Court File No. C65766

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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, BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, URBAN ALLIANCE ON RACE RELATIONS AND CANADIAN ASSOCIATION OF BLACK LAWYERS

Interveners

FACTUM OF THE INTERVENER
THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

STOCKWOODS LLP
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto, Ontario M5K 1H1

Nader R Hasan LS#: 54693W
Tel: 416-593-1668 / Fax: 416-593-9345
naderh@stockwoods.ca

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, Ontario M5G 2C2

Geetha Philipupillai LS#: 74741S
Tel: 416-979-4252 / Fax: 416-591-7333
gphilipupillai@goldblattpartners.ca

Counsel for the Intervener
The David Asper Centre for Constitutional Rights

TO: **THE REGISTRAR OF THE COURT OF APPEAL FOR ONTARIO**
Osgoode Hall
130 Queen Street West
Toronto, Ontario
M5H 2N5

AND TO: **MINISTRY OF THE ATTORNEY GENERAL**
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

Roger Shallow LS#: 46169M
Tel: 416-326-4570
Fax: 416-326-4656
roger.shallow@ontario.ca

Shawn Porter LS#: 30829I
Tel: 416-326-4600
Fax: 416-326-4656
shawn.porter@ontario.ca

Counsel for the Appellant, Her Majesty The Queen

AND TO: **MIRZA KWOK DEFENCE LAWYERS**
55 Village Centre Place, #301
Mississauga, Ontario L4Z 1V9

Faisal Mirza LS#: 47216J
Tel: 905-897-5600
Fax: (905) 897-5657
fm@mirzakwok.com

GAIL SMITH LAW
603 ½ Parliament Street, Suite 202
Toronto, Ontario M4X 1P9

Gail D. Smith LS#: 50278K
Tel: 416-299-1803
Fax: 1-855-253-9905
gail@gailsmithlaw.com

Counsel for the Respondent, Kevin Morris

AND TO: **KASTNER LAW**
65 Queen Street West, Suite 1240
Toronto, Ontario M5H 2M5

Emily Lam LS#: 55867P
Tel: 416-655-3044 x2
Fax: 416-655-3044
elam@kastnerlaw.ca

EDWARD ROYLE & PARTNERS
481 University Avenue, Suite 510
Toronto, Ontario M5G 289

Marianne Salih LS#: 68561R
Tel: 416-309-1970
Fax: 416-340-1672
Marianne.salih@roylelaw.com

Counsel for the Intervener, Criminal Lawyers' Association (Ontario)

AND TO: **ABORIGINAL LEGAL SERVICES**
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4
Tel: 416-408-4041
Fax: 416-408-1568

Caitlyn E. Kasper LS#: 62385M
Kasperc@lao.on.ca
Douglas Varrette LS#: 75302U
varretd@lao.on.ca

Counsel for the Intervener, Aboriginal Legal Services

AND TO: **URSEL PHILLIPS FELLOWS HOPKINSON LLP**
1200-555 Richmond Street West
Toronto, Ontario M5V 3B1
Tel: 416-835-6632
Fax: 416-968-0325

Saman Wickramasinghe LS#: 53892S
Zachary Kerbel LS#: 54322G
Avvy Yao-Yao Go LS#: 31861E
Shalini Konanur LS#: 42871Q
wicks@upfhlaw.ca
zkerbel@upfhlaw.ca

Counsel for the Intervener, South Asian Legal Clinic of Ontario, Chinese and Southeast Asian Legal Clinic & Colour of Poverty/Colour of Change Network

AND TO: **COOPER, SANDLER, SHIME & BERGMAN LLP**
439 University Avenue, Suite 1900
Toronto, Ontario M5G 1Y8

Jonathan Shime LS#: 45804K
Tel: 416-585-1716
Fax: 416-408-2372
jshime@criminal-lawyers.ca

THE BLACK LEGAL ACTION CENTRE
221-720 Spadina Avenue
Toronto, Ontario M5S 2T9

Nana Yanful LS#: 66783B
Tel: 416-597-5831
Fax: 416-925-3564
yanfuln@lao.on.ca

Counsel for the Intervener, Black Legal Action Centre and The Canadian Association of Black Lawyers

AND TO: **KAPOOR BARRISTERS**
161 Bay Street, Suite 2900
Toronto, Ontario M5J 2S1
Tel: 416-363-2700
Fax: 416-363-2787

