Analysis: Considering Social Context Evidence in the Sentencing of Black Canadian Offenders

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ABSTRACT

One of the ways in which anti-Black racism continues to manifest itself is in the over-incarceration of Black Canadians. The incarceration rate of Black Canadian men is five times higher, while Black women are three times more likely to be incarcerated than their white counterparts. Similar to the *Gladue* analysis for Indigenous sentencing, the courts have acknowledged that a cultural lens is also required when sentencing Black Canadians. Examining the implications of anti-Black racism has put forward the proposition that the current sentencing principles can develop a framework of analysis that directly addresses the disparities in the incarcerations of Black Canadians. While not exhaustive, this review positions the recent Canadian court decisions, specifically in Ontario, that have illustrated it is imperative to consider an individual's systemic and social circumstances in determining a fit and proportionate sentence. The sentencing stage provides an opportunity to address the overrepresentation of Black Canadian offenders in the penal system.

Keywords: Sentencing Laws; Anti-Black Racism; Racialization; Impact Cultural and Race Assessment; Incarceration; The Carceral State and the Administration of Justice.

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I. INTRODUCTION

Since reforming 1996 sentencing provisions, the courts have grappled with how to address the role of sentencing objectives within Canada's legacy of colonialism, slavery, and segregation. Several studies and reports have documented a disturbing trend: an increasing over-representation of Black people among those who receive the harshest sentences.[1] Current sentencing practices have contributed to concerns over the higher rates of imprisonment amongst Indigenous and racialized populations in Canada. The incarceration rate of Black Canadian men is five times higher, while Black women are three times more likely to be incarcerated than their counterparts.[2] The 2013 report by the Office of the Correctional Investigator, entitled "The Black Inmate Experience in Federal Penitentiaries," highlights this increase in the carceral population over the past decade: the Indigenous population increased by 46.4 percent, and the number of racialized groups (e.g. Black, Asian, Hispanic) increased by 75 percent.[3] During this same period, the population of white inmates declined by 3 per cent. Further, the report found Black Canadians make up approximately 3 percent of the general population but accounted for 10 per cent of the federal prison population - an increase of 80 per cent since 2003. While these reports confirm that systemic racism and discrimination often manifest in corrections, it also suggests this is a broader societal problem. Empirical evidence and studies, including from Akwasi Owusu-Bempah and Scot Wortley, have shown a direct link between this disparity in the prison population and "Canada's ... historical treatment of racialized peoples and its involvement in both French and British colonialism," which

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1 Black and African Canadians are used interchangeable, represents those who identify as Afro-Caribbean decedents. See e.g. Akwasi Owusu-Bempah, et al, "Race and Incarceration: The Representation and Characteristics in Provincial Correctional Facilities in Ontario, Canada" (2021) *Race and Justice* 1.

2 Akwasi Owusu-Bempah, et al, "Race and Incarceration: The Representation and Characteristics in Provincial Correctional Facilities in Ontario, Canada", (2021), *Race and Justice* 6-8.

3 Government of Canada, The Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries – Final Report" (2013), online: <www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx> [perma.cc/EGC2-XKUM].

"continue[s] to haunt racial minorities in the country."[4] These studies have raised important questions concerning racial discrimination in the criminal justice system, particularly anti-Black racism, and disparities in the sentencing process. From *Parks*to *Le*,[5] the courts have recognized the negative impact of anti-Black racism in the Canadian criminal justice system. Given the acute problem of Black Canadians' over-representation in correctional facilities, Canadian "courts can not presume to be colour blind in these situations."[6] The sentencing stage is one of the areas in the justice system that can directly address the over-representation of Black individuals. The need for sentencing judges to adequately position the social context of anti-Black racism as evidence is evident.

II. SENTENCING LAW

The principles and purposes of sentencing are found in section 718 of the *Criminal Code*.[7] A sentencing judge must consider aggravating and mitigating factors, including those listed in s. 718.2(*a*)(i) to (iv); the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(*b*)); the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh (s. 718.2(*c*)); and the principle that courts should exercise restraint in imposing imprisonment (ss. 718.2(*d*) and (*e*)). However, while reconciling these different goals, the fundamental principle of sentencing under section 718.1 of the *Code* is that a "sentence must be proportionate to the gravity

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4 Scot Wortley & Akwasi Owusu-Bempah, "Race, Crime, and Criminal Justice in Canada" in Sandra M Bucerius & Michael Tonry, eds, The Oxford Handbook of Ethnicity, Crime, and Immigration (New York: Oxford University Press, 2014) 281.

5 *R v Parks* (1993), 84 CCC (3d) 353 (ONCA); *R v Le*, 2019 SCC 34.

