



**CONDITION CRITICAL:
ANTI-BLACK RACISM AND THE IMPERATIVE FOR ACTION**

**Report to the Committee on the Elimination of Racial Discrimination
70th Session, Geneva**

**Review of Canada's Seventeenth and Eighteenth Periodic Reports under the
International Convention on the Elimination of All Forms of Racial
Discrimination
20th and 21st February 2007**

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I. INTRODUCTION

The African Canadian Legal Clinic (ACLC) was established in 1994 to address anti-Black racism and other forms of systemic and institutional discrimination in Canadian society. The ACLC is a community based organization that provides legal services to African Canadians in Ontario and actively engages in law reform, advocacy and public legal education. The ACLC has been, and continues to be involved in groundbreaking cases involving anti-Black racism, human rights and the equality provisions of the *Canadian Charter of Rights and Freedoms*.

The consideration of Canada's seventeenth and eighteenth periodic reports under the *International Convention on the Elimination of All Forms of Racial Discrimination* (the *Convention*) during this Committee's 70th session presents an important opportunity to shine a light on the serious shortcoming in Canada's compliance with the its anti-racism obligations under the *Convention*.

Canada is considered one of the best countries in the world in which to live¹. However this reputation is marred by the grim reality of racism. For African Canadians, the experience of anti-Black racism is one of extreme marginalization and disadvantage; criminalization; overrepresentation in the criminal justice system; racial profiling in policing, security and education; disproportionate and extreme poverty; high levels of unemployment; under representation in institutions and organizations of influence and power; and restricted access to housing and health care.²

Canada has fallen far short in its approach and response to racism, in particular with respect to anti-Black racism. A fundamental flaw has been the reliance on multiculturalism as an anti-racism strategy.

Part II of this report will provide an overview of the historical context of anti-Black racism in Canada. Part III will discuss the failure of multiculturalism as an anti-racism strategy. Part IV will set out specific recommendations by this and other UN Human Rights bodies dealing with discrimination, which remain unimplemented by Canada. Part V will deal specifically with the following areas of concern:

- Racial Discrimination and Non-Citizens
- Effective Measures and the Need for Disaggregated Data Collection
- The Need for an Offence for Racist Acts of Violence

¹ See UNDP, *Human Development Report 2006: Beyond Scarcity: Power, Poverty and The Global Water Crisis* (New York: UNDP, 2006) at 283, where Canada was ranked as the 6th best place to live.

²Commission on Human Rights, *Report By Mr. Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance- Mission to Canada*, 2004, E/CN.4/2004/18/Add.2 at para. 72 (hereinafter Special Rapporteur).

- Racial Profiling of African Canadians
- Police Use of Force Against African Canadians
- The Right to Work
- The Right to Education: Streaming and Zero Tolerance
- The Right to Effective Remedies: Human Rights Protection and the Court Challenges Program

A summary of recommendations is found in Part VI.

II. ANTI-BLACK RACISM - HISTORICAL CONTEXT AND STEREOTYPING

Understanding the current context of anti-Black racism in Canada is linked to an understanding of its history. Slavery existed in Canada from the 16th century until it was formally abolished in 1834. Persons fleeing from slavery found themselves either re-enslaved or living a discounted version of freedom. After the abolition of slavery African Canadians had to contend with de-facto segregation in housing, schooling, employment and exclusion from public places such as theatres and restaurants. The Courts and the justice system re-enforced these racist practices and perpetuated the exclusion of African Canadians from participation in society, keeping them “in their place”: at the bottom of the socio-economic ladder in service to the dominant culture.³

This history and legacy was acknowledged by the UN Special Rapporteur on Racism upon his visit to Canada:

.... Canadian society is still affected by racism and racial discrimination. Because of its history, Canadian society, as in all the countries of North and South America, carries a heavy legacy of racial discrimination, which was the ideological prop of trans-Atlantic slavery and of the colonial system. The ideological aspect of this legacy has given rise to an intellectual mindset which, through education, literature, art and the different channels of thought and creativity, has profoundly and lastingly permeated the system of values, feelings, mentalities, perceptions and behaviours, and hence the country's culture. The sacrificial victims of this culture of discrimination since historical times have been the aboriginal peoples and the communities of African and Caribbean origin⁴.

³ Winks, R. *The Blacks In Canada: A History*, 2d (Montreal: McGill-Queen's Press, 1997); *Christie v. York Corporation* [1940] S.C.R. 139; *R. v. Desmond*, (1947) 20 M.P.R. 297 (N.S.S.C.); *Hill v. Camden and Zone*, 11 U.C.B.Q. 573 (Ont. Q.B.).

⁴ *Special Rapporteur, supra* at para. 68.

Anti-Black racism is rooted in the maintenance and perpetuation of stereotypes directed against African Canadians. These stereotypes include those deriving from the belief that the Black male was a savage, of limited intellectual capacity who was overly aggressive and prone to anti-social behaviour. These stereotypes justified slavery, over-policing, violent policing, and failure to protect victimized Black communities.⁵ More recently, these stereotypes have fed images of the Black man in the mass media as the epitome of criminality.⁶

III. THE FAILURE OF MULTICULTURALISM AS AN ANTI-RACISM STRATEGY

Racism is entrenched at all levels of Canadian society.⁷ It operates and is experienced individually, systemically and culturally. Racism, including anti-Black racism, strives to preserve systems of power and dominance based on the false perception of white superiority. Anti-racism, therefore, must employ methods and strategies to break down and remove these systems. Multiculturalism is premised on the equal recognition and acceptance of the cultural identities of citizens⁸. Seen in this way, Multiculturalism and anti-racism are related, but fundamentally different concepts. Some have noted that:

Although it [multiculturalism] can and should include anti-racism, there has been an increasing recognition of the limitations of this concept because it does not explicitly acknowledge the critical role that racism plays in preventing the achievement of the vision, and also because it may promote a static and limited notion of culture as fragmented and confined to ethnicity.⁹

Merely celebrating the fact that many cultures co-exist within Canada does not address or eliminate the structural power imbalances and inequities in society.

⁵ Hutchison, E. *Assassination of The Black Male Image* (New York: Touchstone, 1997); Thornhill, E. *Focus on Racism: Legal Perspectives From a Black Experience* (Ottawa: National Judicial Institute, March 1995) at 81, 83, 86, 87.

Henry, F. & Tator, C. *Racist Discourse in Canada's English Print Media* (Toronto: The Canadian Race Relations Foundation, 2000) (hereinafter Racist Discourse); Hawkins, H & Thomas, R. "White Policing of Black Populations" in Cashmore, E, Ed., *Out of Order? Policing Black Populations* (London: Routledge, 1991).

⁶ Tator, Henry, *Racist Discourse*, *supra*.

⁷ Henry, Frances; Tator, Carol, Et Al. *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt Brace) at p. 14, 15, 44, 45 (hereinafter Colour of Democracy).

⁸ See *Heritage Canada: What is Multiculturalism* http://www.pch.gc.ca/progs/multi/what-multi_e.cfm

⁹ The Canadian Race Relations Foundation's definition of "Multiculturalism" can be found in its online glossary, www.crr.ca.

Canada's strategy to fight racism, *National Action Plan against Racism*, is based on the policy of multiculturalism,¹⁰ rather than on a systemic strategy focussed and grounded on an understanding of what is needed to combat racism. It does not propose a concrete and cohesive national strategy and plan to address the institutional power structures of systemic racism.

Multiculturalism Assists in Denial of Racism

Multiculturalism obscures the insidious nature of racism and perpetuates the denial of racism as a problem in Canada. The UN Special Rapporteur on Racism noted the reluctance of Canadian federal officials to admit the reality of racism, who at the same time were able to present policies and measures taken by the government.¹¹ Multiculturalism is an easier word to say than racism. It has a sanitizing effect and allows government officials to avoid dealing with the real but "unsavoury" issue of racism.¹²

This has a detrimental impact on racialized communities and continues to be a barrier to progress. Many Canadians believe that racial discrimination does not seriously affect minorities and when racism does occur it is on society's fringes far from the mainstream.¹³ The denial of racism through multiculturalism has helped foster the belief that the current policies are more than enough to maintain an environment that is favourable to minorities and immigrants.¹⁴ This is in sharp contrast to the experiences of racialized Canadians who live with racism daily in the face of Canada's multiculturalism policy.

In addition, Canada's references to all racialized persons in legislation and policies as one group of "visible minorities"¹⁵ prevents an accurate assessment of the problems endemic to each community.

Stephen Lewis, currently the United Nations Envoy for HIV/AIDS in Africa, identified these problems with multiculturalism:

First, what we are dealing with, at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black

¹⁰ See *Canada's National Action Plan Against Racism: A Canada for All* at p. 2, 3.

¹¹ *Special Rapporteur, supra* at para. 71, 72.

¹² *The Colour of Democracy, supra* at 42-43. It also allows the government to avoid the risk of offending the wider community by implementing anti-racism programs that address the concerns of racialized Canadians.

¹³ *Racial Inequality, Social Cohesion and Policy Issues in Canada* (Jeffrey G. Reitz and Rupa Banerjee) (2007) at 11.

¹⁴ *Ibid.*

¹⁵ See for example *Employment Equity Act* S.C. 1995, C. 44

community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. **Just as the soothing balm of ‘multiculturalism’ cannot mask racism, so racism cannot mask its primary target. It is important, I believe, to acknowledge not only that racism is pervasive, but that at different times in different places, it violates certain minority communities more than others.**¹⁶ [emphasis added]

IV. NON-DISCRIMINATION OBLIGATIONS - CANADA’S FAILURE TO COMPLY

International human rights instruments form the backbone of our domestic human rights obligations. Compliance with these principles and values must inform governmental and administrative decision making.¹⁷

This however does not represent the reality in Canada with respect to its international obligations to eliminate racism. A litany of recommendations made by several UN human rights bodies, specifically in relation to the right to non-discrimination, remain unimplemented by Canada:

i) World Conference Against Racism (WCAR), 2001

In 2004, Canada’s Minister of Foreign Affairs addressed the United Nations Commission on Human Rights:

Both domestically and internationally, the fight against racism is a top priority for Canada. It should also be a top priority of states to draw on many of the strategies and approaches outlined in the Program of Action of the World Conference Against Racism.¹⁸

¹⁶ Stephen Lewis, *Report on Racism in Ontario to the Premier*, (1992) (hereinafter Lewis Report).

¹⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

¹⁸ Foreign Affairs and International Trade Canada. *Notes For An Address By The Honourable Bill Graham, Minister of Foreign Affairs, To The 60th Session of The Commission on Human Rights*. Geneva, Switzerland. March 16, 2004.