Anil K. Kapoor LS#: 28490I
akk@kapoorbarristers.com

Dana Achtemichuk LS#: 72792I
dca@kapoorbarristers.com

Counsel for the Intervener, Canadian Civil Liberties Association

AND TO: **HELLER, RUBEL BARRISTERS**
120 Adelaide Street West Suite 1902
Toronto, Ontario M5H 1T1

Taufiq Hashmani LS#: 64417M
Tel: 416-863-9311
Fax: 416-863-9465
tHashmani@hellerrubel.com

Counsel for the Intervener, Canadian Muslim Lawyers Association

AND TO: **RUBY SHILLER ENENAJOR DIGIUSEPPE BARRISTERS**
92 Isabella Street
Toronto, Ontario M4Y 1N4
Tel: 416-964-9664
Fax: 416-964-8305
ruby@rubyshiller.com

Annamaria Enenajor LS#: 64837G
Tel: 416-964-9664
aenenajor@rubyshiller.com

Counsel for the Intervener, Urban Alliance on Race Relations

PART I – OVERVIEW

1. It is beyond dispute that Black Canadians face insidious discrimination within the criminal justice system. Despite Parliament's sentencing reforms intended to promote alternatives to incarceration, Black offenders continue to be overrepresented at all levels of the Canadian criminal justice system — "from arrest to incarceration" — and face discrimination within the corrections system.[1]

2. To its credit, the Crown now agrees that systemic discrimination ought to be taken into account when sentencing Black offenders. This appeal is therefore not about *if* systemic discrimination and systemic background factors ("**systemic factors**") ought to inform the sentencing of Black offenders, but about *how* systemic factors ought to inform that process.

3. Despite acknowledging that systemic factors matter, the Crown invites this Court to impose an impossible evidentiary burden on Black offenders. The Crown says that systemic racism can be taken into account in sentencing Black offenders *only if* the offender succeeds in demonstrating a *causal link* between systemic racism and the offence conduct. Should this Court accede to the Crown's request, it will result in lip service being paid to the plight of Black offenders but no meaningful change to the way Black offenders are sentenced.

4. The David Asper Centre for Constitutional Rights ("**the Asper Centre**") submits that the Crown's position is inconsistent with the principle of substantive equality, which animates all aspects of our criminal law, and is at odds with the Supreme Court's rejection of a causation requirement in *Ipeelee*.

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[1] United Nations Committee on the Elimination of Racial Discrimination. *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/21-23 (United Nations: September 2017) ["CERD Report"], at p. 4.

5. Substantive equality ought to play a central role in developing a framework for sentencing Black offenders. The Asper Centre submits that: (1) judges ought to always turn their minds to systemic factors and whether those systemic factors bear on an individual's moral blameworthiness and the types of sentencing goals that ought to apply in a given case; (2) there should be no evidentiary onus on a Black offender to demonstrate a causal link between systemic factors and their offence conduct; (3) judges have a positive obligation to request the completion of a *Morris* style report where appropriate; and (4) the sentencing inquiry ought to promote the principles of restraint and restorative justice in all cases.

PART II – FACTS

6. The Asper Centre accepts the facts as set out in the parties' facta and takes no position on the disputed facts. We rely on and adopt the submissions of other intervener groups on the historic disadvantages faced by Black and non-Black racialized communities.

PART III – QUESTION IN ISSUE

7. The Asper Centre's submissions focus on the following question: *how* should systemic factors inform the sentencing framework applicable to Black offenders?

PART IV – LAW AND ARGUMENT

A. THE CROWN'S APPROACH IMPOSES AN UNFAIR BURDEN ON BLACK OFFENDERS

8. The Crown acknowledges that systemic racism can be taken into account in sentencing Black offenders, but *only if* the offender succeeds in demonstrating a *causal link* between systemic racism and the offence conduct.

9. Relying on this Court's decision in *R v Hamilton*[2], the Crown asserts that the offender must provide "*specific evidence* … that racial disadvantage is *linked* to a constraint of a particular offender's choices and life experience in bringing him before the court."[3] The Crown further suggests that the offender must marshal expert evidence to explain how systemic factors contributed to bringing the offender before the courts and "how much [and] to what degree." [4]

10. The requirement of a causal link between the offence conduct and the offender's systemic factors is incompatible with the Supreme Court of Canada's decision in *Ipeelee* and this Court's own jurisprudence. While *Hamilton* would seem to offer some support for the Crown position,[5] *Hamilton* predates *Ipeelee* and should no longer be considered good law on that issue.