6 *R v Grant*, 2009 SCC 32 at para 154

7 *Criminal Code*, RSC 1985, c C-46, s 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(*a*) to denounce unlawful conduct;
(*b*) to deter the offender and other persons from committing offences;
(*c*) to separate offenders from society, where necessary;
(*d*) to assist in rehabilitating offenders;
(*e*) to provide reparations for harm done to victims or to the community; and
(*f*) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

of the offence and the degree of responsibility of the offender." The determination of a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the criminal act.[8] The Supreme Court of Canada (SCC)'s judgment in *Ipeelee* discusses proportionality in relation to both the principle of denunciation and the moral blameworthiness of the offender:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing – the maintenance of a just, peaceful, and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence.
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> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.[9]

III. JUDICIAL NOTICE OF SYSTEMIC FACTORS

The goal of any sentencing proceeding is to arrive at a fair and just sentence that is proportionate to the crime. To achieve this objective, courts have considered the background and life circumstances of the person being sentenced. For example, sentencing courts have historically considered factors such as gender, age, employment and immigration status, education level, and family circumstances. This has been non-controversial. Accordingly, courts have also long considered the race of the person being sentenced and the historical and social context of any discrimination that offender may have encountered when determining an appropriate sentence. Judges such as Justice Shreck and Justice Hill have acknowledged the detrimental impact of anti-Black racism in general, as well as its

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8 *R v M (CA)*, [1996] 1 SCR 500 at para. 80. See also Toni Williams, "Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada" (2007) 55:3 Clev St L Rev 269.

9 *Criminal Code*, *supra* note 8, ss 718(b), 718.1; *R v Ipeelee*, 2012 SCC 13 at paras 36-37. See also *R v Hamilton* (2004), 241 DLR (4th) 490 (ONCA) at paras 89-91, 186 CCC (3d) 129 [*Hamilton*].

insidious nature in the sentencing equation.[10] Statutory basis for recognizing the insidious and general impact of racial discrimination sentencing considerations of social context are found under s. 718.2(e) of the *Code*, which states "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders with particular attention to the circumstances of Aboriginal offenders." The first interpretation of s. 718.2(e) and its application and relationship to Indigenous offenders was in the SCC decision in *R v. Gladue*.[11]

A key principle from *Gladue* is that s. 718.2(e) "alter[s] the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders."[12] In other words, the *Gladue* framework instructs courts to pay "particular attention" to the unique circumstances of Indigenous offenders and consider whether those circumstances merit "sanctions other than imprisonment." However, s. 718.2(e) does not provide for an automatic reduction in sentence.[13] Rather, in some circumstances, the provision may result in the reduction of the sentence of an Aboriginal offender compared to a non-Aboriginal offender who is similarly situated.[14] This section must always be considered, even for serious offences.[15] The *Gladue* decision also recognized that for the violent and serious offences, s. 718.2(e) was unlikely to alter the sanction imposed on an Aboriginal offender.[16]

Gladue provided at least two distinct considerations for sentencing judges when attempting to determine whether an offender's Indigeneity may justify a more lenient sentence. *Gladue* mandates that in sentencing the courts must consider: (1) the systemic or background factors that have contributed to bringing the Aboriginal offender before the courts, and (2)

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10 *R v Elvira*, 2018 ONSC 7008 at paras 21 to 26.

11 *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

12 *Ibid* at para 75.

13 *Ibid* at paras 78-80, 88, 99

14 *Ibid*. Since *Gladue*, the SCC, and other appellate courts, have held two extremes in the application of *Gladue*: (1). Aboriginal heritage only reducing a sentence when it is causally linked to the offence, which is too strict (*Ipeelee*, *infra* note 17 at paras 81-83; *R v Kreko*, 2016 ONCA 367 [*Kreko*] at para 21; *R v Laboucane*, 2016 ABCA 176 at para 63 [*Laboucane*]); and (2) Aboriginal heritage automatically reducing every sentence, which is too lenient (*Ipeelee* at para 75; *Kreko* at para 19; *Laboucane* at para 54)

15 *R v Ipeelee*, 2012 SCC 13 at paras 84-87.

16 *Gladue*, *supra* note 13 at paras 79, 82.

the types of sentencing procedures and sanctions which may be appropriate in the offender's circumstances, with consideration given to his or her Aboriginal identity and experiences. If there is no alternative to incarceration, the length of the term must be carefully considered.[17]

The attention to "systemic and background factors" is intended to acknowledge the systemic impact of colonialism on individual offenders. This serves as a recognition that a person's criminal behaviour may result, in part, from a system of barriers caused by the legacy of colonialism. As explained in *Gladue*: "the unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people."[18]

The SCC has considered the *Gladue* framework multiple times. *Ipeelee* reaffirmed the principles established in *Gladue* and clarified how they should operate.[19] In addition to affirming that s. 718.2(e) did not shift the proportionality provision, the Court held that when sentences imposed on Aboriginal offenders are lenient, they will be "justified based on their unique circumstances ... which are rationally related to the sentencing process."[20] Lastly, the Court in *Ipeelee* clarified that Aboriginal offenders did not need to "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." Rather, those background factors need only be "tied in some way to the particular offender and offence" such that they "bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized."[21] In *Wells*, the SCC held that a sentencing judge must take into account "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct.[22] In both *Ipeelee* and *Glaude*, the SCC mandated that an understanding of individual background and systemic factors is important for sentencing a non-Aboriginal offender.[23] The socio-economic and racial discrimination

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17 *Ibid* at paras 66, 69.

