Court File No. 25063

SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Nova Scotia)

B E T W E E N

R.D.S.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondents

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF) et al.

Intervener

- and -

AFRICAN CANADIAN LEGAL CLINIC et al.

Intervener

FACTUM OF THE INTERVENERS, WOMEN'S LEGAL EDUCATION AND ACTION FUND and NATIONAL ORGANIZATION OF IMMIGRANT AND VISIBLE MINORITY WOMEN OF CANADA

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I. FACTS

1. The Interveners, the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada, accept the history of proceedings as set out in the Appellant's factum at paragraphs 1 -10. For ease of reference, the Interveners will reproduce the Learned Trial Judge's remarks which are at issue in this case.

2. R.D.S., a Black male youth was charged with three counts under the *Criminal Code*: assault against a peace officer engaged in the execution of his duties; assault against the same peace officer with intent to prevent the arrest of N.R. (cousin of R.D.S.); and, unlawfully resisting the same peace officer. At the time of the alleged offence, R.D.S. was fifteen years old.

Case on Appeal, Tab 8, Trial Transcripts at 44 and 58

3. In determining whether the Crown had met its evidentiary burden, the Learned Trial Judge in her reasons for judgment stated:

> "...In my view, in accepting the evidence, and I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind and, therefore, based upon the evidentiary burden, which is squarely placed upon the Crown, that they must prove all of the elements of the offence beyond a reasonable doubt, I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th."

Case on Appeal, Tab 8, Trial Transcripts at 82

4. Following her finding that R.D.S. raised a reasonable doubt and in response to

submissions made by the Crown, the Learned Trial Judge commented further:

> "...The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled the Court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non white groups. That, to me, indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day."
>
> **Case on Appeal, Tab 8, Trial Transcripts at 82**

5. The Interveners accept the statement of facts, drawn from testimony on the trial record, as set out in the Appellant's factum at paragraphs 11 - 37. The Interveners will underscore certain additional testimony from the record.

6. The trial transcripts disclose that: when the accused, R.D.S., arrived on the scene, the other young person ("Nathaniel") who was detained by the officer had already been hand-cuffed; R.D.S. was placed in a "choke hold" after the police officer said "Shut up or you'll be under arrest too"; and, the police officer admitted that R.D.S. was still straddling a bicycle, with his feet on the ground, when he placed R.D.S and Nathaniel simultaneously in a "choke hold", described as a "neck restraint" by the officer.

> **Handcuffs: R.D.S. Cross-Examination, Case on Appeal, Tab 8, at 63, lines 13 - 15; at 67, lines 8 - 11.**
>
> **"Shut up...": R.D.S. Direct Examination, Case on Appeal, Tab 8, at 59, lines 13 - 20; at 66, line 20.**
>
> **Neck Restraint: Donald Stienburg, Direct Examination, Case on Appeal, Tab**

8, at 27, lines 20 - 24; at 36, lines 21 - 42; and D. Stienburg, Cross-Examination, at 55, lines 23 -25.

II. POINTS IN ISSUE

7. The Interveners characterize the issues in this case as follows:

(a) How does s. 15 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) require judicial notice of social context?

(b) What is the correct interpretation of the test for reasonable apprehension of bias?

10 (c) How does s. 15 of the *Charter* inform the test for reasonable apprehension of bias?

III. ARGUMENT

III.1 Social Context

8. The Interveners wish to draw this Honourable Court's attention to the following unstated but relevant social and historical facts in considering the two doctrines of judicial notice and 20 judicial bias in the instant case.

9. The Learned Trial Judge, Corrine Sparks, was appointed to the Family Court bench in March 1987, and at the time of trial in December 1994, she was the only Black judge in Nova Scotia.

Richard Devlin, "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.", (1995) 18 Dal. L. J. 408 at 410

10. The trial of R.D.S. was held five years after the Royal Commission on the Donald Marshall Jr. Prosecution (the "Marshall Inquiry") made numerous findings concerning institutional racism and recommendations for changes to the criminal justice system in Nova Scotia.

