

**Confronting Race in the Criminal  
Justice System: The Role of Experts  
and Academics in Sentencing –  
R.v.X and the Advent of  
Cultural Assessments**

March 27 , 2017

Robert S. Wright, MSW, RSW

# Who is Robert Wright?

- RSW Private Practitioner - Direct Practice and Forensics
- Served two terms on NS's Advisory Committee on Provincial Judicial Appointments
- Served several years on NSBS Racial Equity Committee



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# The Case – R. v. X.

April 2013. X, a 16-year-old boy, shot Y, his 15-year-old cousin on the court at their local rec centre. The bullet perforated Y's bowel and chipped his spine. Amid the screaming, X ran away.



# The Prosecution – R. v. X.

Prosecutor previously tried a youth who received an adult sentence. Three Psych reports found X to be a sophisticated criminal.

Prosecutor sought life sentence.



# The Defence – R. v. X.

Defence argued that “Section 34” assessments were incomplete.

Didn’t factor in what is known about race and justice.

Commissioned the Cultural Assessment.



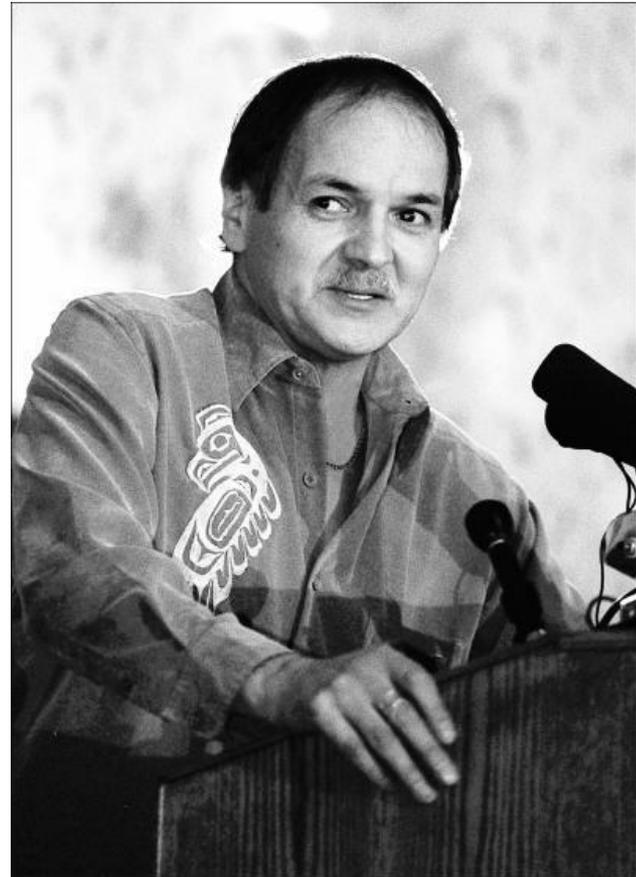
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NOVA SCOTIA

# The “Race” Expert

- Use of experts has long history
- Opinion evidence assists court by drawing conclusions and inferences from complex evidence that would be difficult for the lay person to understand
- Test is low – more knowledge than members of general public; acquired through education, practical training, independent study, lengthy observation, practical experience
- Expert evidence must be:
  - Provided by qualified individual
  - Considered reliable
  - Offered by someone with opportunity to observe current matter

# Context for CA: Racism in Criminal Justice System - 1989

- Marshall Inquiry (Royal Commission) established clearly - racism and discrimination exist in the criminal justice system
- Makes 82 recommendations aimed at reforming systems



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# Context for CA: OCI 2013 report

- Summer 2011 Canadian Human Rights Commission discussed mental health needs of African Canadians in federal corrections
- OCI studies the matter and highlights Black Inmate Experience in its 2013 report