11. Requiring a causal link between offence conduct and systemic factors places an unfair (and arguably impossible) evidentiary burden on the offender. This issue has been squarely addressed in the Indigenous sentencing context. Far too often, sentencing courts and provincial courts of appeal had placed an unfair burden on Indigenous offenders by requiring that the offender draw a direct causal link between her or his criminal conduct and "Aboriginal-specific unique systemic or background factors."[6]

12. In *Ipeelee*, the Supreme Court of Canada criticized these lower court decisions for "display[ing] an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples", and for "impos[ing] an evidentiary burden on

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[2] *R v Hamilton* (2004), 72 OR (3d) 1 (Ont. C.A.) ["*Hamilton*"], at para. 133 ("The fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence").
[3] Crown Factum, at para. 51 (emphasis added).
[4] Crown Factum, at para. 14.
[5] *Hamilton*, *supra* (Ont. C.A.), at para. 133.
[6] See, e.g., *R v Poucette*, 1999 ABCA 305, 250 A.R. 55, at para. 14.

offenders that was not intended by *Gladue*."[7] It was "erroneous" to "suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge."[8] The Supreme Court underscored the "intertwined and interdependent" nature of "cultural oppression, social inequality, the loss of self-government and systemic discrimination."[9] These are not things that are easily capable of forensic proof.

13. This Honourable Court has been equally — if not even more — emphatic in rejecting the causal link requirement. In *F.H.L.*, this Court wrote:

> [C]ourts should not require offenders to establish a causal connection between "systemic or background factors" and the crimes for which they have been convicted. Such a requirement "displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples" and "imposes an evidentiary burden on offenders that was not intended by *Gladue*" … This court has rejected a "causal connection" requirement in multiple decisions….[10]

14. In *Kreko*, this Court allowed a sentence appeal where the sentencing judge erred in holding that there was no connection between the accused's Indigenous heritage and his firearm offences because he had been adopted by non-Indigenous parents. The Court found that the sentencing judge had effectively required proof of a causal connection:

> [T]he appellant's dislocation and loss of identity can be traced to systemic disadvantage and impoverishment extending back to his great-grandparents. This was relevant to his moral blameworthiness for the offences. The intervener has referred to some studies suggesting that adoptions of Aboriginal children by non-Aboriginal parents have a significantly higher failure rate than other adoptions. The appellant's Aboriginal heritage was unquestionably part of the context underlying the offences. The sentencing judge erred by failing to consider the intergenerational, systemic factors that were part of the

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[7] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 ["*Ipeelee*"], at para. 81.
[8] *Ibid.*
[9] *Ibid.*, at para. 83, citing the Aboriginal Justice Inquiry of Manitoba.
[10] *R v F.H.L.*, 2018 ONCA 83, 360 C.C.C (3d) 189 ["*F.H.L.*"], at para. 32 (internal citations omitted). See also *R v Collins*, 2011 ONCA 182, 104 O.R. (3d) 241 ["*Collins*"], at para. 33.

> appellant's background, and which bore on his moral blameworthiness, and by seeking instead to establish a causal link between his Aboriginal heritage and the offences.[11]

15. There are sound reasons to reject a strict causal link requirement. Requiring the offender to show a link between the offence and systemic discrimination places an impossible burden on the offender. The question of why someone commits a bad act is often impossible to answer — even for the offender himself. It is a question that philosophers, criminologists, social scientists, novelists and jurists have debated and will continue to debate for centuries. To require someone who is poor, suffers from systemic discrimination, and is before the courts to prove that his or her poverty and vulnerability caused him or her to come before the courts imposes an unfair, if not impossible, burden.

16. The unfairness of the causal link requirement is augmented by the fact that the criminal law generally does not impose such an evidentiary onus on an offender who relies on other mitigating factors. We generally do not ask young people to *prove* that their immaturity or youthful traits contributed to their offence conduct. Yet, no one talks about an "age-based discount" when judges sentence youthful offenders to a lower sentence (nor should they). No one talks about a "mental health discount" when judges treat mental illness as a mitigating factor (nor should they). These are mitigating factors that limit the moral blameworthiness of the offender and thus are relevant to the proportionality analysis.