18 *Ibid* at 65.

19 *Ipeelee*, supra note 17 at para 1.

20 *Ibid* at paras 76-79.

21 *Ibid* at paras 81-83.

22 *R v Wells*, 2000 SCC 10 at para 38.

23 *Ipeelee supra* note 17 at para 77; *Gladue*, *supra* note 13 at para 69.

experienced by offenders are relevant to the degree of their moral culpability and should inform the way sentencing principles are applied. In *Borde,* for example, the Ontario Court of Appeal accepted that the background and systemic factors of Black Canadians, where they are shown to have played a part in the offence, may be considered when determining the sentence:

> The principles that are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the value of the community from which the offender comes.[24]

IV. The Application of Social Factors to Black Canadians

Many studies and reports have identified the correlation between the impact of anti-Black racism in Canadian society in general and Ontario, in particular, and the overrepresentation of Black people in the justice system.[25] When considering a framework for applying s. 718.2(e) to Black Canadian offenders, the courts have attempted to examine how the *Gladue* framework could better address how factors such as slavery, colonialism, overrepresentation in the child welfare system, segregation in housing and schools, employment, systemic racism in school discipline, police practices of racial profiling, and overrepresentation in the prison population all impact Black Canadians offenders.

Ontario criminal courts have taken judicial notice of the historical and systemic injustices against Black Canadians in *R v. Parks* (1993), *R v RDS* (1997), *R v Golden* (2001), *R v Brown* (2003), *R v Spence* (2005) and *R v Grant*

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24 *R v Borde* (2003), 8 CR (6th) 203 at 32 (ONCA), 172 CCC (3d) 225 [*Borde* ONCA].

25 See e.g. Stephen Lewis, "Report of the Advisor on Race Relations to the Premier of Ontario, Bob Rae" (1992), online (pdf): <www.siu.on.ca/pdfs/report_of_the_advisor_on_race_relations_to_the_premier_of_ontario_bob_rae.pdf> [perma.cc/C4NC-SW75]; Eric Mills, David P Cole & Margaret Gittens, *Report of the Commission on Systemic Racism in Ontario Criminal Justice System* (Toronto: The Commission, 1995); Ontario Human Rights Commission, "Paying the price: The human cost of racial profiling" (2003), online (pdf): <www-ohrc-on-ca.uml.idm.oclc.org/en/paying-price-human-cost-racial-profiling> [perma.cc/MX26-623M]; City of Toronto, *Toronto Action Plan to Confront Anti-Black Racism* (2016), online (pdf): <www.toronto.ca/legdocs/mmis/2017/ex/bgrd/backgroundfile-109127.pdf> [perma.cc/GYW4-8RNK].

(2009).[26] The importance of social context analysis in sentencing processes allows courts to find more robust justifications for the penalties they impose on offenders. Though the Ontario Court of Appeal (ONCA) has agreed that social context is a valid consideration in the sentencing of non-Indigenous offenders in *Borde*,[27] its subsequent decision in *Hamilton*[28] imposed limits on what types of social context evidence should be examined by judges and how social disadvantage should be considered.

In *Borde*, the Court was asked to apply *Gladue* principles to Black Canadians. Defence counsel argued that the historical circumstances of Indigenous people and Black Canadians were analogous and that the *Gladue* framework should apply in the sentencing of Black offenders.[29] While dismissing the direct analogy, Justice Rosenberg agreed that *Gladue* and the reparative justice principles in s. 718.2(e) had broad applications. The ONCA acknowledged the realities of anti-Black racism and the over-incarceration of Black Canadians in jails and penitentiaries, and concluded that "systemic factors facing African Canadians, where they are shown to have played a part in the offence, might be taken into account in imposing a sentence."[30] Justice Rosenberg followed the pre-*Ipeele* assumption that when an offence is more serious or violent, it is unlikely that the *Gladue* framework would apply.