## **A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries**

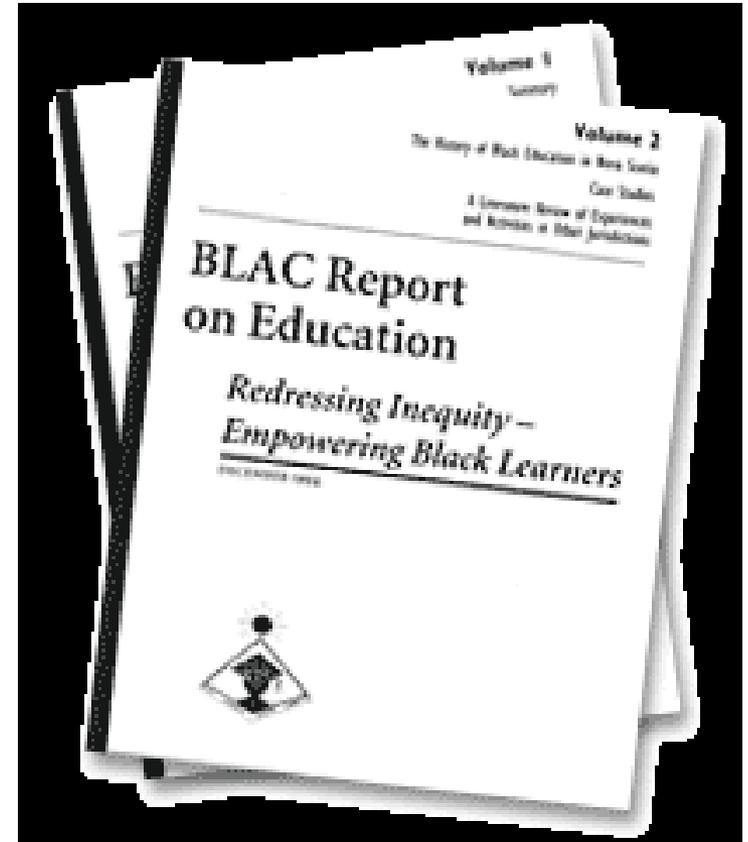
In the 2011-12 Annual Report, the Office committed to a review of the experiences and outcomes of Black inmates in federal custody. A case study was completed over a 4-month period (November 2012 – February 2013) which included a literature review, data analysis and qualitative interviews with Black Inmate Committees, Black inmates, CSC personnel, Audmax (an organization currently on contract with CSC to provide ethno-cultural services in the Ontario region) and community volunteers. Site visits were also conducted in institutions in the Ontario, Quebec and Atlantic region, recognizing that the majority of federally sentenced Black inmates (86%) are incarcerated in these regions.

The Chair of the Black Inmate Committee at each institution was contacted informing them of the case study and requesting their participation and assistance in consulting with members of

the Committee to identify issues to bring forward as part of the case study. Notices were also posted on all ranges informing all Black inmates of the study and the opportunity to voluntarily participate. The Chair of the Black Inmate Committee was interviewed at each institution. Voluntary interviews were also conducted with interested Black inmates in one of three ways: individually, in small groups (2-3 participants) or in larger focus groups (15-20 participants). In total, 73 Black inmates (30 women and 43 men), were interviewed. Interviews were also conducted with 24 CSC personnel representing a variety of positions (e.g. Wardens, Correctional Officers, Program Managers), 2 community volunteers and Audmax. In addition, the OCI contracted with the Afrikan Canadian Prisoner Advocacy Coalition (ACPAC) to provide a literature review, expertise and analysis of Black Canadians in conflict with the law<sup>7</sup>.

# Context for CA: Racism in Education - 1994

- Explores the history of ANS experience in Education
- Establishes that systemic racism persists in education
- Links the “deplorable” socio-economic conditions in Nova Scotia’s Black communities to this history.



