WHITE LAWYERS' AVOIDANCE OF RACE-BASED STRATEGIES: PROPOSAL FOR A RACE-SENSITIVITY PRE-TRIAL CONFERENCE FOR AFRICAN NOVA SCOTIANS

Emma Goulden

African Nova Scotians & Law
Schulich School of Law | Professor Williams
April 2021

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> *[A]s whites and lawyers, they began assuming the norm that race is not a factor. Therefore, they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client. Indeed, their expectation that the African-American client would raise issues of race if they existed suggests that the white lawyers might have applied the assumption that race is an issue for people of colour and not whites.*[1]

The majority of members of the Nova Scotia Barristers' Society are white.[2] White people in general tend to view race-based issues as belonging solely to people of colour and avoid issues of race.[3] Systemic racism in Canada is so deeply entrenched that it has become normalized or invisible, especially to white people.[4] White lawyers thus tend to avoid race-based criminal trial strategies, and this has occurred in widely publicized cases of African Nova Scotians such as Viola Desmond.[5] It has been suggested that a solution to this is to increase the number of African Nova Scotian lawyers, because race will not be erased by African Nova Scotian lawyers as it is by white lawyers.[6] However, this is at its core unfair to African Nova Scotians and reflective of a white way of thinking; it reflects the view that anti-Black racism is an issue for African Nova Scotians to

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[1] Russell Pearce, "White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law" (2005) 73 Fordham L Rev 2081.
[2] Nova Scotia Barristers' Society, "Statistical Snapshot" (2019-2020), online: < https://nsbs.org/wp-content/uploads/2020/01/2019-statsnapshot.pdf>.
[3] Pearce, *supra* note 1.
[4] UNHRC, "Report of the Working Group of Experts on People of African Descent on its Mission to Canada" (August 2017) 36th Sess, online: <https://fbec-cefn.ca/wpcontent/uploads/2019/06/UN-Working-Group-Report_EN.pdf> at p 7.
[5] Constance Backhouse, "'Bitterly Disappointed' at the Spread of 'Colour-Bar Tactics': Viola Desmond's Challenge to Racial Segregation, Nova Scotia, 1946" Colour-Coded: A Legal History of Racism in Canada 1900-1950 (Toronto: University of Toronto Press).
[6] See e.g., Backhouse, *ibid*, and Carol Aylward, "'Take the Long Way Home' RDS VR the Journey" (1998) 47 UNB L J 249.

solve for themselves, and it gives white lawyers a pass. I argue in this paper that cultural competence efforts are not enough to hold white lawyers accountable for the avoidance of race-based criminal trial strategies. Furthermore, efforts to introduce solutions such as race-sensitivity pre-trial conferences must be implemented in Nova Scotia to better address systemic anti-Black racism in the criminal justice system.

PART I: PROBLEMS

I. Anti-Black Racism in Nova Scotia and the Criminal Justice System

Nowhere in the legal system in Nova Scotia is it more critical to address anti-Black systemic racism than in the criminal justice system. The Royal Commission on the Donald Marshall Jr. Prosecution recognized that in Nova Scotia the criminal justice system treats people differently depending on their race and social class.[7] Racism has been said to be "routinely a dominant element in criminal cases."[8]

As I completed this paper, former Minneapolis police officer Derek Chauvin was on trial and was convicted of second degree murder for killing handcuffed African American George Floyd by kneeling on his neck for more than nine minutes[9] and 20-year-old African American Duante Wright was killed in Minneapolis by police in a traffic stop.[10] In Chicago 13-year-old African American Adam Toledo was fatally shot by police with his hands up, in Jacksonville 32-year-old African American Michael Leon Hughes was shot to death by police in a motel, and in Tennessee

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[7] Nova Scotia Government, *Royal Commission on the Donald Marshall, Jr, Prosecution* (December 1989) at 13.
[8] Roger Shallow, "Corrective Lenses for 20/20: Reflections on Systemic Racism and Racial Competence in Criminal Law Practice" (2020) 40:4 For the Defence.
[9] "What to Know about George Floyd's Death" (15 April 2021) *The New York Times*, online: <https://www.nytimes.com/article/george-floyd.html>; "New Yorkers React to Derek Chauvin Verdict" (21 April 2021) *The New York Times*, online: <https://www.nytimes.com/2021/04/21/nyregion/derek-chauvin-new-york.html?referringSource=articleShare>.
[10] John Eligon & Shawn Hubler, "Throughout Trial over George Floyd's Death, Killings by Police Mount" (17 April 2021) *The New York Times*, online: <https://www.nytimes.com/2021/04/17/us/police-shootings-killings.html?auth=login-google1tap&login=google1tap&referringSource=articleShare>.

17-year-old African American Anthony Thompson was killed by police in a high school bathroom.[11] The disproportionately high rates of excessive force and shooting deaths of unarmed Black civilians by police is not only an American problem but has been documented in Canada.[12] The Ontario Human Rights Commission recently published reports showing Black people are far more likely to be arrested, charged, over-charged, struck, shot or killed by the Toronto police.[13] In recent years, a Black person in Toronto was 20 times more likely to be shot and killed by Toronto police than a white person.[14]

Nova Scotia is the "home of Black Canada,"[15] and race relations in the province were historically built on the practice of slavery of African Nova Scotians.[16] Race riots that erupted in 1991 in Halifax that allegedly involved excessive force and racial slurs by police resulted in nothing but a review of an internal police investigation that was "inappropriately handled."[17] Later brawls between Black and white students at Cole Harbour High School resulted in only Black teens being convicted and pepper-sprayed.[18]

When the first African Nova Scotian judge (and first Black judge in Canada, Justice Corinne Sparks) took judicial notice that police officers overreact to non-white groups, this fact "triggered

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[11] *Ibid*.
[12] Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 86-92; UNHRC, *supra* note 4.
[13] Ontario Human Rights Commission, "Second Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service" (August 2020) online: <http://www.ohrc.on.ca/sites/default/files/A%20Disparate%20Impact%20Second%20interim%20report%20on%20the%20TPS%20inquiry%20executive%20summary.pdf#overlay-context=en/disparate-impact-second-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.
[14] *Ibid*.
[15] Comment made by Dr. Robert Wright in *R v Anderson*, 2020 NSPC 10 at para 40.
[16] Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419 at 428.
[17] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 93.
[18] *Ibid* at 93.

a firestorm of criticism"[19] and was litigated all the way to the Supreme Court of Canada in 1997.[20] There, her reasoning was affirmed, and although the Crown had disappointingly made the argument that the existence of racism in Canada was a disputable fact,[21] the Supreme Court agreed there was evidence "capable of supporting a finding of racially motivated overreaction."[22] Furthermore, Justice L'Heureux-Dube acknowledged the reasonable person in Nova Scotia would have knowledge of "the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues."[23]

The Department of Justice Canada has stated publicly that "Black Canadians face profiling at every stage of the criminal justice system, from charging to sentencing to harsher treatment in correctional institutions."[24] Serious issues affecting African Nova Scotians in the criminal justice system include historically unrepresentative juries,[25] unrelenting street checks and police surveillance,[26] and overrepresentation in custody.[27] In 2017-18, African Nova Scotians formed just 2 percent of the population but 11 percent of sentenced custody.[28] African Nova Scotian youth in custody and on remand are grossly overrepresented.[29] Between the years of 2006 and 2017, street