B. THE CAUSAL LINK REQUIREMENT UNDERMINES SUBSTANTIVE EQUALITY

17. In proposing a causal link requirement, the Crown's approach undermines substantive equality. Substantive equality recognizes that identical treatment is not necessarily equal

[11] *R v Kreko*, 2016 ONCA 367, 131 O.R. (3d) 685, at para. 24.

treatment, and that identical treatment can be discriminatory.[12] Substantive equality focuses on the historical disadvantage of a particular group, and the larger social, political and legal context in determining whether laws, policies, programs, or the operation of judicial discretion correspond to the particular needs and circumstances of a group, or perpetuate disadvantage.[13] Substantive equality recognizes that for historically disadvantaged groups, positive measures are necessary to improve equality of opportunity and ensure equal benefit of the law and equal protection from the law.[14]

18. Substantive equality applies not only where s. 15 of the *Charter* is directly engaged; rather, it animates all aspects of Canadian law.[15] As Moldaver J. recently held in *Barton*, substantive equality is a "core concept upon which our justice system rests,"[16] and informs the development of the common law and the exercise of judicial discretion.[17] By incorporating substantive equality into the criminal law, and sentencing law in particular, this Court can "increase the likelihood that disadvantage, vulnerability and lack of power will not be further exacerbated."[18] This Court previously recognized in *Leonard* that substantive equality concerns justified extending *Gladue* and *Ipeelee* beyond s. 781.2(e) of the *Code*.[19] The same reasoning applies to extending *Gladue* and *Ipeelee* beyond the Indigenous sentencing context.

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[12] *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, at para. 37; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61, at para. 331; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 ["*Eldridge*"], at para. 61.
[13] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548, at para. 18.
[14] *Eldridge*, *supra* (S.C.C.), at para. 78.
[15] *R v Beaulac*, [1999] 1 SCR 768, at para. 22.
[16] *R v Barton*, 2019 SCC 33, at para. 202, per Moldaver J.; see also *Hills v Canada (Attorney General)*, [1988] 1 SCR 513, at p. 558, citing *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, and *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, at p. 1078.
[17] *Hill v Church of Scientology*, [1995] 2 SCR 1130, at para. 91.
[18] Rosemary Cairns Way. "Incorporating Equality into Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 *JL & Equality* 203, at p. 240.
[19] *United States v Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496 ["*Leonard*"], at paras 84-86.

19. Parliament's 1996 sentencing reforms, which were incorporated in Part XXIII of the *Criminal Code*, enshrined substantive equality into our laws of sentencing by recognizing the need to take into account the individual circumstances of each offender and each crime to achieve proportionality in sentencing. As the Supreme Court noted in *Gladue*, these reforms were "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."[20] They "changed the range of available penal sanctions in a significant way," including by enlarging the availability of non-custodial sentences.[21]

20. These amendments also fundamentally changed the values and principles underpinning the law of sentencing. Parliament created a remedial regime, which incorporated, for the first time, sentencing purposes and principles beyond the state's interests and the interests of the individual offender.[22] Prior to the enactment of the sentencing reforms, the codified sentencing goals in s. 718 reflected the long-standing goals of separation, deterrence, denunciation and rehabilitation. In the 1996 sentencing reforms, Parliament amended s. 718 to specifically include restorative justice principles.[23]

21. In doing so, Parliament did not simply codify existing sentencing principles, but enacted a remedial regime, which applies to "*all offenders*."[24] As Nakatsuru J. held in *Jackson*, "the principle of restraint [embodied in s. 718.2(e)] now incorporates the concept of restorative justice for all offenders."[25] And as the Supreme Court emphasized in *Gladue*, where Parliament enacts a remedial regime, such as it did in Part XXIII, those provisions are to be given "a fair, large and

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[20] *R v Gladue*, [1999] 1 SCR 688 ["*Gladue*"], at para. 39.
[21] *Ibid.*, at para. 40.
[22] *Ibid.*, at para. 42.
[23] *Criminal Code*, s. 718(e) ("reparations for harm done to victims or to the community"); s. 718(f) ("to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community").
[24] *Gladue*, *supra* (S.C.C.), at para. 43 (emphasis added).
[25] *R v Jackson*, 2018 ONSC 2527 ["*Jackson*"], at para. 77.

liberal construction and interpretation in order to attain that remedial objective."[26] The causal-link requirement would hinder the remedial objectives of the 1996 sentencing reforms by placing s. 718.2(e) beyond the reach of those offenders who are its intended beneficiaries.[27]

C. SUBSTANTIVE EQUALITY REQUIRES A FLEXIBLE *GLADUE*-TYPE FRAMEWORK

22. Part XXIII of the *Criminal Code* and the principle of substantive equality require that Black offenders benefit from a sentencing framework analogous to the *Gladue* framework.