# Context for CA: Racism in Mental Health Service Delivery

- 2009 Mental Health Commission of Canada Task Group on Diversity Publishes paper “Issues and Options”
- 2012 Nova Scotia releases “Together We Can” Mental Health and Addiction Strategy: Acknowledges poor service to ANS and other cultural groups



## The Diversity Task Group Report:

Issues and Options for Improving Mental Health Services for Immigrant, Refugee, Ethno-cultural and Racialized Groups – A Summary

# Context for CA: DSM-V CFI

Figure. Flow of Cultural Formulation Interview domains for cultural assessment



- CFI, developed over decades, legitimizes the idea of cultural issues as a substantive concern in assessment and provides a logical framework for cultural formulation

# Context for CA: Sentencing Principles

- “718.2 A court that imposes a sentence shall also take into consideration the following principles: (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.”
- This section was amended to specifically address Aboriginal over-representation within the criminal justice system c.1996. Gladue Sentencing Principles, refined in Ipeelee, have emerged. Well utilized in Nova Scotia.

# Culture Assessment Conceived – Gladue

- The Gladue decision and Gladue reports come from 718.2(e), sometimes referred to as “aboriginal sentencing guidelines”. The reports were designed to provide the court with a documentation of the “circumstances” to be considered.
- Given the similar overrepresentation of African Canadians under correctional supervision, and that 718.2(e) applied to **all** offenders, it was left then to simply construct a format for presenting the “circumstances”.

# Culture Assessment Constructed – Sentencing Principles

- Built on legacy of Gladue, Cultural Assessments involve 4 levels of consideration:
  - What is known about African Canadian experience generally and as it relates to crime and justice;
  - How does the individual's experience with culture and crime play out;
  - How does this knowledge inform the services and resources that could facilitate rehabilitation and reintegration for this offender?
  - May also comment on or contextualize other reports

# R.v.X. Assessment and Examination

- Commissioned by Nova Scotia Legal Aid lawyer, Christa Thompson
- Completed after review of documents, interview and collaterals
- Report submitted
- One and a half day examination for qualification as expert
- Another day and a half of testifying
- The Section 34 Assessments
- Criminally sophisticated or cultural mask
- Criminally instrumental or social violence
- Premeditated or impetuous

# The Judgement – R. v. X.

[198]. . . . I have asked myself what the evidence of Robert Wright contributes . . . ? I find it raises significant questions about the assessment of “X” as a criminally-entrenched, sophisticated youth. It provides a more textured, multi-dimensional framework for understanding “X”, his background and his behaviours. . . . Mr. Wright’s evidence gives me a lens through which to view “X” in determining this application.

## Boy gets 3 years in custody for 2013 shooting

### THE CHRONICLE HERALD

newsroom@herald.ca

@chronicleherald

A 17-year-old boy has been given a three-year sentence in a provincial youth facility for the attempted murder of another teen outside the North Preston Community Centre.

Halifax youth court Judge Anne Derrick sentenced the North Preston teenager, whose identity is protected, to the maximum penalty allowed for a young offender, rejecting the Crown’s application for an adult sentence.

“I find that when (the offender) shot (the victim) he was not a hardened, criminally sophisticated teenager who had the makings of an effective mercenary,” Derrick said Friday. “He was a vulnerable young person with a reduced capacity for moral judgment.”

and their grandfathers are brothers. They had known each other since they were very young, but their relationship began deteriorating by elementary school and their arguments and fights began escalating.

On April 15, 2013, at about 5 p.m., the victim was talking to a friend on the outdoor basketball court when the offender, then 16, came out of woods with his face partially covered and shot him with a high-powered hunting rifle.

The victim was shot in the stomach and seriously injured but has made a full recovery.

At the time of the shooting, the offender “was an immature, dependent 16-year-old caught up in the dysfunctional dynamics of his community,” Derrick said.