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[19] Faisal Mirza, "'I can't Breathe;: The Right to Security of Person" (2021) 40:5 For the Defence.
[20] Regarding Justice Sparks, see Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 95 and Stephanie Hurley, "Judge Corrine Sparks Named 2020 Recipient of the Weldon Award for Unselfish Public Service," (2 November 2020), online, Dalhousie University: <https://www.dal.ca/news/2020/11/02/judge-corrine-sparks-named-2020-recipient-of-the-weldon-award-fo.html>; the case in question was *R v S(RD)*, [1997] 3 SCR 484 [*RDS*].
[21] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 101.
[22] *RDS*, *supra* note 20 at para 55.
[23] *Ibid* at para 47.
[24] David Burke, "Ottawa to Adopt NS Method to Help Curtail Racism in Justice System" (17 March 2021) CBC News, online: <https://www.cbc.ca/news/canada/nova-scotia/culture-race-assessments-federal-justice-nova-scotia-1.5947196>.
[25] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 113.
[26] Scot Wortley, "Halifax, Nova Scotia: Street Checks Report" (March 2019). Online: <https://humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf> [*Wortley Report*].
[27] Nova Scotia Department of Justice, "Corrections in Nova Scotia: Key Indicators" (April 2019) online: <https://novascotia.ca/just/publications/docs/Correctional-Services-Key-Indicator-Report-2017-18.pdf>.
[28] *Ibid*.
[29] Williams, *supra* note 16 at 431.

checks were conducted on African Nova Scotians at a rate of 15.6% compared to 2.5% of white Nova Scotians in Halifax.[30] African Nova Scotians are understandably fearful of going shopping in stores because of the high rates of consumer racial profiling which can lead to unlawful arrests and use of force incidents.[31] Even simply driving a car in Halifax for an African Nova Scotian can lead to an altercation with police.[32]

Excellent and recent work has been done in Nova Scotia to bring anti-Black racial discrimination to the fore in deciding just sentencing with the introduction of the Impact of Race and Culture Assessment (IRCA).[33] The work of Dr. Robert Wright, Nova Scotia Legal Aid, Brandon Rolle, and others was recently recognized by the federal government by committing to funding IRCAs, and experts in other provinces have started writing the reports.[34] It is time that similar procedural methods are created to address anti-Black racism in Nova Scotia's courts prior to conviction to further reduce incarceration rates and racial profiling.

II. White Lawyers' Avoidance of Race-Based Strategies

It is perhaps impossible to comprehensively review cases in which race-based claims should have been made by white lawyers but were not, because of the erasure of race in much of Canadian case law.[35] Not only have issues of race been avoided in terms of legal strategy, but they also have not been documented in the way that one would need in order to do this type of research. Many cases have been "camouflaged with unrelated legal matters."[36] According to Professor Carol

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[30] *Wortley Report*, *supra* note 26 at p 105.
[31] Greg Mercer, "Nova Scotia Still Faces a Disturbing Problem with Racism, a Problem that can be Traced back Centuries in the Province" (24 January 2020) *The Globe and Mail*, online: <https://www.theglobeandmail.com/canada/article-nova-scotia-still-faces-a-disturbing-problem-with-racism/>.
[32] *Johnson v Halifax (Regional Municipality) Police Service*, [2003] NSHRBID No 2.
[33] See *R v "X"*, 2014 NSPC 95 [*R v X*], and Maria Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103, online: <https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2138&context=dlj>.
[34] Burke, *supra* note 24.
[35] Aylward, *supra* note 5; Backhouse, *supra* note 4.
[36] Constance Backhouse as quoted by Aylward, *supra* note 5.

Aylward, Critical Race Litigation did not occur in Canada until the mid-1990s.[37] There are however a few noteworthy examples that help to illustrate white lawyers' avoidance of race-based strategies.

a) The *Viola Desmond* Case. Viola Desmond, an African Nova Scotian now proudly displayed on the Canadian ten-dollar note, made a conscious decision to challenge the racial segregation of a Nova Scotia movie theatre in 1946 by sitting in the Section designated for white people.[38] After she was forcibly removed by the white manager and a white police officer, she was later arrested and held overnight in cells with men and in the morning she was brought before a white magistrate. Since there was no statute authorizing racial segregation, she was charged with being one cent short on tax for a downstairs ticket, even she had requested a downstairs ticket and had been given seventy cents in change (so she clearly had provided the money to pay the tax). As Professor Constance Backhouse noted, the trial was absent any racial issues, in the "tradition of Canadian 'racelessness'."[39] After she was convicted, Viola Desmond's white lawyer Frederick Bissett made an intentional decision not to address race at all; he did not attack the racial segregation directly, and he did not appeal the conviction.[40]

b) The *RDS* Case. ***RDS*** was a case in which an African Nova Scotian judge took judicial notice that systemic racism within the criminal justice system in Nova Scotia meant police were more likely to stop, arrest, or use force on an African Nova Scotian accused.[41] The Crown appealed, saying Justice Sparks herself was biased. It was noted that when *RDS* went to the Supreme Court,

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[37] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 83.
[38] Bank of Canada, "A Bank NOTE-able Canadian Woman" online: <https://www.bankofcanada.ca/banknotes/vertical10/banknoteable-woman/>; Backhouse, *supra* note 4.
[39] Backhouse, *supra* note 5.
[40] *Ibid*.
[41] Mirza, *supra* note 19.

Black lawyers were determined to place race-based issues before the court.[42] Their white colleagues who were not on the litigation team were of the view that, "any argument based on race would not be appropriate and might predispose the Court to be unfavourable to the appellant's case."[43] The majority decision did not mention race at all, even though the issue of race of the judge herself was before the court.[44] Remarks from the dissent of the court of appeal on this case reflect the general avoidance of race on the Nova Scotia bench: "Questions with racial overtones … are more likely than any other to subject the Judge to controversy and accusations of bias," stated Appeal Court Justice Freeman.[45] The erasure of race is displayed in the view taken by a dissenting Justice Major at the Supreme Court of Canada when he stated the appeal "should not be decided on questions of racism."[46]

c) The *Cole (D)* Case. In the *Cole (D)* case, six young African Nova Scotian men tried together received disproportionately high sentences for the aggravated assault of a young white man in Halifax.[47] Five of the men received sentences of seven to ten years.[48] In contrast, a young white man convicted of the racially-motivated assault of an African Nova Scotian youth received a fine.[49] The white lawyers representing the accused African Nova Scotian youths never raised the issue of race, even at sentencing or upon appeal.[50] The sole African Nova Scotian lawyer (Evangeline Cain-Grant) was prevented from arguing race issues at the Preliminary inquiry by the Crown who

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[42] Aylward, *RDS*, *supra* note 5.
[43] *Ibid*.
[44] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 97
[45] *Ibid*; *R v S(RD)*, [1995] 102 CCC (3d) 233, 145 NSR (2d) 284 at para 68.
[46] *RDS*, *supra* note 20 at para 3.
[47] Stephen Kimber, "Table Manners" (23 February 2006) *The Coast*, online: <https://www.thecoast.ca/halifax/table-manners/Content?oid=958704>; Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 126.
[48] "Watts Attackers Sentenced" (7 March 1996) *Dalhousie University Gazette* online Dalhousie University: <https://findingaids.library.dal.ca/uploads/r/dalhousie-university-archives/e/0/3/e038da3e64baa60c8a359dcb9710eebf7058bbdea5d18a855555d0dfaeb3b143/dalhousiegazette_volume128_issue20_march_7_1996.pdf>.
[49] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 126.
[50] *Ibid* at 128.

interrupted her cross-examination and referred to racism as a political issue.[51] The Crown was later held to have infringed on the right of the accused to make full answer and defence by not providing full disclosure of witness statements placing Mr. Cole on the opposite side of the street when the assault occurred.[52]