23. Although s. 718.2(e) singles out "aboriginal offenders", the *Gladue* framework flows not merely from the language of that provision but from a purposive approach to Part XXIII of the *Criminal Code* and substantive equality principles, which permeate all aspects of Canadian law.[28] While this Court in *Hamilton* rejected the analogy between Indigenous and Black offenders, this Court ought to revisit its previous dicta consistent with the evolving nature of our understanding of equality and discrimination and the needs and circumstances of Black offenders.[29]

24. In explaining why a different approach to sentencing is required in the Indigenous sentencing context, the Supreme Court of Canada in *Gladue* emphasized three factors: (1) the massive over-incarceration of Indigenous offenders[30]; (2) the bias and discrimination that Indigenous offenders face in all parts of the criminal justice system[31]; and (3) the importance of using different sentencing approaches, including restorative justice, to obtain just outcomes.[32]

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[26] *Gladue*, *supra* (S.C.C.), at para. 32.
[27] *Ipeelee*, *supra* (S.C.C.), at para. 81.
[28] *Leonard*, *supra* (Ont. C.A.), at paras. 60 and 84-86.
[29] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, at p. 163-171; *Egan v Canada*, [1995] 2 SCR 513 at p. 550.
[30] *Gladue*, *supra* (S.C.C.), at paras. 58-61.
[31] *Ibid.*, at para. 61.
[32] *Ibid.*, at para. 74.

25. Applying the same purposive approach, it is clear that the circumstances of Black offenders in the criminal justice system, and Canadian society generally, demand a judicial response analogous to the framework which applies to Indigenous offenders under *Gladue* and *Ipeelee*. Like Indigenous peoples, Black offenders are disproportionately represented in prison populations. Ontario has the largest Black inmate population in Canada — nearly three times the next largest province in Quebec.[33] Nationally, the rate of incarceration of Black Canadians is three times more than their representation in the total population of Canada.[34] While the numbers of federally sentenced white inmates declined by over 3% from 2003 to 2013, the numbers of Black inmates grew by nearly 90% during that same period.[35] Rates of over-incarceration and overrepresentation in the criminal justice system are even worse for Black women (which is also the case with Indigenous women).[36] As the reports and statistics show, the crisis facing Black offenders is not new. It is getting worse and requires urgent attention.[37] Second, and as the submissions of other intervener groups demonstrate, Black Canadians face bias and discrimination at all levels of the Canadian criminal justice system "from arrest to incarceration."[38] As Code J. noted in *Nur*, "it is not difficult to establish that anti-black discrimination" is the root cause of the over-incarceration and overrepresentation of Black offenders.[39] Within the corrections system, Black offenders face systemic discrimination,

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[33] Ivan Zinger. *44th Annual Report: 2016-2017* (Office of the Correctional Investigator: June 2017).
[34] *Jackson*, *supra* (Ont. S.C.), at paras. 40-41.
[35] *Ibid.*, at para. 43, citing: The Correctional Investigator of Canada. *Annual Reports of the Office of the Correctional Investigator (2012-2013)*, at p. 3.
[36] *Ibid.*, at para. 42.
[37] *Ibid.*, at para. 2.
[38] CERD Report, at p. 4. See also, for example: Stephen Lewis. *Stephen Lewis Report on Race Relations in Ontario* (Ontario Advisor on Race Relations, 1992); Ontario Human Rights Commission. *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Government of Ontario: 2018) [*OHRC Report*], at pp. 3-5.
[39] *R v Nur*, 2011 ONSC 4874, at para. 79, rev'd on other grounds, 2013 ONCA 677.

including being more likely to be placed in maximum security institutions and segregation.[40] The Ontario Human Rights Commission has found that anti-Black racism plays a role in the use of police force, and is linked to disproportionate rates of police stops and arrests.[41] Outside the criminal justice system, anti-Black racism has been linked to the disproportionate rate of Black children in the child welfare system, higher rates of discipline for Black children in the education system, as well as higher rates of unemployment and underemployment for Black Ontarians.[42]

26. Third, like Indigenous peoples, Black Canadians' experiences of persistent over-incarceration and systemic intergenerational discrimination, including in the correctional system, indicate that traditional sentencing principles of deterrence and denunciation may not be effective or appropriate, and may result in unjust sentencing outcomes, causing undue harm to Black offenders and their communities.[43] Like Indigenous peoples, Black Canadians also have a culturally-specific relationship with restorative justice principles,[44] which may make deterrence and denunciation less relevant for Black offenders.