The holding in *Borde* on the use of social context evidence was supported in the *Hamilton* and *Mason* trial decision. In that case, Justice Hill relied on an element of the *Gladue* framework in emphasizing the need to consider all relevant evidence in the determination of a fit sentence, meaning that "important systemic and background circumstances" of the offence should be relevant to "do justice in every case."[31] The defendants in *Hamilton* and *Mason* were two Black single mothers. Reviewing the evidence, the Court noted that poverty and systemic racism had made Black

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26 *R v Parks* (1993), 84 CCC (3d) 353 (ONCA) at para 54, 24 CR (4th) 81 (Jury Selection); *R v RDS*, [1997] 3 SCR 484 at para 47, 151 DLR (4th) 193 (Social Context Judging); *R v Golden*, 2001 SCC 83 at para 83 (Strip Searches); *R v Brown* (2003), 64 OR (3d) 161 (ONCA) at para 9, 173 CCC (3d) 23 (Racial Profiling); *R v Spence*, 2005 SCC 71 at para 5 (Jury Selection); *Grant*, *supra* note 7 at para 154 (Arbitrary Detention).

27 *Borde* ONCA, *supra* note 26.

28 *R v Hamilton* (2004), 72 OR (3d) 1 (ONCA), 186 CCC (3d) 129 [*Hamilton* ONCA].

29 *Ibid*.

30 *Borde* ONCA, *supra* note 26 at para 27.

31 *R v Hamilton (2003)*, 172 CCC (3d) 114 (ONSJ) at para 221, 8 CR (6th) 215 [*Hamilton* ONSJ].

Canadians, and particularly single mothers, vulnerable to exploitation.[32] The defendants' decision to transport cocaine and act as couriers could not be understood without reference to systemic and background factors. Introducing his own research as evidence, Justice Hill concluded that it would be improper to treat the decision to transport cocaine as purely an individual matter without understanding the structured circumstances of the defendants.[33] The Court held that "systemic and background factors ... should logically be relevant to mitigating the penal consequences" for the defendants.[34]

The Crown appealed the *Hamilton* decision. Justice Doherty, writing the unanimous decision, noted that the trial judge had made several errors. The ONCA concluded that the trial judge had "stepped outside of the proper role of judge on sentencing" and established "a de facto commission of inquiry" on "broad social issues that were not raised by the parties."[35] The Court of Appeal affirmed *Borde*, holding that social context can be considered in the sentencing of non-Indigenous offenders. Furthermore, the Court determined that a sentencing judge must consider all factors that are relevant to the personal culpability of the offender.[36] However, Justice Doherty held that statistical and social science evidence acquired by the trial judge in *Hamilton* and *Mason* could not support a finding that the circumstances of the defendants were the "direct result" of systemic factors: "the fact that an offender is a member of a group that has historically been subject to systemic racial and gender bias does not in and of itself justify any mitigation of sentence."[37] The Court of Appeal warned that if "social ills" are given too much weight on sentencing, "an individual's responsibility for his or her own actions will be lost."[38] *Hamilton* maintained that "systemic and background factors could not affect the length of the sentence" considering "the violent and serious offences committed."[39] The *Hamilton* appeal raised the threshold for mitigation in sentencing due to

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32 *Ibid* at para 198.
33 *Ibid* at para 221.
34 *Ibid* at para 224.
35 *Hamilton* ONCA, *supra* note 35.
36 *Ibid* at para 135.
37 *Ibid* at para 133.
38 *Ibid* at para 140.
39 *Ibid* at paras 28, 104.

social context as the Court cautioned against righting perceived historical wrongs.

Recent cases have highlighted how the courts have grappled with addressing systemic factors when sentencing racialized offenders. In *Duncan,* the sentencing judge declined to apply *Gladue* principles or to consider systemic and racial bias for a Black Canadian offender, given the lack of any evidentiary basis to do so.[40] n *Brissett* the sentencing judge revisited Justice Doherty's comments in *Hamilton* on the risk of overemphasizing social ills to the extent that "result in an individual's personal culpability being lost." In *Brissett,* the Court held that there was no evidence of racial discrimination or stereotyping that exists in society that "had any effect on either the offenders or on the offence in this case."[41] In *Reid,* however, rather than sentencing a young Black man to the 6-12 month jail term sought by the Crown for drug charges, Justice Edward Morgan issued a conditional sentence.[42] The judge considered both Reid's personal circumstances and societal factors, including anti-Black racism and the over-incarceration of Black Canadians.[43] To support his decision, Justice Morgan cited statistics concerning the over-incarceration of Black men in Canada's prison system, including data from the Office of the Correctional Investigator demonstrating that the number of federally incarcerated Black inmates had increased by 80 percent over the last decade. Relying on previous cases such as *Golden*,[44] Justice Morgan acknowledged that the SCC had already taken notice that Black and Indigenous Canadians are overrepresented in the criminal justice system. In turn, the judge held that regarding the Black community, similarly to Indigenous Canadians, "over incarceration is a long-standing problem that has been many times publicly acknowledged, but never addressed in a systemic manner by Parliament."[45] Justice Morgan found that "while this court is not in a position to remedy the societal issues, it can and should take the societal context into account in fashioning an appropriate sentence for an individual offender."[46]

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40 *R v Duncan*, 2012 ONSC 2609 at para 86.