However, Canada's actions at the UN since WCAR belie this stated commitment. Canada has consistently voted against, or abstained from General Assembly and Human Rights Commission resolutions regarding racism and the implementation of the Durban Declaration and Programme of Action.¹⁹

ii) Committee on the Elimination of Racial Discrimination (CERD), 2002

At its 61st session, this Committee issued several concluding observations relevant to the situation of African Canadians including:

- The high rate of incarceration of, violence against, and deaths in custody of African Canadians and other racialized groups. The Committee recommended that the next periodic report include information on the efficacy and results of programmes or inquiries into this issue.²⁰
- Racial discrimination in employment. The Committee requested disaggregated data on measures taken to resolve this issue in the public and private sector.²¹
- Prejudice in the media against African Canadians and other racialized groups. There was a request for information on the implementation of section 718.2 of the *Criminal Code*.²²
- The discriminatory effect of immigration policies including the disproportionate rate that foreigners of African descent are removed from Canada. The Committee recommended greater attention to the possible discriminatory effect of immigration policies.²³
- The poor resolution rate of race related complaints within the human rights tribunal system; a recommendation was made that the human rights complaint system be brought in line with the standards set out article 6 of the *Convention*.²⁴

¹⁹ Canada abstained from voting on the following resolutions before the General Assembly; *Comprehensive implementation of and follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/RES/56/266. *The fight against racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, A/RES/57/195. *Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, A/RES/59/177, A/RES/60/144, and A/RES/61/149; [Canada voted against this resolution at the 58th session (A/RES/58/160)]. *Inadmissibility of certain practices that contribute to fuelling contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, A/RES/60/143 and A/RES/61/147. Canada voted against the following resolutions before the Commission on Human Rights; *Racism, racial discrimination, xenophobia and related intolerance*, E/CN.4/2002/L.12. *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, E/CN.4/2003/L.4.

²⁰ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada*. 01/11/2002, A/57/18 at para. 333 (hereinafter CERD 2002).

²¹ CERD 2002, *supra* at para. 334.

²² CERD 2002, *supra* at para.335.

²³ CERD 2002, *supra* at paras.336, 337.

²⁴ CERD 2002, *supra* at para. 339.

- The Committee recommended that Canada take into account the relevant parts of the Durban Declaration and Programme of Action in implementing the *Convention*.²⁵

iii) Special Rapporteur on Racism - Mission to Canada 2003

The Special Rapporteur noted serious concerns about Canada's ability to address systemic racism. His recommendations included:

- An acknowledgement at the highest levels of government that racism exists, despite the efforts accomplished.²⁶
- An overall assessment of the situation of African Canadians in the areas of employment, habitat, health and education.²⁷
- The implementation of a national programme against racism, with a detailed roadmap provided by the Special Rapporteur.²⁸
- Immediate review of multiculturalism training and diversity of law enforcement agencies.²⁹

iv) Committee on Economic, Social, and Cultural Rights (CESCR), 2006

In its concluding observations, Canada was notified by the Committee of its failure to comply with concluding observations issued in 1993 and 1998.³⁰ Recommendations made in 2006 included:

- An overall assessment of the situation of African Canadians in Canada, specifically in the area of education.³¹ The Committee noted the high poverty rates among African Canadians;³² and the difficulties faced by African Canadian students in accessing education, and their disproportionately high drop-out rate from secondary school.³³

²⁵ CERD 2002, *supra* at para.341.

²⁶ *Special Rapporteur, supra* at para. 81(a).

²⁷ *Special Rapporteur, supra* at para.81 (h).

²⁸ *Special Rapporteur, supra* at paras. 81(b) - 81(f). The Rapporteur's detailed roadmap included; a two-pronged legal and intellectual strategy based on the Declaration and Programme of Action of the Durban conference; and a National Commission to combat discrimination and promote multiculturalism composed of political, communal and scientific elements, with the participation of the private sector.

²⁹ *Special Rapporteur, supra* at para 81(i).

³⁰ Committee on Economic, Social and Cultural Rights. *Consideration of Reports Submitted By States Parties Under Articles 16 and 17 of The Covenant; Concluding Observations of The Committee on Economic, Social and Cultural Rights - Canada, 2006, E/C.12/CAN/CO/4; E/C.12/CAN/CO/5* at paras. 11, 11(a), 12, 35 (hereinafter CESCR 2006). The committee spoke against Canada's strategy of adopting policy rather than binding legislation to protect the rights guaranteed under the Covenant.

³¹ CESCR 2006, *supra* at para.66.

³² CESCR, 2006 *supra* at para.15.

³³ CESCR 2006, *supra* at para. 32.

- Implementing effective enforcement mechanisms for the rights set out in the Covenant, and the provision of legal aid for disputes involving those rights.³⁴
- The expansion of the Court Challenges Program.³⁵
- The collection of disaggregated data to assess the issue of overrepresentation of African Canadian children from low income families in the foster care system.³⁶

Canada's failure to take action on the above recommendations illustrates its lack of commitment to eliminating racism.

V. VIOLATIONS OF SPECIFIC PROVISIONS OF THE CONVENTION

A. ARTICLE 1(2) - RACIAL DISCRIMINATION AND NON-CITIZENS

In 2004, this Committee in *General Recommendation 30 - Discrimination Against Non-citizens*³⁷, clarified the responsibilities of State parties under the *Convention* to non-citizens and affirmed that Article 1(2) must be interpreted "to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated" in international human rights treaties.³⁸

This Committee recommended the adoption of various measures by States to ensure that the implementation of legislation does not have a discriminatory effect on non-citizens³⁹. Specifically, with respect to immigration issues to:

- Ensure that immigration policies do not have the effect of discriminating against persons on the basis of race or colour⁴⁰;
- Ensure that with respect to deportation, non-citizens have equal access to effective remedies, including the right to challenge expulsion orders, and are allowed effectively to pursue such remedies⁴¹;

³⁴ CESCR 2006, *supra* at paras. 40, 43.

³⁵ CESCR 2006, *supra* at para. 42.

³⁶ CESCR, 2006 *supra* at para.56.

³⁷ CERD/C/64/Misc.11/rev.3, 64th session, 23 February - 12 March 2004.

³⁸ *Ibid*, at para. 2.

³⁹ *Ibid*, at para.7.

⁴⁰ *Ibid*, at para.9.

⁴¹ *Ibid*, at para. 25.

- Avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life.⁴²

Prior to General Recommendation 30, this Committee had raised concerns in its Concluding Observations in 2002 on Canada with the disproportionate deportations of people of African descent, and recommended greater attention be given to the possible discriminatory effect of Canadian immigration policies.⁴³

With respect to anti-terrorism, *General Recommendation 30* recommended State measures to ensure that anti-terrorism measures do not discriminate, in purpose or effect, on the grounds of race or colour, and that non-citizens are not subjected to racial or ethnic profiling or stereotyping⁴⁴.

Canada's compliance with Article 2(1) remains a concern in light of these recommendations:

- Concerns with the disparate impact of immigration deportation laws on people of African descent, particularly of long term permanent residents who are denied their rights to appeal removal orders, continue with a lack of Canadian government attention to the discriminatory effects of its laws.
- With respect to Canada's anti-terrorism measures, non-citizens suspected of being security threats are treated unequally when compared to citizens and subjected to a process with little or no procedural rights. In addition, anti-terrorism measures have operated in the context of racial profiling and have disparately impacted racialized groups, including African Canadians.

Deportation - Disparate Impact and Loss of Right of Appeal

Canada's deportation laws are neutral on their face but their operation, in the context of systemic discrimination in the criminal justice system, have an adverse and discriminatory impact on African Canadians.

Stereotypes about African Canadians informed the current deportation provisions in the *Immigration and Refugee Protection Act (IRPA)*⁴⁵ dealing with permanent residents convicted of crimes. The criminality of African Canadians and immigration were explicitly linked in the public discourse in the 10 years leading

⁴² *Ibid*, at para.28.

⁴³ *CERD 2002, supra* at para. 336.

⁴⁴ *General Resolution 30*, para.10.

⁴⁵ 2001, c. 27. (hereinafter IRPA).

up to the amendments to the deportation provisions of *IRPA* in 2001. The genesis of the current "serious criminal" deportation provisions began after the "Just Desserts" killing in Toronto in 1994, when four Black men (one a landed immigrant of Jamaican nationality who had been ordered deported but had been granted a stay) were charged in the shooting of a White woman. The public and media reacted with virulent anti-immigrant and anti-Black sentiment⁴⁶. This led to the first set of amendments to deportation provisions where persons designated as a "danger to the public" were deported and without a right of appeal. ("Non-criminal" permanent residents are allowed to appeal their deportation orders.) In 2001, *IRPA* was further amended to deprive permanent residents of Canada convicted and sentenced to two years or more in prison, of their right to appeal the deportation order.⁴⁷

Given the overrepresentation of African Canadians in the criminal justice system (dealt with in sections below) the data showing the vastly disparate impact of deportations on people of African descent is not surprising. Between July 1995 and December 31, 1997 nearly 40% of the total removals from Ontario Region were to Jamaica, more than six times the number of the next highest recipient country of Trinidad & Tobago, and more than the number of deportees to all of Europe, the United States and Central and South America combined. Government statistics for removal by country of permanent residence for findings of criminal activities for 1991 to 2001 indicate that Jamaicans make up the largest number of deportees (27%). The total number of deportees from African-diasporic countries was 36%. Between 1995 and 1999, total removals from Canada increased by 73%. In 2001, removals of those who posed a threat to society including criminality increased by 6%. 18% of those removed from Canada in 2002 were for criminal inadmissibility.⁴⁸

The result for deportees is the disproportionate deprivation of the right to appeal deportation orders. This deprives them equal protection under the law with respect to the right to an appeal and to access an effective remedy to challenge their removal.

The loss of appeal rights has serious individual impact on a permanent resident. Permanent residents who have been in Canada for many years often since infancy or childhood, who receive a sentence of two years or more, face removal from Canada without any review of equitable considerations such as length of time

⁴⁶ Subsection 70(5) of the *Immigration Act of Canada*; Henry, Frances and Tator, Carol. *Racist Discourse, supra*.

⁴⁷ *IRPA, supra*. at subsections 36(1) (a), 64(1) and 64(2).

⁴⁸ Citizenship and Immigration Canada, Ontario Region, Danger to the Public Report for January 1998, Summary; Ontario Region - Danger to the Public Removed Cases; Ontario Region Danger to the Public Removals, 1997, Detention and Removals, Citizenship and Immigration Canada, Ontario Region; Citizenship and Immigration Canada, *Customs Run Report*, 03/22/02, "Landed Immigrants Removed From Canada Due To Findings of Criminal Behaviour By Country of Last Permanent Residence and Destination on Removal" for the 8 top countries.

a person has lived in Canada, family and community ties, nor for the particular circumstances of the offence or rehabilitation considerations. The law in effect classifies non-citizens on the basis of formal citizenship and ignores the substance of a resident's long-term relationship to Canada (*de facto* citizenship).

The constitutionality of the deprivation of rights to an appeal of deportation has been upheld by the Supreme Court of Canada in *Chiarelli*, justified by on the lack of mobility rights in the *Charter* for non-citizens.⁴⁹ The *Chiarelli* decision has also been relied on by Canada's Federal Court of Appeal to uphold the constitutionality of the *IRPA* security certificate process, discussed below, impacting on the protection of a non-citizen's civil and political rights under Article 2(1) of the *Convention*.