27. Requiring a casual link between offence conduct and systemic factors will undermine the purposes of s. 718.2(e). A causal link requirement will not address the over-incarceration of Black offenders or anti-Black racism in the criminal justice system. Nor will it promote restorative justice principles. To the contrary, a causal link requirement is inconsistent with

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[40] *Jackson*, *supra* (Ont. S.C.), at paras 49-54.
[41] *OHRC Report*, at pp. 26-27, and 30-31.
[42] Government of Ontario. *Anti-Black Racism Strategy* (Province of Ontario: December 2017).
[43] *Gladue*, *supra* (S.C.C.), at paras 57 – 65, 68, 70, and 74.
[44] *Jackson*, *supra* (Ont. S.C.), at para. 114, fn 14 (noting evidence of restorative justice practices in Black communities in Canada); Anthony Morgan. "An Africentric principle could right some wrongs," (Policy Options: April 2019); Michelle Y. Williams. "African Nova Scotian Restorative Justice: A Change Has Gotta Come," (2013) 36:2 Dalhousie LJ 420; Nova Scotia Home for Colored Children Restorative Inquiry. *Reflection and Action Task Group: 2nd Report to the Legislature* (Province of Nova Scotia: April 2019), (applying the "Sankofa" principles of restorative justice).

substantive equality because it will create an artificial barrier to properly addressing these goals through the sentencing process.[45]

D. THE PROPOSED FRAMEWORK: HOW TO APPLY SYSTEMIC FACTORS IN SENTENCING

28. The Asper Centre submits that Black offenders will not attain equal or meaningful access to Parliament's remedial sentencing regime if the sentencing framework set by this Court departs from the framework that the Supreme Court established in *Gladue* and *Ipeelee*. The *Gladue*/*Ipeelee* framework assists this Court because it is designed to be accessible to historically marginalized and disadvantaged offenders, and draws upon substantive equality to understand the impact of systemic factors on an offender's moral blameworthiness.

29. To that end, we submit that a sentencing framework that reflects substantive equality requires that: (1) judges must always turn their minds to systemic factors even in cases in which deterrence and denunciation are typically prioritized; (2) there should be no evidentiary onus on an offender to demonstrate a causal link between their offence conduct and the systemic factors that may have affected them; (3) judges should request the completion of a *Morris* style report if they believe such a report will assist in considering the weight to be given to systemic factors; and (4) in fashioning a fit and proportionate sentence, judges ought to maximize the principle of restraint and restorative justice and apply all the purposes and principles of sentencing with the reality of anti-Black systemic racism and the need for substantive equality in mind.

(i) Judges Must Always Turn Their Minds to Systemic Factors

30. In sentencing a Black offender, the court must always consider the question of whether systemic factors "shed light" on the offender's personal circumstances and how those

[45] *Ipeelee*, *supra* (S.C.C.), at paras. 81-83.

circumstances reflect on the offender's moral blameworthiness.[46] Given the "insidiously stealthy, subtle and incalculable impact of racial discrimination,"[47] systemic factors must be presumed to have had *some* impact on the offender, and therefore the sentencing judge must give attention to and address these systemic factors.[48] Depending on the facts of any given case, it may be that those factors are entitled to more or less weight, but it is an error of principle not to consider them.[49] As with *Gladue*, trial judges have a duty to consider these background factors, and, where appropriate, take judicial notice of them.[50]

31. The sentencing judge must also consider how those systemic factors inform the relevant sentencing goals in a particular case.[51] The Crown suggests that systemic and background factors take a backseat where denunciation and deterrence are relevant factors. While courts have acknowledged that deterrence and denunciation ought to play a significant role with respect to certain types of offences, the Supreme Court of Canada in *Ipeelee* made clear that this general rule does not apply in the *Gladue* context. Indeed, in both *Ipeelee* and the companion case of *Ladue*, the Supreme Court held that the sentencing courts had erred by giving insufficient weight to the systemic background factors.[52] The trial courts in both cases had given little weight to *Gladue* factors because the offences at issue were those where the principles of deterrence, denunciation and protection of the public were "paramount".[53] The Supreme Court held that this approach was an error in principle. The *Gladue* principles *always* apply — even in serious

