

# Critical Race Theory, Canadian Law, and Society



# CONTEXT MATTERS

# Say it Ain't So!

**PUBLIC AUCTION**

*On*  
**MONDAY, 3rd of NOVEMBER**  
1760

**TO BESOLD**

**AT**  
THE HOUSE OF MR JOHN RIDER  
*two*

**SLAVES**

*viz.*  
**A BOY & GIRL , ABOUT 11 YEARS OLD**

**HALIFAX**

## *R v Williams*, [1998] 1 SCR 1128

- [R]acial prejudice... rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so... Racial prejudice and its effects are as invasive and elusive as they are corrosive. (para. 22)

# Key Statistics – Corrections

- There was an 80% increase in Black inmates in federal prison between 2003-2013 (778-1403)
- The percentage of Black inmates in federal prisons is 9.5% despite Black Canadians accounting for just 3% of the general population
- 50% of Black inmates are aged 30 years or younger

# Corrections

- The rate of Black youth aged 12-17 in youth correctional facilities is four (4) times higher than their proportion in the general population
- Black inmates are 1.5 times more likely to be incarcerated in facilities where “programming, employment, education, rehabilitation and social activities are limited”

# Corrections

- Ontario has five (5) medium security prisons. 60% of Black inmates are held in just two (2) of these (Joyceville and Collins Bay)
- Percentage of Black inmates in Joyceville: 37%
- Percentage of Black inmates in Collins Bay: 27%
- Percentage of Ontarians who are Black: 4%
- This means that Joyceville has a Black population that is nine (9) times the provincial average, and Collins Bay has a Black population that is seven (7) times the provincial average

# Education

- Black students suffer from disproportionately high drop-out rates: George Dei's 2008 work titled *Schooling as Community* reported that there was a 42% drop-out rate amongst Black students. Further, Black students suffer from disproportionately high rates of suspension



# Education

- The Toronto Star reported in 2013 that an analysis of the 2006-2007 academic year revealed that while Black students accounted for 12% of total students in Toronto's public education, they accounted for 31% of suspensions. While we recognize that these statistics are from nearly 10 years ago, little has been done to address this issue

# Bias Issues continued

- Excessive Use of Force or other mistreatment
  - police over-reactions; intimidation; disrespect of appearance, custom, culture, religion.
- Denial of Bail
  - over-stating the strength of the case, excessive conditions inviting a breach and subsequent denial of bail.
- Over-charging
  - Pressure to plead guilty
- Sentencing
  - Man mins or Imposing lengthier terms of jail for Blacks compared to less disadvantaged persons

# The Expectation of YOU

# Critical Race Theory

- Critical race theory draws on the priorities and perspectives of both critical legal studies and conventional civil rights scholarship, **while sharply contesting both of these fields.** Angela Harris describes CRT as sharing "a commitment to a vision of liberation from racism through right reason" with the civil rights tradition

# CRT

- It deconstructs some premises and arguments of legal theory and simultaneously holds that **legally constructed rights are incredibly important**. As described by Derrick Bell and Angela Harris, critical race theory is committed to "radical critique of the law (which is normatively deconstructionist) and ... radical emancipation by the law (which is normatively reconstructionist)."

# Case Law

# *R v. Parks* (1993) 84 CCC (3d) 353 (Ont. C.A.)

- *R v Parks*, 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.** (paras. 53, 43)

## *R. v. RDS* [1997] 3 SCR 484

- ...it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. **As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.** (para. 30)
- That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. (para. 152, Minority View on this Point, McLachlin J.)



## *R. v. Golden*, [2001] 3 S.C.R. 679

- African Canadians are more prone to be the recipients of mistreatment during the execution of police powers such as strip searches because they represent a disproportionate number of individuals in the criminal justice system. (para. 83)

## *R. v. Brown*, (2003), 173 C.C.C. (3d) 23 (Ont. C.A.)

- Judges must be careful not to be quickly dismissive of racial profiling arguments because “racial profiling can be a subconscious factor impacting on the exercise of a discretionary power in a multicultural society”. A refusal to allow these areas to be explored may be an apprehension of bias. (para. 81)
- Sub-conscious and unconsciously based discriminatory decisions may occur in policing and proof thereof may be inferred from the circumstances that correspond to the phenomenon of racial profiling. (para. 45)

# *R v Douse* (2009), s 246 CCC (3d)

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- Where the concern on an application to challenge for cause is based on race..... there are fundamental distinctions that inform the analysis. They relate to both the **nature of the biases and to their susceptibility or resistance to judicial cleansing**. First, a court can infer a behavioural link between the pervasive racial prejudice established on the evidence and the possibility that some jurors, consciously or not, would decide the case based on prejudice and stereotypes. (para. 59)
  - Where the predisposition is one as complex and insidious as racial prejudice, we should not assume without more that the judges' instructions will always neutralize it.

# *R. v. Grant*, 2009 SCC 32

- Binnie J. in his partially concurring reasons recognized that visible minorities are particularly prone to improper stops.
- **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:** *R. v. Golden*, 2001 SCC 83 (CanLII), [2001] 3 S.C.R. 679, at para. 83. See also A. Young, “All Along the Watchtower: Arbitrary Detention and the Police Function” (1991), 29 Osgoode Hall L.J. 329, at p. 390; D. M. Tanovich, “Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention” (2002), 40 Osgoode Hall L.J. 145; Ontario Human Rights Commission, Inquiry Report. Paying the Price: The Human Cost of Racial Profiling (2003); Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (1995), at p. 337. **The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations.**
- “visible minorities, may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive”. . (see paras. 44, 154-155 and 169)

# Next Frontier: Sentencing

# *R. v. Hamilton* (2004) 186 C.C.C. (3d) 129 (C.A.)

- [134] A sentencing judge is, however, required to take into account all factors that are germane to the gravity of the offence and the personal culpability of the offender. **That inquiry can encompass systemic racial and gender bias.** As the court explained in *R. v. Borde*, supra, at p. 428 O.R., p. 236 C.C.C...
- [135] Reference to factors that may "have played a role in the commission of the offence" encompasses a broad range of potential considerations. **Those factors include any explanation for the offender's commission of the crime. If racial and gender bias suffered by the offender helps explain why the offender committed the crime, then those factors can be said to have "played a role in the commission of the offence".**

# Sentencing continued

- African Canadians continue to struggle with having the judiciary consider systemic and background discrimination factors as a fundamental principle of sentencing.
- In *Ipeelee* the Supreme Court 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: "Just sanctions are those that do not operate in a discriminatory manner."
- *R. v. Ipeelee*, 2012 SCC 13 at para. 73
- See also - *R. v. Borde*, (2003) 172 C.C.C. (3d) 225 (C.A.) at paras. 27-32; *R. v. Nur*, 2015 SCC 15 (proportionality at paras. 82- 83)