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Canadian judges have made notable, although too limited, strides to recognize the unique conditions of Black Canadians in sentencing processes and decision-making. The use of Impact of Race and Culture Assessments in sentencing people of African descent has gradually gained popularity since they were first introduced in R v "X." *These reports provide the court with the necessary information about the effect of systemic anti-Black racism on people of African descent and how the experience of racism has informed the circumstances of the offence, the offender, and how it might inform the offender's experience of the carceral state. This paper lays out the legislative authority for considering systemic and background factors in sentencing African Canadian offenders; analyzes and classifies the relevant case law with a view to establishing a framework for sentencing African Canadian offenders and clarifying our thinking about how impact assessments may advance sentencing goals; and flags some of the outstanding issues that require further study.*

Les juges canadiens ont fait des progrès notables, bien que trop limités, pour reconnaître les conditions uniques des Canadiens noirs dans les processus de détermination de la peine et de prise de décision. L'utilisation des évaluations de l'impact de la race et de la culture dans la détermination de la peine des personnes d'origine africaine a progressivement gagné en popularité depuis qu'elles ont été introduites dans l'affaire R c. « X .» *Ces rapports fournissent au tribunal les informations nécessaires sur l'effet du racisme anti-Noir systémique sur les personnes d'origine africaine et sur la manière dont l'expérience du racisme a influencé les circonstances de la perpétration de l'infraction, le délinquant, et comment elle pourrait influencer l'expérience de l'état carcéral du délinquant. Dans le présent article, nous présentons l'autorité législative permettant de prendre en compte des facteurs systémiques et contextuels dans la condamnation des délinquants afro-canadiens; nous analysons et classons la jurisprudence pertinente en vue d'établir un cadre pour la condamnation des délinquants afro-canadiens et de clarifier notre réflexion sur la manière dont les évaluations d'impact peuvent faire progresser les objectifs de condamnation; enfin, nous signalons certaines des questions en suspens qui nécessiteraient une étude plus approfondie.*

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Introduction

Canadian judges have made notable, although too limited, strides to recognize the unique conditions of Black Canadians in sentencing processes and decision-making.[1] This emerging approach to sentencing has received some attention from the judiciary and media, but it has not been canvassed in the academic literature.[2] This paper, therefore, makes two contributions: first, it sets out the legal framework that authorizes judges to do this work; and second, it evaluates how the applied context should be adjusted to achieve more appropriate sentencing results.

The ground-breaking decision of *R v "X"*[3] introduced the use of Impact of Race and Culture Assessments (IRCAs) into the sentencing process for people of African descent.[4] IRCAs operate from the assumption that a person's race and culture are important factors in crafting a fit sentence.

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1. As of 9 March 2020, the reported cases on point are: *R v Jackson,* 2018 ONSC 2527 [*Jackson*]; *R v Morris*, 2018 ONSC 5186 [*Morris*] (Crown appeal to the ONCA set to be heard 26 September 2019); *R v TJT*, 2018 ONSC 5280 [*TJT*]; *R v Williams*, 2018 ONSC 5409 [*Williams*]; *R v Peazer*, 2003 CarswellONT 8084, [2003] OJ No 6283 [*Peazer*]; *R v Reid*, 2016 ONSC 8210 [*Reid*]; *R v Nimaga,* 2018 ONCJ 795 [*Nimaga*]; *R v Shallow*, 2019 ONSC 403 [*Shallow*]; *R v Elvira,* 2018 ONSC 7008 [*Elvira*]; *R v Biya*, 2018 ONSC 6887 [*Biya*]; *R v Kabanga-Muanza*, 2019 ONSC 1161 [*Kabanga-Muanza*]; *R v Brissett and Francis*, 2018 ONSC 4957 [*Brissett*]; *R v McIntosh,* 2019 ONCJ 786 [*McIntosh*]; *R v Gaynor*, 2019 ONCJ 580 [*Gaynor*]; *R v Clarke,* 2019 ONSC 5868 [*Clarke*]; *R v Husbands,* 2019 ONSC 6824 [*Husbands*]; *R v Bryce,* 2016 ONSC 7897 at para 32 [*Bryce*]; *R v Duncan,* [2012] OJ No 2966 (SCJ) [*Duncan*]; *R v Borde,* [2003] OJ No 354, 63 OR (3d) 417 (ONCA) [*Borde*]; *R v Hamilton,* [2004] OJ No 3252, 72 OR (3d) 1 (ONCA) [*Hamilton*]; *R v Gabriel*, 2017 NSSC 90 [*Gabriel*] (appeal denied on other grounds 2018 NSCA 60); *R v "X,"* 2014 NSPC 95 [*R v X*]; *R v Perry,* 2018 NSSC 16 [*Perry*]; *R v Gerald Desmond*, 2018 NSSC 338 [*Desmond*]; *R v Middleton* (25 August 2016) Yarmouth (NS SC) [unreported decision] [*Middleton*]; *R v Downey*, 2017 NSSC 302 [*Downey*]; *R v Boutilier*, 2017 NSSC 308 [*Boutilier*] (appeal allowed on other grounds, 2018 NSCA 65); *R v Riley*, 2019 NSSC 92 [*Riley*]; *R v C(JL)*, 2017 NSPC 14 [*C(JL)*]; *R v NW*, 2018 NSPC 14 [*NW*]; *R v Faulkner,* 2019 NSPC 36 [*Faulkner*]; *R v Cromwell,* 2020 NSSC 14 [*Cromwell*]; *R v AL,* 2018 NSPC 61 [*AL*]; *R v Robinson*, 2020 NSPC 1 [*Robinson*]; *R v Ferguson,* 2018 BCSC 1523 [*Ferguson*]; *R v Anderson,* 2020 NSPC 10 [*Anderson*]. The appellant in *R v Rage*, 2018 ONCA 211 argued that the trial judge failed to consider the overrepresentation of African Canadians in sentencing him. The ONCA dismissed the appeal, stating that the trial judge adequately took the appellant's circumstances into account. The case contains no other analysis or discussion of race-based arguments. As such, it will not be discussed in further detail. Not all of the cases mentioned in this note will be discussed in detail in this paper.

2. See e.g. Carly Stagg, "Nova Scotia judge explains why cultural assessments matter in sentencing," *CBC News* (25 May 2016), online: <www.cbc.ca> [https://perma.cc/A5HV-L23G]; Adina Bresge, "African-Nova Scotian killer wants race, 'historical roots' considered," *CTV News* (24 May 2016), online: <www.ctvnews.ca> [https://perma.cc/7KK9-QSXT]; Andray Domise, "We must address anti-black racism not just in the courts—but as a society," *The Globe and Mail* (30 April 2018), online: <www.theglobeandmail.com> [https://perma.cc/VJ3F-774T]; Dakshana Bascaramuty, "Crime, punishment and prejudice: Courts weighing whether race has a role in sentencing black offenders," *The Globe and Mail* (28 August 2018), online: <www.theglobeandmail.com> [https://perma.cc/8WMJ-58AP].

3. *Supra* note 1.

4. The case law sometimes refers to these assessments as IRCAs or Cultural Impact Assessments. For ease of reference, I will refer to them as IRCAs throughout.

They provide the court with necessary information about the effect of systemic anti-Black racism on people of African descent. They connect this information to the individual's lived experience, articulating how the experience of racism has informed the circumstance of the offender, the offence, and how it might inform the offender's experience of the carceral state.

IRCAs are necessary in the light of the historical and ongoing systemic anti-Black racism present in Canada, and its effect on Black Canadians' lived experiences. The prevalence of anti-Black racism is directly connected to the history of slavery and subjugation of people of African descent in Canada.[5] One way in which anti-Black racism continues to manifest in this country is through the overincarceration of Black Canadians.[6] The incarceration rate of Black Canadians is three times our representation rate in society.[7] This is not simply because Black people commit more crimes.[8]

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5. See e.g. United Nations Specialized Conferences, *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Declaration* (United Nations: 2001), online (pdf): <www.un.org> [https://perma.cc/D3B2-PYAN], endorsed by gen res 56/266 at art 13 [*Durban Declaration*]; Commission on Human rights, *Report of the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, UNECOSOC, 2004, Un Doc E/CN 4/2004/18 Add 2, at paras 68-70 [Diène Report]; Harvey Amani Whitfield, *North To Bondage: Loyalist Slavery in the Maritimes*, (Vancouver: UBC Press, 2016) at 6, 111-112 [Whitfield, *North to Bondage*]; Colleen Sheppard, "Challenging Systemic Racism in Canada" in Elaine Kennedy-Dubourdieu, ed, *Race and Inequality: World Perspectives on Affirmative Action* (Burlington: Ashgate Publishing Limited, 2006) at 43; B Singh Bolaria & Peter S Li, *Racial Oppression in Canada* 2nd ed (Toronto: Garamond Press, 1988) at 188.

6. See e.g. African Canadian Legal Clinic, *Errors and Omissions: Anti-Black Racism in Canada —Report of the ACLC to CERD (80th Session)* (Toronto: African Canadian Legal Clinic, 2012) at 6 [African Canadian Legal Clinic, *Errors and Omissions*]; African Canadian Legal Clinic, *Civil and Political Wrong: The Growing Gap Between International Civil and Political Rights and African Canadian Life: A Report on the Canadian Government's Compliance with the International Covenant on Civil and Political Rights*, report by Anthony N Morgan & Darcel Bullen (Toronto: African Canadian Legal Clinic, 2015) at 26, 35 [African Canadian Legal Clinic, *Civil and Political Wrong*]; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Black Point, Nova Scotia: Fernwood Publishing, 16 September 2017) at 87-88; David M Tanovich, "The Further Erasure of Race in *Charter* Cases*"* (2006) 38:84 CR-ART 38 at 47. The problems with overincarceration should be self-evident. As such I will not discuss them in depth in this paper. Though I will note that the negative impacts include the destruction of black families. See e.g. Dorothy E Roberts, "Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement" (2001) 34:4 UCDavis L Rev 1005.

7. See e.g. Canada, Office of the Correctional Investigator, *Annual Report 2014–2015,* by Howard Sapers (Ottawa: 2015), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx> [https://perma.cc/H5QK-WYJP] at 3 [OCI*, Annual Report 2014–2015*].

8. See e.g. Akwasi Owusu-Bempah & Scot Wortley, "Race, Crime, and Criminal Justice in Canada" in Sandra Bucerius & Michael Tonry, eds, *The Oxford Handbook of Ethnicity, Crime, and Immigration* (London: Oxford University Press, 2014) at 297: "it must be stressed that any overrepresentation of blacks and Aboriginals in street-level crime and violence can be explained by their historical oppression and current social and economic disadvantage." See also, David M Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-based Conception of Arbitrary Detention" (2002) 40:2 Osgoode Hall LJ 145 at 160-161.

It is because of pervasive, systemic anti-Black racism that permeates our institutions and social structures.[9] The association of black skin with criminality has deep roots. It can be traced back to "runaway slave ads," which portrayed self-liberated people of African descent as thieves and criminals.[10] Slaveholders would place ads in the newspaper when enslaved people escaped and would use the court system to affirm their property interests in the enslaved person.[11]

The United Nations' Working Group of Experts on People of African Descent recognized the overincarceration of African Canadian people following their visit to Canada in 2016.[12] The Working Group noted that they were "deeply concerned about the human rights situation of African Canadians" and "particularly concerned about the overrepresentation of African Canadians in the criminal justice system."[13] Despite representing only 3.5% of the population Black Canadians represented 8.6% of the total incarcerated population in 2016–2017,[14] and 8% of the total incarcerated population in 2018–2019.[15] In 2017–2018, Black offenders represented 12% of the incarcerated "young adult" population (ages 18-21).[16]

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9. Owusu-Bempah & Wortley, *supra* note 8. See also, *supra* note 5; *Borde, supra* note 1 at paras 29-30; *R v X, supra* note 1 at para 198; *Gabriel, supra* note 1 at para 50; *Reid, supra* note 1 at para 25; *Anderson, supra* note 1 at paras 91-94; The Honourable Roy McMurtry & Dr. Alvin Curling, *The Review of the Roots of Youth Violence* (Toronto: Queen's Printer for Ontario, 2008), vol 1 at 43. This includes the school to prison pipeline. See e.g. Carl James, *Towards Race Equity in Education: The Schooling of Black Students in the Greater Toronto Area* (April 2017), online (pdf): <https://edu.yorku.ca/files/2017/04/Towards-Race-Equity-in-Education-April-2017.pdf> [https://perma.cc/3C68-EAPE] [Carl James, *Towards Race Equity in Education*]; Andrea Gordon, "Black students hindered by academic streaming, suspensions: Report," *The Star* (24 April 2017) online: <www.thestar.com> [https://perma.cc/6KQW-2A6T].

10. Maynard *supra* note 6 at 85; See also, Diène Report, *supra* note 5 at paras 43, 55; Michelle Y Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal LJ 419 at 430; Graham Reynolds & Wanda Robson, *Viola Desmond's Canada: A History of Blacks and Racial Segregation in the Promised Land* (Black Point: Fernwood Publishing: 2016) at 49-63; David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law 2006) at 56 [Tanovich, *The Colour of Justice*].

11. See e.g. *DeLancey v Woodin,* an 1880 case where a plaintiff brought an action in trover when an enslaved person, Jack, ran away and began working for wages in the Royal Nova Scotia Regiment. The court decided in favour of the plaintiff, affirming his property right in the enslaved person.

12. United Nations' Working Group, "Statement to the Media by the United Nations' Working Group of People of African Descent, on the Conclusion of its Official Visit to Canada, 17–21 October 2016" (21 October 2016), online: <www.ochr.org> [https://perma.cc/D7XX-Y6TV].

13. *Ibid.*

14. Canada, Office of the Correctional Investigator, *Annual Report 2016–2017,* by Ivan Zinger (Ottawa: 2017), online (pdf): <https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf> [https://perma.cc/K6TM-QAMG] at 55–56 [OCI, *Annual Report 2016–2017*].

15. Canada, Office of the Correctional Investigator, *Annual Report 2018–2019,* by Ivan Zinger (Ottawa: 2019), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20182019-eng.aspx> [https://perma.cc/2EU4-782D] [OCI, *Annual Report 2018–2019*].

16. Canada, Office of the Correctional Investigator, *Annual Report 2017–2018,* by Ivan Zinger (Ottawa: 2018), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx>

The Canadian government is well aware of the overincarceration of people of African descent. The Office of the Correctional Investigator (OCI) has been keeping records and reporting on the growing African Canadian inmate population for over a decade.[17] In its 2011–2012 report, the OCI identified Black inmates as one of the "fastest growing sub-groups in [federal] corrections."[18] The population increased by 75% from 2002–2012, 90% from 2003–2013, and 69% from 2005–2015.[19] Importantly, these alarming increases have occurred despite the problem being consistently raised.[20] As the OCI reported in 2017, despite the data collected on the issue, 4 years after the 2011–2012 report, "very little appears to have changed for Black people in federal custody."[21]

The judiciary has also commented on the overincarceration of Black Canadians. For example, in *R v Golden*, the Supreme Court of Canada noted that African Canadians, like Aboriginal people, are overrepresented in the criminal justice system.[22] Judge Derrick (as she then was) made a similar observation in *R v X*.[23] In *R v Reid,* Justice Morgan noted that many of the sociological causes for this overrepresentation are linked to anti-Black racism.[24] Similarly, in *NW*, Judge Buckle noted that there is growing consensus in the case law that African Canadian offenders are overrepresented in prison, and that unique systemic and background factors may play a role in their offences.[25] In *Elvira,* Justice Schreck observed:

> One does not have to spend much time working in the criminal justice system to realize that African–Canadians are overrepresented among those accused of crimes. I do not need evidence to draw this conclusion any more than I need evidence to conclude that gun crimes are prevalent in the City of Toronto.[26]

[https://perma.cc/LN7B-7P8P].