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[46] *Ibid.*, at para. 73.
[47] *R v Williams*, 2018 ONSC 5409, at para. 45.
[48] *Collins*, *supra* (Ont. C.A.), at para. 33.
[49] *Ibid.*
[50] *Gladue*, *supra* (S.C.C.), at paras. 34, 83, and 93.
[51] *Ipeelee*, *supra* (S.C.C.), at para. 73.
[52] *Ibid.*, at paras. 88-97.
[53] *Ibid.*, at para. 88.

cases.[54] As in the *Gladue* context, judges sentencing Black offenders ought not subordinate systemic factors to denunciation and deterrence. Substantive equality recognizes that an offender who has suffered through systemic and overt discrimination, dislocation or poverty is a poor canvas on which to advance the utilitarian goals set out in s. 718 of the *Criminal Code*.

(ii) A Causal Link Requirement Is Not Required

32. Judges have a duty to consider an offender's background to determine the extent to which systemic factors ought to weigh in the determination of a fit and proportionate sentence. The offender may marshal evidence setting out their background and the systemic factors that may have affected them, but the offender should not be required to draw a causal link between their offence conduct and the systemic factors.

33. As noted above, the causal link requirement is inconsistent with substantive equality and misapprehends the insidious nature of systemic discrimination. Requiring the offender to show such a link places an impossible burden on the offender and is inconsistent with the remedial purpose of Part XXIII of the *Criminal Code* and the principle of substantive equality.

(iii) The Judge's Role in Obtaining Relevant Evidence

34. Where the sentencing court suspects that counsel has failed to marshal the relevant evidence, the court should request the completion of a *Morris* style report (and direct the Crown to pay for it) if they believe such a report will assist in considering the weight to be given to systemic factors. It would be inconsistent with substantive equality if those factors that contributed to bringing the offender before the court (such as lack of resources) also prevented the offender from marshalling the evidence necessary to determine a fit sentence.

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[54] *Ibid.*, at para. 87.

(iv) Applying the Framework

35. The overarching goal is to determine the extent to which systemic factors bear on the moral blameworthiness of the offender and to apply all sentencing goals in a manner that advances substantive equality. As this Court has held, "[w]hen inquiring into 'moral blameworthiness', courts must ensure they do not inadvertently reintroduce the same evidentiary difficulties that *Ipeelee* sought to remove."[55]

36. Canadian courts have shown considerable flexibility in their understanding of moral blameworthiness. It is not limited to factors that might affect the *mens rea* for the particular offence. Age, diminished capacity, and immigration status function as mitigating factors even without causal connection to the offence conduct. A similarly flexible approach ought to be taken here. As the Saskatchewan Court of Appeal has noted, sentencing principles require that we consider the similarity of offenders (the parity principle) but also the ways in which those offenders' circumstances might differ.[56] Those differences might commend a different sentence or a sentence other than jail.[57]

37. To that end, a sentencing court ought to ask the following questions when sentencing a Black or racialized offender:

i. Do systemic factors shed light on this individual's life circumstances?[58] In addressing this question, courts must pay careful attention to the complex harms of colonization, displacement, systemic discrimination and poverty and the insidious ways in which those factors affect people.[59]

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[55] *F.H.L.*, *supra* (Ont. C.A.), at para. 46.
[56] *R v Whitehead*, 2016 SKCA 165, 344 C.C.C (3d) 1, at para. 32.
[57] *Ibid.*
[58] See e.g., *R v Bourdon*, 2018 ONSC 3431, at para. 551.
[59] See *F.H.L.*, *supra* (Ont. C.A.), at para. 46.

ii. In light of those systemic factors, which sentencing objectives should be prioritized in the offender's case?[60]

38. In answering the second question, the court should ask the following:

i. In light of the systemic factors, is it appropriate to give rehabilitation greater weight than it might have otherwise been given?

ii. Would restorative justice be advanced by giving the offender a non-custodial or rehabilitative sentence?