In deciding not to sentence him as an adult, Derrick weighed the sometimes conflicting evidence of different experts who assessed the accused, as well as evidence

# Culture Assessment Implemented – Cases to Date

- R.v. N.O.P. – Nov. 2013: Adult, submitted, not tested
- R.v.X. – July 2014: Youth, submitted, tested, useful
- R.v. E.S. – Nov. 2015: Youth, submitted, not tested
- R.v.K.G – Summer 2016: Adult, submitted, pending \* (Lana MacLean)
- R.v.J.W.A.M – October 2016: Adult, submitted, pending

# Cultural Assessment Emerging Content

- The Nature of an Impact of Race and Culture Assessment
- A Note about the Assessor
- Preparation of this Report
- African Nova Scotians and Crime
- Patterns of Crime in Criminally Affected African Nova Scotian Communities
- “X”: Youth from a Criminally Impacted African Nova Scotian Community
- N.P.: Drug Endangered and Criminally Impacted African Nova Scotian Child
- E.J.S: Criminally, Racially, and FASD Impacted Metis/African Nova Scotian Youth
- J.W.A.M.:A Brief Review of Personal History; The Effect of Adverse Childhood Experiences on Development; Trauma, Loss and Triggering; Disability
- A Racial Analysis of the Instant Crime
- A Note about Testing Results
- General Conclusions from other Assessments
- Additional Observations from Interviews
- Revisiting the Issues, Observations, and Recommendations
- Bibliography

# Culture Assessments – Emerging Themes

- Historical geographical isolation, systemic educational disadvantage, economic marginalisation
- Systemic, criminal recruitment and racialize criminal patterns
- Community displacement through relocation or gentrification
- Modern economic collapse & increased demand for education
- Particular patterns of violence and crime (incl. Black on Black\*)
- Community and individual experiences of racialized violence and trauma
- Tragic family of origin issues intensified by racial location
- V64.2 Target of Adverse Discrimination . . . Sometimes by police

# Cultural Assessments – Universally Acknowledged?

- Summer, 2016: Provincial Court made an order for a cultural assessment to be done and for the cost to be paid by the DoJ: Yarmouth in the matter of R. v. JWAM. Defense Counsel, Dave Curry, sought the order. Crown did not oppose, order was made by Judge Claudine MacDonald
- “Court orders PSR and under 721(4), Court requests as part of PSR that cultural assessment/report be done which shall examine role played by race in these offences and more generally in Mr. M’s involvement in criminal justice system. Cultural assessment is (or shall be ? ) analogous to Gladue report and shall be completed by individual(s) with specialized knowledge/training/experience in preparation of reports relating to systemic and background factors affecting the African Nova Scotian community.” © Robert S. Wright, MSW, RSW

# The Future of Cultural Assessments

- Need support for public and professional discussion, debate and scholarship beyond cost of completing assessments
- Cost limits access – need for a funding pool
- Assert need for clinical level analysis vs. compilation of “what is known”
- Certification of Qualified Practitioners
- Locating “expertise” within an African Nova Scotian Justice Infrastructure – need for an Institute
- Will CA ever be an artifact of the days before courts understood and accepted cultural context as necessary component of standard assessments and reports?