> ***Royal Commission of the Donald Marshall, Jr., Prosecution*, Commissioners' Report, Findings and Recommendations, 1989 ("*Marshall Inquiry Report*")**

11. In Nova Scotia, "Native People" and "Blacks" have expressed little faith in the justice system's ability to treat members of their communities fairly. The Marshall Inquiry report stated:

> At the moment, Blacks and Natives clearly do feel aggrieved by their treatment at all levels of the justice system: by Police, Crown prosecutors, defence lawyers, government officials and judges.....Not only does that system not reflect the needs of their people, Black and Native leaders told us, but it also does not even reflect the simple fact of the *existence* of their people.
>
> ***Marshall Inquiry Report, supra*, para 10, at 151**

12. In Nova Scotia, "Blacks" and "Whites" commonly believe that "Blacks" are discriminated against at all levels of the criminal justice system. As has been demonstrated by many inquiries, institutional racism is a fact of life in Nova Scotia and other parts of Canada.

> ***Marshall Inquiry Report, supra*, para 10, at 182**
>
> ***Report of the Commission on Equality in Employment* by Rosalie Abella (Ottawa: Queen's Printer, 1985)**
> **Appellant's Book of Authorities, vol. 1, tab 22**
>
> ***Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Ontario: Queen's Printer, 1995)**
> **Appellant's Book of Authorities, vol. 1, tab 23**

13. Anti-black racism, which is rooted in slavery, is a fundamental aspect of Canadian history. Racism in contemporary society is the source of prejudicial beliefs and practices against Black peoples in North America.

> **Barry Cahill, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 U.N.B.L.J. 73**
>
> **Elizabeth A. Gaynes, "The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause" (1993) 20 Fordham U.L.J. 621**

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14. Parliament and all provincial legislatures have recognized racial and other forms of discrimination and have passed anti-discrimination legislation aimed at providing redress. The common law also recognizes dominance of certain groups over others and the need to debunk myths that have operated to the detriment of certain groups in society. For example, in relation to wife assault, one common expression of gender dominance, this Honourable Court has stated:

> "Laws do not spring from a social vacuum....Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day."

20 ***R.* v. *Lavallee*, [1990] 1 S.C.R. 852, *per* Wilson J. at 872**

15. The Interveners submit that this Court's appreciation of the social context for interpreting judicial notice and judicial bias should include the following:

(1) the recognition of racism as a social reality

(2) an acknowledgment of the racial and gender dynamics of this case: the accused is a Black male youth; the police officer is a white man; the Learned Trial Judge is a native Nova Scotian Black woman and the only Black judge in that province at the time of trial; and the alleged offence took place in Halifax, Nova Scotia, where one of the most comprehensive and

public inquiries into the existence of racism in the criminal justice system has recently been undertaken.

III.2 Summary Of The Interveners' Position

16. In the instant case, the Interveners submit that this Court should defer to the Learned Trial Judge's having found a reasonable doubt about the guilt of the accused.

10 17. The Interveners urge this Honourable Court to require judges to take judicial notice of the social context in which a case arises in order to give effect to the constitutional guarantee of equality enshrined in s. 15 of the *Charter*.

18. The Interveners urge this Honourable Court to interpret the doctrines of judicial notice and judicial bias in a manner that is consistent with the *Charter*'s guarantee of equality.

19. The Interveners submit that the fact that a trial judge has taken notice of the social context in which a case arises does not in itself constitute a finding of reasonable apprehension of bias.

20

III.3 Section 15 of the Charter

20. In interpreting s. 15 of the *Charter*, this Honourable Court has stated:

> "[The s. 15 guarantee] is the broadest of all guarantees in the *Charter*. It applies to and supports all other rights guaranteed by the Charter."
>
> ***Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, *per* McIntyre J. at 185**

10

Furthermore, Wilson J., in *Andrews* stated at 154:

> "[Section] 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society".

21. The accused R.D.S. is Black and as such is a member of a historically disadvantaged group that is specifically accorded protection from racial discrimination in s. 15 of the *Charter* and is thus entitled to the equal protection and benefit of the law.

22. This Honourable Court has ruled that the *Charter* can be used as an interpretive aid in

20 statutory interpretation and the development of common law principles. The Interveners submit that the *Charter* applies to the common law doctrines of judicial notice and judicial bias.

> ***Hill* v. *The Church of Scientology*, [1995] 2 S.C.R. 1130, *per* Cory J. at 1166**
> **Appellant's Book of Authorities, vol. II, Tab 40**

23. To give effect to the guarantee of substantive equality enshrined in s. 15 of the *Charter*, judges must be aware of the particular social context of a given case before them and incorporate

that knowledge into their decision-making. This is particularly important when judges exercise their discretion to determine which party/witnesses are to be believed in whole or in part.