41 *R v Brissett*, 2018 ONSC 4957. Brissett did not follow reasons in *Jackson*, *infra* note 56.

42 *R v Reid,* 2016 ONSC 954 at para 27 [*Reid*].

43 *Ibid* at paras 21-27.

44 *Golden*, *supra* note 33.

45 *Reid*, *supra* note 51 at para 23. Quote from *Gladue, supra* note 13 at para 57.

46 *Ibid* at para 27.

In *Jackson*, Justice Nakatsuru moved beyond *Hamilton* and formed an approach to sentencing that emphasizes the need to consider social context evidence when sentencing Black Canadians. In that case, the defendant was a Black man with a lengthy criminal record. Mr. Jackson self-identified as both Indigenous and African Nova Scotian. Defence counsel asked the judge to take into consideration the systemic and background factors in Jackson's sentencing. Echoing the trial judge's comments in *Hamilton*, Justice Nakatsuru held that it was important to consider the circumstances of each offender in their appropriate context. Building on previous decisions such as *Parks* and *Golden*, Justice Nakatsuru took notice of anti-Black racism. Justice Nakatsuru noted the long history for African Nova Scotians marked by "systemic discrimination, marginalization and systemic recruitment into criminality."[47] Recognizing aspects of *Gladue* that were applicable, Justice Nakatsuru held that socio-economic factors that affect Black Canadians can lead to discriminatory sentencing. In sentencing Mr. Jackson to a total of six years,[48] the Court found that the defendant's personal history of "early racial conflict, identity confusion and family disruption" created conditions for the defendant to come into contact with the justice system.[49]

While in *Hamilton* the ONCA held that systemic and background factors could only be considered if the immediate circumstances of the offender were the "direct result" of these factors, Justice Nakatsuru reconsidered this direct link post-*Ipeelee*. In *Ipeelee*, the SCC noted that the connection between histories of colonialism and present realities is complex, and cautioned against "impos[ing] an evidentiary burden on offenders that was not intended by Gladue."[50] In this vein, the Court in *Jackson* concluded that requiring a direct connection "would simply impose a systemic barrier that would only perpetuate inequality for African Canadians"[51] Justice Nakatsuru acknowledged that the over-incarceration of Black Canadians is "an acute problem" and concluded that "[s]ection

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47 *R v Jackson*, [2018] OJ No 2136 at para 31 [*Jackson*].

48 Mr. Jackson is a Canadian of African heritage. Mr. Jackson self-identified as having had Indigenous heritage but waived the application of *Gladue* principles in his sentencing. Justice Nakatsuru, for possession of prohibited firearm with ammunition and breach of prohibition order. Credited, total sentence was 2 years and 257 days. (Crown sought total of 8.5-10 years. Defence counsel requested 4 years).

49 *Jackson*, *supra* note 56 at para 57.

50 *Ipeelee*, *supra* note 17at para 82.

51 *Jackson*, *supra* note 56 at para 112.

718.2(e) can be resorted to in order to address this particular problem."[52] Further, Justice Nakatsuru found that "within the sentencing principles that currently exist, I believe there is room to build a framework of analysis that can begin to address the issue of disproportionate incarceration of African Canadians."[53]

In his decision, Justice Nakatsuru wrestled with how to reconcile the principles in *Gladue* and *Jackson* with the requirements of sentencing serious crime: "it is recognized that for some crimes, mitigating factors regarding the offender's responsibility is outweighed by the needs of general deterrence and denunciation."[54] In accepting the admissibility of the reports, Justice Nakatsuru concluded: "these are systemic and case-specific factors that lessen ... moral blameworthiness for this offence and soften the impact of general deterrence and denunciation" in this particular case.[55]

In *Morris*, a jury found the defendant guilty of possession of an unauthorized firearm, possession of a prohibited firearm with ammunition, and carrying a concealed weapon. The Crown had asked for 4-4.5 years in jail. Defence counsel argued the sentence should be one year, minus credit for the number of *Charter* violations that occurred. Justice Nakatsuru sentenced the defendant to 12 months in jail and probation for 18 months. Judicial note was taken on the history of colonialism, slavery, segregation, intergenerational trauma, and anti-Black racism's impact on Black Canadians, specifically Morris as a young Black man.[56]

While acknowledging the similarities between Indigenous persons and Black Canadians, Justice Nakatsuru held that there was little value in comparing the situations as there are significant differences, stating "the relationships they have with state institutions such as the criminal justice system reflect different lived experiences and socio-political realities. In my opinion, the voices of each community deserve to be heard on their own individual terms."[57]

V. Race and Cultural Assessments

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52 *Ibid* at para 79.