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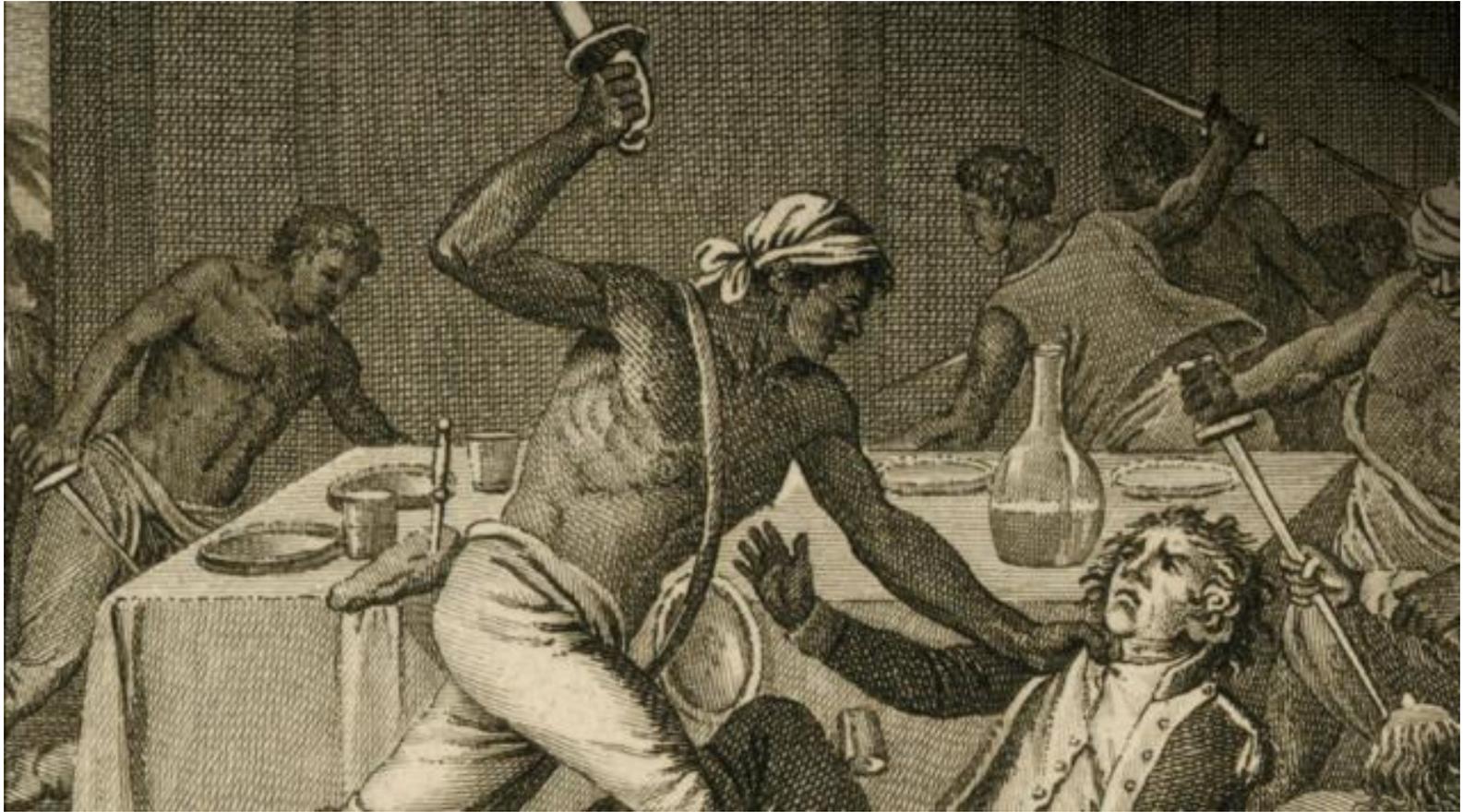
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# The Broader Conversation

- **Confronting Race and Racism in the Criminal Justice System, March 27, 2017. LAO and R.A.C.E - Toronto**
  - <https://www.eventbrite.ca/e/confronting-race-and-racism-in-the-criminal-justice-system-tickets-32271234130?aff=es2>
- **Race and Justice: R. v. X. and the Advent of Cultural Assessments, February, 9, 2017. Calliste Lecture, Acadia.**
- **Race and Justice: R. v. X. and the Advent of Cultural Assessments, October 25, 2016. Wellesly Institute and CAMH, Toronto.**

# Resistance



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# Resistance



# Legal Foundations

Dum Diversas – 1452

Papal Bull authorizing Portugal to  
conquer and enslave Saracens and  
North Africans

Barbados Slave Code – 1661

Codified British North American  
slave trade



# Hx of African Substance Patterns

- Precolonial, culturally bounded, ritualized use:
  - Fireside use by nomadic traders
  - Hospitality shown to honored guests
  - Religious and ritualistic use
  