24. This Honourable Court has acknowleged that the law should reflect existential and experiential gender differences in constructing the "reasonable person" test against which to assess a woman's assertion of the defence of self-defence. The Interveners respectfully submit that it is also appropriate to acknowledge and be responsive to racialized and gendered differences and dominance so that members of racialized communities as well as women receive equal benefit and protection of the law.

10 ***Lavallee, supra*, para 14, *per* Wilson J. at 874**

Devlin, *supra*, para 9, at 419

25. The Interveners submit that to take notice of social context to assess witnesses' credibility would not in itself give rise to an apprehension of bias whereas to not do so, may deny an accused the benefit and protection of the law that directs courts to acquit if a reasonable doubt is raised by the accused.

26. The Interveners urge that proper notice of social context would encourage triers of fact
20 to debunk myths and condemn discriminatory practices which operate against the constitutionally protected interests of members of historically disadvantaged, equality seeking, groups.

27. The Interveners submit that Judges and lawyers, in Nova Scotia as elsewhere, have a special responsibility to ensure that racism does not permeate the justice system. The

Interveners submit that to achieve substantive equality, social context and relationships of dominance must be factored into decision-making at every level. To enable the judiciary to discharge this special responsibility, guidelines for provincial judicial appointments in Nova Scotia require, in part, that prospective judges have: (a) an awareness of and an interest in knowing more about the social problems that give rise to cases coming before the courts; (b) sensitivity to changes in social values relating to criminal and family matters; and (c) a capacity to exercise the larger policy role conferred upon the judiciary by the *Charter*.

> ***Provincial Judicial Appointments*** **(Approved by the Executive Council, Government of Nova Scotia), Sept. 14, 1995 at 3**

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28. The Interveners submit that a broader appreciation of social context, including vulnerability and the dynamics of dominance, should promote fairness in judges' exercise of their discretion as the judiciary diversifies and becomes more reflective of Canadian society.

III.4 Interveners' Arguments with respect to the Issues

III.4 (a) How does s.15 of the *Canadian Charter of Rights and Freedoms* (the *"Charter"*) require judicial notice of social context?

20

III.4 (a)(i) Judicial Notice

29. The doctrine of judicial notice has been described as follows:

> "Judicial notice is the acceptance by a court or judicial tribunal, in a civil or

> criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party."
>
> **John Sopinka et al., "Rules Dispensing With Or Facilitating Proof" in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 976**

10 29. In the instant case, the Interveners rely on the first branch of the above test that trial judges must take notice of notorious social facts which provide a context for their assessment of the credibility of witnesses. The Intervenors submit that notorious facts would include the social context outlined, *supra,* paragraphs 8 - 15.

31. The Interveners submit that the findings of the Marshall Inquiry concerning anti-black discrimination in the criminal justice system is well known locally and nationally and have been cited in the common law of Nova Scotia and Ontario:

> "The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report... A person would have to be stupid, complacent or
20 ignorant not to acknowledge its presence, not only individually, but also systematically and institutionally."
>
> ***Nova Scotia (Minister of Community Services)* v. *S.M.S. et al* (1992), 110 N.S.R. (2d) 91 at 108, Neidermayer J.F.C.**
> **Appellant's Book of Authorities, vol. 1, Tab 21**

> "Examination of racism as it impacts specifically on black persons suggests that they are prime victims of racial prejudice. In Nova Scotia, anti-black racism has
30 been described by both blacks and non-blacks as 'pervasive'."
>
> ***R.* v. *Parks* (1993), 84 C.C.C. (3d) 353 at 367**
> **Appellant's Book of Authorities, vol. 1, Tab 19**

32. This Honourable Court has ruled that trial judges can appropriately take notice of a non-

contentious historical fact (for example, the Holocaust) that provides a background to the evidence that is required to prove an offence, and that some facts are so notorious (for example, the existence of price and wage inflation) that evidentiary proof is unnecessary and trial judges may properly take notice of them, on their own motion.

***R.* v. *Zundel*, [1992] 2 S.C.R. 731**

> "It may be that the existence of exceptional circumstances is so notorious as to enable the court, on its own motion, to take judicial notice of them without reliance on extrinsic material to inform it."

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> ***Reference Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373, *per* Laskin C.J. at 423**

33. The Interveners submit that it is appropriate for judges, on their own motion, to take notice of the passage of anti-discrimination legislation by the Canadian Parliament and all provincial legislatures, and infer therefrom the widespread acknowledgment of the existence of racial and other forms of discrimination in Canadian society and its institutions.