IRPA - Security Certificates: A Discriminatory Scheme

The *IRPA* security certificate scheme is distinct and exclusive for non-citizens alleged to be security threats, and has been mainly used by Canada instead of the *Anti-terrorism Act* and related *Criminal Code* sections.⁵⁰ In the context of Canada's "war against terrorism", the *IRPA* scheme is in essence about the determination of security threats, and the rights that should be afforded to those suspects, and not about immigration. Two different security regimes therefore exist: one for citizens with protections under the *Criminal Code* and one for non-citizens with little or no due process under *IRPA*. This is in essence discrimination on the grounds of citizenship status.

The constitutionality of the security certificate provisions are being challenged in the appeals of *Charkaoui*, *Harkat and Almrei*, currently awaiting decision from the Supreme Court of Canada. The court below relied on the lack of mobility rights of non-citizens to find that it was not discriminatory to deal with non-citizens suspected of being security threats under *IRPA*.

The ACLC and coalition partners the Canadian Council for Refugees, the International Civil Liberties Monitoring Group, and the National Anti-Racism Council of Canada intervened at the Supreme Court, arguing that while distinctions exist between citizens and non-citizens with respect to their mobility rights, this distinction cannot nullify the civil and political rights of non-citizens. The appellants were not asserting that they had a citizen's right to enter and remain in Canada, but rather that they should have equal protection in procedures to determine whether or not they are security threats. The Coalition argued that constitutional rights, except for mobility rights must be enjoyed by

⁴⁹ *Canada (M.E.I.) v. Chiarelli*, [1992] 1 S.C.R. 711.

⁵⁰ *Report of the Working Group on Arbitrary Detention – Visit to Canada (1-15 June 2005)*, E/CN.4/2006/7/Add.2, 5 December 2005, at para. 30; US Department of State, *2005 Country Reports on Terrorism* (April, 2006) at 160-161.

all, otherwise a state would be given *carte blanche* to discriminate against non-citizens in the immigration sphere, a situation that the court in *Chiarelli* cannot have intended. This position is consistent with *General Recommendation 30*.

IRPA - Security and Racial Profiling

Since 9/11, the *IRPA* provisions have operated within a climate of racial and religious profiling. Canada's anti-terrorism measures have had a disparate impact on Arab, South Asian and Muslim communities, including Muslim African Canadians, who have reported being criminalized and stigmatized.⁵¹

African Canadians in general have also experienced increased scrutiny in the post 9/11 context of increased security powers. The African Canadian community, already subjected to racial profiling as the "usual suspects",⁵² have reported an increase in stops and searches by enforcement officials. (Racial profiling is discussed in detail below.)

The Canadian experience is mirrored in the United Kingdom where data is collected: a Metropolitan police survey found that the number of searches on Black people rose 30% between 2000/01 and 2001/02 compared to 8% for white people in the same period.⁵³

For African Canadian Muslims, disadvantage and discrimination is experienced on multiple levels: race and colour (Black), religion (Muslim) and often immigration or newcomer status, described by Somalis as "three strikes". For Muslim women, disadvantage is also experienced on the basis of their gender. Somalis constitute a significant number of Muslims in Toronto, with an estimated population of 50,000 to 70,000. Almost all came to Canada as refugees in recent years and are Muslims, with Islam playing a central role in their culture and way of life.⁵⁴

Increased security measures and practices post-9/11 have also translated into the increased surveillance of the African Canadian community at border crossings. Prior to 9/11, African Canadians experienced stops and searches based on stereotypical racial assumptions and on the use of criteria that disparately impacts African Canadians.⁵⁵

⁵¹ Canadian Council on American-Islamic Relations CAIR-CAN, *A Presumption of Guilt: A National Survey on Security Visitations of Canadian Muslims*, at 8: 9% of Muslims surveyed self identified as African.

⁵² Scot Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Justice", Paper presented at the 48th Annual Conference of American Society of Criminology; Ontario Human Rights Commission. *Paying the Price: The Human Cost of Racial Profiling Inquiry Report*. Toronto: October 21, 2003 at 9-10 (hereinafter *Paying the Price*)

⁵³ Liberty, *The Impact of Anti-Terrorism powers on the British Muslim population*, June 2004, at 5.

⁵⁴ Community Development and Prevention Program, Children's Aid Society of Toronto, *Needs Assessment Somali adolescents in the process of adjustment*: Toronto 2001, August 2001, at 4, 11.

⁵⁵ Scot Wortley *Racial Differences in Customs Searches at Pearson International Airport: Results from a Pilot Survey*, January 2001: data analysis from the pilot survey at Toronto International Airport in 1998 of passengers arriving in Toronto on flights from Jamaica and concluded that Black passengers were about five and a half times more likely to be questioned and

Since 9/11, many complaints from the community arose of an increase in stops, searches and secondary searches at airports. Somali and Rastafarian communities have reported being particularly targeted. Suspicion is heightened towards the Somali community because they are Muslim and for the Rastafarian community because they are seen as a fringe group. Added humiliation is experienced by Somali women who have been asked to remove their hijabs at airports and who submit to physical searches. Because of the particular vulnerability of the community, many Somalis are fearful to report incidents and pursue possible recourse.

There is a concern that the July 2005 bombing incidents in London has increased suspicion against Somalis and African Canadians, as has occurred in the U.K. A recent Operational Order issued to British Transport Police identifies terrorist suspects as of "Asian, West Indian and east African origin".⁵⁶

In addition to border crossings, Somalis have experienced problems from anti-terrorism measures relating to terrorist financing. Incidents have not been limited to the high profile⁵⁷, but have affected Somalis on an everyday basis. Their ability to send money to family overseas through informal channels has been curtailed by the monitoring and reporting requirements relating to terrorist financing offences. Innocent people have been identified as terrorists and their money confiscated simply because their names are the same or are similar to one on the Office of the Superintendent of Financial Institutions (OSFI) List. Once labelled as a terrorist, people are so fearful of the stigmatization and of drawing attention to themselves that that they would rather lose their money than take the matter further. The difficulties in the process in clearing one's name also acts as a powerful disincentive.⁵⁸

Recommendation:

That the Committee recommend that Canada:

Take steps to ensure that its deportation laws policies do not have the effect of discriminating against African Canadians.

Ensure equal and barrier free access to effective remedies including appeals of deportation orders.

searched by Canada Customs than white or Asian passengers; COMPAS Inc. Multi-Audience Research; *Canada Customs Visible Minority Study*. (Report Prepared for Revenue Canada: March 1999); Canada Customs Policy - *Customs Intelligence Profile "Drugs by Air Passenger."*

⁵⁶ The Independent, London, "Anti-terror police told to target Asians", by Marie Woolf, Chief Political Correspondent, 13 September 2005.

⁵⁷ See the case of Liban Hussein discussed in Reem Bahdi, "No Exit: Racial Profiling and Canada's War Against Terrorism", [2003] 41 *Osgoode Hall Law Journal* 293, at 309.

⁵⁸ *Ibid*, 302.

Avoid expulsions of non-citizens, especially of long-term residents, which would result in disproportionate interference with the right to family life.

Ensure that non-citizens suspected of being security threats are to be dealt with under the *Criminal Code* and not the *IRPA* security certificate scheme.

Ensure that non-citizens are not subjected to racial or ethnic profiling or stereotyping in the implementation of anti-terrorism strategies.

Report fully upon the impact of legislation, including deportation, on non-citizens, and include in their periodic reports socio-economic data on non-citizens within their jurisdiction, including data disaggregated by race and colour, gender and national or ethnic origin.⁵⁹

B. ARTICLE 2(1)(c): EFFECTIVE MEASURES - DISAGGREGATED DATA COLLECTION

Proactive and corrective measures are needed to address the problem of racism and anti-Black racism in Canada. The collection of disaggregated data is the first step in taking effective measures in the development of legislation and policies that target systemic racial disparities. Data should be disaggregated by race to measure actual disparities between different racial groups. For the most part, the federal government has failed in this regard.⁶⁰

The Importance of Data Collection

Data collection is a vital tool in eliminating discrimination and racism. In 2005, the Ontario Human Rights Commission released its *Policy and Guidelines on Racism and Racial Discrimination* that included a significant discussion on the collection and the use of data. In the context of the Racism and Racial Discrimination Policy, the Commission identified disaggregated data collection as a prerequisite for organizations seeking to combat racism and racial-discrimination, or defend themselves against such claims. A failure to collect disaggregated data, where there was some evidence of racial discrimination, would be indicative of an organization's failure to meet its duty to prevent a

⁵⁹ *General Recommendation 30*, para. 5.

⁶⁰ See *Employment Equity Act* S.C. 1995, c. 44. Neither the statutory sections nor regulations require the collection of disaggregated data by race and ethnicity. The Act only requires the collection of data on four designated groups: 1. Women 2. Aboriginal Peoples; 3. Persons with Disabilities; 4. Members of Visible Minorities. There is no separation between minority groups.

violation of the provincial human rights law.⁶¹ When used properly,⁶² this type of data collection can be vital in the fight against anti-Black racism.⁶³

For example, data collection can provide an early warning system for problems in particular areas and provide assistance in identifying effective stop-search procedures.⁶⁴ In 2005, the Kingston (Ontario) Police Service concluded a self-study using disaggregated data. It was revealed that African Canadians, particularly young African Canadian males, were more likely to be stopped and questioned by the Kingston Police than people from other racial backgrounds.⁶⁵ The Kingston Chief of Police has publicly lauded the benefits of the project and the collection and analysis of disaggregated data.⁶⁶

Canada is embarrassingly behind other state parties in this regard. In the United States and the United Kingdom, data collection programs related to law enforcement, employment, education, and other socio-economic conditions, by various federal and state agencies, have been in place for many years. In the United States over 400 law enforcement agencies have initiated “traffic-stop data collection” programs. In the United Kingdom, legislative reforms were

⁶¹Ontario Human Rights Commission’s “*Policy and Guidelines on Racism and Racial Discrimination*” (Toronto: June 2005) at 44-47 (hereinafter *Policy on Racism*). The Commission noted that in situations where the collection of data was clearly warranted: 1) a failure to do so may prevent an organization from putting forward a credible defence; 2) result in the commission relying on qualitative evidence to prove disproportionate representation; and 3) result in the commission seeking public interest remedies compelling data collection and analysis during litigation and during settlements.

⁶²*Policy on Racism, supra* at 47. The Commission cautions against the collection and analysis of data in order to re-enforce stereotypes and further inequities. It mentions that certain safeguards must be implemented when collecting and using disaggregated data. These include, the hiring of experts to collect and analyse the data, addressing the privacy concerns of subjects, ensuring that there is an organizational will to act on the results and an awareness of the accuracy of the data which is collected.

⁶³See “Commission Settles Employment Case With Toronto District School Board” Backgrounder November 10, 2005. Available online at http://www.ohrc.on.ca/english/news/e_bg_omoruyi-odin-settlement.shtml. In 2005, the Ontario Human Rights Commission settled a case with the Toronto District School Board (“TDSB”). The case concerned allegations of systemic racial discrimination against African Canadian teachers in the employment context. As part of the settlement the TDSB agreed to develop a survey and collect data on the number of racialized persons (disaggregated by race) who are in permanent and acting positions of responsibility for the school year of 2005-2006. Results of the survey are pending.