53 *Ibid* at para 73.

54 *R v Morris*, 2018 ONSC 5186 at para 55 [*Morris* ONSC].

55 *Ibid* at 75.

56 *Ibid* at para 74.

57 *Jackson*, *supra* note 56 at para 57.

A. Initial Development and Use of Impact of Race and Culture Assessments

Courts have attempted to address the integration of cultural assessment pre-sentence reports into the justice system. The Impact of Race and Culture Assessment ("IRCA") originated in Nova Scotia, and IRCAs have been admitted in Nova Scotia trial courts and used to build on the similarities of *Gladue* reports when determining appropriate sentencing for Black offenders.[58] The IRCAs provide insight into the social context impacting Black Canadian offenders. The inclusion of these reports can be viewed as a sign that the courts are improving their understanding of the implications of systemic racism and addressing the over-representation of Black Canadians in jails. The topics covered in the IRCAs include but are not limited to: socio-economic adversity; mental health, childcare interventions; and immigration hardship. Overall, these cases examine cultural assessment by asking: (1) what is known about the Black Canadian experience in general and as it relates to crime and justice, (2) how the individual's experience and culture contribute, and (3) how does this context inform the services and resources that could facilitate rehabilitation and reintegration for this offender.[59]

R v X was the first reported case to use an IRCA pre-sentencing report. The case was a young offender convicted of the attempted murder of his cousin. The Crown was seeking an adult sentence. The IRCA report provided the sentencing judge with background and contextual evidence of X's experience as a member of the Black community. The report explained that X's demeanour, which was viewed as unremorseful and anti-social, was likely influenced by coping mechanisms developed in response to the impacts of the criminality that affected his community.[60] Justice Derrick acknowledged that it was important to understand the unique racial and cultural factors of Black Canadians in the sentencing process. In this context, the judge found that the IRCA went beyond other pre-sentencing materials or s. 34 of the *Code* to provide "a more textured, multi-dimensional framework for understanding X, his background and his behaviours."[61] The report helped the Court realize the dynamic of the

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58 See e.g. *R v X*, 2014 NSPC 95; *R v Gabriel*, 2017 NSSC 90; *R v ES*, 2014 NSPC 81; *JC (Re)*, 2017 NSPC 14.

59 *Jackson*, *supra* note 56.

60 *R v X*, *supra* note 67 at para 189.

61 *Ibid* at para 193.

accused as both an offender and a victim of violence in the context of his criminality.[62] The judge ruled for a youth sentence.

B. Impact of Race and Culture Assessments in Ontario Trial Courts

Ontario courts have moved to consider IRCAs in the sentencing of Black Canadian offenders. In *TJT*, the issue before the Court was whether a youth or adult sentence should be imposed for a 15-year-old that had been found guilty of second-degree murder. The IRCA report provided Justice Garson with an understanding of how the offender's childhood had impacted his critical reasoning and decision-making.[63] In this case, the report included descriptions of his father having been in jail most of the boys' life, and a mother who worked two jobs - while raising five boys - the death of his grandmother, the murder of his friends, and his two older brothers being shot multiple times.[64] Justice Garson weighed all the relevant factors and imposed a youth sentence. The Crown did not appeal.

The Court in *Jackson* reaffirmed the judicial powers under s. 723(3) and 721(1) of the *Code* to permit the order of the production of evidence and pre-sentence reports that demonstrate the relationship between systemic factors and the individual's circumstances. Counsel for Jackson submitted an IRCA. The IRCA was prepared by a social worker and presented case-specific information about the impact of anti-Black racism in a manner similar to the *Gladue* reports. In *Morris*, the defence counsel presented two reports: (1) dealing with anti-Black racism in Canada, and (2) addressing Morris' social history. The Court has acknowledged that IRCAs "have the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration."[65] The Court concluded that cultural assessment reports are an "attempt to articulate the issues of anti-Black and systemic racism in Canadian society to the court at the sentencing stage of adjudicating African Canadians"[66] Justice Nakatsuru's decision was a departure from the pattern of courts sentencing for gun offences. Justice Nakatsuru explained that general deterrence and denunciation, which are often used to justify tougher sentences for gun-

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62 *Ibid* at para 198.

63 *R v TJT*, 2018 ONSC 5280 at paras 42-27, 78-82.

64 *Ibid* at para 53.

65 *Ibid* at para 101.

66 *Jackson*, *supra* note 56 at para 28.

related offenses, are not in opposition with the consideration of systemic factors. Furthermore, in *Nur* and *Proulx*[67], the SCC recognized that general deterrence is an ineffective principle in practice.