17. See *Jackson, supra* note 1 at para 43.
18. United Nations' Working Group, *supra* note 12.
19. *Jackson, supra* note 1 at para 43, referring to: Canada, Office of the Correctional Investigator, *Annual Report 2012–2013,* by Howard Sapers (Ottawa: 2013), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx> [https://perma.cc/W9H3-GAMM] at 3; OCI, *Annual Report 2014–2015, supra* note 7 at 2, 27, 30; Canada, Office of the Correctional Investigator, *Annual Report 2015–2016,* by Howard Sapers (Ottawa: 2016), online: <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx> [https://perma.cc/5JZ5-FC37] at 8, 61–66; OCI, *Annual Report 2016–2017, supra* note 14 at 55.
20. *Jackson, supra* note 1 at para 43.
21. OCI, *Annual Report 2016–2017, supra* note 14.
22. *R v Golden,* 2001 SCC 83 at para 83. See also *Borde, supra* note 1 at paras 17-19; *Perry, supra* note 1 at para 76.
23. *R v X, supra* note 1 at para 197.
24. *Reid, supra* note 1 at para 25, referring to *R v Nur,* 2011 ONSC 4874, at para 79 (appeal allowed on other grounds, [2015] 1 SCR 773). See also, *Jackson, supra* note 1 at para 31.
25. *NW, supra* note 1 at para 31, referring to: *Perry, Gabriel,* and *Borde,* all *supra* note 1.
26. *Elvira, supra* note 1 at 22.

Both the government and the judiciary are also aware of the fact that the needs of Black offenders are not being met in prison, and that Black offenders are typically treated worse than non-Black offenders while incarcerated.[27] The OCI released a report detailing the Black inmate experience in federal corrections in 2014.[28] The report explained that Black offenders are more likely to be placed in maximum security than the general population, despite being rated as lower risk to re-offend.[29] Black offenders are overrepresented in involuntary/disciplinary segregation[30]; are less likely to be granted federal day or full parole[31]; are more likely to be targeted for discretionary institutional charges, which can add more time to their sentence[32]; and are overrepresented in use of force incidents, among other issues.[33] The report also explained that the cultural needs of Black offenders are not being met while they are incarcerated. This includes a lack of cultural programming, a lack of cultural products for hygiene, and a lack of relevant community support.[34] As a result of these factors, African Canadian offenders in effect serve a harsher sentence than the general population.[35] It is not surprising that in 2019, the OCI stated that Black inmates accounted for 37% of *all* discrimination complaints to the OCI between 2008–2018, despite representing only 8% of the incarcerated population.[36]

Because the criminal law in this country has evolved against a backdrop of Whiteness as the norm, in the absence of people of African descent, it is unsurprising that the ways in which sentences are determined does not include the perspectives and circumstances of African Canadian people. Therefore, the historical and social context of African Canadians must be explicitly included in criminal proceedings, particularly sentencing. IRCAs ensure that this information is, at the very least, available to sentencing judges. This paper argues that not only have the courts been correct to

27. See e.g. *Jackson, supra* note 1 at paras 53-54; *Anderson, supra* note 1 at paras 75, 78, 104; Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report* (February 2014), online: <https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx#toc4b> [https://perma.cc/QJ58-96TC] [OCI, *A Case Study of Diversity in Corrections*].
28. OCI, *A Case Study of Diversity in Corrections, supra* note 27. This study was updated in the OCI *Annual Report 2016–2017, supra* note 14, which indicated that very little had changed.
29. OCI, *A Case Study of Diversity in Corrections, supra* note 27 at para 55.
30. *Ibid* at para 59.
31. *Ibid* at para 62.
32. *Ibid* at paras 56-58.
33. *Ibid* at para 60.
34. *Ibid* at paras 23-36.
35. See e.g. *Jackson, supra* note 1 at paras 31, 49-54.
36. OCI, *Annual Report 2018–2019, supra* note 15.

accept arguments relating to anti-Black racism and overincarceration as an integral part of the sentencing process for Black offenders, but also that IRCAs should be mandatory (unless waived by the offender) to ensure that the unique circumstances of African Canadian offenders are before the court to enable a more informed, anti-racist, and, therefore, more just sentencing process.

Part I of this paper sets out the legislative context in the sentencing provisions of the *Criminal Code*.[37] It argues that various sections of the *Code* authorize judges to consider systemic and background factors in sentencing all offenders. This approach is consistent with the wording of the sentencing provisions, the government's rationale in drafting the provisions, and judicial interpretation of s 718, in particular. This part also briefly addresses the youth context contained in the *Youth Criminal Justice Act*,[38] as some of the cases were decided based on that authority.[39]

Part II provides a doctrinal analysis of the IRCA case law, with a view to establishing a framework for sentencing African Canadian offenders. It begins by identifying and explaining the framework that Justice Nakatsaru established in *Jackson*[40] and *Morris*.[41] From there it builds on *Jackson* and *Morris* by reviewing the cases that adopt a similar approach. Finally, it canvasses the lessons that can be learned from the cases that reject the *Jackson/Morris* approach.

Part III addresses some of the outstanding issues raised by the case law. It argues that judges and lawyers should stop defaulting to "this is not Gladue"-type arguments and reasoning; that IRCAs should be mandatory unless waived by offenders; that sentencing is only one of many tools needed to address the overrepresentation of Black offenders in prisons; and that judges should do more than simply state that they have considered the systemic factors in their reasons. This part then addresses who should write IRCAs and what type of information should be included in them. It also addresses the role of defence counsel and the need for training in race-based arguments. Part III is followed by a brief conclusion.

37. *Criminal Code,* RSC 1985, c C-64 [*Code* or *Criminal Code*].
38. *Youth Criminal Justice Act*, SC 2001, c 1 [*YCJA*].
39. See e.g. *R v X, supra* note 1; *TJT, supra* note 1; *C(JL), supra* note 1.
40. *Supra* note 1.
41. *Supra* note 1. *Morris* is currently on appeal to the ONCA, date to be determined.

I. *The legislative context*

Sentencing is governed by Part XXIII of the *Criminal Code*.[42] It provides a framework for judges to use in determining a fit sentence for each offender. Section 718 delineates the purpose of sentencing:

> **718.** [Purpose] 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.[43]

Paragraphs (a)–(d) address denunciation, deterrence, separation, and rehabilitation, while paragraphs (d)–(f) are restorative in nature, aimed at rehabilitating the offender and repairing the harm done to society.[44] Section 718.2 lists additional principles that must be considered by a sentencing judge:

> **718.2** [Other sentencing principles] A court that imposes a sentence shall also take into consideration the following principles:
> (*a*) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
> (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
> (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization shall be deemed to be aggravating circumstances;
> (*b*) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

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42. *Criminal Code, supra* note 37 at Part XXIII.
43. *Ibid* at s 718.
44. *R v Gladue,* [1999] 1 SCR 688, 23 CR (5th) 197 at paras 33, 43 [*Gladue*]; *Interpretation Act,* RSC 1985, c I-21 at s 12.

(*c*) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(*d*) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(*e*) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.[45]

These provisions are necessarily remedial in nature.[46] They aim to remedy the overuse of incarceration in the criminal justice system.[47] To attain their remedial objective, they must be given "a fair, large and liberal construction and interpretation."[48]

The weight given to the objectives listed in ss 718 and 718.2 are limited by the fundamental principle of proportionality in s 718.1.[49] This principle requires a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender,"[50] and is constitutionally protected by ss 7 and 12 of the *Charter*.[51] Proportionality is meant to serve a restraining function to help to ensure justice for the offender.[52]

Many sections in Part XXIII authorize judges to order and consider IRCAs. The discussion of cultural-based sentencing is largely focused on s 718.2(e), which will be addressed shortly, however other provisions are also relevant. For example, IRCAs can be grounded in s 718(d) as an essential element of rehabilitation; in s 718.1 with respect to the degree of responsibility of the offender; in s 718.2(a) as a mitigating factor[53]; and in s 718.2(d) as relevant circumstances. They can also be grounded in s 723(2), which requires the court to "hear any relevant evidence presented by the prosecutor or the offender."[54] Judges are also able to order IRCAs pursuant

45. *Criminal Code, supra* note 37 at s 718.2.
46. *Gladue, supra* note 44 at paras 33, 57.
47. *Ibid* at paras 46, 57, quoting Minister of Justice Allan Rock introducing Bill C-41. The *Criminal Code, supra* note 37 has been amended to address this issue with respect to bail. See Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2019, s 493.2(b) (Royal Ascent 21 June 2019).
48. *Gladue, supra* note 44 at para 32.
49. *R v Ipeelee,* 2012 SCC 13 at para 114, Rothstein (dissenting in part) [*Ipeelee*].
50. *Criminal Code, supra* note 37 at s 718.1.
51. *Ipeelee, supra* note 49 at para 36.
52. *Ibid* at para 37, quoting Justice Wilson in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at 533. At para 68, the court notes, a just sentence is one that does not operate in a discriminatory manner.
53. Case law suggests that s 718.2(e) can also be mitigating. This is addressed in detail in Part II(3).
54. *Criminal Code, supra* note 37 at s 723(2).

to s 723(3) of the *Criminal Code*.[55] Section 724 authorizes judges to accept the information contained in the IRCA as proved at sentencing.[56]

Section 718.2(e), also referred to as the principle of restraint, is particularly important for IRCAs, as it requires judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances" for all offenders.[57] The three key aspects of this provision are: the circumstances of the offender, the reference to imprisonment, and the application to all offenders.

First, IRCAs provide judges with information relevant to understanding the circumstances of the offender. For example, as Justice Derrick stated in *R v X,* the expert evidence (contained in the IRCA and *viva voce* evidence) provided "a more textured, multi-dimensional framework for understanding 'X,' his background and his behaviours."[58] Similarly, Justice Campbell underscored the importance of this information for African Canadians, a group he identifies in *Gabriel* as being subjected to "notorious centuries long systemic discrimination":

> **[51]** …It is important to know about the systemic and background factors that bring any person before the court for sentencing. That is particularly so when they relate to members of a group that is disproportionately represented in the prison population, disproportionately economically disadvantaged, disproportionately disadvantaged in education, and disproportionately disadvantaged in health outcomes.
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> …
>
> **[57]** Sentencing judges struggle to understand the context of the crime and person being sentenced. To do that judges rely on our own common sense and understanding of human nature. Sometimes that isn't enough. Our common sense and our understanding of human nature are products of our own background and experiences. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male. The [IRCA] serves as a reminder of the fallibility of some assumptions based on an entirely different life experience.[59]

Second, IRCAs are directly connected to the government's objectives when they amended part XXIII of the *Code* in 1996. The amendments, and

55. *Ibid* at s 723(3). This step is important as these reports range in estimate from $3,000–$9,000. As a result of the systemic barriers to education and employment, etc., many of the individuals who could benefit from these reports are unable to afford them.
56. *Ibid* at s 724.
57. *Ibid* at s 718.2(e).
58. *R v X, supra* note 1 at para 198.
59. *Gabriel, supra* note 1 at paras 51, 57.

s 718.2(e) in particular, were enacted as a reaction to overincarceration.[60] The government wanted imprisonment to be used as a last resort for all offenders.[61] IRCAs can help the judiciary achieve this objective by connecting the accused person's experience with anti-Black racism to overincarceration.[62] They can connect an individual offender to the larger, racially-influenced, social practice of controlling and incarcerating Black bodies. IRCAs also help to emphasize the importance of rehabilitation in sentencing African Canadian offenders.[63]

Finally, s 718.2(e) explicitly refers to "all offenders." The plain reading of this provision includes African Canadians despite no specific reference to us. The court has also held that s 718.2(e) applies to everyone. For example, in *Gladue*, the SCC concluded that the restorative justice goals expressed in s 718(d-f) apply "to all offenders, and not only Aboriginal offenders."[64] It also concluded that s 718 is evidence of Parliament's intent to "expand the parameters of the sentencing analysis for all offenders."[65] In *Hamilton*, the Ontario Court of Appeal held that there is "no doubt" that s 718.2(e) applies to all offenders.[66]

1. *Youth context*

Because youth are sentenced pursuant to the *Youth Criminal Justice Act*, the judicial authority to order and consider IRCAs in sentencing youth is different than in the adult context. The case law in this area appears to be confined to situations where the Crown is seeking an adult sentence.[67] This could be because the cases involving an application for an adult sentence are more likely to be reported than other youth cases, or because counsel has not sought to use IRCAs in less serious cases. Regardless, the jurisprudence is applicable to all youth sentences.

Generally, where any young person is before the court for sentencing, s 3(1)(c)(iv) of the *YCJA* explicitly requires judges to consider the young person's race:

> *(c)* within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should…
> *(iv)* respect gender, ethnic, cultural and linguistic differences and

60. *Gladue, supra* note 44 at para 57.
61. See e.g. *ibid* at para 46; *Peazer, supra* note 1 at paras 64-65.
62. *Jackson, supra* note 1 at para 101.
63. See e.g. *Perry, supra* note 1 at para 76; *Middleton, supra* note 1 at 17, 21; *Anderson, supra* note 1 at para 70.
64. *Gladue, supra* note 44 at para 70.
65. *Ibid* at para 43.
66. *Hamilton, supra* note 1 at para 98.
67. See *R v X, supra* note 1; *TJT, supra* note 1; *NW*, *supra* note 1.

> respond to the needs of aboriginal young persons and of young persons with special requirements…[68]

This has been interpreted to authorize the use of IRCAs in sentencing young people.[69] In situations where the Crown seeks an adult sentence, the background of the offender is a relevant factor that the court must consider. Section 72 of the *YCJA* authorizes the court to order an adult sentence where (a) the presumption of diminished moral blameworthiness is rebutted, and (b) a youth sentence would not be sufficient to hold the young person accountable.[70] Case law has established an offender's background is relevant to the accountability analysis.[71]

2. *Individualized sentencing*

Before moving on to establish the framework for considering systemic and background factors, one additional point should be addressed: the individual nature of sentencing decisions for all offenders. Courts repeatedly state that sentencing is "an inherently individualized process."[72] In *R v M(CA),* the leading authority on judicial discretion in sentencing, the SCC cautioned against a rote, uniform approach to sentencing and accepted that sentences may vary for similar offences committed under different circumstances:

> …the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.[73]

From the foregoing, it is evident that both the legislative scheme and jurisprudence authorize judges to order and consider IRCAs in sentencing African Canadian offenders. The following Part will set out the current framework for doing this work, and how it has been applied.