34. The Interveners submit that the Learned Trial Judge had a duty to take notice of the

20 particular manifestations of racism in Nova Scotia and assess its relevance to the matters before her.

> "It is our duty as judges, to take judicial notice of facts which are known to intelligent persons generally."

> ***Ref. re Alberta Legislation*, [1938] S.C.R. 100 at 128**

35. The Interveners submit that in the discharge of her duty to notice facts known to intelligent persons, the Learned Trial Judge should be accorded deference in her notice of the

existence of systemic racism, a fact that is well known in the community where the instant case was tried. This approach would be consistent with the Ontario Court of Appeal's ruling that what constitutes common knowledge within a community is to be determined by reference to the locality where the issue is being tried and that trial judges should receive deference when they take notice of a fact that is well known locally, even where that notice relates to proof of an element of an offence rather than notice of background social reality.

_R._ v. _Potts_ (1982), 134 D.L.R. (3d) 227 at 236-37 (Ont. C.A.); lv to S.C.C. ref'd

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III.4 (a) (ii) The Role of Social Context in the Trial Judge's Decision

36. The Interveners urge this Honourable Court to adopt the following approach to the Learned Trial Judge's decision: that she had relied on social context to assess the impact on the Crown's case of the contradicted testimony before her, to wit, the testimony of R.D.S. that he was told to shut up or he would be arrested (which contradiction, in fact, the Crown chose not to resolve through reply evidence) and the officer's admission that he placed R.D.S. and another

20 young person simultaneously in a neck restraint, while R.D.S. straddled his bike.

37. The Learned Trial Judge took notice of the background historical fact concerning the nature of police interaction with Black male youths as a factor in her deliberations on the controverted testimonies of the police officer and the young R.D.S. The Interveners further submit that a failure to draw appropriate inferences from the testimony of R.D.S. that the officer told him "shut up or else ...", combined with the officer's testimony that he placed two young

males in a neck restraint simultaneously, would result in a de-contextualized decision-making exercise that necessarily deprives R.D.S. of equal benefit and protection accorded to him by s. 15 of the *Charter*. Absent social context to assess credibility of witnesses, the testimony of R.D.S. might seem preposterous and unworthy of credit.

38. Based on the trial record, the Interveners submit that the Learned Trial Judge's findings of reasonable doubt and probable overreaction by the police officer have a proper evidentiary base and that her comment on "prevalent attitude" is not essential to, nor does it displace these findings.

10

39. The Interveners submit that the Learned Trial Judge, in the exercise of her decision-making power, was required to take the following steps:

(1) draw on her awareness of the social reality of young Black males and their interaction with the criminal justice system;

(2) rely on her knowledge of the social context in which the alleged criminal offences took place to assess the credibility of the witnesses before her;

(3) consider duly the totality of evidence presented by the Crown and the defendant; and,

20

(4) determine which portions of the contradictory narratives had a more truthful ring.

The Learned Trial Judge's discharge of these duties that enabled her to conduct a fair assessment of the evidence before her cannot be said to constitute bias on her part.

40. The Interveners submit that the equality guarantees enshrined in s. 15 require that this Court direct triers of fact to articulate in their decisions all non-legal assumptions upon which

they base their judgments: whether they rely upon experiential knowledge, common experience or community awareness, or knowledge derived from extrinsic sources, in addition to the evidence presented in the case. This articulation would facilitate review by superior courts, guard against reliance on myths and prejudicial beliefs, and ensure that the inclusion in reasons for judgment of valid generalizations based upon well known social facts and observations is not construed as bias.

III.4 (b) What is the correct interpretation of the test for reasonable apprehension of bias?

41. The Interveners submit that the test for reasonable apprehension of bias itself is not in dispute in the instant case, but whether it was applied in a manner that is consistent with the equality guarantees contained in the *Charter*. The Interveners respectfully submit that the test was incorrectly applied by the Nova Scotia Court of Appeal as it did not attribute knowledge of social context to the construct of the "reasonable person."

III.4(b)(i) The Reasonable Apprehension Of Bias ("RAB") Test

42. The Interveners respectfully submit that an appellate court must, in determining whether a reasonable apprehension of bias exists on the part of a judicial officer, start with a presumption of judicial impartiality. The Interveners submit that the doctrine of the "presumption of regularity" requires that, except in the clearest of cases, appellate courts not interpret ambiguities

in a trial court's reasons as evidence of bias.