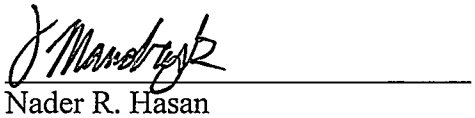
iii. In light of the systemic factors, is this an appropriate case in which to attempt to accomplish the goals of denunciation and deterrence?

39. Such a framework would help realize the aspirations of s. 718.2(e) and ensure that the sentencing process remains alive to the overarching value of substantive equality.

PART IV – COSTS AND ORDER REQUESTED

40. The Asper Centre does not seek costs and asks that none be awarded against it. The Asper Centre does not seek any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2019.

For 

Nader R. Hasan
Geetha Philipupillai
Counsel to the Intervener,
David Asper Centre for Constitutional Rights

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[60] *Ibid.*, at para. 40.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1. *R v Hamilton*, 72 O.R. (3d) 1, 2004 CanLII 5549 (Ont. C.A.)
2. *R v Poucette*, 1999 ABCA 305, 250 A.R 55
3. *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433
4. *R v F.H.L.*, 2018 ONCA 83, 360 C.C.C (3d) 189
5. *R v Collins*, 2011 ONCA 182, 104 O.R. (3d) 241
6. *R v Kreko*, 2016 ONCA 367, 131 O.R. (3d) 685
7. *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396
8. *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61
9. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624
10. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548
11. *R v Beaulac*, [1999] 1 SCR 768
12. *R v Barton*, 2019 SCC 33
13. *Hills v Canada (Attorney General)*, [1988] 1 SCR 513
14. *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573
15. *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110
16. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038
17. *Hill v Church of Scientology*, [1995] 2 SCR 1130
18. *United States v Leonard*, 2012 ONCA 622, 112 O.R. (3d) 496
19. *R v Gladue*, [1999] 1 SCR 688
20. *R v Jackson*, 2018 ONSC 2527
21. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143
22. *Egan v Canada*, [1995] 2 SCR 513

23. *R v Nur*, 2011 ONSC 4874

24. *R v Williams*, 2018 ONSC 5409

25. *R v Whitehead*, 2016 SKCA 165, 344 C.C.C (3d) 1

26. *R v Bourdon*, 2018 ONSC 3431

Secondary Sources

27. United Nations Committee on the Elimination of Racial Discrimination. *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/21-23 (United Nations: September 2017).

28. Rosemary Cairns Way. "Incorporating Equality into Substantive Criminal Law: Inevitable or Impossible?" (2005) 4:2 *JL & Equality* 203.

29. Ivan Zinger. *44th Annual Report: 2016-2017* (Office of the Correctional Investigator: June 2017).

30. Stephen Lewis. *Stephen Lewis Report on Race Relations in Ontario* (Ontario Advisor on Race Relations: 1992).

31. Ontario Human Rights Commission. *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Government of Ontario: 2018).

32. Government of Ontario. *Anti-Black Racism Strategy* (Province of Ontario: December 2017).

33. Nova Scotia Home for Colored Children Restorative Inquiry. *Reflection and Action Task Group: 2nd Report to the Legislature* (Province of Nova Scotia: April 2019)

34. Anthony Morgan. "An Africentric principle could right some wrongs," (Policy Options: April 2019).

35. Michelle Y. Williams. "African Nova Scotian Restorative Justice: A Change Has Gotta Come," (2013) 36:2 Dalhousie LJ 420.

SCHEDULE "B"
RELEVANT PROVISIONS OF STATUTES, REGULATIONS AND BY-LAWS

Criminal Code, RSC 1985, c C-46.

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

…

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence, or

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Court File No. C65766

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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 ND COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, BLACK LEGAL ACTION CENTRE, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, URBAN ALLIANCE ON RACE RELATIONS AND CANADIAN ASSOCIATION OF BLACK LAWYERS

Interveners

FACTUM OF THE INTERVENER THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

STOCKWOODS LLP
Toronto-Dominion Centre. TD North Tower,
Box 140, 77 King Street West, Suite 4130
Toronto, Ontario M5K 1H1

Nader R Hasan LS#: 54693W
Tel: 416-593-1668 / Fax: 416-593-9345
naderh@stockwoods.ca

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, Ontario M5G 2C2

Geetha Philipupillai LS#: 74741S
Tel: 416-979-4252 / Fax: 416-591-7333
gphilipupillai@goldblattpartners.com

Counsel for the Intervener The David Asper Centre for Constitutional Rights