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68. *YCJA, supra* note 38 at s 3(1)(c)(iv).
69. *R v X, supra* note 1 at paras 196-198; *TJT, supra* note 1 at 82. See also, *NW, supra* note 1 at paras 28-29. Although *NW* did not involve a formal IRCA, his s 34 psychological assessment included a "race and cultural component" that included many of the same factors contained in an IRCA: information about his historical and current cultural context and background and systemic factors that impacted his life and may have played a role in the offence.
70. *YCJA, supra* note 38 at s 72.
71. *NW, supra* note 1 at paras 27, 30; *R v MM,* 2013 NSPC 45 at paras 6-11; *R v Ellacott*, 2017 ONCA 681 at para 18.
72. *Gladue, supra* note 44 at 76, quoting *R v M(CA)* [1996] 1 SCR 500, 46 CR (4th) 269 at 103 [*M(CA)*].
73. *M(CA), supra* note 72 at para 92.

II. *The framework for context-driven sentences for African Canadian offenders*

This Part outlines, explains, and builds upon the framework for considering systemic and background factors in sentencing Black offenders, as established in *Jackson* and *Morris*, and rooted in s 718.2(e) of the *Criminal Code*.[74] Although some judges have recognized their ability to consider race and systemic arguments in sentencing African Canadian offenders dating back to *Borde* and *Hamilton*, there have been growing pains and lessons that needed to be learned along the way. One such lesson was how to use race-based information as a mitigating factor. For example, as Justice Campbell stated in *Gabriel*, the cultural information "prompts a judge to struggle with difficult questions for which there may not really be entirely clear answers."[75] Some judges have stated that they had "considered" the systemic arguments in crafting their sentence but did not explicitly indicate, nor is it obvious, how those arguments mitigated the sentences they determined.[76]

Jackson and *Morris*, two cases decided by Justice Nakatsaru in 2018, provide the most recent, comprehensive analysis of why the judiciary should consider systemic arguments and how they can mitigate sentence. Essentially, the framework involves three parts: (1) taking judicial notice of systemic racism[77]; (2) acquiring information connecting this historical and contextual information to the particular circumstances of the offender[78]; and (3) treating all of this information, when taken together, as a mitigating factor in the sentencing analysis.[79]

1. *Taking judicial notice of systemic racism*

In *Jackson*, Justice Nakatsaru began by taking judicial notice of the history of colonialism, slavery, policies and practices of segregation,

74. I should note that the use of IRCAs began in Nova Scotia, with *R v X, supra* note 1. This is unsurprising given African Nova Scotian history. A full account is beyond the scope of this paper; however, it is worth noting that Nova Scotia has deep roots in the Trans-Atlantic Slave Trade, which significantly shaped (and continues to shape) the lives of Black Canadians in this province. It is also important to note that the African Nova Scotian community is not simply defined by our history of oppression. The contributions that we have made in building Nova Scotia, and our presence, perseverance and persistence in fighting for equality are fundamental aspects of African Nova Scotian identity. This paper looks to *Jackson, supra* note 1 and *Morris, supra* note 1 to establish the framework for considering IRCAs because they are the first cases to systematically set out *how* judges can and should go about taking systemic information into account. Importantly, *Jackson*, the first case to use IRCAs in Ontario, involved an African Nova Scotian person, and the report was written by Mr. Wright, the originator of IRCAs in *R v X*.

75. *Gabriel, supra* note 1 at para 91.

76. See e.g. *Desmond, supra* note 1; *Nimaga, supra* note 1; *Riley, supra* note 1 at para 30.

77. *Jackson*, *supra* note 1 at paras 81-92.

78. *Ibid* at paras 93-104.

79. *Ibid* at paras 105-115.

intergenerational trauma, and the overt and systemic racism experienced by African Canadians, and how this has translated into "socio-economic ills and higher levels of incarceration."[80] He reasoned that taking judicial notice of these facts is consistent with the principle of restraint in s 718.2(e), the judicial recognition of discrimination against African Canadians, and the doctrine of judicial notice.[81]

Judges have long recognized their ability to take judicial notice of facts that are clearly uncontroversial or beyond reasonable dispute.[82] In *R v Find*, the SCC set a strict threshold for judicial notice; courts are able to take judicial notice of facts that are: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[83] This threshold is relaxed for social framework facts.[84] Judges are able to take judicial notice of social framework facts where they are satisfied that the facts "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used…."*[85]

Given the plethora of reports conducted on the Black experience in Canada and the impact of systemic anti-Black racism,[86] and the academic

80. *Ibid* at para 82.

81. *Ibid* at paras 82, 87. At para 87, Justice Nakatsaru refers to the following cases recognizing historical and systemic discrimination against African Canadians: *R v Parks,* [1993] OJ No 2157, 15 OR (3d) 324; *R v RDS,* [1997] 3 SCR 484, 151 DLR (4th) 193; *Golden, supra* note 22; *R v Brown*, [2003] OJ No 1251, 64 OR (3d) 161; *R v Grant*, 2009 SCC 32; *R v Spence*, 2005 SCC 71 [*Spence*].

82. See e.g. *R v Find,* 2001 SCC 32 at para 48 [*Find*]; *Newfoundland (Treasury Board) v NAPE,* 2004 SCC 66 at para 56; *Spence, supra* note 81 at para 65; *R v Lacasse,* 2015 SCC 64; *R v Le,* 2019 SCC 34 at paras 83-85 [*Le*].

83. *Find, supra* note 82 at para 48.

84. *Spence, supra* note 81 at para 65.

85. *Ibid* at para 65 [emphasis in original].

86. See e.g. Diène Report, *supra* note 5 at paras 20, 43, 45; African Canadian Legal Clinic, *Civil and Political Wrong, supra* note 6; African Canadian Legal Clinic, *Errors and Omissions, supra* note 6; Canada, Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: 1995) [Canada, *Commission on Systemic Racism*]; *Royal Commission on the Donald Marshall, Jr., Prosecution: Consultative Conference,* vol 7 (Halifax: Province of Nova Scotia, 1988) [*Consultative Conference*]; *Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations*, (Halifax: Province of Nova Scotia, 1989); Dr Wilson Head & Don Clairmont, *Royal Commission on the Donald Marshall, Jr., Prosecution: Discrimination Against Blacks in Nova Scotia: The Criminal Justice System: A Research Study*, vol 4 (Halifax: Province of Nova Scotia, 1989); Nova Scotia, Black Learners Advisory Committee, *BLAC Report on Education: Redressing Inequity—Empowering Black Learners* (Nova Scotia: Black Learners Advisory Committee, 1994) vol 1–3; *Durban Declaration, supra* note 5 at art 13.

literature[87] and jurisprudence on point,[88] Justice Nakatsaru was correct to conclude that he must take judicial notice of the historical and ongoing experiences of African Canadians, including our overrepresentation in prison. The SCC has explicitly held that "courts have acknowledged that racial prejudice against visible minorities is so notorious and indisputable that its existence will be admitted without any need of evidence."[89] Recently, in *R v Le*, the SCC explained, "[e]vidence about race relations relevant to the detention analysis, like all evidence of social context, can be derived from 'social fact' or the taking of judicial notice."[90]

Both the lower threshold for social framework facts, and the higher threshold for judicial notice generally, are met. Reasonable, informed people who have taken the trouble to inform themselves on the topic of the historical and ongoing systemic anti-Black racism in Canada would accept that the history of colonialism, slavery, policies and practices of segregation, intergenerational trauma, and overt and systemic racism has translated into socio-economic ills and higher levels of incarceration. These facts are capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy, as the government has been gathering data and information in this area for decades.[91]

These facts should also be so notorious or generally accepted as not to be the subject of debate among *reasonable* people. The only issue may

87. See e.g. Sheppard, *supra* note 5; Singh & Li, *supra* note 5; Reynolds & Robson, *supra* note 10 at 46; Tanovich, *The Colour of Justice, supra* note 10 at 56; Michelle Y Williams, *supra* note 10; Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Nova Scotia: Fernwood Publishing, 1999) at 14-15; Robert S Wright & Jacqueline Barkley, "Race as a significant variable in the legal system," *The Society Record* (31 May 2014) 37; Esmeralda MA Thornhill, "So Seldom for Us, So Often Against Us: Blacks and Law in Canada" (2008) 38:3 Journal of Black Studies 321; David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal justice System" (2008) 40 Supreme Court Law Review 655 [Tanovich, "The Charter of Whiteness"]; Dale E Ives, "Inequality, Crime and Sentencing: *Borde, Hamilton* and the Relevance of Social Disadvantage in Canadian Sentencing Law" (2004) 30:1 Queen's LJ 114; Kenneth Donovan, "Slaves and their Owners in Ile Royal, 1713–1760" (Autumn 1995) 25:1 *Acadiensis* [Donovan, "Slaves and their Owners"]; Kenneth Donovan, "Slavery and Freedom in Atlantic Canada's African Diaspora: Introduction," (2014) 43:1 *Acadiensis* [Donovan, "Slavery and Freedom"]; Barry Cahil, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 UNB LJ 73 [Cahil, "Slavery and the Judges of Loyalist Nova Scotia"]; Whitfield, *North To Bondage, supra* note 5; Robin W Winks, *The Blacks in Canada: a History*, 2nd ed (Montreal: McGill-Queen's University Press, 1997); Carl James et al, *Race & Well-Being: The Lives, Hopes, and Activism of African Canadians* (Black Point: Fernwood Publishing, 2010); Barrington Walker, ed, *The African Canadian Legal Odyssey* (Toronto: University of Toronto Press, 2012) [Walker, *African Canadian Legal Odyssey*]. There are many, many other academic resources on point.

88. See e.g. *supra* notes 1, 76.

89. *Spence, supra* note 81 at para 5.

90. *Le, supra* note 82 at para 71.

91. See e.g. *supra* notes 86, 87; all of the yearly reports by the Office of the Correctional Investigator, e.g. *supra* notes 14-16, 19.

be that Canada and Canadians have a tendency towards collective amnesia when it comes to our history with slavery and systemic anti-Black racism.[92] However, this comes perhaps from a place of fear, a lack of understanding, or wilful blindness, rather than a reasonably held belief that Canada does not have a history of subjugating and oppressing Black Canadians and disproportionately targeting us for incarceration.

Taking judicial notice of historical and ongoing systemic anti-Black racism also alleviates the need for accused persons to prove these facts in court, which can be quite costly given the need to retain experts.[93] Due to the very racism that they would need to prove, which negatively impacts their education and employment prospects, the accused person may not have the resources available to produce expert evidence at trial. In this vein, not taking judicial notice further entrenches systemic anti-Black racism in the criminal justice system.

2. *Connecting the historical information to the circumstances of the offender*

Step two in the *Jackson/Morris* framework is to connect the historical information to the particular circumstances of the offender in an attempt to understand how it has contributed to bring the offender before the court.[94] This is consistent with the SCC in *Ipeelee*, and the ONCA in *Borde* and *Hamilton*, where the courts accepted their ability to consider systemic and background factors where they "have played a role in the offence."[95] It is also consistent with the individualized nature of sentencing.[96]

Offenders do not need to show a "direct" connection between their personal circumstances and the historical and systemic factors.[97] Proving a direct connection would "impose a systemic barrier that would only perpetuate inequality for African Canadians."[98] Instead, Justice Nakatsaru adopts the Saskatchewan Court of Appeal's approach that the link between systemic factors, the circumstances of the offender, and the offence "is based on inferences drawn from the evidence based on the wisdom and experience of the sentencing judge."[99] Offenders therefore must provide

92. See e.g. Whitfield, *North to Bondage, supra* note 5 at 4. See also Diène Report*, supra* note 5 at 21.
93. *Jackson, supra* note 1 at para 90.
94. *Ibid* at paras 93-104.
95. *Borde, supra* note 1 at para 32; *Hamilton, supra* note 1 at paras 133-135; *Ipeelee, supra* note 49 at para 77; *Gladue, supra* note 44 at para 69.
96. *Gladue, supra* note 44 at 76, quoting *R v M(CA), supra* note 72 at 103.
97. *Jackson, supra* note 1 at para 111.
98. *Ibid* at para 112.
99. *Ibid* at para 111, referring to *R v FL*, 2018 ONCA 83 at para 46 [*FL*], quoting *R v Whitehead*, 2016 SKCA 165 at para 63.

the court with evidence from which it can draw an inference. In *Jackson* this evidence was presented in the form of an IRCA written by Social Worker, Robert Wright, MSW, RSW.[100] Mr. Wright has authored numerous such reports, including the first one, in *R v X*.[101] In *Morris*, the evidence was presented in the form of two reports: one addressing anti-Black racism in Canada, the other addressing Morris' social history.[102] The reports were prepared by Professor Akwasi Owusu-Bempah, Professor Carl James, and Ms. Camisha Sibblis, MSW.[103]

Despite noting the benefit of such reports,[104] Justice Nakatsaru declined to hold a presumption in favour of them unless the offender waives their right to have systemic evidence before the court. Instead, he held that IRCAs are not mandatory.[105] His reasoning is threefold: first, although s 718.2(e) imposes an obligation on sentencing judges in sentencing Aboriginal offenders, which creates an obligation to require case-specific information about the Indigenous offender, *Gladue*-reports themselves are not mandatory.[106] Second, it is not his role to dictate how information should be presented in a given case where an African Canadian is being sentenced.[107] Finally, he reasons that it is not mandatory to consider systemic and background factors for Black offenders such that a failure to do so would be an error in principle unless waived by the offender.[108] Instead, he concludes that judges must arrive at a fit and proper sentence and should take systemic and background information into account "when the case calls for it."[109] However, judges may not need additional information to be able to do so, and where they do need additional information, it need not take the form of an IRCA.[110]

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100. *Jackson, supra* note 1 at para 29 (for more on Mr. Wrights' credentials, see <http://www.robertswright.ca/> [https://perma.cc/7N2X-M5HD]).
101. *Supra* note 1.
102. *Morris, supra* note 1 at para 13.
103. Professor James has a Ph.D. in sociology, and is the Jean Augustine Chair in Education, Community, and Diaspora at York University and a Fellow of the Royal Society of Canada (for more see *ibid* at para 15). Professor Owusu-Bempah has a PhD in Criminology and Socio-legal Studies. He is an assistant professor in the Department of Sociology at the University of Toronto (for more see *ibid* at para 16). Ms. Sibblis is a PhD candidate at York University. She has a Master's Degree in Social Work (for more see *ibid* at para 17).
104. See e.g. *Jackson, supra* note 1 at para 101.
105. *Ibid* at paras 94-104.
106. *Ibid* at paras 95-96.
107. *Ibid* at para 98.
108. *Ibid.* The SCC stated in *Ipeelee, supra* note 49 at para 87 that failing to take the unique circumstances of an Aboriginal offender into account at sentencing violates the sentencing principles and is a reviewable error on appeal.
109. *Jackson, supra* note 1 at para 99.
110. *Ibid* at paras 99-100. The issue of whether IRCAs should be mandatory will be addressed in further detail in Part III.