Because the white lawyers had not raised the issue of racial motivation on behalf of the Crown for failing to disclose, the remedy was a new trial instead of stay of proceedings, and the argument could not be made at the Supreme Court of Canada.[53] The issue of race was effectively erased at the highest court in Canada by white lawyers on an issue (disclosure of exculpatory and inconsistent eyewitness testimony) that was not unlike that of the wrongful conviction of Donald Marshall Jr., years after the Royal Commission had pointed out how systemic racism had affected that case of wrongful conviction through every stage.[54]

d) The *Fraser* Case. Mr. Fraser was a Black teacher in Nova Scotia, accused of assaulting a white teenage student.[55] His white lawyer, Lance Scaravelli, ignored repeated requests from Mr. Fraser to do something about the all-white jury, telling him there was nothing he could do about it.[56] In this case, not only was there something Mr. Scaravelli could have done about it, but following the *Parks* decision, and given the history of anti-Black racism in Halifax, he should have challenged for cause on the basis of race during jury selection under *Criminal Code* Section

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[51] *Ibid* at 126.
[52] *Ibid* at 127.
[53] *Ibid* at 128.
[54] *Ibid* at 129.
[55] *R v Fraser*, 2011 NSCA 70 [*Fraser*].
[56] For the fact that Lance Scaravelli is white see, e.g., Lance Scaravelli, Facebook Profile online: <https://www.facebook.com/lance.scaravelli.75>; for Lance Scaravelli being Mr. Fraser's lawyer, see Blair Rhodes, "Lance Scaravelli, chastised Halifax lawyer, quits law" (01 October 2013) *CBC News*, online: <https://www.cbc.ca/news/canada/nova-scotia/lance-scaravelli-chastised-halifax-lawyer-quits-law-1.1875174>; for the repeated requests made by Mr. Fraser, see Richard Devlin & David Layton, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis" (2014) 60 CLQ 361.

638(1)(b).[57] While the challenge for cause is unlikely to result in demonstrating more than explicit and intentional racial discrimination,[58] the *Fraser* case shows even the bare minimum was not seen as important by the white lawyer, even when requested by his client. After his appeal resulted in a new trial based on ineffective assistance of counsel, the Crown withdrew the charges against Mr. Fraser.[59]

e) A United States Case. In his article on "White Lawyering," Professor Russell Pearce discusses a United States case in which the client told police he was racially profiled. His white lawyer, a law professor, and two students, never addressed the racism in court. Even though they won the case, their client was understandably upset. The professor, Pearce argues, did not acknowledge they started from a position of whiteness in assuming that race is not a factor. So, says Professor Pearce, "they would not on their own initiative raise the possibility that race played a role either in the matter or in their relationship with their client."[60]

[57] *R v Parks*, [1993] OJ No 2157, 24 CR (4th) 81, leave to appeal to SCC refused 23860 (28 April 1994) [*Parks*]; *Criminal Code*, RSC 1985 c C-46 [*Criminal Code*]; Devlin & Layton, *ibid.*
[58] Canadian Institute for the Administration of Justice, *Jury Representation in Canada: Halifax Roundtable* (December 2019), online: <https://ciaj-icaj.ca/wp-content/uploads/documents/2020/01/r83e_report_jury-representation-in-canada-ac_f.pdf?id=11422&1607729247>; Aylward, *Canadian Critical Race Theory*, *supra* note 12 at p 158.
[59] Blair Rhodes, "Sex Charges Withdrawn against Former NS Teacher" (03 December 2012) *CBC News*, online: <https://www.cbc.ca/news/canada/nova-scotia/sex-charges-withdrawn-against-former-n-s-teacher-1.1160114>.
[60] Pearce, *supra* note 1.

PART II: SOLUTIONS

> *The opposite of racist isn't "not racist." It is "anti-racist." What's the difference? One endorses either the idea of a racial hierarchy as a racist, or racial equality as an anti-racist. One either believes problems are rooted in groups of people, as a racist, or locates the roots of problems in power and policies, as an anti-racist. One either allows racial inequities to persevere, as a racist, or confronts racial inequities, as an anti-racist. There is no in-between safe space of "not racist."*[61]

I. Increasing Diversity: The Implicitly or Explicitly Suggested Solution

Increasing the number of African Nova Scotian lawyers will logically increase sensitivity to race-based litigation issues in Nova Scotia because of the lived experience of a Black lawyer. Increasing the number of Black members of the bar has been suggested as a solution to the erasure of race in litigation case law by several experts. For example, by stating that "race-based litigation in Canada is impeded by the paucity of Black lawyers," Professor Aylward implicitly suggests that a solution to the erasure of race in litigation strategies is to increase the number of Black lawyers.[62] Similarly, Professor Backhouse suggested things may have been different for Viola Desmond if she had been able to hire a Black lawyer in Nova Scotia: "The only Black lawyer practising in Halifax in 1946 was Rowland Parkinson Goffe… For reasons that are unclear, Viola Desmond did not retain Goffe. He may have been away from Halifax at the time."[63] In a similar vein, in the context of the IB&M Initiative, Professor Naomi Metallic stated, regarding having Aboriginal and Black lawyers on a Bar Council, "having benchers at the table who can be strong advocates for the importance of diversity in the legal profession… has changed things."[64] The Schulich School of

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[61] Ibram Kendi, *How to Be an Anti-Racist* (Bodley Head, 2019) as cited in Shallow, *supra* note 8.
[62] Aylward, *supra* note 5 and Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 82.
[63] Backhouse, *supra* note 5 at 252.
[64] Naomi Metallic, "Celebrating 30 Years of the Indigenous Blacks & Mi'kmaq Initiative: How the Creation of a Critical Mass of Black and Aboriginal Lawyers is Making a Difference in Nova Scotia" (2019) Canadian Race Relations Foundation's Directions J at 7-8.

Law website also states alumni of the IB&M initiative are "catalysts for change beyond the legal profession."[65] In other words, a benefit of the IB&M Initiative is it will automatically produce new advocates for racial diversity.[66]

This conclusion is indisputably true, that African Nova Scotian lawyers will be more sensitive to race-based issues. However, as a solution to systemic racism in the criminal justice system, its logical conclusions actually present a disheartening view. Although it could be seen as just one of many strategies, it may be reflective of an underlying belief that white lawyers simply cannot (or will not) attain a level of professional cultural competence comparable to a racialized lawyer who has their own lived experience to draw upon. Professor Aylward acknowledges white lawyers may be able to gain an appropriate perspective, but must be willing to listen, defer and appreciate the unique perspective of people with lived experiences.[67] This places a heavy burden on African Nova Scotian lawyers; along with their employment and facing racism in their daily lives and professions comes the expectation that they will advocate for their communities and fellow African Nova Scotians, fight against systemic racism within the province, and constantly strive to voice issues of racism in a 'room' of white lawyers and judges.[68]

A large study undertaken in 2014 on the Ontario legal community showed racialized lawyers reported much higher rates of being disadvantaged or having faced barriers throughout their

[65] Dalhousie University Schulich School of Law, "Indigenous Blacks & Mi'kmaq Initiative: Information for Students" online, Dalhousie University <https://www.dal.ca/faculty/law/indigenous-blacks-mi-kmaq-initiative/information-for-students.html>.
[66] See also Williams, *supra* note 16 at footnote 72.
[67] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 135.
[68] In many materials the view is presented that the judiciary should reflect the lived experiences of a broad spectrum of society (e.g., Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 99). This should not be confused with the present issue. The burden of advocacy is arguably not the same for a judge as it is for a litigation lawyer by the very nature of the profession. The need for African Nova Scotian judges is also hopefully obvious to the reader.