Devlin, *supra*, para 10, at 417

43. This Honourable Court has set out the following as the proper test to determine if a reasonable apprehension of bias exists:

> "The apprehension of bias must be a reasonable one, held by reasonable and right-minded people, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude'."
>
> ***Committee for Justice* v. *National Energy Board*, [1978] 1 S.C.R. 369 at 394 *per* de Grandpré J. (in dissent on the merits but whose reasoning on RAB was accepted by the majority of the Court)**
> **Appellant's Book of Authorities, vol. 1, Tab 10**

44. The RAB test is now understood to be an inquiry into whether the reasonable right-minded person, with all the information, would perceive that the person making the decision was not impartial as to the outcome.

> "The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience'."
>
> ***Committee for Justice*, *supra*, para 43 at 395**
> **Appellant's Book of Authorities, vol.1, Tab 10**

45. The RAB test enunciated in *Committee for Justice* requires that a court determine, on a case by case basis, what constitutes "all the information" and a "realistic and practical view" of the matter. The Interveners therefore submit that the correct application of the RAB test requires that the social context of each case be taken into account.

46. The Interveners further submit that an important, if often invisible, component of the RAB test is the construction of the "well informed right-minded person." It is submitted that, for the RAB test to be truly contextual and thus informed by Charter principles, it must attribute to this "person" both a recognition of pertinent social facts and an ability to draw appropriate inferences from those facts.

III.4(c) How does s. 15 of the *Charter* inform the application of the test for reasonable apprehension of bias?

10 47. The Interveners submit that the proper construction of the "well informed right-minded person" must necessarily be invested with an awareness both of existing legislative protection of the rights of members of disadvantaged groups, and of the constitutional commitment to equality enshrined in the Charter.

> **Christine Boyle, "The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203 at 215**

48. The Interveners submit that given the special role of judges to protect against, and to
20 condemn, conscious and unconscious racist practices within the criminal justice system, a well informed person who is guided by the equality guarantees of the Charter would not apprehend bias on the part of the Learned Trial Judge who, in the instant case, connected the evidence to background facts of police "overreaction" in their dealings with "non-whites."

49. The Interveners respectfully submit that to assess whether the Learned Trial Judge's

notice of the social reality of the relationship between the Black community and the police in Nova Scotia constitutes bias, this Court must decide whether this social reality is indeed common knowledge and therefore attributable to construction of a well informed right-minded person. The Interveners submit that a well informed right-minded person would not conclude, on the totality of the evidence before the trial court, that R.D.S.'s statement that he was told to shut up or he would be arrested is wholly incredible; nor conclude that the treatment of R.D.S. is standard police practice, unrelated to race.

50. The Interveners submit that to be misinformed about crucial aspects of the social reality that forms the context of a case is to be partial. Failure by a judge to disclose key assumptions on which he or she relies in exercising his or her judicial discretion means that any resultant partiality is covert. Covert partiality is inconsistent with the principles of fairness and justice. Indeed, when key assumptions are not included in the trial court's reasons for judgment, the requirement that justice not only be done but be seen to be done is unmet, and the ability of appellate courts to supervise trial courts is substantially undermined.

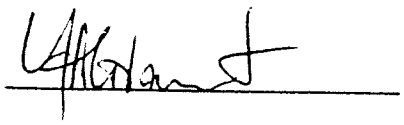
51. Finally, the Interveners submit that the proper administration of justice requires that the threshold proof to establish an apprehension of bias is not interpreted in a manner that effectively stifles and eviscerates the contributions of judges who are members of, or who take judicial notice of the social context of, minority and disadvantaged groups in society. This result may negate the constitutional guarantees offered to accused persons in s. 15 of the Charter.

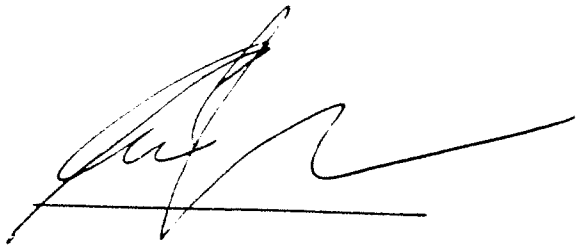
IV. RELIEF REQUESTED

52. The Interveners support the order for relief requested by the Appellants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 12th day of February, 1997.





10 **Yola Grant** **Carol Allen**

PART V - AUTHORITIES

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Court File No. 25063

R.D.S.

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

SUPREME COURT OF CANADA
On Appeal from the Court of Appeal of Nova Scotia

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