3. *Treating systemic and background information as mitigating factors*

This step of the framework requires judges to use the information gathered by taking judicial notice of systemic and background factors and the case-specific information in the IRCA (or another source) to arrive at a fit sentence.[111] The question is, how does this information translate into an appropriate sentence? In *Jackson*, Justice Nakatsaru started from the perspective that it can inform the incidence of crime and recidivism.[112] This has two components. First, it helps to ensure that judges properly take the contextual circumstances of the lived experience of the offender into account in sentencing.[113] Where this experience is not considered, there is a risk that systemic factors may inadvertently lead to discrimination in sentencing. The SCC accepted this rationale from Professor Quigley in *Ipeelee:*

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination. [Citation omitted].[114]

Justice Nakatsaru applied the same reasoning for African Canadians.[115] This led him to conclude that "careful, culturally appropriate, and sensitive assessments are a must" in sentencing African Canadian offenders. Systemic and background factors influence how judges apply the principles of sentencing. In particular, they may alter the balance between the principles of general deterrence and denunciation and other sentencing objectives.[116] For example, viewed with subtlety and nuance, the principles of general denunciation and deterrence may be met by sentences of greater restraint.[117]

111. *Ibid* at para 105.
112. *Ibid*.
113. *Ibid* at para 107.
114. *Ibid* at para 107, quoting *Ipeelee, supra* note 49 at para 67.
115. *Jackson, supra* note 1 at para 108.
116. *Morris, supra* note 1 at paras 55-57.
117. *Ibid* at paras 59-62.

Second, the systemic and background information may bear on the offender's moral culpability.[118] This relates to the offender's choice to act, and the characterization of the seriousness of the crime, [119] and helps to contextualize an offender's criminal record.[120] Justice Nakatsaru recognized that an offender's choice to act may be constrained by their circumstances.[121] Some offenders may have limited choices available to them due to racism and discrimination, which can negatively affect employment prospects, education, housing, etc.[122] The seriousness of the crime must be determined with the offender's limited choices and personal circumstances in mind.[123] Systemic and background factors contextualize criminal records and help judges to see the offender as more than a series of criminal acts. Judges should also bear in mind that systemic factors were likely not taken into account during previous sentencings, which arguably translates to the offender having received stiffer penalties for those offences.[124] This approach is consistent with the proportionality principle in s 718.1 of the *Criminal Code*, which requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.[125]

4. *Applying the framework*

After setting out the framework, Justice Nakatsaru applied it in *Jackson* and *Morris*. Jackson was sentenced to 6 years total for possession of a prohibited firearm with ammunition (5 years) and breach of a probation order (1 year). After credit for pre-trial custody of 1,203 days, he was sentenced to a further 2 years and 257 days in custody.[126] The Crown sought a total sentence of 8.5–10 years, while the defence sought a 4-year sentence. Justice Nakatsaru reasoned that the Crown's position did not give adequate attention to the contextualization of his criminal record, the background factors that brought Jackson before the court, the proper understating of the seriousness of his offences, ignored his potential for rehabilitation, and gave too much weight to deterrence and denunciation.[127] While Justice Nakatsaru found the defence's position to be too lenient, he did apply the

118. *Jackson, supra* note 1 at para 109.
119. *Morris, supra* note 1 at para 56.
120. *Jackson, supra* note 1 at para 147.
121. *Morris, supra* note 1 at para 56.
122. *Ibid.*
123. *Ibid*.
124. See e.g. *Jackson, supra* note 1 at paras 164-166.
125. *Criminal Code, supra* note 37 at s 718.1.
126. *Jackson, supra* note 1 at para 177.
127. *Ibid* at para 173.

principle of restraint, consider Jackson's prospects for rehabilitation, and treat the systemic and background factors as mitigating.[128]

The systemic and background information enabled him to contextualize Jackson's record, understand how he came before the court, and ensure that he did not just "write him off [as] a criminal not worth the time..."[129] Justice Nakatsaru noted that Jackson's involvement with the criminal justice system began when he was young, and that he received "pretty tough" sentences from the beginning.[130] Jackson struggled with his racial identity, which led to struggles fitting in with both Black and White communities, and led to him associating with bad influences.[131] He also struggled at school, which is common for Black youth, as they are often underserved in the education system due to systemic barriers.[132] His mother had mental health issues that were not properly diagnosed or treated, which also has systemic roots.[133]

Morris was convicted of possession of an unauthorized firearm, possession of a prohibited firearm with ammunition and carrying a concealed weapon.[134] He was sentenced to 15 months in custody (less 3 months for *Charter* violations).[135] After credit for pre-trial custody he was sentenced to a further 1 day in jail and 18 months' probation.[136] The Crown sought 4–4.5 years in custody, while the defence sought 1 year before credit for *Charter* breaches.[137]

Justice Nakatsaru recognized that the principles of general deterrence and denunciation are most important for firearm offences. He also recognized that it would be wrong to only consider those principles as the effect of systemic racism on Morris was also relevant.[138] Although Morris

128. See e.g. *ibid* at paras 101, 123, 147, 149, 164, 169-170.
129. *Ibid* at paras 146-149. Justice Nakatsaru also noted at para 164 that despite his lengthy criminal record, Jackson's background was not a factor in those sentencings.
130. *Ibid* at para 142.
131. *Ibid* at paras 127-128.
132. *Ibid* at paras 125-126.
133. *Ibid* at paras 138-139.
134. *Morris, supra* note 1 at para 2.
135. *Ibid* at para 97. The *Charter* breaches are set out at paras 86-96. Briefly, the police hit Morris with their police car, violating s 7. They also violated s 9 because they continued to question Morris after he asked to speak to a lawyer. Although Justice Nakatsaru took these violations into account in sentencing, he declined Morris' application to stay the charges. Many of the cases set out in this article involve *Charter* violations by the police. These violations did not result in a stay of proceedings but were considered in the sentencing analysis. The significance of these *Charter* violations is not fully addressed in this paper. However, further research should be done to determine whether systemic racism is involved in the impugned police conduct, not only in the cases addressed in this paper, but also in all cases where an African Canadian offender alleges a *Charter* violation by police.
136. *Ibid* at paras 97-98.
137. *Ibid* at para 6.
138. *Ibid* at paras 54-56.

fled from police and threw away the gun, Justice Nakatsaru did not consider this to be an aggravating factor given the systemic and specific information before him. Instead, he found that systemic factors have led to distrust between the police and Black men, while Morris' personal interactions with the police have caused him to believe that he would not be treated fairly by police.[139] The reports stated that anti-Black racism affected his life in a way that brought him before the court, and negatively affected his opportunities.[140] Morris grew up in a socio-economically challenged neighbourhood, where he was exposed to danger; he was underserved in the education system; he was vulnerable to negative influences; and his feelings of powerlessness and frustration as a result of the environment that he grew up in made the possibility of possessing a gun "real."[141] Morris was exposed to violence, and was stabbed on two occasions, including once while in custody, which caused him to experience Post-Traumatic Stress Disorder, anxiety, dysphoria and paranoia.[142] He lost friends to violence, suffered from anxiety from a young age due to the environment that he lived in, which fostered a sense of hopelessness and desperation.[143] He also did not receive help to address his mental health.

Justice Nakatsaru concluded that a 15-month sentence for a youthful, first time offender was a "significant reformatory sentence" *in the circumstances*. The sentence accomplished many objectives. It would deter others, while also showing those familiar with the Morris' circumstances that the sentencing objectives can be reached by measured punishment, not heavy-handed punishment based on fear.[144] This sentence would also begin to address the problem of the overincarceration of Black offenders.[145]

Morris was scheduled be heard by the ONCA in April 2020, however that has been postponed due to the COVID-19 outbreak. A new date has yet to be set. The Crown has appealed Justice Nakatsaru's ruling on many grounds, including: the sentence was unfit, the court mistreated the social context evidence, and the court misapplied the aggravating and mitigating factors.[146] The case presents an opportunity for the ONCA to provide guidance on how systemic and background factors should be used in sentencing African Canadians. The ONCA concluded in *Borde*

139. *Ibid* at paras 64-66.
140. *Ibid* at para 74.
141. *Ibid*.
142. *Ibid* at para 77.
143. *Ibid*.
144. *Ibid* at para 79.
145. *Ibid*.
146. See e.g. David Asper Centre for Constitutional Rights, "Asper Centre Cases," online: <http://aspercentre.ca/constitutional-cases/asper-centre-cases/#Morris> [https://perma.cc/VPL7-Q7CV].

that systemic factors could be relevant, but that the evidence should be presented at trial where it could be tested and the relevance to the particular offender could be explored.[147] This is precisely what Justice Nakatsaru did in *Jackson* and *Morris*. Hopefully the ONCA will confirm that s 718.2(e) authorizes judges to consider systemic and background factors in sentencing African Canadian offenders, and that these factors mitigate sentence. Ideally the SCC will also speak to this issue and deem the failure to consider systemic and background factors in sentencing African Canadians contrary to sentencing principles.

The antecedent and subsequent case law to *Jackson* and *Morris* can be divided into two broad categories: cases that are consistent with *Jackson/Morris* and cases that reject *Jackson/Morris*. Through this doctrinal analysis, it becomes clear that although judges are taking systemic information into account, they do not always communicate how the information actually mitigates sentence.

a. *Cases that are consistent with the* Jackson/Morris *framework*[148]

It should come as no surprise that the decision in *R v X* is consistent with the Jackson/Morris framework. Afterall, *X* was the first case to use an IRCA in sentencing and has therefore been relied on in the subsequent case law, including *Jackson.*[149] The similarities are obvious: Judge Derrick had the benefit of an IRCA, she considered race-based arguments in sentencing, and they affected how she sentenced "X." Justice Derrick did not take judicial notice of systemic racism because she did not need to. Instead, she qualified Robert Wright, MSW, RSW, to give opinion evidence on the social factors relating to the community where "X" lived.[150] He was also qualified to give opinion evidence on the effect of those social factors on "X," and rehabilitative recommendations for him.[151] Judge Derrick also allowed Mr. Wright to express his opinion about the absence of any reference to race in "X"'s psychological and psychiatric assessments prepared for sentencing.[152] She then used Mr. Wright's evidence to rebut the evidence presented in the psychological and psychiatric assessments

147. *Borde, supra* note 1 at para 30.

148. This section does not address every case that is consistent with *Jackson/Morris* in detail. For example, in *Husbands, supra* note 1 at paras 83-84, Justice O'Marra agreed with Justice Nakatsaru that the impact of systemic racism on Husbands mitigated the seriousness of his criminal record and criminal activity "to some degree," and that his "opportunities and choices" were restricted based on his race.

149. See e.g. *Gabriel, supra* note 1 at para 50; *Desmond, supra* note 1 at para 26; *NW, supra* note 1 at para 28.

150. *R v X, supra* note 1 at para 163.

151. *Ibid.*

152. *Ibid*.

that "X" was a "criminally-entrenched sophisticated youth."[153] For Judge Derrick, the race-based evidence provided a textured, multi-dimensional framework for understanding "X," his background, and his behaviours.[154]

Given that Judge Derrick's analysis was focused exclusively on "X"'s diminished moral culpability and accountability in the context of a s 72 application for an adult sentence, the evidence on race and culture was not used to mitigate sentence in the way that it was used in *Jackson* and *Morris*. However, the evidence did inform Judge Derrick's conclusion that the Crown's application for an adult sentence should fail.[155]

In *McIntosh*, Justice Bourque "whole heartedly" agreed with Justice Nakatsaru's analysis in *Jackson.*[156] Tasked with sentencing McIntosh for attempting to possess a restricted firearm, Justice Bourque took into account the "overt and systemic disadvantage" to which Black Canadians are subjected.[157] He also considered the interaction between specific and general deterrence, where specific deterrence could be addressed through a conditional sentence, while general deterrence could necessitate a custodial sentence.[158] Ultimately, Justice Bourque found that a custodial sentence could "significantly impact" McIntosh's potential recidivism, and in McIntosh's particular circumstances, general denunciation and deterrence did not outweigh the appropriateness of a conditional sentence.[159] Justice Bourque's analysis is in keeping with Justice Nakatsaru's conclusion that systemic and background factors can impact the balance to be achieved between sentencing objectives.[160]

Judge Williams provided a thorough analysis of how the IRCA informed her sentence in *Anderson,*[161] a case involving possession of a loaded firearm. She began by noting that the principles of sentencing often do not address the causes of offending behaviour, particularly for people whose offending is linked to systemic racism and poverty. She recognized that while she must apply the principles of sentencing, she "must also gain an understanding and appreciation of the circumstances" that led Mr. Anderson to offend.[162] This included taking into account the historical and social context for Black Canadians, including the overrepresentation of

153. *Ibid* at para 198.
154. *Ibid* at paras 198, 248, 250.
155. See e.g. *ibid* at para 240.
156. *McIntosh, supra* note 1 at para 21.
157. *Ibid* at para 22.
158. *Ibid* at paras 23-24.
159. *Ibid* at para 27.
160. *Morris, supra* note 1 at paras 55-57.
161. *Supra* note 1. The Crown has filed a notice of appeal. The appeal has yet to be scheduled.
162. *Ibid* at para 7.

Black Canadians in custody, and the impact that this had on Mr. Anderson's choices. After providing a thorough review of the information presented in the IRCA, including issues related to housing, education, employment, mental health, intergenerational trauma, and racial profiling—including the fact that "30% of all Black males in Halifax have been arrested for a crime at some point in their lives" compared to 6.8% for white men—Judge Williams addressed how this information impacts sentencing.[163]

First, she adopted Mr. Wright's question: whether she should send Anderson to jail, a system that we know will fail him for myriad reasons,[164] or sentence him to a community sentence, creating an "opportunity for meaningful change."[165] Similarly to *Jackson*, she then recognized that systemic factors are relevant to the principles of sentencing. She reasoned that sentencing cannot predominantly be about denunciation and deterrence, as "punishment does not change behaviour when the actions are rooted in marginalization, discrimination and poverty…"[166] Further, deterrence assumes that offenders weigh the pros and cons of their behaviour, and operates from the assumption that people can freely chose to act, without their choices being limited by systemic and socio-economic factors. Because the socio-economic factors "are so powerful and firmly entrenched in systemic racism and marginalization," she reasoned that regardless of what sentence she imposed on Anderson, it would likely not provide general deterrence.[167] Instead, she concluded that accountability and reparation should inform a restorative approach, and that she should look to the community to help address the needs of offenders like Mr. Anderson.[168] She therefore sentenced him to a conditional sentence of 2 years less a day, and included various conditions to address racialized factors that could not be addressed in a federal or provincial jail.[169] This included "Afrocentric therapy interventions," community service in the African Nova Scotian community, and mentorship through either 902 Man Up, or IMOVe, two services that provide Afrocentric mentoring and therapy to help raise cultural self-awareness.[170]

Judge Williams also adequately addressed problematic arguments from the Crown. In arguing for a 2- to 3-year federal sentence, the Crown

163. *Ibid* at para 64.
164. *Ibid* at paras 75-79, 104-105.
165. *Ibid* at para 95.
166. *Ibid* at para 88.
167. *Ibid* at para 94.
168. *Ibid* at para 104.
169. *Ibid* at paras 107-112.
170. *Ibid* at para 107.

suggested that Anderson was not living a "pro-social" lifestyle because he had "71 criminal contacts" with the police, despite no charges being laid in relation to those "contacts."[171] As set out in more detail in Part III, the Crown also argued that society should not be negatively impacted by Anderson's life circumstances. Judge Williams recognized the need to "exercise extreme care" in assessing the Crown's submissions in the light of the history of street checks in Nova Scotia.[172] Importantly, streetchecks were deemed illegal by former Chief Justice Michael McDonald in an independent opinion prepared for the Nova Scotia Human Rights Commission in 2019.[173]