careers.[69] Challenges faced by racialized lawyers included racist environments in law school,[70] being excluded during the recruitment process,[71] feeling alienated or a lack of fit with the dominant culture of a law firm,[72] feeling out of place in an all-white courtroom,[73] being mistaken for a client,[74] a mailroom clerk,[75] or an IT technician,[76] being given less work because of lack of fit,[77] and struggling to find an articling position.[78] Racialized respondents were also less likely to report they found a suitable first job or were kept on after articling, were able to practice in their preferred area, advance as rapidly, or received advice from mentors, than non-racialized respondents.[79] Forty-one percent of racialized respondents felt they were expected to perform to a higher standard due to racial stereotypes,[80] that they were assumed to be less competent, so they had to be better.[81] Some described harsh and overt racism by colleagues and judges.[82] Feeling passed over and excluded can lead to exiting the profession.[83] Findings of lack of career advancement for racialized lawyers and the "Old Boys Club" in law firms was replicated in another study with respondents from across Canada.[84]

Placing the burden on racialized lawyers, who are already facing professional and personal challenges of racism, to be expected to advocate for change is not very different from the "typical

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[69] Law Society of Upper Canada, "Challenges Facing Racialized Licensees: Final Report" (11 March 2014) online: <https://www.stratcom.ca/wp-content/uploads/manual/Racialized-Licensees_Full-Report.pdf>.
[70] *Ibid* at 11-12.
[71] *Ibid* at p 7.
[72] *Ibid* at p 13.
[73] *Ibid* at p 14.
[74] *Ibid*.
[75] *Ibid* at p 12; see also Nova Scotia Bar Association Employment Equity Guidelines Committee, *supra* note 102 at p 10 regarding "fit" being used to exclude a lawyer.
[76] *Ibid* at p 12.
[77] *Ibid* at p 43.
[78] *Ibid* at p 32.
[79] *Ibid* at p 33.
[80] *Ibid* at p 51.
[81] *Ibid* at p 12.
[82] *Ibid* at p 12-13.
[83] *Ibid* at p 15.
[84] Canadian Centre for Diversity and Inclusion, "Diversity by the Numbers: The Legal Profession" (30 November 2016) online: <https://ccdi.ca/media/2019/dbtn_tlp_2016.pdf> at pp 10 & 15.

Canadian effort to maintain the myth of toleration by pretending to address intolerance while at the same time maintaining the dominant groups' 'right' to discriminate."[85] This harkens back to the days when *Christie* was decided.[86] It gives white lawyers a pass. It allows white lawyers to discriminate and maintain the status quo rather than become actively involved in addressing systemic racism. In the year 2021, this is simply not enough; the white lawyers who make up the majority of the profession must make active efforts to be anti-racist and to address systemic racism in the criminal justice system. As a research participant in the above-mentioned study noted, "[i]t's wonderful that there are focus groups of racial people, but it is equally important for the Law Society to reach out to Caucasian lawyers and partners, and ask if they think there are issues with racialized lawyers. If they don't feel it's a relevant issue, there won't be any change."[87]

II. Why Cultural Competence is Not Enough

Current efforts aimed at white lawyers to encourage them to be more sensitive to issues of race and racial discrimination are done mainly through education by law schools and bar associations to develop their 'cultural competence.' The Nova Scotia Barristers' Society has drafted a cultural competence standard for criminal practice.[88] There is also an "Equity Lens Toolkit" which states that lawyers must have a general awareness of the history of African Nova Scotians to be able to effectively advocate for their clients.[89]

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[85] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 82.
[86] *Christie v York* (1939), [1940] SCR 139.
[87] Law Society of Upper Canada, *supra* note 69 at 17.
[88] Nova Scotia Barristers' Society Criminal Law Standards Committee, "Cultural Competence" (April 2021), online: <https://nsbs.org/wp-content/uploads/2021/03/Criminal-Standards-Cultural-Competence-.pdf > [*Draft Cultural Competency Standards*].
[89] Nova Scotia Barristers' Society, "Equity Lens Toolkit" (2019) online: <https://nsbs.org/wp-content/uploads/2019/12/Equity-Lens-Toolkit.pdf >.

The efforts of bar associations yield no enforceable standards,[90] and bar societies will likely only react when such levels of incompetence are reached that the behaviour is egregious.[91] The focus that law societies have on misconduct means that more subtle discrimination, such as avoiding race-based trial strategies, will be ignored.[92] Cultural competency efforts intended to bring lawyers up to speed on cultures outside of their lived experiences are well-intentioned but they do nothing to provide a remedy to African Nova Scotian clients who do not even realize what may have gone wrong. If a client is convicted, and if they are made aware that a race-based issue was not properly addressed, their only avenue may be to appeal on the basis of ineffective assistance of counsel. This is an expensive and risky avenue to take, and it is unjust to an appellant who is incarcerated due to their lawyer's incompetence; the appellant would need to successfully argue that their counsel's conduct fell outside the range of reasonable professional assistance and that it resulted in a miscarriage of justice.[93] Cultural competence is one of the factors that can determine the outcome of a case, which means it can determine true access to justice.[94]

Cultural competency would be better viewed in terms of responding to systemic racism.[95] If efforts for cultural competency in white lawyers are ineffective in ensuring their minds are turned to race-based strategies, perhaps the law can respond where education cannot,[96] and foster white allyship by providing lawyers and judges with the necessary legal tools to be culturally competent.

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[90] *Ibid* at p 3.
[91] See, e.g., *Fraser*, *supra* note 55.
[92] *Ibid* at p 5.
[93] Mark Halfyard, Michael Dineen & Jonathan Dawe, *Criminal Appeals: A Practitioner's Handbook* (Toronto: Emond, 2017) at 44.
[94] Nova Scotia Barristers' Society Ad Hoc Equity Committee, "Cultural Competency and Diversity in the Nova Soctia Legal Profession: Final Report" (25 November 2014) online: <https://www.lians.ca/sites/default/files/documents/00065928.pdf> at p 9.
[95] Shallow, *supra* note 8.
[96] In the tradition of Critical Race Theory, the role of law can be transformed from perpetuating racism and white privilege: Williams, *supra* note 16 at 423.

III. Increasing Diversity is Not a Solution to White Lawyers' Lack of Competency

So as to not be misunderstood, it is not debatable that promoting the increase in the number of African Nova Scotian members of the bar is critical. It is hoped this point is obvious to the reader and need not be elaborated. Briefly, however, increasing the number of African Nova Scotian lawyers and judges will not only be more representative of the general population and is required to correct the historical exclusion from the legal profession,[97] but it will act to increase power in the legal system held by racialized peoples, increase understanding in others of discrimination faced by African Nova Scotians, remind others about access to justice needs, educate others about histories and challenges in African Nova Scotian communities, make it more comfortable to raise issues of race, class and privilege,[98] and provide African Nova Scotian clients a lawyer with whom they may feel more comfortable.[99] The need for and benefits of important programs such as the Indigenous Blacks & Mi'kmaq Initiative at the Schulich School of Law to support and attract African Nova Scotians to the profession have been documented elsewhere and need not be repeated here.[100]

The question is not whether to increase the number of African Nova Scotian lawyers and judges. Nor is the question who has historically advocated to be heard on cases involving racism. Rather, the question that should be asked is: in what ways can we ensure those who come to the profession without the lived experience as a racialized person appreciate when racism has played a role in their client's case and ensure they are held accountable to challenge that racism? If we do

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[97] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 26.
[98] Although not intended for this specific purpose, Metallic mentions these measures in her article, *supra* note 64 at 3, 8, 11.
[99] Shallow, *supra* note 8.
[100] See, e.g., Metallic, *supra* note 64.

not address this question, the majority of lawyers will be relatively free to ignore race-based strategies in litigation as long as they do not reach a somewhat uncertain level of incompetence.

a) Research Shows Increasing Diversity Does Not Solve the Problem. It is possible that white lawyers begin from the position that race is not a factor because of their lived experience as privileged and their uncomfortableness with confronting issues of race.[101] Professor Russell Pearce suggests even white people who believe racism is a significant problem in society lack a claim to racial identity and participate in white supremacy so feel they have little to offer on issues of race. Because they believe they can't understand, white people believe they should defer to people of colour who have lived the experience and are therefore experts. This, argues Professor Pearce, discourages white lawyers from acknowledging and exploring their white identity and the role it plays in their professional setting. This causes further harm because it discourages white lawyers from engaging in dialogue about race.