⁶⁴ See C. Smith, *Crisis, Conflict and Accountability: The Impact and Implications of Police Racial Profiling* (March 2004) at 103 (hereinafter *Crisis, Conflict and Accountability*). See also Maureen J. Brown, *In Their Own Voices: African Canadians in the Greater Toronto Area Share Experiences of Police Profiling*, (March, 2004) at 29 (hereinafter *In Their Own Voices*).

⁶⁵ S. Wortley, *Bias Free Policing: The Kingston Police Data Collection – Final Report* (Toronto: Centre of Criminology, University of Toronto, 2005), at p.. 73, 75, 89 (hereinafter *Bias Free Policing*). See also D. Tanovich, *The Colour of Justice: Policing Race in Canada* at 79, 80, 82 (Irwin Law Inc. 2006).

⁶⁶ See W. Closs and P. Mckenna, *Profiling A Problem In Canadian Police Leadership: The Kingston Police Data Collection Project*. Canadian Public Administration Volume 49, No. 2 (Summer 2006) at 155, 156. A few of the cited benefits were that in spite of the criticism for the project it: 1) generated meaningful discussion on the issue of racial profiling in Canadian policing; 2) sent a message to new police recruits that the Kingston force takes bias-free policing (racial profiling) seriously and they need to consider this issue when using their significant police powers; 3) demonstrated that racial profiling can have its roots in prejudice and it can also be perceived through “unchecked police powers applied to vulnerable citizens”.

introduced to require each police department to collect data disaggregated by race and ethnicity on all police stops and searches.⁶⁷

Recommendation:

That Committee recommend that Canada:

Implement nationwide mandatory disaggregated data collection, based on race and colour with a view to improving the socio-economic conditions of African Canadians as recommended by the Special Rapporteur on Racism. The specific areas of employment, education and policing need to be addressed.

Provide in its next periodic report information on any data collection measures implemented and their results.

C. ARTICLE 4(a) – OFFENCE FOR ACTS OF RACIAL VIOLENCE

While the *Canadian Criminal Code* sets out hate related offences such as hate propaganda⁶⁸ and defacing religious property,⁶⁹ it does not contain a specific offence for acts of violence against racialized or ethnic individuals.

Canadian Criminal Code

A hate crime motivated by race is dealt with by the sentencing provisions of the *Criminal Code*. It is not an offence in and of itself. Section 718.2(a)(i) allows a court to consider evidence that an offence was motivated by hate based on race or other factors after an accused has been convicted.⁷⁰ The racist nature of criminal violence can be raised under this section as an aggravating factor during the sentencing of an offender. As aggravating factors can be weighed against mitigating factors in determining a sentence, there is no way to ascertain whether a harsher sentence has been meted out for a racist crime. In this way, the absence of a federal offence for race based assaults creates a problem with transparency and accountability. Because the *Code* makes no distinction between an assault and an assault motivated by racism (the sentence may differ, but the conviction is the same), it is practically impossible to track and measure the efficacy of hate crime prosecutions and convictions.

⁶⁷ *Crisis, Conflict and Accountability, supra* at 88-100.

⁶⁸ *Criminal Code* at ss. 318 and 319, R.S., 1985, c. C-46.

⁶⁹ *Ibid.* at s. 320,

⁷⁰ The section also considers whether the hate was motivated by national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor.

Frequency of Hate Crimes Against African Canadians

The need for a specific racially motivated offence is heightened by national statistics revealing the extent of hate crimes against African Canadians, who are the victim group most affected by hate crimes on the basis of race.⁷¹ While police data collection is not universal or consistent, the statistics that have been gathered reveal an overwhelming trend of victimization based on race, especially for African Canadians.

Nationally

In 2004, Statistics Canada's Canadian Center for Justice released a one time Hate Crime Pilot Survey of 12 major police forces across Canada, after years of no national assessment on the issue.⁷² The survey showed that, at 30%, African Canadians were the most frequently targeted group of criminal incidents police identified as being motivated by the victim's race or ethnicity.⁷³ In another study, the *Ethnic Diversity Survey*, African Canadians were confirmed to be the most likely of all visible minority groups to report fearing for their safety relative to hate-motivated crime.⁷⁴

Toronto, Ontario

Almost half of Canada's African Canadian population live in Toronto.⁷⁵ Over the past thirteen years the number one cause of reported hate crimes in Toronto has been the victims' race, with 1,184 occurrences.⁷⁶ Religion (664) and Multi-Bias (365) offences rank a distant second and third.⁷⁷ During this same period African Canadians have consistently been one of the most affected victim groups, both overall and in the category of race. African Canadians in Toronto were the number one target of hate crimes overall in 1999,⁷⁸ 2000,⁷⁹ 2003,⁸⁰ and 2005.⁸¹

⁷¹ Statistics Canada. *Pilot Survey on Police-Reported Hate Crimes* in Juristat: Hate Crime in Canada, Vol. 24, no. 4. While the study was released in June of 2004, it analysed information collected in 2001 and 2002. Available online at www.statcan.ca/Daily/English/040601/d040601a.htm (hereinafter *Pilot Survey*).

⁷² *Pilot Survey, supra*. While the study was released in June of 2004, it analysed information collected in 2001 and 2002. As early as 1998, the federal government noted the challenges to collecting statistical information in this area due to a fear of reporting by victims, and the fact that, when reported these crimes are not classified or coded in a consistent manner.

⁷³ *Pilot Survey, supra*, this is almost twice the rate of the second highest group, South Asians (18%).

⁷⁴ Statistics Canada. *Ethnic Diversity Survey*, September 29, 2003. Record Number 4508.

⁷⁵ Statistics Canada. 2003. *Canada's Ethnocultural Portrait: The Changing Mosaic*. Statistics Canada Catalogue no.96F0030XIE2001008. In 2001 (47%) of the Black population, about 310,500, lived in the Toronto census metropolitan area.

⁷⁶ Toronto Police Service. *2005 Annual Hate / Bias Crime Statistical Report*, at 20.

⁷⁷ *Ibid.*

⁷⁸ Toronto Police Service. *1999 Annual Hate / Bias Crime Statistical Report*. In 1999, race accounted for 38% of hate crimes.

⁷⁹ Toronto Police Service. *2000 Annual Hate / Bias Crime Statistical Report*. In 2000, race accounted for 46% of hate crimes.

There were only marginal exceptions in two years. In 2001⁸² and 2004⁸³, race based hate crimes came second to religion overall; but African Canadians still remained the number one victim group for race.⁸⁴

Effects of the Failure to Criminalise Race-Based Hate Assaults

Lack of Public Condemnation

Strong public condemnation of hate crimes through the enactment of a specific offence to address racist violence is warranted.⁸⁵ The lack of such an offence sends a message that victims of racial violence, both the individual and the community, do not merit proper protection.

Victimization associated with hate-motivated assaults is more severe and fundamentally different than the nature of victimization associated with other criminal activity. The nature of the harm affects not only the victim, but the community as a whole.

Problems with the Section 718.2 of the Criminal Code

Without a specific offence for race based assault, perpetrators of hate crimes against African Canadians are charged with a criminal offence that is not distinguishable from other non-racial offences. These concerns have been voiced by various police forces: they have referred to the current legislative scheme as “a backwards way of looking at the issue” and noted that data collection would be a helpful tool in addressing hate crimes, which are still underreported.⁸⁶

⁸⁰ Toronto Police Service. *2003 Annual Hate / Bias Crime Statistical Report*. In 2003 race accounted for 33% of hate crimes.

⁸¹ Toronto Police Service. *2005 Annual Hate / Bias Crime Statistical Report*. In 2005 race accounted for 36% of hate crimes.

⁸² Toronto Police Service. *2001 Annual Hate / Bias Crime Statistical Report*. In 2001, religion accounted for 36% per cent of hate crimes and race accounted for 27% of hate crimes. The Toronto Police acknowledge that the change in trend for this year was due to a spike in attacks on Muslim religious institutions after the September 11 terrorist attacks. However, even in a post-9/11 world, African Canadians remain the number one victims of hate crimes motivated by race.

⁸³ Toronto Police Service. *2004 Annual Hate / Bias Crime Statistical Report*. In 2004 religion accounted for 45% of hate crime and race accounted for 25% of hate crime.

⁸⁴ In 2001, 53 of the 90 race based victims were African Canadian. In 2004, 31 of the 41 race based victims were African Canadian.

⁸⁵ Hate Crimes Working Group, *Addressing Hate Crime in Ontario: Final Report of the Hate Crimes Community Working Group to the Attorney General and the Minister of Community Safety and Correctional Services* (Toronto: 2006) at 51 (hereinafter *Hate Crimes Working Group*).

⁸⁶ Kelly Pedro. *Chief seeks stronger laws on hate crimes* in The London Free Press; Sun Media. February 7, 2007.

In addition, at the sentencing stage, barriers exist for African Canadian hate crime victims. Because of their overrepresentation in the criminal justice system, there is a resistance to address the needs of African Canadians as victims of crime, rather than perpetrators of crime. Notwithstanding the high incidence of anti-Black hate crime, it is rarely a subject in public discourse.⁸⁷ Because the prosecutor must request that the judge consider the racist nature of the crime when sentencing, the prosecutors' lack of understanding of the uniqueness of anti-Black racism may prevent it from being considered at the sentencing hearing.⁸⁸

In practice, the victim and community groups have to exert pressure on the prosecutor in order to have the offence recognised as a hate crime motivated by anti-Black racism.⁸⁹ The only way to protect the high numbers of African Canadian victims is to ensure consistent sentences for race based hate crimes across the country, and publicly denounce hate crimes fuelled by anti-Black racism is by enacting a criminal offence of race-based assault as required by article 4(a). Such a provision has been enacted in other jurisdictions⁹⁰ and is a clear affirmation by States that race based violent crimes require specific recognition and attention.⁹¹

In their *Action Plan Against Racism*, Canada acknowledges the effect that hate crimes have on visible minorities, but does not propose anything more than educational campaigns and an increased representation and participation of racial and ethnic groups in mainstream media, thereby downloading their responsibility to address the issue onto the communities affected by the problem.

Recommendation:

That the Committee recommend that Canada:

Enact legislation creating an offence for racial violence.

⁸⁷ *African Canadian Legal Clinic. Letter to Toronto Police Services and the Toronto Police Services Board. April 2005.* At the Toronto Police Services Board Meeting of April 7, 2005 where the hate crime statistics were presented to community groups, there were no references in the TPSB oral presentation of the extent and devastating impact of hate crimes on African Canadians.

⁸⁸ Julian V. Roberts *Disproportionate Harm: Hate Crime in Canada*, Department of Criminology, Univ. of Ottawa, 1995. Roberts, Julian V and Andrew J.A.Hastings "Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a) (i) of the Criminal Code" 2001, 27 Queen's Law Journal 93.

⁸⁹ See for example CBC News. *Beating a hate crime, Quebec City victim says.* Thursday, July 6, 2006 at 12:55 PM ET where a Black victim was beaten by four white men with a wrench, shouting "white power" during the attack. The police would not call it a hate crime. Available online at <http://www.cbc.ca/canada/montreal/story/2006/07/06/hate-crime.html>.

⁹⁰ In the United States, 40 states and the District of Columbia have enacted hate crime laws. See also *Hate Crime Statistics Act of 1990*.