There are at least two noteworthy cases where the court has ordered an IRCA at the request of counsel: *Middleton*, and *Boutilier.*[174] *Middleton* is significant in two respects: it was the first case where the court agreed to order an IRCA, which meant that the government paid for the assessment instead of the accused (or Legal Aid); and, because *Middleton* is a transcribed copy of the sentencing hearing, it includes all submissions by counsel and Middleton's own comments in addressing the court. Readers are able to gain some insight into how the IRCA affected *Middleton*. He described how he let down his guard in discussions with Mr. Wright, how the process opened his eyes to the impact that race and racism had on his behaviour and interactions with the criminal justice system, and how the process gave him hope for his future.[175] Middleton went so far as to thank Judge MacDonald for ordering the report, stating that he would have otherwise not met Mr. Wright, and that he would perhaps have continued to "miss the mark":

> I'm not saying I got it all together, but my footing is better. I'm ready to move forward in my life so I've got to thank you for having [taken] the time to see the person and the problems and adjudicate and be fair and I couldn't ask for something more. Now I just trust the process and my belief is more today.[176]

Middleton plead guilty to multiple breaches of probation and undertakings, uttering threats, multiple counts of resisting arrest,

171. "Criminal contacts" with police likely means street checks, or carding, a practice whereby the police collect "personal and/or identifying information" and enter it into the Versadex database for future use. See J Michael MacDonald & Jennifer Taylor, "Independent Legal Opinion on Street Checks" (October 2019), online (pdf): <https://humanrights.novascotia.ca/news-events/news/2019/street-checks-legal-opinion> [https://perma.cc/2B8R-3UG7] at 3.
172. *Anderson, supra* note 1 at para 36.
173. MacDonald & Taylor, *supra* note 171 at 9.
174. *Supra* note 1. Judge Curran also ordered an IRCA in *Faulkner, supra* note 1 at para 17.
175. *Middleton, supra* note 1 at 16-17.
176. *Ibid* at 17, lines 13-15.

possession of a controlled substance, assault, and destruction of property. Both an IRCA and Pre-Sentence Report (PSR) detailed Middleton's "deeply tragic personal history."[177] He was sentenced by way of joint recommendation to a 9-month conditional sentence followed by 1-years' probation.[178] As a result, there is not much discussion of how the systemic and background factors mitigate Middleton's offences. However, some insight can be gained from the Crown and defence submissions and Judge MacDonald's reasons. The Crown submitted that they were seeking the jointly recommended sentence given the background factors set out in both the IRCA and PSR.[179] Both Crown and defence connected Middleton's distrust of authority (which no doubt played a role in his resisting arrest) to childhood abuse and his time spent in the Home for Colored Children and the Shelburne School for Boys.[180] Defense counsel connected Middleton's engagement with the criminal justice system to his adverse childhood experiences.[181] Judge MacDonald also commented that the report, among other things:

> …sets out the context in terms of your becoming involved in criminal behaviour and it sets out the context, again, in a way that is—it's very relevant to these proceedings. It's very important and very relevant.[182]

The court also ordered an IRCA in *Boutilier.*[183] The decision is noteworthy, insofar as it explicitly sets out what the report should address. Justice Chipman ordered an IRCA to be prepared as part of Boutilier's PSR to examine the role that Boutilier's cultural background played in his offence.[184] The report was to be prepared by an individual(s) with "specialized knowledge, education and experience in the completion of such reports relating to systemic and background factors affecting the African-Nova Scotian Community."[185] Justice Chipman also ordered that the report address Boutilier's African Nova Scotian background, including the following systemic factors that could have individual impacts: poverty/

177. *Ibid* at 12, line 22. Middleton was abused as a child, spent time at both the Home for Colored Children and the Shelburne School for boys.
178. *Ibid* at 19, 21.
179. *Ibid* at 10, lines 22-25.
180. *Ibid* at 9-11.
181. *Ibid* at 14-15.
182. *Ibid* at 17, lines 21-23.
183. *Supra* note 1 at para 16.
184. Mr. Boutilier stole a van from a dealership. The owners saw him and followed him in their own vehicle. Mr. Boutilier crashed into a pole. He continued driving, cutting over a curb and crashing into a Volkswagen stopped at a red light. Mr. Blackburn, the Volkswagen's driver, died as a result of the injuries that he sustained in the crash.
185. *Boutilier, supra* note 1 at para 17. The report was prepared by Robert Wright.

low income; poor educational outcomes; community fragmentation; historical and contemporary impacts of racialized and intergenerational trauma; the overrepresentation of African Nova Scotians in the criminal justice system, where there remains little to no culturally relevant programming; and the clinical/mental health implications to Black males' psychological and global functioning.[186]

The Crown sought to exclude the report on two grounds. The Crown argued that Mr. Wright overstepped the scope of his expertise by diagnosing Boutilier with a traumatic brain injury and ascribing aspects of his behaviour to it.[187] Justice Chipman agreed and struck these parts of the report from the record.[188] The Crown also argued that the report should be excluded because the order contained statements about the lack of culturally relevant programing in the criminal justice system, which the defence should have to prove.[189] Justice Chipman ruled that the order would stand, but allowed the Crown to cross-examine Mr. Wright.[190]

Boutilier does not provide much, if any, insight as to how the cultural information mitigates the offender's sentence. Justice Chipman essentially split the crown and defence submission (on the Criminal Negligence charge) down the middle, sentencing Boutilier to a global sentence of 7.5 years.[191] Although he quotes a series of questions and answers that Mr. Wright included in the report, including how Boutilier's history and identity as an African Nova Scotian offender should be addressed at sentencing, Justice Chipman did not explain how systemic and background factors influenced Boutilier's sentence. He did say that the IRCA, together with other defence evidence, allowed him to accept that Boutilier expressed remorse.[192] He also ordered that Boutilier have access to culturally appropriate counselling and therapy while in custody.[193]

Although the court did not have the benefit of an IRCA in *Nimaga*, there was *viva voce* evidence from Nimaga's mother addressing the

186. *Ibid* at para 16. These factors closely mirror the factors that Ms. Lana McLean identified as being relevant to understanding the offender in *Downey, supra* note 1 at para 9, released 2 days later.
187. *Boutilier, supra* note 1 at para 16.
188. *Ibid* at paras 20-23.
189. *Ibid* at para 18. See *Anderson, supra* note 1 at paras 75, 77-78, addressing the lack of services for federally and provincially incarcerated African Canadians.
190. *Boutilier, supra* note 1 at para 20.
191. *Ibid* at para 46. The Crown sought 10 years, while the defence sought 4. Both crown and defence sought 1 year consecutive for failing to stop and 6 months concurrent for the theft of a motor vehicle (*ibid* at paras 5, 10).
192. *Ibid* at paras 29, 39.
193. *Ibid* at para 59. The court also ordered culturally appropriate counselling in *Downey, supra* note 1, *Middleton, supra* note 1, *C(JL), supra* note 1, and *Anderson, supra* note 1, a point that will be addressed at the end of this Part.

systemic racism that Nimaga and her family experienced. She testified that he was diagnosed with ADHD and learning disabilities, for which he received no specialized assistance at school.[194] He stopped taking his ADHD medication because it made him sleepy, and instead consumed marihuana. His family lived in a predominantly white neighbourhood, and the other kids would not play with him, which led to him feeling rejected. At school other students would tease him about his skin colour. At six, an adult educator stuffed a piece of pizza into his mouth because he was not eating fast enough, which led to him becoming more violent. When he was older, while walking with his girlfriend, the police stopped them and asked her why she would associate with a crack smoker. Nimaga believed that this incident would not have happened if he was white.[195]

Defence counsel relied on *Jackson* to argue that particular attention had to be given to the principle of restraint in sentencing Nimaga for possession for the purpose of trafficking and breach of probation. They argued that 6 months to 2 years less a day was appropriate, and that no further jail time was necessary given Nimaga's credit for pre-trial custody. They argued that it would be appropriate for Nimaga to serve his sentence in the community by way of a conditional sentence order and probation.[196]

Judge Bourgeois agreed with the reasoning in *Jackson* that she could take judicial notice of systemic racism. She linked Nimaga's background and circumstances to the offences for which he was being sentenced, noting that there was a "direct" link between the two.[197] She concluded that his socio-economic background could not be ignored. His addiction, school circumstances, unemployment, and family living arrangements were all testaments to the systemic anti-Black racism identified by the studies referred to in *Jackson.*[198] She declined to sentence Nimaga in the range of 18 months to 2 years less a day, as requested by the Crown.[199] Instead, she sentenced him to 7 months, with credit for 6 months and 3 weeks pre-trial custody, and 18 months' probation.[200] Like *Boutilier*, she did not explain how Nimaga's experience with systemic racism was treated as a mitigating factor; instead she explained its relevance to his crime, and stated that she considered it as a mitigating factor.[201]

194. *Nimaga, supra* note 1 at paras 10, 52.
195. *Ibid* at para 11.
196. *Ibid* at para 6.
197. *Ibid* at paras 52, 60.
198. *Ibid* at paras 60-61.
199. *Ibid* at para 3.
200. *Ibid* at para 65.
201. *Ibid* at para 65.

b. *Cases that expand upon* Jackson *and* Morris

There are a handful of cases that take the *Jackson/Morris* framework further than Justice Nakatsaru. In two of these cases, *Elvira* and *Williams,* the courts infer the impact that systemic racism has on the offender.[202] In others, the courts do not go so far as to infer an impact, but they do consider race despite not having the benefit of an IRCA or evidence connecting the systemic information to the offender.[203]

In *Elvira*, Justice Schreck did not have the benefit of an IRCA when he sentenced Samuel Elvira, a youthful, first-time offender for firearm and drug trafficking related offences. The Crown sought a global sentence of 6 years' incarceration, arguing that denunciation and deterrence should be the primary considerations.[204] Defence counsel sought a global sentence in the range of 2–3 years' imprisonment, given that Elvira was a youthful first-offender and his personal background, including the effects of systemic racism.[205] Justice Schreck sentenced him to a global sentence of 4 years and 3 months' imprisonment, less time for pre-sentence custody, for a total of 2 years less a day going forward.[206] He noted the aggravating factors in the case included: Elvira's possession of a firearm was at the "true crime" end of the spectrum, the trafficking charges involved "extremely harmful" substances (heroin and cocaine), and Elvira was not an addicted-trafficker, but instead chose to exploit those who were.[207] The mitigating factors included: Elvira's youth, that he had no criminal record, his supportive family, his expression of remorse, and systemic racism and background factors.[208]

The Crown argued that the evidence of the type adduced in *Jackson* and *Morris* was not present on the facts of the case, and that since Elvira's brother grew up in similar circumstances and became a successful business person, it followed that Elvira's circumstances growing up played no role

202. *Supra note* 1. *Peazer, supra* note 1 also fits in this category. There appears to be no IRCA or systemic evidence presented to the court, however defence counsel did rely on *Gladue, supra* note 44, and other cases like it to argue that the court should be guided by the principle of restraint in s 718.2. In *Peazer, supra* note 1 at para 59, the court took judicial notice that systemic racism was "likely at play in the circumstances of the case."

203. See e.g. *Reid, supra* note 1; *Desmond, supra* note 1; *Cromwell, supra* note 1 at para 51. In *Robinson, supra* note 1 at para 25, despite the IRCA not explaining how the systemic information related to Robinson's offending, Judge Sakalauskus nevertheless remained "mindful" that African Nova Scotians are overrepresented in custody, in part due to racism and systemic discrimination, and that incarceration should always be a last resort.

204. *Elvira, supra* note 1 at para 8.

205. *Ibid* at para 9.

206. *Ibid* at para 36.

207. *Ibid* at paras 1-17.

208. *Ibid* at paras 18-26.

in his criminality.[209] Justice Schreck rejected both arguments. With respect to the argument about Elvira's brother, he stated:

> With respect, [the Crown's submission] misunderstands the role of adverse personal circumstance in the sentencing calculus as well as the concept of causation. … The fact that others in a similar circumstance made different choices does not mean that those circumstances had no role to play in the choices that were made. Were it otherwise, the fact that most Indigenous Canadians do not commit crimes would mean the principles in *Gladue* are irrelevant.[210]

Justice Schreck also reasoned that Elvira made a choice to become a criminal, his brother did not. However, the issue was not whether Elvira was morally culpable, which he was; the issue was *the degree* to which Elvira was morally culpable.[211]

With respect to the first crown argument, Justice Schreck acknowledged that the case did not include the same type of evidence adduced in *Jackson* and *Morris*, however he was still prepared to take judicial notice of the existence of anti-Black racism and the overrepresentation of African Canadians in the criminal justice system.[212] He then inferred that Elvira was impacted by the effect of anti-Black racism, though the details and extent of that impact were not established.[213] He addressed the need to establish some connection between the circumstances of the offence and the systemic information. He concluded that on the record before him, the impact of Elvira's race was "not without some significance."[214] Justice Schreck reasoned that the area in which Elvira grew up was known to be socio-economically depressed and that he had "no doubt" that Elvira did not "enjoy many of the same advantages that many non-racialized [people] take for granted."[215]

In reaching his conclusion that race was a relevant factor in sentencing Elvira, Justice Schreck relied on *Williams*, a sentencing decision for unlawful possession of a loaded firearm, breach of a probation order, and breach of a weapons prohibition.[216] At the time of his sentencing, Williams was a 20-year-old male of African Canadian and Aboriginal heritage. Yet, the only report before the court was a PSR. There was no

209. *Ibid* at paras 21, 26.
210. *Ibid* at para 26.
211. *Ibid*.
212. *Ibid* at para 22.
213. *Ibid* at para 23.
214. *Ibid* at para 25 with reference to *Williams, supra* note 1, which will be discussed in more detail after *Elvira.*
215. *Elvira, supra* note 1 at para 23.
216. *Supra* note 1 at para 1.

IRCA ordered. A *Gladue* Report was ordered; however, it was unable to be completed.[217] The Crown sought 6 years' imprisonment (less credit for presentence custody of 34.5 months), emphasizing denunciation and general deterrence, and the lack of apparent impact of prior court orders on Williams.[218] The defence sought a sentence of time served, given Williams' youth, his potential for rehabilitation, that he was tasered on arrest, the efficiency of the trial, state misconduct in breaching his *Charter* rights, a case for enhanced pre-sentence custody credit, and the influence of Williams' cultural background.[219]

Justice Hill sentenced Williams to a global sentence of 4.5 years, reduced to 19.5 months for pre-sentence custody.[220] He found Williams' possession of a concealed, loaded handgun in public (including a high school), his criminal history for violence, and the fact that Williams was on probation at the time of the offences to be aggravating factors.[221] Mitigating factors included that Williams was 18 when he committed the offences, and the trial was conducted efficiently. Justice Hill also found Williams' background to be a relevant factor.[222] He concluded that even with minimal evidence connecting the impact of Williams' experiences as an African Canadian person and his Aboriginal heritage to his circumstances, these factors carried some significance.[223] He reasoned as follows:

> **[45]** Having regard to the insidiously stealthy, subtle and general incalculable impact of racial discrimination, and the uniform guidance of Supreme Court of Canada guidance in the context of offenders of Aboriginal ancestry (*Gladue/Wells/Ipeelee*) rejecting a straight-line causation analysis, between cultural disadvantage and commission of an offence, before cultural background context is relevant to the sentencing function, the court's *dicta* in *Hamilton* is best understood to mean that the record before the court ought to raise this issue from the general to the specific in the sense of some evidence, direct or inferential, that racial disadvantage is linked to constraint of a particular offender's choices and to his life experience in bringing him before the court.
>
> **[46]** As a young black-skinned male, the offender is a member of a group in the community long the target of racism and discrimination. It is also

217. *Ibid* at paras 6-8. Aboriginal Legal Services said they were unable to complete the report because both they and Williams were unsure about the specific nature of his Aboriginal ancestry, and even if it could be confirmed, they were unable to address how his Aboriginal heritage affected his life circumstances.
218. *Ibid* at paras 23-25.
219. *Ibid* at para 15. At para 51, the police violated Williams' rights to silence and to counsel.
220. *Ibid* at para 60.
221. *Ibid* at para 55.
222. *Ibid* at para 59.
223. *Ibid* at para 47.