Although Professor Pearce calls the avoidance of racism a "race-neutral" strategy, I would argue this is not neutral and it is not reflective of cultural competence in lawyers or anti-racism. Critical Legal Studies theorists attack the concept of neutrality in the law because the dominating groups control the narrative based on their own biases or blind spots.[102] As Professor Pearce acknowledges, framing the avoidance of racial issues as neutral allows it to be upheld as a positive value of the legal profession.

Professor Pearce suggests further that more effective than relying on diversity as the mechanism to eliminate racism is for members of the legal profession to acknowledge their own differences and how those might affect their work. Using the work of organizational scholars, Pearce points out that relying on diversity to do the work leaves racialized people feeling their

[101] Pearce, *supra* note 1.
[102] See, e.g., Williams, *supra* note 16 at 422, and Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 22.

racial identity is a source of powerlessness and for white people it is a source of apprehension.[103] This leaves people of colour feeling disrespected and devalued. This is in contrast to what is called the "integration-and-learning model," or "learning-and-effectiveness paradigm," in which perceptions of power and status are equalized, open discussion is created, and resultant performance is higher.[104]

The organizational scholars Professor Pearce relied on point out that, "[h]aving people from various identity groups 'at the table' is no guarantee that anything will get better; in fact, research shows that things often get worse, because increasing diversity can increase tensions and conflict."[105] Indeed, diversity has increased in the Nova Scotia bar but African Nova Scotian overrepresentation in the criminal justice system has continued to rise.[106]

To turn differences into assets, Pearce says team members must orient themselves to learn from their differences and not marginalize or deny them. Inclusion on its own fails to reconfigure power relations. What is required, then, is for racialized people to: a) be able to influence the agenda and work; b) have one's interests and needs considered; and c) recognition, advancement opportunities and rewards.[107] To do that, leaders need to build trust, actively work against discrimination, embrace a range of voices, and make differences a source of learning. Typically, companies have

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[103] Pearce, *supra* note 1, relying on Robin Ely & David Thomas, "Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes" (2001) 46 Admin. Sci. Q. 229 and Robin Ely & David Thomas, "Team Learning and the Racial Diversity-Performance Link" (2004) Harvard Business School Working Paper No. 05-026.
[104] See, e.g., *ibid* and Robin Ely & David Thomas, "Getting Serious about Diversity: Enough Already with the Business Case" (2020) Harvard Business Rev, online: <https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case>.
[105] *Ibid*.
[106] See Nova Scotia Bar Association Employment Equity Guidelines Committee, "Fostering Employment Equity and Diversity in the Nova Scotia Legal Profession" (August 2000) online: <https://nsbs.org/wp-content/uploads/2020/06/Fostering-Employment-Equity-and-Diversity-in-the-NS-Legal-Profession.pdf>; Metallic, *supra* note 64; Nova Scotia Department of Justice, *supra* note 27.
[107] *Ibid.*

not done this difficult work, and it appears neither has the legal profession, all preferring to rest with the easier approaches that do not institute change.

PART III: CONSTRUCTING THE RACE-SENTISITVITY PRE-TRIAL CONFERENCE

> *[A]n advocate has a duty and a responsibility under rules of professional ethics to "ask every question, raise every issue and advance every argument, however distasteful [or difficult], that the advocate reasonably thinks will help the client's case; and endeavour to obtain for the client the benefit of any and every right, remedy and defence that is authorized by law" (NSBS 1990: Rule 10). A failure to take a Critical Race position in a case that warrants it should be viewed as a breach of this professional obligation, especially in light of the fact that such failures help to perpetuate the racial inequities that are pervasive in Canadian society and embedded in the Canadian legal system.*[108]

In discussing cases like *RDS*, Professor Aylward suggests the unwillingness or inability of white lawyers to make race-based arguments may be caused by various factors such as:

> "conscious or unconscious racism, an inability to recognize the race implications of a particular case, a lack of knowledge about how to challenge and deconstruct legal rules and principles which foster and maintain discrimination, the total acceptance of the myth of "objectivity" of laws, or the fear that raising issues of race before the Courts will disadvantage a client's case because of the unacceptance or hostility of the Courts to these arguments."

All of these factors are important to consider when seeking solutions to this avoidance. In particular, notes Aylward, lawyers must be able to recognize when issues of race arise.

[108] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 131.

According to Professor Aylward, "[t]he questions to be asked by the lawyer engaged in Critical Race Litigation are: Does the doctrine, legal rule, principle or practice at issue in the particular case subordinate and discriminate against people of colour? Is race an issue? If the answers are yes, should it be litigated or should some other strategy be employed?"[109] The first step, she argues, is to take a consciousness-raising approach, to understand the everyday experiences of people of colour dealing with subordination and racism.[110] Next is the ability to identify, given the legal context, when race is an issue that should or must be addressed. The advocate must then fearlessly raise the issue. Deconstruction, analysis, reconstruction, and risk analysis should also take place.

It is the first three steps (race consciousness raising, issue spotting, fearless advocacy) that are most relevant in the context of this paper because it is those steps that appear to not come easily for a white lawyer, it is those steps that have been actively avoided in past Canadian criminal litigation, and it is those steps that can be incorporated into a structured procedure designed to take the guess-work out of race-based litigation strategies.

Regarding issue spotting, Professor Aylward suggests that when involved with a case of "interracial crime" the lawyer must ask: "What role did race play in the crime itself, and what role will race play in the trial of this Black accused?"[111] Considering that police forces,[112] Crown prosecutors, and the judiciary are mostly white in Nova Scotia,[113] and the Supreme Court and others have accepted that there is undeniably a long history of systemic racism in the province's criminal justice system,[114] I would here argue two points. First, that a crime is "interracial" is a rebuttable presumption when the accused is African Nova Scotian. Second, the presumption ought

[109] *Ibid* at 82.
[110] *Ibid* at 134-5.
[111] *Ibid* at 137.
[112] Statistics Canada, "Visible Minority Police Officers, by Province and Territories, Canada, 2016 and 2011" (28 March 2018) online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54912/tbl/tbl01a-eng.htm>.
[113] Nova Scotia Barristers' Society, "Statistical Snapshot", *supra* note 2.
[114] *RDS*, *supra* note 20 at para 47.

not only apply to an African Nova Scotian accused person but also to an African Nova Scotian complainant. In addition, it was recently acknowledged in a trial level case that police officers of colour can also display racial prejudice against Black accused,[115] so the idea of "interracial" need not apply. The only requirement is that the accused or complainant be African Nova Scotian.

To those who would say race is not always an issue therefore we need not ask the question, Justice Doherty in *Parks* had an apt response: "A question directed at revealing those whose bias renders them partial does not 'inject' racism into the trial, but seeks to prevent that bias from destroying the impartiality of the jury deliberations."[116]

The Pretrial Conference

The purpose of a pretrial conference is to deal with procedural matters.[117] The *Criminal Code* Section 625.1(1) states a "pre-hearing conference" may be held to "consider the matters that, to promote a fair and expeditious hearing, would be better decided before the start of the proceedings, and other similar matters, and to make arrangements for decisions on those matters."

The purpose of holding a pretrial conference for an African Nova Scotian accused of a crime or complaining of a crime against them would be to guide a cooperative approach between Crown, defence, and the court, to ensure that race-based issues have been properly considered by all actors in the criminal justice system. The question is not whether race was an issue, but whether race was *not* an issue in the case proceeding to trial.[118] A pre-trial conference can be used to ensure the steps of race consciousness raising, issue spotting, and fearless advocacy are taken by all lawyers.