⁹¹ *Hate Crimes Working Group, supra* at 51.

Design and implement training for judges and prosecutors on the nature of anti-Black hate.

Implement a nationwide mandatory disaggregated data collection policy, and collect disaggregated data annually on reporting, prosecutions, and convictions of hate crimes.

Provide in its next periodic report information on any data collection measures implemented and their results.

Acknowledge the existence of, and disparate impact of, violent hate crimes against African Canadians and treat these incidents and the victims with the seriousness they deserve.

D. ARTICLE 5(b) - SECURITY OF THE PERSON: RACIAL PROFILING

Systemic racism within the criminal justice system⁹² is evidenced by the phenomenon of racial profiling. Systemic racism has been described as:

The institutionalization of discrimination through policies and practices which may appear neutral on the surface but which have an exclusionary impact on particular groups, such that various minority groups are discriminated against, intentionally or unintentionally. This occurs in institutions and organizations where the policies, practices and procedures (e.g. employment systems - job requirements, hiring practices, promotion procedures, etc.) exclude and/or act as barriers to racialized groups. Systemic discrimination also is the result of some government laws and regulations⁹³.

Racial profiling based on racist stereotypes about the propensity of African Canadians to crime and violence,⁹⁴ including the beliefs that African Canadians are prone to violence results in the disparate treatment, over-policing and overrepresentation of the community in the criminal justice system.⁹⁵

⁹² Gittens, M. & Cole, D., *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Toronto: Queen's Printer, 1995 (hereinafter *Commission on Systemic Racism*).

⁹³ See Canadian Race Relations Foundation: Online Glossary `Systemic Discrimination. [http:// www.crr.ca](http://www.crr.ca).

⁹⁴ *R. v. Richards* (1999), 26 C.R. (5th) 286, at 295. See also *R v. Brown* (2003), 64 O.R. (3d) 161 where the Court of Appeal for Ontario articulated the link between anti-Black racism and racial profiling; acknowledging that police conduct may be based on sub-conscious racial stereotyping.

⁹⁵ *Bias Free Policing*, *supra*. at p.. 73, 75. See also *R. v. Golden*, 2001 SCC 83. Racial profiling is not limited to policing and the criminal justice system, but occurs in many other spheres such as immigration and education as elaborated herein.

Despite its newfound notoriety since 9/11, the fight against racial profiling and for equal protection under the law has been led by African Canadians for decades.⁹⁶ Notwithstanding overwhelming evidence, Canadian officials have refused to address the problem of racial profiling of African Canadians at the federal or provincial level and have denied or shown a reluctance to acknowledge its existence.

Over-Policing and Over-Representation in the Criminal Justice System

Racial profiling plays a pivotal role in the overrepresentation of African Canadians in prisons. The federal incarceration rate for African Canadians (146 per 100,000) is over 3 times higher than for whites (42 per 100,000), and over 9 times higher than for Asians (16 per 100,000). African Canadians represent over 6 percent of the federal prison population⁹⁷ even though they comprise approximately 2 percent of Canadian population. The higher rates of incarceration correlate to a policy of over-policing driven by a perennial suspicion of criminality amongst the African Canadian community.

Impact on the African Canadian Community

The most disturbing effect of racial profiling is the way in which it divests African Canadians of a sense of citizenship and belonging within their country and respective communities. Living under the cloud of racial profiling has a significant adverse impact on African Canadians. Whether or not they come into contact with law enforcement agencies, African Canadians live in constant fear of being targeted; and the risks and humiliation of police encounters for no apparent reason than the colour of one's skin. The Ontario Human Rights Commission racial profiling report, *Paying the Price*, revealed that African Canadians felt the need to warn family members "to be careful around the police"; and described feeling the need "to be protected from the police."⁹⁸

This violation of the right to equal treatment before law enforcement, as well as the broader right to live free from discrimination, diminishes the human dignity of African Canadians.

⁹⁶ See for example, Allan G. Andrews. *Review of Race Relations Practices of The Metropolitan Toronto Police Force*, Metropolitan Audit Department, The Municipality of Metropolitan Toronto, September 1992 (hereinafter *Review of Race Relations Practices*). See discussion in *Commission on Systemic Racism, supra*.

⁹⁷ See Correctional Service Canada, *Corrections and Conditional Release Statistical Overview*, Ottawa: Public Works and Government Services Canada, 2004 at 52.

⁹⁸ *Paying the Price, supra*, 24, 25.

Developments since CERD 2002

In October of 2002, the *Toronto Star* newspaper published a series of reports on an analysis of a Toronto police database of charges laid in Toronto between 1996 and 2002 which concluded that African Canadians in Toronto were subject to racial profiling and harsher treatment with respect to police arrests, stops and searches, and release.⁹⁹ The results echoed and validated the long standing concerns of the African Canadian community:¹⁰⁰

- (a) African Canadians were more likely to be arrested for criminal or drug offences. 23.3% of people arrested were African Canadian, though they represent only 8.1% of the population, while 58% of those arrested are white, slightly below their percentage (62.7%) in the population.
- (b) African Canadians charged with a single drug possession were less likely to be released at the scene on a promise to appear. 61.8% of African Canadians were released at the scene in contrast to 76.5% of whites.
- (c) When taken to the police station, African Canadians were twice as likely to be held for a bail hearing - 15.5% of the time for African Canadians and 7.3% of the time for whites.
- (d) A disproportionate number of African Canadian motorists were ticketed for violations that only surface following a traffic stop. About 34% ticketed were African Canadian drivers (who make up 8.1% of Toronto's population) in contrast to 52% of white drivers who are 62.7% of the population. Black men between 25 and 34 years old were even more over-represented - they were issued 39.3% of tickets for these types of offences, while they represent only 7.9 per cent of the city's population in that age category.

The response by politicians and law enforcement officials was indicative of the culture of denial with respect to racism in Canadian society, a refusal to acknowledge a serious problem and the entrenched resistance to any call for accountability.¹⁰¹ The organizational culture ingrained within police

⁹⁹ *Toronto Star*, "Singled Out", October 19, 2002; "The Story Behind The Numbers", October 19, 2002; "Police Target Black Drivers, Star Analysis of Traffic Data Suggests Racial Profiling", October 20, 2002. These results were independently reviewed and validated. Factors such as age, criminal history and employment were taken into account. See *Toronto Star*, "Star's Race Profiling Series Valid, Board Told York U. Professor Explains Analysis", December 11, 2002; Michael Friendly, *Analysis of Toronto Police Data Base*, (York University, 2003).

¹⁰⁰ *Toronto Star*, "Another Inquiry: For Black Leaders It's Deja Vu, 1992", Nov. 2, 2002. See also *African Canadian Community Open Letter to Ernie Eves*, Premier of Ontario, October 30, 2002 Available online at www.ocasi.org/Php?Qid=699&Catid=117. See also *Commission on Systemic Racism*, *supra*.

¹⁰¹ See *Special Rapporteur*, *supra* at para.71 where the Rapporteur comments on the paradoxical tendency of the Government to deny the existence of racism while simultaneously promoting their policies to eradicate it.

administration is well known.¹⁰² That the police are resistant to organisational change indicates that change must come from higher levels of government.

The chair of the Ontario Civilian Commission on Police Services and the then Mayor of Toronto stated that they did not believe that Toronto police engaged in racial profiling.¹⁰³ The Toronto Police Chief publicly announced that there was no racism in his force, emphatically denied that his force engaged in racial profiling¹⁰⁴ and commissioned his own study to refute the Star's analysis.¹⁰⁵

The Toronto Police Association criticised the reports, called for a boycott of the newspaper¹⁰⁶ and launched a \$2.7 billion class action libel lawsuit, claiming that the articles implied the police were all "racists" and "bigots" and damaged every officer's reputation.¹⁰⁷ This lawsuit was dismissed by the Ontario Court.

Rare instances of police acknowledgment of racial profiling were quickly suppressed. After the Deputy Police Chief of Ottawa acknowledged the existence of racial profiling among the Ottawa police, saying that the police were not exempt from systemic forms of racism that existed throughout society, members of Ottawa's police association reacted with numerous complaints, claiming that they had been unfairly branded as racists.¹⁰⁸

The release of the Toronto Star report brought about several calls for change. The Ontario Human Rights Commission, and the African Canadian Community Coalition on Racial Profiling each undertook studies on racial profiling;¹⁰⁹ a roundtable was held between high level leaders from all three government

¹⁰² *Review of Race Relations Practices, supra.*, at 2 - 14. The report found that after working in the force, officers developed strong attitudes about racialized people that resulted in biased behaviour that caused unequal treatment.

¹⁰³ *Toronto Star*, "Analysis Raises Board Hackles", October 20, 2002; "No Racial Profiling By Police: Gardner", Nov. 18, 2002

¹⁰⁴ *Toronto Star*, "Fantino: 'We Do Not Do Racial Profiling'", October 19, 2002

¹⁰⁵ *Toronto Star*, "Police Attack Star's Race Articles", February 21, 2003; Edward B. Harvey, *An Independent Review of The Toronto Star Analysis of Criminal Information Processing System (CIPS) Data Provided By The Toronto Police Service (TPS) Summary Report*, February 20, 2003 which can be found at <http://www.torontopolice.on.ca/publications/2003.02.20review/executivesummary.pdf>

¹⁰⁶ *Toronto Star*, "Police Union Blasts Star", October 22, 2002

¹⁰⁷ *Toronto Star*, "Police Union Sues Star Over Race-Crime Series", Jan. 18, 2003. This lawsuit was ultimately dismissed by the Ontario Court which determined that the suit had no hope of succeeding at trial. *Toronto Star*, "Judge Dismisses Suit Against The Star", June 25, 2003

¹⁰⁸ *Toronto Star*, "Ottawa Police, Deputy Chief at Odds Over Racial Profiling", March 2, 2003. A notable exception to the widespread reaction was the Kingston police force. In spite of having a relatively small African Canadian community, they were the first to undertake a study of the problem. However this individual response has not been mirrored by government officials. See generally William J. Closs, Chief of Police. *Bias Free Policing: The Kingston Data Collection Project, A Preliminary Report to the Kingston Police Services Board*, March 17, 2005.

¹⁰⁹ See *Paying the Price, supra.* See also Charles C. Smith, *Crisis, Conflict and Accountability: The Impact and Implications of Police Racial Profiling*, March 2004.

parties and the African Canadian community; and community pressure for a solution increased. In spite of this, Canada has yet to criminalise racial profiling.

The Need for a National, Multi-Level Approach

The United Nation's Working Group on People of African Descent has called on all governments to "ban racial profiling by police and law enforcement officers."¹¹⁰ Canadian courts have acknowledged the existence of racial profiling¹¹¹ but the government refuses to enact legislation to prohibit the practice and provide victims with remedies and recourse.

In 2004, a Private Member's Bill, *An Act to Eliminate Racial Profiling*,¹¹² was put before federal Parliament. The purpose of the Act was to outlaw racial profiling, and to prevent detentions and investigations solely on the basis of the individual's race, colour, ethnicity, ancestry, religion or place of origin. The proposed legislation prohibited and condemned the practice of racial profiling and required enforcement agencies to establish procedures to eliminate it; including disaggregated data collection. This bill did not receive enough support from any party and was shelved.