> a notorious fact that black males are disproportionately incarcerated compared to their numbers in the community. The court did not have the benefit of an IRCA (Impact of Race and Culture Assessment), as have some sentencing courts, detailing how a specific black offender's race and culture might factor into understanding the context of how he came to be before the courts—see *Regina v. Jackson*, 2018 ONSC 2527 (CanLII); *Regina v. Gabriel*, 2017 NSSC 90 (CanLII) (conviction appeal dismissed 2018 NSCA 60 (CanLII)).
>
> **[47] While the court has, at best, a relatively thin record respecting the impact of the offender's race and Aboriginal heritage upon his current circumstances, these factors are nevertheless not without some significance in considering the appropriate degree of punishment.**[224]

Reid, like *Williams*, considered race without having the benefit of an IRCA and without much evidence of the impact of systemic anti-Black racism on Reid. The case is particularly interesting because it does not appear that counsel raised the race-based arguments.[225] Rather, the judge was prompted to consider systemic factors by comments made by Reid in the PSR. Reid stated that he had made poor choices, was looking to better himself and that he "[did] not want to be that 30-year-old black man who is a lost cause…."[226] Justice Morgan saw this as a call to address the overincarceration of young African Canadian men.[227] After reviewing statistical data and Supreme Court jurisprudence on point, Justice Morgan concluded that in sentencing Reid, he needed to consider Reid's personal circumstances and the societal circumstances that contextualized his actions.[228] He recognized that "racial disparities in imprisonment are especially problematic with respect to street level drug dealing,"[229] and that while the court could not remedy societal issues, it should take them into account in sentencing an individual offender.[230]

Reid plead guilty to 3 counts of street-level cocaine trafficking and 1 count of possession of the proceeds of crime. The Crown sought a 6- to 12-month custodial sentence, while the defence argued that a conditional sentence order of 2 years less a day was appropriate.[231] Reid admitted that he had a drug problem and attributed it to his difficult childhood. He

224. *Ibid* at paras 45-47 [emphasis added].
225. The case does not mention any arguments made by counsel about race.
226. *Reid, supra* note 1 at para 21.
227. *Ibid* at para 21.
228. *Ibid* at paras 21-24.
229. *Ibid* at para 26.
230. *Ibid* at paras 26-27.
231. *Ibid* at paras 7-8.

attended a high school known for gang-related violence, where he saw a young student get murdered, and his best friend was killed in a shooting.[232] As a result, he dropped out of school and found it difficult to maintain a steady job and manage his emotions.[233] Given Reid's background, the social context, and his low risk to re-offend, Justice Morgan agreed with defence counsel and sentenced him to 2 years less a day to be served in the community under strict conditions.[234] The sentence was designed to meet the objectives of sentencing, including rehabilitation, denunciation and deterrence.[235]

In *Desmond*, Justice Brothers was asked to take race into account in sentencing the offender for criminal negligence in the operation of a motor vehicle causing bodily harm.[236] The record before her included slightly more race-based evidence than in *Reid*, though the court did not have the benefit of an IRCA or PSR. There was evidence from the defence that the Department of Community Services took Desmond from his home as an infant, that he spent time in the Nova Scotia Home for Coloured Children (NSHCC) and was in foster care until age 12. Justice Brothers took judicial notice of the physical, psychologic and sexual abuse perpetrated at the NSHCC.[237] However, there was no evidence as to the effect this had on Desmond,[238] nor was there any evidence connecting systemic factors in general to Desmond's particular circumstances.[239] For this reason, Justice Brothers stated that an IRCA would have been helpful.[240] Despite the lack of evidence, Justice Brothers was still able to conclude that there was "certainly some connection" between Desmond's circumstances and his cultural background.[241] Although she stated that she "considered" the systemic factors and their impact on Desmond, Justice Brothers did not explain how that information mitigated sentence.[242] The Crown sought 36 months' incarceration, while the defence sought 28 months. Justice Brothers sentenced Desmond to 28 months. With credit for pre-trial custody, he had served his sentence.[243]

232. *Ibid* at para 5.
233. *Ibid*.
234. *Ibid* at paras 28, 31.
235. *Ibid* at paras 28-30.
236. *Desmond, supra* note 1 at para 1.
237. *Ibid* at para 13.
238. *Ibid*.
239. *Ibid* at para 23.
240. *Ibid* at para 28.
241. *Ibid* at para 23.
242. *Ibid* at para 29. This is common, see *supra* note 76.
243. *Desmond, supra* note 1 at paras 47, 80.

Finally, in *Faulkner*, Justice Whalen explains how systemic factors are relevant to determining the appropriate range for sentencing. As *Jackson* and *Morris* establish, systemic factors are relevant to contextualize the offender's criminal record, but Justice Whalen clarifies that judges should also consider whether there was an IRCA before the court in the cases that counsel reference to determine the appropriate sentencing range.[244] For example, she notes that it was "glaringly obvious" that in the robbery cases that she was referred to, "there was no [IRCA] before the court or any information about the intersection of race and the criminal justice system."[245] Coupled with the notion that IRCAs are necessary to arrive at a fit and proper sentence for an African Canadian person, it is relevant to consider whether the range-setting cases dealt with racialized people, and whether there was evidence before the court about the intersection of race and the criminal justice system. As Justice Whalen puts it, IRCAs provide information on the "defendant's "background" which is part of the "formula" when considering the "range" and final disposition imposed."[246]

c. *Cases where the court declined to apply* Jackson *and* Morris *due to lack of evidence*

*S*ome cases adopt the reasoning in *Jackson/Morris*, but do not apply it because there was no IRCA prepared, or no evidence provided to the court connecting the background and systemic information to the circumstances of the offender.[247] For example, in *Shallow*, defence counsel argued that race was a relevant factor in sentencing the African-Canadian offender, relying on *Jackson* and *Borde.*[248] Defence counsel also argued that race was relevant to whether Shallow should receive credit for ss 8 and 10(b) *Charter* breaches.[249] Justice Spies took judicial notice of the systemic factors outlined in *Jackson.*[250] She also agreed with the reasoning in *Reid* that social considerations should be taken into account, particularly the fact "that the offender was black and that racial disparity in imprisonment is especially problematic with respect to street level drug dealing."[251] However, she concluded that she had no evidence that Shallow's possession for the purpose of trafficking charges were "due to his African Canadian

244. *Faulkner, supra* note 1 at para 57.
245. *Ibid.*
246. *Ibid.*
247. See e.g. *Shallow, supra* note 1 at para 48. See also, *Ferguson, supra* note 1 at paras 120-129; *Bryce, supra* note 1 at para 32; *Duncan, supra* note 1 at para 86; *Gaynor, supra* note 1 at paras 24, 26.
248. *Shallow, supra* note 1 at paras 38-40.
249. *Ibid* at paras 30, 49.
250. *Ibid* at para 48.
251. *Ibid* at para 44, referring to *Reid, supra* note 1 at para 26.

background," poverty, or peer pressure.[252] She reasoned that although Shallow was diagnosed with a learning disability, he received educational support; although his uncle was deported, which was considered a major disruptive episode in his emotional development, she could not conclude that this was connected to race discrimination; and, his mother was always supportive of him.[253]

Defence counsel argued that given Shallow's past anxiety in dealing with the police, he should be given credit for the beach of his *Charter* rights.[254] Shallow told his social worker that during a previous arrest, the police used brute force to restrain him and were verbally abusive.[255] He also said that he developed a mistrust for police and a fear that he would be targeted after being repeatedly and frequently carded by police.[256] Defence counsel argued that the police need to carefully explain things "to a tee" and try to repair their relationship with the Black community.[257] Justice Spies did not agree that this warranted a reduction in sentence. She reasoned that although she had evidence of how Shallow felt after previous interactions with the police, there was no evidence as to how his interactions with the police affected him on this occasion.[258]

Shallow, and the cases like it,[259] could fit in the category of cases that are inconsistent with *Jackson/Morris* given that Justice Nakatsaru sets out the steps that judges can take to ensure that the court has the necessary information to consider systemic and background factors:

> …When the case calls for it, a sentencing judge should take any relevant systemic or background factors into consideration. They should also have sufficient information to do that. Section 723(3) of the *Criminal Code* permits a judge to order the production of evidence that would assist in the determination of the appropriate sentence. Further s 723(4) allows the court to compel the appearance of any person who is a compellable witness and can assist. Finally, under s 721(4) the court can require a pre-sentence report to contain information on any matter after hearing arguments from the parties. Thus, when appropriate, these provisions can provide a vehicle whereby the sentencing judge can obtain further

252. *Shallow supra* note 1 at para 48.
253. *Ibid*.
254. *Ibid* at para 50.
255. *Ibid* at para 13. The charges against him were later dropped.
256. *Ibid*.
257. *Ibid* at para 50.
258. *Ibid* at paras 50-51.
259. *Shallow, supra* note 1, *Ferguson, supra* note 1, *Bryce, supra* note 1, *Duncan, supra,* note 1, and *Gaynor, supra* note 1. *Clarke, supra* note 1 also fits into this category, though it will be addressed in more detail bellow. At paras 54, 57-59, Justice Lemay makes some effort to secure evidence connecting systemic racism to the circumstances of the offender, but he does not go so far as to exercise his authority under s 723(3).

> information in order to do justice in the individual case: *Borde* at para. 32.[260]

This approach would not run afoul of *Hamilton*, which holds that judges should not become an advocate or an inquisitor.[261] Where it is clear to the court that defence counsel is making arguments relating to systemic and background factors, it would be appropriate for the court to exercise its authority to obtain information about the effect of those factors on the particular offender. Arguably, the court has an obligation to acquire this information. In *Le*, the SCC concluded that for the purposes of a s 9 *Charter* analysis, judges must take into account the racial background of the accused in assessing whether the reasonable person would perceive that they are being detained. This imposes a positive duty on judges to understand the community that they are judging. By extension, this should also apply to sentencing involving a racialized person.

d. *Cases that reject or are inconsistent with the* Jackson/Morris *framework*

This section addresses the arguments raised in the case law where courts have refused to apply *Jackson/Morris*, or to consider race-based arguments in sentencing. The starting point in this category is *Brissett*, decided 4 months after *Jackson.*[262] The offenders, Brissett and Francis, were convicted of living off the avails of prostitution and exercising control, direction or influence over the movements of the victim to aid, abet or compel her to engage in prostitution.[263] The crown sought a 5-year sentence (2.5 years on count one, to be served concurrently to 5 years on count 2). The defendants sought 5 months. In the alternative, Mr. Francis sought time served (1,083 days). Justice Lemay sentenced Francis to 3 years, less 1,083 days for remand credit, and sentenced Brissett to 4 years, given his higher level of involvement in the offences. Relying on *Jackson*, counsel for both parties asked the court to take judicial notice of the historical racism and discrimination against African Canadians, *and* the effects of this history on the offenders.[264] Justice Lemay took issue with the reasoning in *Jackson* and declined to apply it.

However, Justice Lemay's issues with *Jackson* appear to be based on a misguided view that it says courts should take judicial notice of systemic

260. *Jackson, supra* note 1 at para 99.
261. *Hamilton, supra* note 1 at paras 3, 65, 71. See also *Jackson, supra* note 1 at para 100.
262. *Supra* note 1.
263. *Ibid* at para 1.
264. *Ibid* at para 54.

racism *and* the effects that it has on the accused.[265] He reasoned that this approach is not consistent with *Hamilton*, and that Justice Nakatsaru could not rely on the recognition of systemic racism in other aspects of the criminal justice system to justify his approach because sentencing requires a connection between systemic racism and the circumstances of the crime.[266] However, Jackson does not stand for the principle that judges can take judicial notice of systemic factors *and* their effects on the offender. Justice Nakatsaru specifically addressed the need for some information connecting the historical and systemic factors to the circumstances of the offender.[267] Further, the fact that systemic racism exists at other stages of the criminal justice system is relevant to sentencing, insofar as it recognizes that the criminal justice system as a whole is implicated in the overincarceration of Black Canadians.

In *Brissett*, the parties did not provide evidence to the court connecting the systemic information to the circumstances of the offenders. Justice Lemay noted that the PSR "provided no significant indications of any issues."[268] He also asked defence counsel to point to evidence in the PSR that connected the historical information to their clients; they were unable to and could not point to any evidence on the record.[269] This raises two important issues: the need for defence counsel to understand that they must present the court with evidence of the effects of systemic and background factors on their clients,[270] and the need for the judiciary to understand that just because a PSR does not raise race-related issues does not mean that they are not present.[271] Various factors could correlate to a lack of race-based information in a PSR, including: the offender not feeling comfortable talking about race-based trauma with the PSR writer, and a lack of understanding by the PSR writer that race may be a factor.[272] Additionally, research has shown that PSRs can perpetuate and entrench anti-Black racism in sentencing.[273] For these reasons, it is best for defence counsel to provide the court with evidence connecting systemic

265. Perhaps because this was the position argued by defence counsel (*ibid*).
266. *Ibid* at paras 58-72.
267. See e.g. *Jackson, supra* note 1 at para 111.
268. *Brissett, supra* note 1 at para 71.
269. *Ibid* at para 61.
270. This point will be addressed in further detail bellow, regarding the need to make IRCAs mandatory.
271. See Canada, *Commission on Systemic Racism, supra* note 86 at 285: the Commission cautioned that "judges should not be wholly dependent on probation officers for information that is so important to fairness in sentencing."
272. See e.g. *R v X, supra* note 1 at para 189.
273. Kelly Hannah-Moffat, "Actuarial Sentencing: An 'Unsettled' Proposition" (2013) 30:2 Justice Q 270 at 280-282.

and background factors to the circumstances of their client, for example, through an IRCA.