- Qat, Cannabis, fermented beverages, and a range of hallucinagens

# European Trade Triangle



# Sugar, Rum and People

- African persons stolen, shipped to America to farm sugar (and other crops)
- Sugar (and other crops) sent to Europe to be distilled and refined
- Foreign intoxicants (distilled alcohols) and trade goods shipped to Africa, disrupt local economy and cultural patterns of substance use
- Alcohol used as a mollifying agent to pacify enslaved Africans in America
- Entrenchment of culturally disrupted patterns of substance use among African Americans

# Emancipation's Influence

- Classes of African Americans emerge
  - Rural poor – those who remain in subsistence farming
  - Urban poor – establish the foundations of inner city ghettos
  - Working class – largely urban, later form the foundation of the Black middle class

# Early American Drug Attitudes

- By the late 1800's, perhaps influenced by prevalent use of morphine during civil war . . .
- Drugs – morphine, cocaine, cannabis – gain increasing popularity

# Great Awakening – Temperance

- Religious revivals in late 1700's and mid 1800's create push back against growing drug prevalence
- Temperance movement created the foundation for the policy of prohibition
- Prohibition in US 1920-1933, in Canada 1918-1920's

# Illegality of Substances

- Prohibition pushed urban drug and alcohol use underground
- Many speak easies and gin joints were established in African American ghettos
- White ethnic criminal organizations systematically recruit African American persons to traffic in narcotics

# Cultural Paradox of Substance Use

- Growing prevalence of drug use and trafficking in White community detracts from social and economic engagement
- Despite devastating effects of drugs in ANS communities, substance trafficking provides significant economic input to historically, socially and economically excluded peoples

# R. v. X.

Well reviewed in  
Jon Tattrie's 4  
part piece:  
Colour of Justice

Judge Anne  
Derrick's  
decision is  
available in full  
online

The screenshot shows the CBC News website interface. At the top, there are navigation links for TV, RADIO, NEWS, SPORTS, MUSIC, ARTS, LOCAL, and MORE. A search bar is located on the right. Below the navigation is a banner for 'CBCnews Nova Scotia' featuring four people's faces. A 'LIVE' indicator for 'CBC Radio One' is also present. The main navigation menu includes Home, World, Canada, Politics, Business, Health, Entertainment, Technology & Science, and Video. The article title is 'IN DEPTH | Colour of Justice Part 1: The Crime' with a sub-headline 'They were coming after me. I'm protecting myself'. The author is Jon Tattrie, and the article was posted on March 09, 2015. A photograph shows a police car and a van at a crime scene with yellow tape. A sidebar on the right offers social media links and an advertisement for Porter's 10th birthday savings. A 'Listen' button is visible at the bottom left of the article content.

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## IN DEPTH | Colour of Justice Part 1: The Crime

'They were coming after me. I'm protecting myself'

By Jon Tattrie, CBC News Posted: Mar 09, 2015 6:11 AM AT | Last Updated: Mar 10, 2015 1:02 PM AT

This basketball court was the scene of an April 15, 2013, shooting in North Preston. (CBC)

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**Listen**

Race a factor in sentencing  
7:35

*Nova Scotia Judge Anne Derrick recently had to make a potentially groundbreaking decision. A young man (called X in court documents) stood convicted of the attempted murder of another teenager (called Y). Should the fact that X is African Nova Scotian be a mitigating factor when she decided to sentence X as an adult, or as a youth?*

# Context for CA: Formal recognition of racial indignity of police encounters



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RACE MATTERS

## Black men fleeing the police is reasonable, Massachusetts court rules



KENYA  
DOWNS

Digital  
reporter/producer.

BY KENYA DOWNS *September 22, 2016 at 1:10 PM EDT*

*A Massachusetts court rules that a history of racial bias in police searches makes it reasonable for black men to flee. Photo by Matthew Palmer/Getty Images*

When black men flee to avoid an encounter with police, they're not being suspicious. That's according to a [recent ruling](#) by the Massachusetts Supreme Judicial Court. As

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