Recommendation:

That the Committee recommend that Canada:

Acknowledge the existence of racial profiling and its disparate impact on African Canadians, given the overwhelming number of accounts and complaints of racial profiling that have been made by several communities in Canada.

Adopt broad and effective national measures to end racial profiling and to provide victims with effective recourse and remedies.

Adopt broad and effective national measures to end racial profiling by law enforcement agencies. These measures should be replicated provincially.

Implement a nationwide mandatory disaggregated race-based data collection policy, and collect disaggregated data annually stops, searches, arrests, and releases by the police.

¹¹⁰ Stephanie Nebehay, U.N. *experts call for ban on racial profiling*. Reuters. February 2, 2007.

¹¹¹ *R. v. Brown* (2003) 64 O.R. (3d) 161; *R. v. Richards* (1999) 26 C.R. (5th) 286.

¹¹² Bill C-296. First Session, Thirty-eighth Parliament, 53 Elizabeth II, 2004.

Provide in its next periodic report information on any data collection measures implemented and their results.

E. ARTICLE 5(b) - SECURITY OF PERSON: POLICE USE OF FORCE

The impact of racial profiling must also be considered in the context of the use of deadly force by police services, which has overwhelmingly impacted African Canadian males. African Canadians have been disproportionately subject to police violence and use of force resulting in death or serious injury. A study of official deaths caused by the police in Toronto and Montreal between 1994 and 1997¹¹³ illustrates the overwhelming disparity of Black victims. In Montreal 45% of deaths were Black men, even though African Canadians were 1.25% of that population in 1991. In Toronto, 50% of deaths were Black men despite a corresponding 3.25% of Toronto's population. All Black victims of police were killed by the use of handguns.

More recently in 2006, a groundbreaking study on the use of force by police in Ontario by the ACLC for the Ipperwash Inquiry¹¹⁴ showed that African Canadians were grossly overrepresented in use of force interactions with police in Ontario.¹¹⁵ The report examined data on Special Investigations Unit (the civilian oversight body for use of force) investigations between 2000 and 2006. It showed that African Canadians are ten times more likely to be killed or seriously injured by police shooting than Whites in Ontario. Blacks account for 35% of deaths caused by police shootings, while they are only 3.6% of the population, that is, 16 times greater than the rate for Whites. The overrepresentation of Blacks in police shooting deaths is most glaring in Metropolitan Toronto, where the majority of African Canadians live. Compared to Whites, Blacks are 12 1/2 times more likely to be shot by police and are 37 times more likely to be shot to death by the police. African Canadians account for two-thirds of all deaths caused by police shootings. The report also shows that African Canadian victims of police use of force are less likely to have criminal records, less likely to exhibit signs of intoxication and mental health problems at the time of the incident.

Recommendation:

¹¹³ Pedicelli, Gabriella, *When Police Kill: Police Use of Force in Montreal and Toronto*, Véhicule Press, 1998, at 63-75.

¹¹⁴ The inquiry was set up to look into and report on events surrounding the death of Dudley George, an aboriginal man, who was shot and killed by law enforcement officers in 1995 during a protest by First Nations representatives at Ipperwash Provincial Park in Ontario, Canada. The study analyzed data from Special Investigation Unit (SIU) reports which are created every time an investigation is conducted when serious injury or death is caused by the police. See www.ipperwashinquiry.ca

¹¹⁵ See Scot Wortley & Terry Roswell, *Police use of force in Ontario: An Examination of Data from the Special Investigations Unit* (Toronto, 2006).

That the Committee recommend that Canada:

Acknowledge the disparate impact of police shootings of African Canadians, and adopt comprehensive measures, including data collection, to address this problem.

Provide in its next periodic report information on any measures implemented and their results.

F. ARTICLE 5(e)(i) - RIGHT TO WORK

African Canadians continue to struggle with anti-Black racism and systemic discrimination in employment. Disproportionately higher unemployment rates, concentration in low level employment positions, percentages of part-time workers, and lower income levels relative to the general Canadian population, are indicative of a chronic and systemic problem.

African Canadians are twice as likely to be unemployed than white Canadians.¹¹⁶ Even with comparable levels of education, studies have shown that African Canadians are less likely to be employed than non-Blacks.¹¹⁷ Even African Canadians with a university education earn significantly less than non-Blacks.¹¹⁸

A 2006 study of ethno-racial groups in Toronto found that the unemployment rate for African Canadians is 9.6 percent for men and 13.2 percent for women, compared to the average rates of 5.2 and 6.3 percent, respectively.¹¹⁹ The type of work performed by African Canadians has contributed to the high rates of Black poverty. For instance, the study found, “[a]n extraordinarily high proportion of African Canadian women, 47.6 percent, are employed in less skill non-manual occupations.”¹²⁰ African Canadians are more likely to be employed in part-time

¹¹⁶ Written Submission of the African Canadian Legal Clinic to the African Regional Group, March 22, 2004 at 8.

¹¹⁷ See for example, Canada. *Employment and Immigration Canada: Affirmative Action Training Manual* cited in R. Abella, *Equality In Employment: A Royal Commission Report* (Ottawa: Canadian Government Publishing Centre, 1984) at 19, noting that “employment practices have...evolved based on the physical and cultural attributes of [the] favoured type of worker, placing other workers and job applicants at a disadvantage regardless of their abilities and qualifications”.

¹¹⁸ See, Anne Milan and Kelly Tran “Blacks In Canada A Long History” Canadian Social Trends (Spring 2004) at 6, 7 The Average Employment Income of Canadian-Born Blacks (\$29,700) was notably lower than all Canadian-born workers (\$37,200), even when age is standardized, the numbers are (\$32,000) for Blacks and (\$37,200) for all Canadian-born workers.

¹¹⁹ See Michael Ornstein, *Ethno-Racial Groups in Toronto 1971-2001: A Demographic and Social Profile* (Toronto: Institute of Social Research, 2006) at 54 (Hereinafter Michael Ornstein)

¹²⁰ Michael Ornstein (2006), *Ibid* at 55.

work and less likely to be self-employed than other groups.¹²¹ African Canadians are less likely to have full time jobs. In Toronto, only 32% have full time jobs compared to 38% for non-Blacks.¹²² Even when Blacks and non-Blacks have similar jobs, Blacks earn approximately 30% less than non-Blacks. Blacks are overrepresented in occupations with least pay, greatest insecurity and least authority and underrepresented in occupations defined as managerial and higher paying.¹²³

The high unemployment rate among African Canadians is only a symptom of the underlying problem of anti-Black racism. In this context, it is extremely troubling that Canada would cite as progress a marginal increase of 1.4% from 3.4% in the representation of “visible minorities” in public sector management positions. This is in spite of a market availability rate of 12.46%. The situation in the private sector is worse. Visible minority representation increased a negligible 0.3% from 8.2% over the same period, although the availability rate was approximately 17%.¹²⁴ Not only are visible minorities grossly underrepresented in positions of power within the public and private sectors, the failure to disaggregate “visible minorities” by race and ethnicity, effectively hides the significant inequities of African Canadians and prevents any real analysis and measurement.

A prime example of government’s resistance to change and lack of desire was demonstrated with the repeal of the *Employment Equity Act* by the Ontario government in 1995. The repeal of this legislation effectively left African Canadians in Ontario without an instrument to compel institutional action against systemic discrimination in employment.

For African Canadians, systemic racism is not the only malaise contributing to higher unemployment rates, lower incomes and an inability to attain higher positions in organizations. It also includes racial harassment and discrimination in workplace interactions¹²⁵.

¹²¹ Michael Ornstein (2006), *Ibid.* at 54.

¹²² James Torczyner, *The Shaping of Toronto’s Black Identity: A Demographic Analysis of Black Community In Toronto and Regions* (McGill Consortium, 2003) at 54.

¹²³ James Torczyner, *Ibid.* at 58.

¹²⁴ Canada’s Seventeenth and Eighteenth Periodic Reports Committee on the Elimination of Racial Discrimination CERD/C/CAN/18 (5 April 2006) at para. 47- 48.

¹²⁵ See *Special Rapporteur supra* at 49. “Several public servants have complained to the Special Rapporteur about harassment and retaliation against members of visible minorities who complain about racial discrimination in the public service”.

Recommendation:

That the Committee recommend that Canada:

Acknowledge systemic anti-Black racism in the workforce, that Canada show commitment and leadership to pursue meaningful and substantive equity in employment or the integration of visible minorities, including African Canadians in the private and public sectors.

Ensure equality of working opportunities for all and request Canada to prevail on provincial and territorial governments to enact meaningful Employment Equity legislation, where none exists and to ensure that such laws are vigorously enforced.

G. ARTICLE 5(e)(v) - RIGHT TO EDUCATION

Canada has failed in its duty to protect the rights of African Canadian students.¹²⁶ The continued use of streaming of African Canadian children in schools informed by stereotypes about African Canadians, the disproportionate impact of “Safe Schools” policies, and higher drop out rates have served to deny African Canadian children their right to education. Anti-Black systemic racism and the racist implementation of policies have effectively driven high numbers of African Canadians out of the public school system.

Streaming

Streaming is a practice that places students in basic, general, vocational or advanced academic programs. African Canadians are unfairly and disproportionately streamed into less intellectually challenging courses, programs and opportunities. The practice is highly racialized as stereotypes about students’ abilities or inabilities influence the streams into which students are placed.¹²⁷ These stereotypes are linked to low teacher expectations of African Canadian children.¹²⁸ African Canadian students are socially constructed as

¹²⁶ CESCR 2006, *supra*. at paras. 32, 66.

¹²⁷ See J. Oakes, *Multiplying Inequalities: The Effects of Race, Social Class, and Tracking on Opportunities To Learn Mathematics and Science* (Santa Monica, CA: The Rand Corporation, 1990); David Gillborn, “Citizenship Education As Placebo: ‘Standards’, Institutional Racism and Education Policy” (2006) 1(1) *Education, Citizenship and Social Justice* 83 at 89; Kathleen Lynch & John Baker, “Equality In Education: An Equality of Condition Perspective” (2005) 3(2) *Theory and Research In Education* 131 at 137.