C. Impact of Race and Culture Assessments at the Ontario Court of Appeal

The *Morris* appeal was the first time an Ontario appellate court addressed the IRCA in the sentencing of Black people in the province.[68] In Ontario, the courts have yet to provide an in-depth analysis of systemic racism, specifically anti-Black racism's impact in sentencing. Prior, NSCA set the foundation for IRCA moving forward. The NSCA in *Anderson* adopted the approach that sentencing judges must consider anti-Black racism with each Black offender:

> In explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for the court to determine, based on the record of the judges' reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted.[69]

By adopting the approach that IRCAs, Justice Derrick held that the use of these reports can play a role in reducing the reliance on incarceration for African Nova Scotian offenders. As such, if any judge ignores or fails to inquire into the systemic and background factors raised during sentencing of an African Nova Scotian, it may amount to an error in law:

> The sentencing of African Nova Scotian offenders must [...] evolve. This is to be accomplished by judges taking into account evidence of systemic and background factors and offender's lived experience, ideally developed through an IRCA, at every step in the sentencing process, and ultimate crafting of a just sanction.
>
> [...]
>
> Mr. Anderson's sentencing shows that change is possible, for the offender, and as significantly, for our system of criminal justice. [70]

In *Morris*, the Crown argued that Justice Nakatsuru's sentence was lenient, and that systemic factors should not be considered because there is no causal link between systemic racism and Morris' offence. Defence counsel,

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67 *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Proulx*, 2000 SCC 5.

68 *R v Morris*, 2021 ONCA 680 [*Morris* ONCA].

69 *R v Anderson*, 2021 NSCA 62 at para 123 [*Anderson*].

70 *Anderson, supra* note 69 at 164.

along with 10 intervenors, including the Black Legal Action Centre, advocated for the inclusion of IRCA reports that detail systemic factors when sentencing individuals who are targeted by discriminatory systems to advance substantive equality in sentencing. The key question on appeal in *Morris* was whether a sentencing judge should consider social context evidence that details the effects of anti-Black racism when sentencing a Black person. The Crown argued that anti-Black racism and Morris' possession of a gun must meet the high test for casual connection, by introducing specific evidence to demonstrate if systemic factors are to be taken into consideration in determining Morris' sentence. However, intervenors argued that *Ipeelee* explicitly rejected a causation requirement, and such requirement would impose an unfair evidentiary burden for Black offenders.

The issue before the Court was how much weight should be given to systemic racism, specifically, anti-Black racism. As noted, the courts have long considered the systemic disadvantages of Indigenous offenders in sentencing, however no such principle has been applied for Black Offenders. The Crown's position on appeal included the claim that there lacked a clear evidentiary link between systemic discrimination and the crimes Morris was convicted for. For the Crown, the decisions in *Borde* and *Hamilton* remained good law, as these cases acknowledge that an offender's personal circumstances, including those connected to both overt and institutional racism and its impacts, are relevant in determining an appropriate sentence.[71] The impact of overt and institutional racism will depend on the specifics of the individual case. Further, given the seriousness of gun violence, the Crown maintained that the trial judge allowed the consideration of the impact of systemic racism to "overwhelm" all other considerations in tailoring a fit sentence.[72] The Crown's position was that an appropriate sentence would be three years. On appeal, the Crown accepted that given the time that had passed, the incarceration of Morris would not be appropriate.[73] However, the Crown asserted that the courts should not provide leniency toward these types of convictions. Acknowledging that anti-Black racism is a reality in Canadian society, the ONCA held that courts should take judicial notice of systemic anti-Black racism, and furthermore, that sentencing judges can consider the impact of

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71 *Morris* ONCA, *supra* note 79 at para 5.

72 *Ibid* at para 6.

73 *Ibid* at para 7.

anti-Black racism without requiring that person to first establish a link between their experiences of racism and the offences in which they have been conflicted. The Court also noted that a trial judge's task is not "primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles, and objectives of sentencing."[74]

In *Morris*, the ONCA held that the individualized nature of the sentencing process requires judges to "prioritize and blend the different objectives" to reflect the seriousness of the offence and, in turn, the responsibility of the offender.[75] Further, "trial judges are given considerable discretion to decide how best to blend the various legitimate objectives of sentencing."[76] A fundamental aspect of each sentence is the principle of proportionality. The SCC has confirmed the paramount role of proportionality in sentencing. A sentence that does not comply with the principle of proportionality is considered an unfit sentence.[77] The Courts have described the duality of the principle of proportionality: "on one hand, this principle considers the offender's culpability and responsibility. On the other hand, proportionality measures the seriousness of the crime."[78] The Courts have held that the gravity of the offence is the wrongfulness of the conduct and the harm caused by such conduct.[79] According to the ONCA in *Morris*, the gravity of the offence then demands an emphasis on the objectives of denunciation and deterrence. A key aspect of the principle of proportionality is that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender.