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[115] *R v Morris-Rainford*, 2020 ONCJ 447 at para 35.
[116] *Parks*, *supra* note 57 at para 26.
[117] *R v Smith*, 2005 BCPC 27.
[118] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 191.

The pretrial conferences and their content should be mandatory, and the Crown should provide an air of reality to the absence of racial profiling and racial discrimination during the investigative stage. The defence should raise any race-based issues that may cause a delay or require more time. Counsel on both sides should give clients the opportunity to self-identify as African Nova Scotian. Self-identification is in-line with the Nova Scotia Barristers' Society draft Cultural Competence Standards,[119] and more generally with international treaties regarding indigeneity.[120]

Effectively, to deal with these issues prior to trial may see charges withdrawn[121] when there is evidence of racial discrimination, resulting in less time in the courts and lowered incarceration rates. It may improve the relationships between African Nova Scotians and lawyers in the province. Fewer cases proceeding to trial will have a trickle-down effect on police who will increase self-monitoring, increase anti-racist policies, and ultimately reduce racial profiling. It is possible that race-based statistics could also be collected which will assist in further addressing systemic discrimination and provide protection for the human rights of African Nova Scotians.[122]

There are several ways in which the pretrial race-sensitivity conference could be mandated, and the content prescribed. It could be included in statute by way of amending the *Criminal Code*. It could be a policy of Crown prosecutors in the province of Nova Scotia. It could be a standard

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[119] *Draft Cultural Competency Standards*, *supra* note 88.
[120] *Convention No. 169 of the International Labor Organization on Indigenous and Tribal Peoples in Independent Countries*, 27 Jun 1989, 1650 UNTS 383 (entered into force 5 Sep 1991). See also Williams, *supra* note 16 at 454.
[121] This would be consistent with the Crown Attorney policy to prosecute when in the public interest: Nova Scotia Public Prosecution Service, "The Decision to Prosecute (Charge Screening)" (3 February 2021) at p 13, online: <https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/DecisionToProsecute.pdf>.
[122] Discrimination is manifested in "lack of disaggregated race-based data collection": *Draft Cultural Competency Standards*, *supra* note 88 at p 7; concerns were also expressed by the UNHRC working group about the lack of statistical data collection, in particular of fatal police incidents, *supra* note 4 at para 41; see also Andrea Gunn, "Nova Scotia Senator Calls for Race-Based Statistics Gathering to Make Discrimination Measurable" (19 June 2020) *The Chronicle Herald*, online: <https://www.saltwire.com/nova-scotia/news/local/nova-scotia-senator-calls-for-race-based-statistics-gathering-to-make-discrimination-measurable-464466/>.

set out by the Nova Scotia Barristers' Society. It could also be a requirement prescribed by the courts operating within Nova Scotia as a matter of procedure.

Prior to implementing a mandatory procedure, a consultative process should take place with African Nova Scotians to ensure completeness of the proposed content and agreeance with it in principle. It is possible that clients may fear reprisal or lack of support from their community.[123] Consulting will empower clients and community during the process, for it is they who must live with the consequences.[124]

What oppressions of African Nova Scotians in the criminal justice system can be overcome through law?[125] The proposed content of the race-sensitivity pretrial conference follows, with a brief explanation of the issues which must be considered. It is based on the author's research of potential areas of racial discrimination that should be addressed prior to proceeding to a criminal trial for an African Nova Scotian accused or complainant. These are issues beyond a more obvious hate crime or racially-motivated crime. These are issues that should be dealt with prior to trial because either they may take up more time, or they need to be explicitly considered in order to rule out race playing a role in a way that negatively impacts the accused or complainant.

I. Jury Selection

a) Jury Representativeness. "The historic distrust between African Nova Scotians and the legal system combined with their over-representation in legal custody and underrepresentation on juries results in a multifaceted problem."[126]

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[123] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 181.
[124] *Ibid* at 181.
[125] This is considered an important step in Critical Race Litigation: Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 139.
[126] Canadian Institute for the Administration of Justice, *supra* note 58.

Although the representativeness of a jury is said to be symbolically of paramount significance,[127] and the requirement of jury unanimity makes racial bias of any juror potentially distorting of a verdict,[128] the Supreme Court of Canada held in *Kokopenace* that representativeness is met when the source lists (and not the final jury makeup) used for jury selection are conducted in a random way from a "broad cross-Section of society."[129] This has been called a colour-blind approach because it will not necessarily result in a representative jury.[130] Under *Charter* Section 11(d), the accused has the right to be tried by an "impartial tribunal."[131] In Nova Scotia, more representative juries could be composed by targeting geographically, however the distrust in the legal system may create problems, especially if it is a member of that community being tried.[132]

In 2019, after an all-white jury acquitted Gerald Stanley of second degree murder,[133] Parliament amended the *Criminal Code* to abolish peremptory challenges,[134] which may help with jury representativeness.[135] Five peremptory challenges were used by Gerald Stanley's defence to remove visibly Indigenous potential jurors, who, it may have been thought, would have had more

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[127] Law Reform Commission of Canada, *Report on the Jury* (1982).
[128] *R v Griffis*, 1993 CarswellOnt 1086 at para 3.
[129] *R v Kokopenace*, 2015 SCC 28 [*Kokopenace*].
[130] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 153.
[131] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(d) [*Charter*].
[132] Canadian Institute for the Administration of Justice, *supra* note 58.
[133] "Shooting of Colten Boushie," (24 March 2021) *Wikipedia*, online: <https://en.wikipedia.org/wiki/Shooting_of_Colten_Boushie>.
[134] Canada, Department of Justice, "Legislative Background: An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts and to Make Consequential Amendments to Other Acts as Enacted (Bill C-75 in the 42nd Parliament)" (06 September 2019) online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/p3.html>.
[135] Although it may not assist; see Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 157.

sympathy for the shooting victim who was a young Indigenous man.[136] Peremptory challenges being used in a discriminatory manner have been well documented by many legal experts.[137]

b) Challenge for Cause. The Nova Scotia case, *Fraser*, reinforced the need for lawyers to be aware of the right of the accused to challenge for cause on the ground of racial bias following the *Parks* decision.[138] As described earlier, Mr. Fraser's lawyer ignored Mr. Fraser's concerns about the all-white jury selected for his trial, and upon appeal a new trial was ordered due to ineffective assistance of counsel. Professor Richard Devlin has commented that although there is no automatic right to challenge for cause, the long history of racism in the Halifax-Dartmouth area of Nova Scotia means race-based challenges will likely always be allowed.[139]

The *Parks* question has limited utility in ferreting out unconscious racial bias and allows a limited inquiry into potential bias of a juror. In the *Griffis* case, the trial judge decided that the *Parks* case did not limit his discretion as to the proper questions to be asked.[140] He allowed two of six[141] questions created by a professor of Anthropology to be put to prospective jury members: "(5) What opinions do you have about the involvement of black people in criminal behavior involving drugs? (6) Would those opinions interfere with your ability to try this case fairly?"[142]

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[136] Guy Queeneville & Jason Warick, "'Deck Is Stacked against Us," Says Family of Colten Boushie after Jury Chosen for Gerald Stanley Trial" (29 January 2018) CBC News online: <https://www.cbc.ca/news/canada/saskatoon/colten-boushie-shooting-case-jury-selection-gerald-stanley-1.4506931>.

[137] Frank Iacobucci, *First Nations Representation on Ontario Juries* (February 2013) online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html#top >; Chris Purdy, "Experts Renew Call for Challenge Changes, Jury Lists with More Indigenous Names" (9 February 2018) *Huffington Post*, online: <https://www.huffingtonpost.ca/2018/02/09/experts-renew-call-for-challenge-changes-jury-lists-with-more-indigenous-names_n_19220988.html>; Canada, Department of Justice, *supra* note 134; Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 153.