¹²⁸ See George J. Sefa Dei, Et Al, *Reconstructing ‘Dropout’: A Critical Ethnography of the Dynamics of Black Students’ Disengagement from School* (Toronto: University of Toronto Press, 1997), c.7 (hereinafter *Reconstructing Dropout*).

academically incompetent.¹²⁹ For example, African Canadian students are often believed to have extraordinary athletic abilities and for this reason teachers and other school officials promote participation on school teams to the neglect of academic development and advancement.¹³⁰ African Canadian children are also often streamed into special education classes based on stereotypes about their learning and intellectual capabilities.¹³¹

Streaming also helps dictate the options available to African Canadian youth in the future. This leads to reduced options for, and access to, post-secondary education, lower earning potential, lower social status and reduced access to supervisory and managerial positions. In 1987, the Toronto Board of Education undertook two major studies to measure the progress of Black students compared to Whites and Asians in high school. The Board found an astonishingly higher percentage of Blacks in basic programs that emphasize vocational rather than academic training. One out of every thirty-three Asian students was enrolled in a basic program whereas the number for Whites was one in ten. For Blacks it was one in five.¹³²

Streaming results in the *de facto* exclusion of African Canadians from post-secondary institutions and ensures the furthering of inequality through the creation of defined divisions within the education system and society. A two tiered educational system is manifest with African Canadians prepared for lower paying jobs, subordinate positions, and constant unemployment and underemployment. This is contrast to the upper tier which in reinforcing dominance and privilege, familiarizes and prepares white students for roles in professional vocations and managerial decision making positions. This sets the stage for comparative lower incomes, high dropout rates, and impending poverty.¹³³ Streaming creates “severe social injustice and a tremendous waste of human learning potential – at a time when formal [university] education is increasingly heralded as essential to the well-being of our society.”¹³⁴

¹²⁹ Keren S. Braithwaite and Carl E. James eds., *Educating African Canadians*. (Toronto: James Lorimer & Co, 1996) at 16.

¹³⁰ See C. James, *Stereotyping and Its Consequence for Racial Minority Youth*. In Canadian Diversity: Racial Discrimination, Racism and Human Rights. Volume 3:3 Fall 2004 at p.. 42. See also See Bruce Curtis, D.W. Livingstone & Harry Smaller, *Stacking the Deck: the Streaming of Working-Class Kids in Ontario Schools* (Halifax: James Lorimer & Co. Ltd, 1992) at 1.

¹³¹ Keren S. Braithwaite and Carl E. James eds., *Educating African Canadians*. (Toronto: James Lorimer & Co, 1996) at 19.

¹³² See, Generally, African Canadian Legal Clinic, CERD Report, See also George Radwanski, *Ontario Study of The Relevance of Education, and The Issue of Dropouts* (Toronto: Ontario Ministry of Education, 1987).

¹³³ See Scott Wortley, “Hidden Intersections: Research on Race, Crime, and Criminal Justice In Canada” (2003) 3 Canadian Ethnic Studies 99 at 101, Noting that the intersection of race and poverty significantly “Contribute to the apparent disadvantage many minorities face when dealing with the police, the courts and corrections.”

¹³⁴ Bruce Curtis, *et al*, *supra* at 1.

Zero Tolerance

African Canadian children's right to education is also violated by "zero tolerance" policies. In Ontario, the *Education Act* was amended ostensibly to promote "safe schools" by preventing or reducing violence and promoting respect and discipline. The "*Safe Schools*" policies allow all schools to punish inappropriate behaviour through increased use of suspensions and expulsions.¹³⁵

The impact of the *Safe Schools* provisions has been deleterious to the African Canadian community, resulting in the disproportionate suspension, expulsion and disciplining of African Canadian children. This, in turn, has resulted in increased dropout rates of African Canadian children and reinforced systemic racism and anti-Black racism in the school system.¹³⁶ These policies impede the ability of African Canadian children to receive an education.

That these policies invariably result in increased and disproportionate suspension and expulsion of African Canadian students has been documented by many reports, including *The Ontario Safe Schools Act: School Discipline and Discrimination*¹³⁷ by the Ontario Human Rights Commission (OHRC), and the Toronto District School Board's Safe and Compassionate Schools Committee Report.

However, the disproportionate impact of the "*Safe Schools*" policy on African Canadians, the Ontario government has not repealed the legislation. It has also failed to adopt specific measures or otherwise effectively address the identified problems or concerns.¹³⁸ Instead, it continues to defend the human rights complaint filed against it by the OHRC even when the Toronto District School Board has settled with the OHRC.¹³⁹

The disproportionate impact of the safe schools policies and practices led the OHRC to file systemic complaints against the Ministry of Education and the

¹³⁵ The Ontario government introduced "Safe Schools" policies as amendments to the *Education Act* R.S.O. 1990, C. E-2. These disciplinary procedures are now contained in Part VIII of the *Act*. See African Canadian Legal Clinic, *Anti-Black Racism: A Report on The Canadian Government's Compliance With The International Convention on The Elimination of All Forms of Racial Discrimination* (July 2002) at 40-43.

¹³⁶ *Reconstructing Dropout*, *supra*.

¹³⁷ K. Bhattacharjee, *The Ontario Safe Schools Act: School Discipline and Discrimination*, (Toronto: Ontario Human Rights Commission, 2003)

¹³⁸ The Ontario government in December of 2004 requested that a group of education professionals undertake a review of the *Safe Schools Act* and related policies and programs. The group issued a report in June 2006 which included recommendations for reforms and changes to the *Safe Schools Act*. See *Safe Schools Policy and Practice: An Agenda For Action (Safe Schools Action Team)* (June 2006)

<http://www.edu.gov.on.ca/eng/ssareview/report0626.html>.

¹³⁹ See News Release: "*Human Rights Settlement Reached With Toronto District School Board*" www.ohrc.on.ca/english/news/e_pr_tdsb-settlement.shtml

Toronto District School Board.¹⁴⁰ The complaint against the school board was settled with significant public interest remedies.¹⁴¹

The Toronto District School Board's Task Force on Safe and Compassionate Schools found that the policy had a disproportionate impact on racialized students and recommended the repeal of the 'Safe Schools' provisions of the *Education Act* and the collection of disaggregated statistical data on suspensions and expulsions to monitor and prevent any discriminatory impact.

Canada has a duty to ensure equality in education for all children without discrimination, including African Canadian children.¹⁴² Failure to address concerns under the 'Safe Schools Act' only serve to continue the violation of the rights of African Canadian children.¹⁴³

Recommendation:

That the Committee recommend that Canada:

Take steps to ensure the repeal of the 'Safe Schools' provisions of the Ontario *Education Act* and to prevail on the province of Ontario to take all necessary measures to protect the rights of African Canadian children to education and to non-discrimination in educational opportunities.

H. ARTICLE 6 - EFFECTIVE REMEDIES: BILL 107 AND THE EROSION OF HUMAN RIGHTS PROTECTION IN ONTARIO

The protection of human rights in Ontario has been detrimentally affected by the passing of *Bill 107*,¹⁴⁴ provincial legislation amending the *Human Rights Code* ("Code").¹⁴⁵ While problems had been identified with the *Code*, including by this Committee,¹⁴⁶ *Bill 107* effectively decimates the Ontario Human Rights

¹⁴⁰ For more information on the complaint visit http://www.ohrc.on.ca/english/news/e_pr_safe-schools-complaint.shtml.

¹⁴¹ See News Release: "Human Rights Settlement Reached With Toronto District School Board" http://www.ohrc.on.ca/english/news/e_pr_tdsb-settlement.shtml and *Background: Human Rights Settlement Reached with Toronto District School Board Terms of Settlement* http://www.ohrc.on.ca/english/news/e_bg_tdsb-settlement-terms.shtml The settlement required the board to collect data on the expulsions and suspensions under its 'safe schools' policies in order to determine impact on racialized students and students with disabilities.

¹⁴² General Assembly, *Convention on the Rights of the Child*, 1989, 44/25 at art.28.

¹⁴³ *Ibid* at art. 28(2).

¹⁴⁴ 38th Legislature, 2nd Session. Royal Assent December 20. S.O. 2006, Chapter 30.

¹⁴⁵ R.S.O. 1990, C. H.19

¹⁴⁶ *CERD 2002, supra.* para.339 the significant discrepancy between the number of complaints relating to racial discrimination brought before Canadian Human Rights Commissions and the number of admissibility

Commission. It removes the Commission's powers to investigate and prosecute complaints on behalf of individuals, and prevents a comprehensive and integrated approach to support and services with respect to human rights protection. Furthermore, none of the legislative changes provide solutions to the ongoing issue of poor resolution of race based complaints and only serve to exacerbate existing barriers faced by African Canadian complainants. The consultative process for these changes was undemocratic and excluded the voice of African Canadians and other racialized communities.

Privatization

Bill 107 allows the Tribunal to handle individual complaints but removes legal representation at the Tribunal provided by the Commission and the Commission's powers to investigate. The removal of a complainants' right to a publicly funded lawyer creates a critical void and represents a privatization of the human rights process under the guise of efficiency. This is a serious barrier to access to justice for Ontario racial minority communities. The high cost of independent counsel makes this remedy unattainable to most of those who need it; for those who do access the system, the lack of counsel tips the balance in favour of well resourced respondents. While Bill 107 provides for the establishment of a Legal Support Centre to provide legal support, there is no guarantee of legal representation; or that the Centre will be appropriately funded and resourced to handle the thousands of complaints that the Commission handles.

Without the Commission as a full party to all complaints at the Tribunal, complaints before the Tribunal are reduced to private disputes between parties similar to civil litigation. This represents an ideological shift that undercuts the importance of human rights.

Many victims of crime are unhappy with the justice system. Imagine if the government responded to these concerns by eliminating the police who investigate crime and Crown prosecutors who bring the matter before the courts. Imagine the government saying investigating and prosecuting crimes takes too long so now you can bring your charge directly to the courts. I can't imagine Canadians would agree this is an effective fix for our problems with the criminal justice system. So why would we

decisions was noted. It was recommended that Canada ensure the efficiency and accessibility of the complaint system, in conformity with Article 6 CERD.

believe that this type of system would work for human rights administrations?"¹⁴⁷

Access to Justice: Removal of Supports

Because access to justice is substantive, complainants must be provided with substantive and administrative supports in order to effectively access human rights protection and remedies. In addition to a public prosecutor, the Commission also provided investigation, intake, and mediation of complainants. Bill 107 eliminates these critical services provided by the Commission. Leaving complainants to navigate a formal judicial process without these fundamental supports frustrates the availability of the remedy. It exacerbates already existing power imbalances between complainants and respondents who are in most cases well resourced, including government respondents. Given the large proportion of race-based cases in Ontario, the stripping away of these essential supports for individual complainants would have a disproportionately high impact on the ability of African Canadians to seek redress for racial discrimination.

Impact on Systemic Complaints

As a historically marginalized and socio-economically disadvantaged group living in a society in which anti-Black racism is deeply embedded and pervasive, rarely will there be an individual complaint of anti-Black racism that does not have systemic issues. Removing crucial support for African Canadian complainants will significantly reduce their ability to bring their complaints forward.

In addition, in bifurcating the Commission's functions, Bill 107 makes an artificial distinction between the individual and the systemic in race based cases. An integrated approach is the only effective method of addressing the systemic barriers inherent within anti-Black racism. While the Commission retains its systemic function in theory, the separation of this body from complainants and the complaint process hampers its effectiveness, and does not allow for monitoring of systemic issues in the public interest. Bill 107's dismantling of the integrated process transforms the human rights system in a manner that prevents it from addressing complaints of anti-Black racism in a meaningful and effective way.

¹⁴⁷ Mary Woo Sims, "Human Rights Reform – The Disturbing Revolution", available online at www.defendhumanrights.org/pdf/marywoosimms.pdf.