Justice Lemay also cautioned against allowing "societal ills" to outweigh other factors in sentencing.[274] He adopts the reasoning in *Hamilton* that "[i]f [societal] ills are given prominence in assessing personal culpability, an individual's responsibility for his or her own actions will be lost."[275] However, considering systemic and background factors is not about providing race-based discounts or denying responsibility.[276] Rather, it contextualizes the crime, and recognizes that factors outside of the offender's control may affect their actions and moral culpability.[277] It also helps to hold the criminal justice system accountable for its role in the overrepresentation of Black offenders at every stage of the system.[278] Robert Wright has been quoted as saying, "the 'race discount' that people are talking about is not a discount as much as it's calling attention to the fact that we have been systematically overcharged forever… that's not a discount, that's justice."[279]

The circumstances for not considering systemic arguments in *Clarke* are eerily similar to *Brissett*, though Justice Lemay did make some effort to secure evidence connecting systemic racism to the circumstances of the offender. When defence counsel first argued that *Jackson* and *Morris* should apply, Justice Lemay directed them to his decision in *Brissett* and *Francis*.[280] Defence counsel conceded that there was no race-based evidence before the court, but suggested an adjournment to obtain additional evidence. Justice Lemay rejected this proposal for two reasons: first, "and most importantly," he concluded that the PSR "did not provide [him] with any sense that information showing that the offender was personally affected by the issues raised in *Jackson* might exist." Second, despite numerous appearances before the court on this matter, and Justice Lemay "strongly" encouraging Ms. Clarke's cooperation to prepare a report "in order to obtain this very information if it existed," no such evidence was before the court on their fourth appearance.[281] Justice Lemay therefore declined to apply *Jackson* and *Morris*, either by concluding that the evidence did not exist, as he seems to be suggesting with his comment

274. *Brissett, supra* note 1 at para 69.
275. *Ibid* at para 68, quoting *Hamilton, supra* note 1 at para 140.
276. See e.g. *Gabriel, supra* note 1 at para 52; *Elvira, supra* note 1 at para 26.
277. See e.g. *Elvira, supra* note 1 at para 26; *Anderson, supra* note 1 at paras 91, 94.
278. See Bascaramuty, *supra* note 2.
279. *Ibid*.
280. *Clarke, supra* note 1 at para 54, referring to *Brissett, supra* note 1 at paras 54-72. Sentencing took place over 2 days in June and September. Defence counsel first raised the issue in June.
281. *Clarke, supra* note 1 at paras 57-59.

about the PSR, or at the very least because the evidence was not before the court.[282] Again, this case highlights the need for defence counsel to put the necessary evidence before the court.

Similarly to *Brissett* and *Clarke*, Justice Wakefield rejected the *Jackson* analysis in *Gaynor*.[283] He too felt bound by *Hamilton*, and the rationale that sentences should not be lowered based on "nothing more than membership in a disadvantaged group."[284] He noted that even if *Jackson* is accepted in the future, he did not have the necessary evidentiary foundation to apply it.[285]

The following two cases, *Downey* and *Biya*, arguably mistreat the impact of systemic anti-Black racism to varying degrees. Downey plead guilty to punching Kaylin Diggs outside a downtown bar, which caused him to fall and fatally hit his head. At a contested sentencing hearing the Crown sought 7 years in custody, while the defence sought 2-3 years. Justice Rosinski sentenced him to 4 years. A PSR and IRCA were prepared for sentencing. Justice Rosinski noted that the IRCA spoke to a history of discrimination, a cultural code of resolving social injustice by not leaving, backing down, or being "punked out," and being unconsciously hyper-vigilant to potential conflicts, among other issues.[286] The race and cultural impacts for Downey included: the impacts of historical and contemporary systemic racism, the impact of community dislocation and fragmentation, clinical/mental health implications to black male psychological and global function, poor education outcomes, and the overrepresentation of African-Nova Scotians in the criminal justice system where there remains little to no culturally relevant programming.[287] However, Justice Rosinski concluded that there was no "social injustice trigger" that played a role in Downey's offence:

> In the circumstances of this case, there was no social injustice trigger; no racial or discriminatory [black versus white] trigger evident; no realistic need to be hyper-vigilant, given that I have concluded that Mr. Downey was in the company of Michael Chisholm who was fighting Cody Good, surrounded by 8 to 10 of their friends, when Mr. Diggs, an African-Nova Scotian male of similar age, arrived at the fight to assess his friend Cody Good's situation. None of the foregoing factors could realistically be said to play any role in Mr. Downey's striking Mr. Diggs. Moreover, I reiterate Justice Campbell's comments in *R. v. Gabriel,* 2017 NSSC 90

282. *Ibid.*
283. *Gaynor, supra* note 1 at para 23.
284. *Ibid*.
285. *Ibid* at paras 23-24.
286. *Downey, supra* note 1 at para 8.
287. *Ibid* at para 9.

(CanLII), at para. 90:

> Those questions are why a cultural assessment with respect to an African-Nova Scotian offender serves such an important purpose. It does not provide a justification for a lighter sentence. Like a *Gladue* Report, it might prompt the consideration of restorative justice options where those are appropriate. It doesn't position the offender as a helpless victim of historical circumstances.[288]

Respectfully, this conclusion misses the mark. The idea that the impact of systemic racism requires a "social injustice trigger," or a "black versus white" trigger to manifest in the actions of a young, black male is misguided. It ignores the reality that systemic racism is pervasive and prevalent in all of our institutions. The court should not require a specific black versus white trigger in a given situation to consider race and systemic anti-Black racism in sentencing. This would effectively require a "direct" connection between racism and the offence, which the SCC and other courts have rejected.[289] It also seems to suggest that systemic racism plays no role in Black-on-Black crime.[290] Justice Rosinski's sentence was closer to what the defence sought than the Crown. However, this could be because he concluded that there was no evidence that Downey sucker punched the victim.[291]

Biya was convicted of possession of a loaded firearm, careless storage of a firearm, careless storage of ammunition, possession while unauthorized (firearm and ammunition), unauthorized possession of a firearm knowing possession was unauthorized, occupying a motor vehicle knowing there was a firearm, possession for the purpose of trafficking (MDEA), and possession of the proceeds of crime.[292] Justice Brown sentenced him to 4 years (less 3 months and 51 days of pre-trial custody). She rejected defence arguments to take into account the principles in *Morris* regarding the systemic overrepresentation of Black Canadians in prison.[293] She found that Biya's circumstances were not applicable given that he "lived in a stable, supportive family, had a good education, indicated that he had

288. *Ibid* at para 10.
289. See e.g. *Ipeelee, supra* note 49 at para 83; *FL, supra* note 99 at para 46; *Jackson, supra* note 1 at paras 111-112; *Williams, supra* note 1 at paras 45-47.
290. On this point, see e.g. *Anderson, supra* note 1 at paras 48-49, 59-63 where Judge Williams discusses the historical roots and patterns of violence in African Nova Scotian communities, as set out in the IRCA.
291. *Downey, supra* note 1 at para 4.
292. *Biya*, *supra* note 1 at para 1.
293. *Ibid* at para 36.

no concerns about his neighbourhood or the community in which he was raised and did not witness violence either in the community or at home."[294]

This aspect of *Biya* is potentially problematic. It is possible to grow up in a "stable" home and still experience the effects of systemic discrimination. For example, the court in *Peazer* concluded that it was open to the court to find that the offender was either directly or indirectly affected by systemic anti-Black racism, "despite his own advantaged background," by virtue of his membership in the larger Black community.[295] It is also possible to be impacted by systemic racism without having conscious knowledge of this fact.[296] Without the benefit of an IRCA prepared by a qualified writer who could dig into Biya's life circumstances, and uncover what, if any, effect racism had on him, Justice Brown was limited to the information before her: Biya's indication that he had no concerns about his neighbourhood, and the evidence that he grew up in a stable home.

e. *Cases where judges refuse to consider systemic arguments*

There are also cases where the court has refused to consider the systemic arguments made by counsel. In *C(JL)* Judge Derrick (as she then was) refused to order the preparation of s 34 psychological assessment[297] "with a cultural component" in the context of a s 94 sentence review.[298] Because Nova Scotia Legal Aid (NSLA) had declined to pay for an IRCA, J.C.'s counsel requested that the court order one,[299] arguing that it would be beneficial to his sentence review. Although Judge Derrick accepted that a cultural assessment would be a relevant component of a s 34 assessment for an African Nova Scotian young person, in the particular circumstances of the case, it would not "enable [her] to make a more informed decision under s 94(19)" of the *YCJA*.[300] This is because the only options available to her were to confirm the sentence, or release J.C. from custody under conditional supervision.[301] Judge Derrick concluded that she had to

294. *Ibid.*
295. *Peazer, supra* note 1 at para 59.
296. For example, in *Gabriel, supra* note 1 at para 105, Justice Campbell commented that Gabriel's "perception of his childhood as being relatively stable is perhaps a comment on his diminished expectations rather than reality." Gabriel's childhood appears to be far different than Biya's: a childhood marked by sexual assault, an absent father, racism, problems at school, time in a youth facility, and multiple re-locations, to name a few. However, this passage from *Gabriel* highlights that judges should not necessarily take the offender's words about their experience of systemic racism at face value.
297. *YCJA, supra* note 38 at s 34.
298. *Ibid* at s 94.
299. *C(JL), supra* note 1 at paras 17, 18. Given the high cost associated with preparing IRCAs, NSLA is not able to pay for them for every client.
300. *Ibid* at para 41, referring to *YCJA, supra* note 38 at s 94(19).
301. *YCJA*, *supra* note 38 at s 94(19)*; C(JL), supra* note 1 at para 24.

confirm his sentence because J.C. was charged with serious adult offences and remanded to an adult facility for crimes he allegedly committed 5 months into his 27-month Custody and Supervision Order[302]; he had a long history of not successfully following release conditions; and, he breached his conditions and committed new offences.[303]

Defence counsel argued that the s 34 assessment would be beneficial even where the only option was to confirm J.C.'s sentence.[304] It could have enabled J.C. to re-apply for NIRCS (Non-Intensive Rehabilitative Custody and Supervision)[305] funding, J.C. could have used it in his bail review on the adult charges, and it would have benefitted him in custody and with his eventual release and reintegration.[306] However, Judge Derrick did not accept these arguments. She concluded there was a small window in which J.C. could benefit from the assessment while in youth custody, given that the custodial portion of his sentence would be complete in 5 months.[307] Further, there was no evidence that the cultural assessment would identify new services, programs, or greater opportunities for rehabilitation in the community, nor was there any evidence that J.C.'s NIRCS denial could be revisited.

In *Kabanga-Muanza*, Justice Spies also declined to consider systemic arguments because they would not affect her decision on sentence. The offender was convicted of various firearm-related offences.[308] The Crown sought a global sentence of 6.5 years, less pre-sentence credit. Defence counsel sought a global sentence ranging from time served to 3 years. Counsel made "voluminous submissions" on considering systemic and background factors in sentencing Kabanga-Muanza.[309] The Crown argued,

302. *C(JL), supra* note 1 at para 1. He was charged with participating in a riot, assaulting youth workers and property damage.
303. *Ibid* at para 33.
304. *Ibid* at para 28.
305. An IRCS sentence is a rare sentence for serious violent offenders. It involves a period of custody with mandatory treatment followed by conditional supervision and support in the community. See "Explore the YCJA," online: <https://www.ycja.ca/?q=teachers/youth-sentencing-options/in-depth-3> [https://perma.cc/W528-KDQE]. NIRCS funding is sometimes available for cases that qualify for special treatment due to the nature of the offence and the circumstances of the young person. See Nova Scotia Department of Justice, *YCJA Pocket Guide,* online (pdf): <https://novascotia.ca/just/YCJAPocketGuide/docs/2013.pdf> [https://perma.cc/9TB3-A74H] at 45.
306. *C(JL), supra* note 1 at para 28.
307. *Ibid* at para 29.
308. *Kabanga-Muanza, supra* note 1 at para 1. He was convicted of careless storage of a firearm, careless storage of ammunition, possession of a prohibited firearm without a license and registration certificate, possession of a prohibited firearm knowing that he did not have a license and registration certificate, possession of a loaded restricted firearm with readily accessible ammunition, possession of a firearm knowing that the serial number had been defaced, and possession of a firearm while prohibited from doing so by reason of a s 109 order.
309. *Ibid* at para 60.

"any relevance that systemic and background factors have to moral blameworthiness should not be extended to the issue of denunciation as it relates to serious crimes for non-[I]ndigenous offenders."[310] It is not clear from the case what arguments defence counsel made, however it could be inferred that they argued that given Kabanga-Muanza's African heritage, systemic racism should be a mitigating factor.[311] Justice Spies concluded that it was "not necessary" for her to "weigh into" the debate about what role race should play in sentencing Kabanga-Muanza, given her decision to effectively sentence him to time served.[312] He received a 4.5-year sentence with credit for 5 years of pre-trial custody.[313]

While it makes sense that Justice Spies did not need to consider mitigating Kabanga-Muanza's sentence based on race, given that he was effectively sentenced to time served, it still would have been appropriate for her to do so. She sentenced him to 4.5 years in custody for his offences. Had she considered systemic and background factors it is possible that she would have arrived at a lesser sentence. While this would not have impacted the ultimate outcome of the case, it would have other benefits. For example, it would have helped to build the body of case law addressing the use of systemic and background factors in sentencing Black Canadians. It could have set precedent for receiving a lesser sentence for these offences. It could have signaled to Black Canadians that the judiciary is beginning to understand the role that anti-Black racism plays in crime. It would be relevant in the future should Kabanga-Muanza be sentenced for additional crimes, give that sentences typically increase with each subsequent offence. And, it would have (hopefully) prevented the judge from saying that she considered Kabanga-Muanza's upbringing in reaching her decision "without considering the colour of his skin."[314]

f. *Cases where the IRCA informs how the accused serves their sentence*

Before moving on, there is another category of cases worth mentioning: those that address how an IRCA can inform how an offender serves their sentence. *Boutilier, Downey, Middleton,* and *Anderson* fit into this

310. *Ibid* at para 63.
311. *Ibid* at paras 60-61. Defence counsel referred to *Elvira, supra* note 1, *Jackson, supra* note 1, *Morris, supra* note 1, and *Reid*, *supra* note 1.
312. *Kabanga-Muanza, supra* note 1 at para 63.
313. *Ibid* at paras 117-118, 129. Kabanga-Muanza was given additional pre-sentence credit for extensive time spent in lockdown.
314. *Ibid* at para 106. Although it may have not been intentional, this statement is reminiscent of "I do not see colour" arguments, which serve to ignore the realities of black identity. Ian F Haney Lopez, *White by Law: The Legal Construction of Race,* (New York: Ney York University Press, 1996) at 176 states, "in order to get beyond racism, we must first take account of race. There is no other way."

category.[315] This aspect of the case law is important in situations where the judge concludes that a custodial sentence is still necessary, despite mitigating for systemic and background factors. As set out earlier, despite being overrepresented in custody, Black offenders are also underserved while incarcerated.[316] The OCI reported that correctional programs are not culturally relevant, cultural products are not available, there is a lack of community support, and that Black offenders are more likely to be placed in maximum security institutions, among other issues.[317] In this context it is significant that judges are using the information that they learn about the offender to order culturally appropriate counselling while the offender is incarcerated or serving their sentence in the community. It is otherwise unlikely that Black offenders will have access to these resources, as identified by the OCI.[318]

There are institutional costs associated with these judicial orders. For example, federal penitentiaries will need to hire culturally appropriate counsellors to meet this need. This is not to suggest that the judiciary should not order culturally appropriate counselling, rather it is to encourage the government to meet these needs. Culturally informed sentences can help to rehabilitate offenders. For example, Middleton told the court that through his conversations with Robert Wright that he was better able to understand his behaviours and what led him to be involved with the criminal justice system.[319] In *Anderson*, Judge Williams concluded that Anderson needed Afrocentric therapy and an African Nova Scotian mentor/role model to help rehabilitate him.[320]

III. *Keeping perspective: things to address going forward*

This part should not detract from the commendable work that the judiciary (defence counsel, and at times the Crown) is doing in an attempt to address the overincarceration of Black Canadians and the systemic anti-Black racism that contributes to bring African Canadian people before the courts. Instead it should be viewed as a reminder that there are still lessons to be learned and work to be done. Four key recommendations are addressed in the part: (1) judges and the Crown should stop relying on "this is not

315. *Boutilier, supra* note 1 at para 59; *Downey, supra* note 1 at para 34; *Middleton, supra* note 1 at 22, 26; *Anderson, supra* note 1 at para 112. See also, *R v X, supra* note 1 at paras 253-264. Judge Derrick compared the services available to "X" in both a youth and adult facility.
316. See e.g. OCI, *A Case Study of Diversity in Corrections, supra* note 27; *Anderson, supra* note 1 at paras 75-79; Owusu-Bempah & Wortley, *supra* note 8.
317. OCI, *A Case Study of Diversity in Corrections, supra* note 27.
318. *Ibid*.
319. *Middleton, supra* note 1 at 16-17.
320. *Anderson, supra* note 1 at paras 102-103.