[138] *Fraser*, *supra* note 55; *Parks*, *supra* note 57.

[139] Devlin & Layton, *supra* note 56.

[140] *R v Griffis*, [1993] OJ No 3314, 20 CRR (2d) 104 at para 5 [*Griffs*].

[141] See *Griffis*, *ibid* at para 17 where the judge concluded questions one through three would not be permitted and para 19 where question four would not be permitted.

[142] *Griffis*, *ibid*; Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 159.

Since the time of this case, which was decided just after *Parks*, other judges have allowed modifications to the *Parks* question.[143]

II. Witness Preparation

In an Alberta case at the trial level, the judge took notice that the justice system has failed Indigenous people, that Indigenous people do not culturally share the concepts of the European based justice system implemented in Canada, and that they feel their views are not considered adequately or fairly in the white system of justice.[144] The judge then took notice that witnesses can have fears of repercussions, facing the offender, shaming the community, inviting bad spirits, using bad medicine, being alone, fines imposed on their domestic partner, and a "lack of confidence in the 'white' system of justice" due to a history of human rights violations.[145] Equality before the law, the judge held, means to give Indigenous people allowances for the difficulties they have in the white justice system. That included proper preparation of a Crown witness, not just "handing them a subpoena and leaving them to their own resources to deal with all of the fears and difficulties that they encounter in our justice system."[146] It has been recognized in Nova Scotia courts that the systemic racial discrimination experienced by Indigenous Canadians also affects African Canadians,[147] so witness preparation should be considered by lawyers in Nova Scotia in the context of the history of race relations in the province.

III. IRCAs

Grounded in the *Criminal Code* and *Charter*, Impact of Race and Culture Assessments (IRCAs) were recently developed in Nova Scotia to ensure just sentencing for African Nova

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[143] See, e.g., *R v Santiago*, 2020 ABQB 446.
[144] *R v T(BH)*, 1998 ABPC 135.
[145] *Ibid* at para 22.
[146] *Ibid* at para 32.
[147] *R v Anderson*, 2020 NSPC 10 at para 40.

Scotians to try to address overincarceration.[148] IRCAs can show that anti-Black racism can affect an offender's life in a way that it causes them to be brought before the courts.[149] IRCAs serve to "disrupt some comfortable certainties" that although an offender may be exercising "free will" they do so only with the world view they have been given through their life experiences.[150] In the words of Justice Nakatsuru, regarding taking into account the offender's Indigenous heritage and ancestry in sentencing: "It is also obvious that this tree is not healthy. The leaves droop and appear sickly. It does not flourish regardless of the attention paid upon it. The tree needs healing."[151] IRCAs should be discussed prior to trial because they may require more time for preparation and more time at trial.

IV. *Charter* Section 9, 15 and 7 Challenges

a) Section 9: Racial Profiling. The Nova Scotia Barristers' Society Professional Standards (Criminal) Committee recently drafted a standard for *Charter* applications.[152] The purpose is for lawyers to have a clear understanding that *Charter* applications must be done in a timely manner, and this includes obtaining instructions from the client and providing reasonable notice to the court. The preliminary inquiry will not be the hearing at which a remedy under Section 24(2) of the *Charter* is decided,[153] however lawyers should still, according to the draft standard, decide whether there are grounds and client willingness to make an application as soon as possible after

[148] *Dugas*, *supra* note 33.
[149] *Ibid* at 124.
[150] *R v Gabriel*, 2017 NSSC 90 at para 91.
[151] *R v Armitage*, 2015 ONCJ 64 at para 56.
[152] Nova Scotia Barristers' Society, "Draft *Charter* Application Standard" (12 January 2021), online, NSBS <https://nsbs.org/wp-content/uploads/2021/03/Criminal-Standards-Charter-Applications.pdf>.
[153] *R v Mills* (1986), 52 CR (3d) 1 (SCC).

disclosure is received.[154] Notice is required for a fair and expeditious trial and to avoid "litigation by ambush."[155]

The draft standard specifically states that, "[l]awyers should be careful to consider the availability of potential *Charter* applications that are specific to racialized clients, including: a. Racial Profiling, (see R. Dudhi, 2019 ONCA 665); b. Police authority to question individuals, (see R. v. Le, 2019 SCC 34)" and the draft standard further remarks that failure to bring a *Charter* challenge can have unintended consequences.[156] However, the rest of the standard is void of application to racial discrimination. The standard is a good start, but it does not go far enough to impress upon counsel to consider and employ race-based strategies. The Nova Scotia Barristers' Society recently acknowledged systemic racism within its policies and has committed to undertake an external review.[157]

A *Charter* Section 9 challenge can be undertaken in cases of racial profiling. Racial profiling has been defined in the courts as comprised of attitude plus causation.[158] The attitude in question is the attitude by police that race is somehow relevant as a risk factor, and causation is that the attitude played a causal role, consciously or unconsciously in selecting a suspect.[159] This construction has attracted criticism that racial profiling claimants will now be required to prove a police officer harboured racist views, which is unjustified because social science provides evidence that we all hold racial stereotypes and implicit bias.[160] Furthermore, critical race theory holds legal

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[154] Nova Scotia Barristers' Society, "Draft *Charter* Application Standard", *supra* note 152 at 1.
[155] *R v Floate*, 2001 ABPC 250; *R v Doncaster*, 2013 NSPC 13.
[156] Nova Scotia Barristers' Society, "Draft *Charter* Application Standard", *supra* note 152 at 1-2.
[157] Nova Scotia Barristers' Society, "Acknowledgement of Systemic Discrimination" (April 2021), online NSBS <https://nsbs.org/about/council-committee/acknowledgement-systemic-discrimination/>.
[158] *R v Le*, 2019 SCC 34 [*Le*]; *R v Dudhi*, 2019 ONCA 665 [*Dudhi*].
[159] See *Dudhi*, *ibid*, at paras 54-55, relying on *Peart v Peel (Regional Municipality) Police Services Board* (2006), CR (6th) 175.
[160] Chris Rudnicki, "One Step Forward, Two Steps Back: Why the Progressive Promise of R. v. Dudhi is Undermined by its New Formulation of the Test for Racial Profiling" (2021) 40:5 For the Defence.

frameworks should reflect the fact that we live in a society with systemic racism that shapes our thinking, and we should not continue to place unjustified burdens on claimants to establish intent or implicitly held views.[161] The much earlier *RDS* case stands for the principle that racial discrimination by police officers towards people of colour does not require evidence to be placed before the courts, and the fact that race and racial discrimination exists in Canada is a matter of common sense assumed to be part of the knowledge of a reasonable person.[162] The test for racial profiling is thus ripe for further litigation.

