own lane”.

35 This case is again a good example. Police interpreted the Appellant’s nervous behaviour as incriminating: *Ruling on Charter Application*, at paras. 5, 29. See also *Grant, supra* (S.C.C.), at paras. 6-7.

36 See, for example, *Huang, supra* (B.C. Prov. Ct.), where police stopped a car because its passenger was “Asian.”

III. A COURT'S PROPER ASSESSMENT OF MITIGATING AND AGGRAVATING CIRCUMSTANCES IN SENTENCING A RACIALIZED OFFENDER IS ONLY AS GOOD AS THE COURT'S PROPER APPRECIATION FOR AND USE OF EVIDENCE OF SYSTEMIC DISCRIMINATION AND SYSTEMIC BARRIERS

28. Finally, SALCO/CSALC/COP-COC submit that to give proper effect to mitigating and aggravating circumstances when sentencing racialized offenders, courts ought to take systemic discrimination and barriers that may have affected the offender into account.

29. In the instant case the Appellant complains that the sentencing judge did not attribute sufficient weight to the aggravating fact that the Respondent ran from police.³⁷

30. SALCO/CSALC/COP-COC submit that the approach the sentencing judge took is exemplary and ought to be endorsed by this court. The sentencing judge considered the weight to give the Respondent's flight on the basis of the social context reports filed by the Respondent, including the social history report. The Respondent was young, impulsive, had a learning disability, suffered from Post-Traumatic Stress Disorder, and is from a community that did not have confidence in the police. This evidence, taken together, permitted the sentencing judge to properly situate the Respondent's flight in the sentencing process.

31. This type of informed reasoning is particularly applicable to racialized offenders due to the absence of factors traditionally found to be mitigating when it comes to historically disadvantaged racialized group members. Mitigating factors such as employment, family support and education are often privileges that are not features in the lives of racialized offenders because of systemic barriers they face in various aspects of their lives. Not allowing systemic discrimination to act as a substitute mitigating factor in sentencing would serve to further perpetuate racism within the criminal justice system by perpetuating the differential sentencing experiences between racialized and non-racialized group members.

PART IV – COSTS

31. SALCO/CSALC/COP-COC do not seek costs and request that none be awarded against it.

³⁷ Appellant's Factum paras. 33

PART V – ORDERS SOUGHT

32. SALCO/CSALC/COP-COC takes no position on the disposition of this appeal.

DATED this 19th day of July, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED


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PART VI – TABLE OF AUTHORITIES

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PART VII – LEGISLATION CITED

Bill C-75 (Third Reading)

Principle and Considerations

Principle of restraint

493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.

Aboriginal accused or vulnerable populations

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

(a) Aboriginal accused; and

(b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.