In *Ipeele*, the SCC held that, the "principle serves a limiting or restraining function and ensures justice for the offender."[80] In *Morris*, the ONCA, quoting *Nur,* restated that imposing a fit sentence is a "highly individualized exercise, tailored to the gravity of the offence, the

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74 *Ibid* at para 56.

75 *Ibid* at para 58.

76 *Ibid* at para 80.

77 *Ipeelee*, *supra* note 17, para 37; *Morris* ONCA, *ibid* at para 61.

78 *R v Nasogaluak 2010 SCC 6, [2010] 1 SCR 206* at para 42; *R v Lacassse* 2015 SCC 164, [2015] 3 SCR 1089 at para 64; *Morris* ONCA, *ibid* at paras 65-66.

79 *R v Friesen*, 2020 SCC 9, 391 CCC (3d) 309 para 75-76, Morris ONCA, *ibid* at para 68.

80 *Ipeelee*, *supra* note 17 at para 37.

blameworthiness of the offender, and the harm caused by the crime."[81] The ONCA held that the principle of proportionality will "most often require a disposition that includes imprisonment."[82] This is particularly the case as the ONCA argued that Canadian courts have long recognized the gravity of certain kinds of offences that require sentences focused on denunciation and general deterrence.[83] The ONCA found that, while they agreed with the trial judge that an offender's life experience can influence the choices made to commit a particular crime, the gravity and seriousness of Morris' offences are not diminished by the systemic evidence that shed light on his decision to commit said crimes. Further, evidence of how the offender's choices are limited by his racial systemic disadvantage addresses the offender's moral responsibility and not to the seriousness of the crimes.[84] In the case of *Morris*, considerations of systemic anti-Black racism are mitigated, to some extent, by considerations of the offender's responsibility when addressing the possession of a loaded, concealed handgun in a public place and the potential harm to the community. The ONCA found that a distinction must be maintained between factors relevant to the seriousness of gravity of the crime and those to the offender's degree of responsibility. If that distinction is maintained, the ONCA found the principle of proportionality "may be misapplied":

> A sentence, like the sentence imposed here, which wrongly discounts the seriousness of the offence to reflect factors which are relevant to the offender's degree of responsibility, will almost inevitably produce a sentence that does not adequately reflect the seriousness of the offence, and, therefore, fails to achieve the requisite proportionality.[85]

The ONCA further stated that sentencing judges have always considered an offender's background and life experiences, and in *Morris*, nothing in the social context evidence provided information that detracted from the seriousness of his offence or the objectives of denunciation and deterrence.[86] Rather, the ONCA found that the report provided at trial level conveyed the deep harm caused to everyone in the community by

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81 *Morris* ONCA, *supra* note 79 at para 64.
82 *Ibid* para 70.
83 *Ibid* at para 71.
84 *Ibid* at paras 75-76.
85 *Ibid* at para 77.
86 *Ibid* at paras 78, 88.

persons, "like Morris," who choose to engage in criminal conduct that is dangerous to community security.[87]

The ONCA did not equate Black offenders with Indigenous, rather, they found that the *Gladue/Ipeele* decisions can inform the sentencing of Black offenders. As noted, in *Morris*, the Court reaffirmed judicial notice of the existence of anti-Black racism and the impacts of individual offenders. Courts should admit evidence on sentencing that is directed at the existence of anti-Black racism, and courts should keep in mind the establishment of over-incarceration of Black offenders, with an emphasis on young male offenders.[88] According to the ONCA, the restraint principle not only requires the courts to determine the important role of sentencing in serious crimes, but it also requires the sentencing judge to consider how long that sentence should be.[89] Asserting that Morris' trial judge erred in sentencing principles in serious crimes by imposing a sentence "far below the range," the ONCA acknowledged that anti-Black racism must be confronted, mitigated, and erased. However, the ONCA did not set out a framework for accounting for the impacts of anti-Black racism on an offender at the sentencing stage.

VI. Conclusion

Given the widely acknowledged problem of Black Canadian overrepresentation in Ontario prisons and jails, it is important that the courts collectively understand and consider the role anti-Black racism plays in contributing to Black Canadians' contact with the justice system. However, this understanding and consideration by the courts should not be approached by simply layering a *Gladue* template on top. A sentencing judge can find an appropriate sentence for the offender, one that accounts for all the contributing circumstances, including historical and systemic factors. The *Borde* decision left an invitation for sentencing judges to address the problems raised by proposing fresh evidence. The ONCA in *Morris* acknowledged that what is new is the information these reports provide and judicial "willingness to receive, understand, and act on that

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87 *Ibid* at para 78.

88 *Ibid* at para 123.

89 *Ibid* at para 130.

evidence."[90] The decision in *Morris* opened the door to more innovative sentencing approaches toward Black Canadian offenders.

[90] *Ibid* at para 107.