Nonetheless, the two 2019 cases cited by the Nova Scotia Barristers' Society show a racial profiling challenge is now more likely to be taken seriously than in the past and is worth undertaking. In *Dudhi*, the Ontario Court of Appeal held that the presence of reasonable grounds did not preclude racial profiling, and an officer's racist comments, even when made after an arrest, could be used as circumstantial evidence of racial profiling.[163] As noted in commentary by Professor Don Stuart, the majority of the Supreme Court decision in *Le* made a critical statement on that point when they stated "the concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or subject treatment."[164] The words "to any degree" used by the Supreme Court were understood by the Ontario Court of Appeal to change or clarify the common law such that the standard for a Section 9 breach is not based on a balance of probabilities that there was no cause for the stop.[165] Instead, racial profiling contaminates police decision-making and the presence of reasonable grounds must

[161] *Ibid*.
[162] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 84.
[163] *Dudhi*, *supra* note 158.
[164] See headnote of *Dudhi*, *ibid*, in WestlawNext.Canada; *Le*, *supra* note 158 at para 76.
[165] *Dudhi*, *supra* note 158 at paras 56-66.

not be given undue weight.[166] The court in *Dudhi* held that racial profiling necessarily elevates the seriousness of the *Charter* breach such that the evidence should possibly be excluded under Section 24(2) of the *Charter* and that a new trial would be necessary to conduct a proper analysis.[167]

Racial profiling will likely not be proven by direct evidence but rather by circumstantial evidence such as an officer's comments ("another brown guy who is a drug dealer"), or a lack of good faith evidenced by failing to develop reasonable grounds.[168] It is also relevant to look at what actions or statements are consistent with racial profiling rather than hold them to a high standard of proving racial profiling.[169] The Supreme Court recently commented that entrapment is a "breeding ground for racial profiling," so lawyers dealing with cases of potential police entrapment should carefully consider how it may have interacted with racial bias.[170]

b) Sections 15 and 7: Bias in Police Policies and Use of Force. Although less commonly claimed, it is possible to challenge police policies and use of force if created or applied on a discriminatory basis. However, these claims have not proven successful in the past, likely because policies are written to be neutral on their face. "Culture eats policy… and we have a police subculture whose core elements in many places include a fear of Black people," remarked an American professor, Philip Stinson.[171]

A Section 7 *Charter* challenge could be mounted in cases of excessive use of force by police.[172] It is possible that this avenue could also be used for over-policing and the resultant humiliation of

[166] *Dudhi*, *ibid* at paras 65, 82 & 85.
[167] *Dudhi*, *ibid* at para 88.
[168] *Dudhi*, *ibid* at paras 71, 75 & 90; *R v Brown*, [2003] OJ No 1251 (ONCA).
[169] *Dudhi*, *ibid* at para 79.
[170] *R v Ahmad*, 2020 SCC 11.
[171] John Eligon & Shawn Hubler, *supra* note 10.
[172] Mirza, *supra* note 19; *R v Nasogaluak*, 2010 SCC 6.

African Nova Scotians.[173] The effects of police attitudes on African Canadians was recently recognized by the Ontario Court of Appeal as "profoundly dispiriting and destructive," eating away at the heart and casting a shadow on the soul of the accused.[174]

A Section 15 combined with Section 7 *Charter* claim was made in Nova Scotia after three days of racially-motivated riots at Cole Harbour High school in 1989.[175] The Nova Scotia Court of Appeal held in that case that it was necessary for the appellants to establish on balance that their right to equality had been violated. This is not the law as later laid out by the Supreme Court; applicants must only establish a prima facie case of discrimination.[176] In any event, the appellants in the Cole Harbour High case were unable to do so, because they argued only that the impacts were disproportionate.[177] In *Peart v Peel (Regional Muncipality) Police Services Board*, a Section 15 claim of racial profiling was also unsuccessful.[178] With the recent recognition that a Section 9 challenge no longer requires an applicant to establish racial profiling on balance,[179] it is possible that when the facts are appropriate for a Section 15 claim that it will be successful.

V. Expert Opinion on Racism

It may be advantageous for the defence to call expert witnesses on systemic anti-Black racism. This was done in the Nova Scotia landmark case *R v X*, the first to consider IRCAs.[180] Expert witnesses could also be helpful to provide guidance on cross-racial identification if identification of the accused is at issue.[181] However, experts can be costly. Caselaw shows judges may take judicial notice of relevant race relations and systemic racism, so this should be the preferred

[173] Mirza, *supra* note 19; *Le*, *supra* note 158.
[174] *R v Kandhal*, 2020 ONSC 3580.
[175] *R v Smith*, 1991 CarswellNS 709 [*Smith*].
[176] *R v Kapp*, 2008 SCC 41.
[177] *Smith*, *ibid* at paras 15 & 20.
[178] *Peart v Peel (Regional Muncipality) Police Services Board*, *supra* note 159.
[179] *R v Morris-Rainford*, 2020 ONCJ 447 at para 34, relying on *Dudhi*, *supra* note 158.
[180] *R v X*, *supra* note 33 at paras 15, 163-193.
[181] *R v MacLellan*, 2019 NSCA 2.

route.[182] Lawyers should be prepared to assert the judge's ability to take judicial notice of systemic racism against African Nova Scotians.

CONCLUSION

> *Black lawyers involved in race advocacy… often face a heavy burden of "justifying either that race really exists as an issue at all, or that they are competent to address the topic of race in a fair and reasoned manner." Non-minority lawyers engaged in Critical Race Litigation will no doubt face obstacles as well. Arguably, they will meet with less hostility, however, than Black lawyers, who will often be challenged on the stereotypical basis of competency and "self-interest."*[183]

"It is unfortunate that race-conscious solutions sometimes engender more controversy than race-conscious problems."[184] Proposing an additional procedural step for an already overburdened justice system will not be popular with everyone. In Nova Scotia efforts have been made to increase the number of African Nova Scotian lawyers since 1989.[185] Yet in 2011, a white Nova Scotian lawyer still failed to challenge the jury for cause, something that should be minimally required.[186] If race-sensitivity pretrial hearings were in place in 2011, Mr. Fraser's lawyer would have appeared incompetent prior to trial when he would have had to share with the Crown and the judge that he would not be challenging the jury.

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[182] *Le*, *supra* note 158; *R v Jackson*, 2018 ONSC 2527; *Nova Scotia (Minister of community Services) v S(SM)*, 1992 CarswellNS 364; *RDS*, *supra* note 20.
[183] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 175.
[184] Paul Butler, as cited in Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 158.
[185] The first Black lawyer in Nova Scotia was hired in 1960, the IB&M Initiative was begun in 1989, and in 1999 the Premier announced Employment Equity Guidelines: Nova Scotia Bar Association Employment Equity Guidelines Committee, *supra* note 102.
[186] See *Fraser*, *supra* note 55, and Richard Devlin, "Speaker's Corner: Time to Train Lawyers on Cultural Competence" (16 January 2012), online: <https://www.lawtimesnews.com/archive/speakers-corner-time-to-train-lawyers-on-cultural-competence/260238>.

If race-sensitivity pretrial hearings work to reduce systemic racism by discouraging racial profiling, oversurveillance and overcharging of African Nova Scotians, there will ultimately be lowered incarceration rates of African Nova Scotians. To those who would say mandating accountability of lawyers is unnecessary or excessive, "[i]n Nova Scotia we need only look at our history to see that equal rights have never been provide voluntarily. Repeatedly it has been shown that progress has only been achieved through enforcement mechanisms, including legislation, regulatory requirements and judicial review."[187]

Rather than viewing a race-sensitivity pretrial hearing as mandating accountability, it should be viewed as a helpful guide to cultural competency and how to be anti-racist in the criminal justice system, provide effective assistance of counsel, and shoulder part of the burden of eradicating systemic racism. If white lawyers can come to accept their lived experiences of privilege, their uncomfortableness with race, and the fact that they lack the lived experience of a racialized lawyer needed to do their job properly, a race-sensitivity hearing should simply be viewed as another tool in their legal toolbox. "[F]or attorneys of colour, 'representing race' was a 'fundamental' and 'inescapable' part of their professional identity and political function."[188] This should be said of all lawyers in Nova Scotia, not just attorneys of colour.

This paper provides a drafted set of race-based issues to be covered prior to proceeding to a criminal trial so that all lawyers arrive with a minimal level of competence regardless of their own lived experience and uncomfortableness with race. This will ultimately assist in upholding lawyers' competence in Nova Scotia as well as instilling an anti-racist culture within the criminal justice system and provide forward motion toward a more just society.

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[187] Nova Scotia Bar Association Employment Equity Guidelines Committee, *supra* note 106 at 2.
[188] Aylward, *Canadian Critical Race Theory*, *supra* note 12 at 175.

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