The Reform Process - Democracy at its Worst

Given the importance of human rights legislation,¹⁴⁸ and the fact that this was the first undertaking of sweeping human rights reforms in Ontario, the government's obligation to consult with community stakeholders was of critical importance. There was an absence of community consultation when the Bill was drafted, and this was replicated in the legislative review process. Instead of ensuring the broadest level of consultation, after being subjected to strong criticism of the proposed legislation¹⁴⁹ and after only seven days of Committee hearings,¹⁵⁰ the Ontario government invoked a rarely used closure motion to end consultation.¹⁵¹ Numerous organisations and individuals had been scheduled to make submissions but were cut out by the closure motion. The motion also called for the clause-by-clause debate on the Bill to be completed in one day, and for the Third Reading in Legislature to be completed in one day. In practice, the Legislature and legislative committees are given ample time to complete this process.

The closure motion was passed only days after oral and written assurances from the government of its commitment to hearing from all affected communities.¹⁵² This draconian measure drew widespread criticism from affected groups, media, and the Chief Commissioner of the Ontario Human Rights Commission.¹⁵³

¹⁴⁸ See *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, para. 18, where human rights legislation was described as being among the most pre-eminent category of legislation; the final refuge of the disadvantaged and the disenfranchised. See Also *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at P. 547 where this legislation is afforded a "special nature, not quite constitutional but certainly more than the ordinary ..."

¹⁴⁹ *Community Groups Want Human Rights Reform But Bill 107 Is Not It*. Canada Newswire. Ottawa: May 30, 2006; *Outcry Against Bill 107 Grows: More Than 50 Organizations Call on Premier For Change*. Canada Newswire. Ottawa: Jun 15, 2006; *Disabled Fear Ontario Bill Limits Human-Rights Agency's Powers*. April Lindgren. CanWest News. Don Mills, Ont.: Jul 7, 2006.; *McGuinity Government's Controversial Human Rights Bill Comes Under Fire at London Public Hearings Tomorrow*, Canada Newswire. Ottawa: Aug 7, 2006; *McGuinity Government's Controversial Human Rights Bill Comes Under Fire At Ottawa Public Hearings Tomorrow*. Canada Newswire. Ottawa: Aug 8, 2006; *McGuinity Government's Controversial Human Rights Bill Comes Under Fire At Thunder Bay Public Hearings Tomorrow*. Canada Newswire. Ottawa: Aug 9, 2006; *Community Advocates Launch TV Ads Opposing McGivney's Controversial Human Rights Reform Bill*. Canada Newswire. Ottawa: Nov 9, 2006.

¹⁵⁰ August 8, 2006; August 9, 2006; August 10, 2006; November 15, 2006; November 16, 2006; November 22, 2006; November 23, 2006.

¹⁵¹ Legislative Assembly of Ontario, 2nd Session 38th Parliament. Orders and Notices Paper No. 123. Tuesday November 21, 2006. Government Notice of Motion Number 248. The Legislative Library, Office of The Legislative Assembly of Ontario. *Glossary of Parliamentary Terms* defines closure as the procedure by which a debate may be terminated by a majority decision of the house, even though all members wishing to speak may not have had the opportunity to do so.

¹⁵² A letter from Michael Bryant, Attorney General for the Province of Ontario, to Margaret Parsons, Executive Director of the African Canadian Legal Clinic was received November 14, 2006 wherein he stated that the Legislative Committee intended to hold public hearings in the winter on Bill 107. He also stated he anticipated further amendments would be made to strengthen the Bill once the hearings were completed.

¹⁵³ *Chief Commissioner Barbara Hall's Letter To The Premier In Response To The Government's Notice To End Debate on Bill 107, An Act To Reform The Ontario Human Rights Act*. Canada Newswire. Ottawa: Nov 21, 2006 where the Chief Commissioner confirmed the need for broad consultation and stated, "What should have been a broad,

Recommendation:

That the Committee recommend that Canada:

Ensure that the Government of Ontario not proclaim Bill 107; that it resumes scheduled public hearings to hear from affected disadvantaged groups and allow for a meaningful and open consultation on human rights reform.

I. ARTICLE 6 - EFFECTIVE REMEDIES: THE ELIMINATION OF THE COURT CHALLENGES PROGRAM

The equality guarantee, subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter) provides the guarantee of equality before and under the law and the right to equal protection of the law.¹⁵⁴ The equality guarantee has, at its core, a remedial component focussed on disadvantaged groups.¹⁵⁵ The right to an effective remedy for infringement of equality rights requires barrier-free, meaningful, and equal access to justice and courts to vindicate those rights. Equality before the law can only be ensured if there is real access to legal representation and the courts. By funding cases of national importance that centred on equality, the Court Challenges Program facilitated access to justice for African Canadians and other historically disadvantaged groups. The right to an effective remedy has suffered a severe setback with the elimination of the Court Challenges Program in September of 2006 by the federal government. The elimination of this program has severely hampered the ability of racialized litigants to access the courts to enforce their rights.

The Court Challenges program was eliminated under an “Effective Spending Policy.”¹⁵⁶ There have been no proposals on ways to address the financial shortfall of this decision. While provincial Legal Aid plans provide limited

consensus-building exercise in the best traditions of promoting human rights was undertaken in a way which, instead, caused division within the communities concerned.” See also *McGuinty Government Will Face Its Muzzled Critics In Tomorrow's Controversial Bill 107 Clause-By-Clause Debate*. Canada Newswire. Ottawa: Nov 28, 2006 where Margaret Parsons, Executive Director of The African Canadian Legal Clinic stated, “It is a cruel irony that this human rights reform claims to guarantee a right to a hearing for all, and yet the government has denied much of the equality-seeking community a right to a hearing before the standing committee.”

¹⁵⁴ *Constitution Act*, 1982 Schedule B to the Canada Act 1982 C. 11.

¹⁵⁵ Mary C. Hurley *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*. Ottawa: Parliamentary Research Branch, Law and Government Division, BP-402e. <http://www.parl.gc.ca/information/library/prbpubs/bp402-e.htm>.

¹⁵⁶ Treasury Board of Canada Secretariat, *Background: Effective Spending*, http://www.tbs-sct.gc.ca/media/nr-cp/2006/0925_e.asp. See also Department of Finance Canada, *Canada's New Government Cuts Wasteful Programs, Refocuses Spending on Priorities, Achieves Major Debt Reduction as Promised*. Ottawa, September 25, 2006, 2006-047.

funding for Charter litigation, primarily select criminal or correctional matters,¹⁵⁷ this is not available in every province. To require individuals to fund their own litigation in complicated and lengthy Charter disputes is tantamount to denying them any remedy. This is exacerbated by the fact that African Canadians make up a significant percentage of persons living in poverty or the lowest income levels in Canada, while simultaneously having one of the most contentious records of legal disputes over equality rights. The imbalance of power and already disadvantaged status of African Canadians is worsened.

The elimination of the Program is diametrically contrary to the Canadian government's stated commitment to the Program at international forums. In its report to the Committee on Economic, Social and Cultural Rights Canada flaunted the success of the program and confirmed its commitment to its longevity.

The Court Challenges Program ... has been successful in supporting important court cases that have a direct impact on the implementation of rights and freedoms covered by the Program. The individuals and groups benefiting from the CCP are located in all regions of the country and generally come from official language minorities or disadvantaged groups, such as Aboriginal people, women, racial minorities, gays and lesbians, etc. The Program has also contributed to strengthening both language and equality-seeking groups' networks. The Program has been extended to March 31, 2009.¹⁵⁸

In its concluding observations, the Committee for Economic, Social and Cultural Rights asked that the mandate Program be broadened to permit funding to equality litigation against provincial governments.¹⁵⁹

Recommendation:

That the Committee recommend that Canada:

Reinstate the Court Challenges Program.

¹⁵⁷ Legal Aid Ontario, *Information for Lawyers; Back to How to Apply for Group and Test Case Certificates*, http://www.legalaid.on.ca/en/info/test_case-correctional.asp.

¹⁵⁸ Government of Canada. *Implementation of The International Covenant on Economic, Social and Cultural Rights Fifth Periodic Reports Submitted By States Parties Under Articles 16 and 17 of The Covenant*, 17 August 2005 at para. 86.

¹⁵⁹ CESCR, 2006, *supra*..

VI. SUMMARY OF RECOMMENDATIONS

That the Committee recommend that Canada:

1. Take steps to ensure that its deportation laws policies do not have the effect of discriminating against African Canadians.
2. Ensure equal and barrier free access to effective remedies including appeals of deportation orders.
3. Avoid expulsions of non-citizens, especially of long-term residents, which would result in disproportionate interference with the right to family life.
4. Ensure that non-citizens suspected of being security threats are to be dealt with under the *Criminal Code* and not the *IRPA* security certificate scheme.
5. Ensure that non-citizens are not subjected to racial or ethnic profiling or stereotyping in the implementation of anti-terrorism strategies.
6. Report fully upon the impact of legislation, including deportation, on non-citizens, and include in their periodic reports socio-economic data on non-citizens within their jurisdiction, including data disaggregated by race and colour, gender and national or ethnic origin.¹⁶⁰
7. Implement nationwide mandatory disaggregated data collection, based on race and colour with a view to improving the socio-economic conditions of African Canadians as recommended by the Special Rapporteur on Racism. The specific areas of employment, education and policing need to be addressed.
8. Enact legislation creating an offence for racial violence.
9. Design and implement training for judges and prosecutors on the nature of anti-Black hate.
10. Implement a nationwide mandatory disaggregated data collection policy, and collect disaggregated data annually on reporting, prosecutions, and convictions of hate crimes.

¹⁶⁰ *General Recommendation 30*, para. 5.

11. Acknowledge the existence of, and disparate impact of, violent hate crimes against African Canadians and treat these incidents and the victims with the seriousness they deserve.
12. Acknowledge the existence of racial profiling and its disparate impact on African Canadians, given the overwhelming number of accounts and complaints of racial profiling that have been made by several communities in Canada.
13. Adopt broad and effective national measures to end racial profiling and to provide victims with effective recourse and remedies.
14. Adopt broad and effective national measures to end racial profiling by law enforcement agencies. These measures should be replicated provincially.
15. Implement a nationwide mandatory disaggregated race-based data collection policy, and collect disaggregated data annually stops, searches, arrests, and releases by the police.
16. Acknowledge the disparate impact of police shootings of African Canadians, and adopt comprehensive measures, including data collection, to address this problem.
17. Provide in its next periodic report information on any measures implemented and their results.
18. Acknowledge systemic anti-Black racism in the workforce, that Canada show commitment and leadership to pursue meaningful and substantive equity in employment or the integration of visible minorities, including African Canadians in the private and public sectors.
19. Ensure equality of working opportunities for all and request Canada to prevail on provincial and territorial governments to enact meaningful Employment Equity legislation, where none exists and to ensure that such laws are vigorously enforced.
20. Take steps to ensure the repeal of the 'Safe Schools' provisions of the Ontario *Education Act* and to prevail on the province of Ontario to take all necessary measures to protect the rights of African Canadian children to education and to non-discrimination in educational opportunities.

- 21. Ensure that the Government of Ontario not proclaim Bill 107; that it resumes scheduled public hearings to hear from affected disadvantaged groups and allow for a meaningful and open consultation on human rights reform.**
- 22. Reinstate the Court Challenges Program.**
- 23. Provide in its next periodic report information on any data collection measures implemented and their results.**