Gladue"-type arguments to exclude a systemic approach to sentencing for Black Canadians; (2) IRCAs should be mandatory unless waived by the offender; (3) IRCAs should supplement other interventions needed to address the overincarceration of Black Canadians; and, (4) judges should include some analysis of how the systemic information mitigates their sentence. Two additional points are addressed briefly to identify the need for more work. More thought must be given to, first, the type of information that should be included in an IRCA and who should write the IRCA, and second, the role of defence counsel and the need for training on how to make race-based arguments in sentencing.

1. *Moving beyond "This is not Gladue"*

There is no question that the circumstances of Aboriginal Peoples are unique. However, nothing about the process or rationale for considering systemic and race-based factors in sentencing Black Canadians seeks to deny this reality. And yet, at times, the underlying arguments from the Crown and reasoning from the judiciary reads as though sentencing Black Canadians in a manner that takes our history into account somehow detracts from the remedial and unique approach to sentencing Aboriginal offenders.[321] Section 718.2(e) of the *Criminal Code* does specifically mention Aboriginal Peoples[322]; the government does have constitutionally enshrined obligations to Aboriginal Peoples; and Aboriginal Peoples do have a unique relationship to the rest of Canada. However, this does not mean that Black Canadians do not have a legitimate claim to have our unique history, and the present-day manifestations of this history, factor into how we are sentenced by the court. This is especially true since s 718.2(e) refers to "all offenders."[323]

This country was built on the backs of enslaved people of African descent.[324] Many of our ancestors were forcibly removed from their homes and loaded onto ships destined for Canada to work the land that was forcefully stolen from Indigenous communities.[325] The conditions

321. See e.g. *Jackson, supra* note 1 at paras 93-96; *Kabanga-Muanza, supra* note 1 at para 63; *Brissett, supra* note 1 at para 66.

322. *Criminal Code, supra* note 37 at s 718.2(e).

323. *Ibid.*

324. See e.g. Barrington Walker, "Introduction: From a Property Right to Citizenship Rights—The African Canadian Legal Odyssey" in Barrington Walker, ed, *The African Canadian Legal Odyssey* (Toronto: University of Toronto Press, 2012) 3 [Walker, "Introduction"]; Winks, *supra* note 87.

325. Not all people of African descent arrived as enslaved people during this time period. In Nova Scotia, for example, there were four distinct period through which people of African descent arrived: Slavery, The Black Loyalists, The Jamaican Maroons and the Black Refugees. See e.g. Harvey Amani Whitfield, *Blacks on the Border: The Black Refugee in British North America, 1815–1860*, (Burlington, Vermont: University of Vermont Press, 2006) [*Blacks on the Border*]; Whitfield, *North to*

onboard these ships were horrific.[326] Those who survived the journey were raped, tortured, and forced into manual labour.[327] Others were murdered.[328] Slavery was a form of biological discrimination that resulted in "pervasive and myriad social forms of anti-Black racism."[329] This anti-Black racism became entrenched during the hundreds of years through which slavery thrived in Canada.[330] It continues to be entrenched in our institutions, including the criminal justice system, to this day.[331] The court should take this into account in sentencing where it has played a role in the circumstance of the offence or the offender. They are required to do this on the plain reading of ss 718.1 and 718.2(e), and the individualized nature of sentencing.

2. *The case for making IRCAs mandatory*[332]

Justice Nakatsaru declined to declare IRCAs mandatory in *Jackson*. One of his reasons for doing so was that *Gladue* Reports themselves are not mandatory in sentencing Aboriginal offenders, even though s 718.2(e) specifically mentions Aboriginal people. Instead, it is the information contained in a *Gladue* Report that is mandatory unless waived by the offender.[333] While this is true, the argument is not that IRCAs in and of themselves should be mandatory, the argument is that the information contained in the IRCA should be mandatory, and the IRCA is a proven, effective way of getting this information before the court.[334]

Bondage, supra note 5; Walker, "Introduction," *supra* note 324. However, due to racist immigration policies, until approximately 1950, the majority of Black Canadians lived in Nova Scotia and were descendants of the enslaved people brought to Canada during the trans-Atlantic slave trade.

326. See e.g. Ken Donovan, "Female Slaves as Sexual Victims in Île Royale" (2014) 43:1 *Acadiensis* 147 at 148.

327. See e.g. Winks, *supra* note 87 at 4-9; Donovan, "Slavery and Freedom," *supra* note 87 at 111; Donovan, "Slaves and their Owners," *supra* note 87 at 3. See also Whitfield*, North to Bondage, supra* note 5; Whitfield, *Blacks on the Border, supra* note 325 at 12-24; DG Bell, Barry Cahil & Harvey Amani Whitfield, "Slavery and Slave Law in the Maritimes" in Barrington Walker, ed, *The African Canadian Legal Odyssey* (Toronto: University of Toronto Press, 2012) 363 at 364.

328. See *supra* note 327.

329. Walker, "Introduction," *supra* note 324 at 21.

330. *Ibid* at 6. See also Esmeralda MA Thornhill in C*onsultative Conference, supra* note 86 at 68; David Steeves, "Maniacal Murderer or Death Dealing Car: The Case of Daniel Perry Sampson, 1933–1935" in Barrington Walker, ed, *The African Canadian Legal Odyssey* (Toronto: University of Toronto Press, 2012) at 201.

331. See *supra* notes 81-82.

332. Nothing in this section should be taken to suggest that judges are not able to mitigate for systemic racism without having an IRCA.

333. *See Jackson, supra* note 1 at para 95.

334. See e.g. *Morris, supra* note 1 at paras 27, 66; *R v X, supra* note 1 at para 258; *R v Gabriel, supra* note 1 at paras 90-91; *Jackson, supra* note 1 at paras 95, 103, 123.

Morris, Jackson, Biya, Brissett, Shallow, Ferguson, Clarke, Desmond, and *Gaynor* are all illustrative of this point.[335] In *Morris* Justice Nakatsaru commented on the volume of information presented to him through both expert reports: "I will say in my many years as a judge, I have seldom come across so much information presented to me at a sentencing hearing in general let alone materials specific to the issue of anti-Black racism and a Black offender."[336] In some cases decided after *Jackson*, judges have declined to consider race-based arguments where they have not been presented with evidence that connects the systemic issues to the particular circumstances of the offender. In *Biya, Brissett, Shallow, Ferguson, Clarke,* and *Gaynor* defence counsel attempted to raise arguments about overincarceration and the need to consider systemic factors, however they did not provide the court with the necessary evidence linking these factors to their respective clients.[337] Making IRCAs (or the information contained in them) mandatory would ensure that this does not happen in the future.

IRCAs should also be mandatory because they ensure that race-based issues are considered by the court. Justice Nakatsaru stated in *Jackson* that judges are able to decide whether they need more information about the circumstance of the offender and systemic issues in a given case.[338] With respect, it should not be left to the judiciary to determine this point. Professor Tanovich explains how at times the judiciary has failed to adopt critical race standards and arguments, and at times was, or appeared to be, "hostile" when asked to adjudicate racial issues.[339] There is also a historic reluctance to address race in court proceedings by all players. For example, the historical record shows that both the judiciary and the legislature were reluctant to declare slavery illegal until 1843 out of fear that doing so would impute a presumption of legality to slavery.[340] The historical record also shows that lawyers have been either reluctant or oblivious to the racial issues at play in their cases.[341]

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335. All *supra* note 1.

336. *Morris, supra* note 1 at para 27. This information was presented in the form of two reports: one detailing the historical context, and another addressing how this impacted Morris. An IRCA typically brings these two things together into one document. See e.g. *R v X, supra* note 1; *Jackson, supra* note 1 at para 28.

337. *Biya, supra* note 1 at para 36; *Shallow, supra* note 1 at paras 48, 51; *Brissett, supra* note 1 at para 70; *Ferguson, supra* note 1 at paras 125-129.

338. *Jackson, supra* note 1 at para 100.

339. Tanovich, "The Charter of Whiteness," *supra* note 87 at 662-672.

340. See e.g. Barry Cahil, "Slavery and the Judges of Loyalist Nova Scotia," *supra* note 87 at 76, 84-86; Bell, Cahil & Whitfield, *supra* note 327 at 382.

341. See e.g. Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) at 229 setting out the circumstances of Viola Desmond's case. Her case is illustrative of the fact

Beyond ensuring that race-based arguments are considered by the court, IRCAs are also helpful to the judiciary.[342] Justice Brothers would have liked an IRCA in *Desmond*, but she was not provided with one.[343] Justice Campbell also explained in *Gabriel* that judges are not always able to understand the perspective of a Black offender: "[o]ur common sense and our understanding of human nature are products of our own background and experience. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male."[344] In a report commissioned by former Chief Justice of Nova Scotia, Michael MacDonald, Justice Oland also identified the need to diversify the bench to better understand the circumstances of the people who are before the court.[345] Former Chief Justice of Canada, Beverly McLachlin has raised similar concerns.[346] IRCAs therefore help bridge the experience gap between the judge and offender.

Further, making IRCAs mandatory limits the Crown's ability to argue repeatedly that they are unnecessary or irrelevant to the case at bar, or that there is insufficient evidence to take systemic factors into consideration.[347] This is a significant reality. For example, Robert Wright's qualifications were heavily contested in *X*.[348] In *Morris*, the Crown argued that the race-based information was not corroborated by outside sources; that the scope of the writer's expertise and the "nature of the opinion" she was offering were unclear.[349] In *Anderson*, the Crown argued that "society should not

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that race is often mediated and adjudicated without expressly being discussed. See e.g. *DeLancy v Woodin, supra* note 11; *Gilpin v Halifax Alehouse Limited,* 2013 CanLII 43798 (NS HRC).

342. See e.g. *Borde, supra* note 1 at paras 22-23, referring to a recommendation made by the Commission on Systemic Racism in the Ontario Criminal Justice System on the need for judicial education (Canada, *Commission on Systemic Racism, supra* note 86 at 285).

343. *Supra* note 1 at para 28.

344. *Gabriel, supra* note 1 at para 57.

345. Nova Scotia, Nova Scotia Court of Appeal, *No One Looks Like Me: Diversity on the Bench*, Report by Justice Linda Lee Oland, Commissioned by Chief Justice Michael MacDonald, (Nova Scotia: 2016) [unpublished].

346. See The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Judging: the Challenges of Diversity" (Judicial Studies Committee Inaugural Annual Lecture, delivered in Edinburgh, Scotland, 7 June 2012), online (pdf): <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf> [https://perma.cc/3KLZ-AH42].

347. See e.g. *R v X, supra* note 1; *R v Jackson, supra* note 1 at para 37; *Elvira, supra* note 1 at paras 21, 26; *Morris, supra* note 1 at paras 12, 20, 23; *Williams, supra* note 1 at para 26, where the Crown argued that the record "was scant" with respect to connecting the offender's background to his offences.

348. See e.g. *R v X, supra* note 1 at paras 163, 176-177.

349. *Morris, supra* note 1 at para 23. However, the Crown seems to have abandoned this argument on appeal, as they seem to accept that the information is relevant and are instead challenging how Justice Nakatsaru applied it. See e.g. Teodora Pasca, "Substantive equality in sentencing: Interventions in R v Morris and R v Sharma," online: <https://aspercentre.ca/tag/ontario-court-of-appeal/> [https://perma.cc/6D75-BNZ5].

be 'held responsible or hostage'" for Anderson's life circumstances.[350] This argument is especially problematic given that Anderson's life circumstances as a Black man are a product of the prevalent anti-Black racism in Canada and Nova Scotia in particular. In *Jackson*, although the report was admitted by consent, the Crown still argued that the systemic and background factors had "little relevance" to Jackson's circumstances, and that the information in the report was "more pertinent" to how he would be dealt with in jail than to his sentence.[351]

With respect, Crown prosecutors should have no standing to argue that centuries-long, pervasive, systemic anti-Black racism has no impact on the circumstances of an African Canadian person, particularly when the criminal justice system itself is deeply implicated in the overincarceration of African Canadians.[352] Further, the SCC has held that the prosecutor's role is not to win or lose, but rather their function is a "matter of public duty" that must be exercised fairly, and with the dignity, seriousness, and justness that judicial proceedings require.[353] This is echoed in the *Model Code of Professional Conduct*, which requires prosecutors to "act for the public and the administration of justice resolutely and honourably…"[354]

In addition to these substantive reasons, IRCAs should also be mandatory because of their cost. IRCAs cost on estimate from $3,000–$9,000.[355] As a result of the systemic barriers to education and employment, many of the individuals who could benefit from these reports are unable to afford them.[356] Although some offenders are represented by Legal Aid, resources are limited and reports cannot be paid for in every case where they may be beneficial. If the reports are mandatory, then the onus shifts from the individual to the government to pay for them.

3. *Multiple interventions are needed to address overincarceration*

Some critics have questioned the effectiveness of cultural approaches to sentencing in addressing overincarceration.[357] This point is frequently

350. *Anderson, supra* note 1 at para 35.

351. *Jackson, supra* note 1 at para 37.

352. See e.g. Dr Head & Clairmont, *supra* note 86 at 69 noting the "widespread discrimination against Blacks in the criminal justice system," and that the justice system "has not met the needs of the residents of Nova Scotia for 'equal justice under the law.'"

353. *Boucher v R,* [1955] SCR 16, 110 CCC 263 at 24. Although this case dealt with Crown conduct in the course of a trial, the same principles should also apply to sentencing hearings. Fairness remains a relevant consideration at sentencing.

354. Federation of Law Societies of Canada, *Model Code of Professional Conduct,* amended 14 March 2017, at 5.1-3.

355. This was the average cost in 2016. It is likely to have changed since then.

356. This is largely a result of unequal access to education and employment, as discussed above.

357. See e.g. Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBS Press, 2013) at 171. Murdocca argues that s 718.2(e) has done little to

raised in reference to *Gladue* Reports, as they arguably have done little to address the overincarceration of Aboriginal Peoples.[358] While this concern is valid, IRCAs and other cultural assessments are only one of many interventions needed to address the problem of overincarceration. They cannot be expected to remedy this systemic, social issue on their own. Professor H. Archibald Kaiser explains, "[b]ecause of the public, solemn and deliberate nature of judicial proceedings, there is some tendency to overstate the remedial potential of the sentencing proceedings."[359] He went on to quote the SCC in *Gladue* and the trial judge in *Hamilton*, both to the effect that although society expects the courts to remedy social issues, the criminal justice system should not be expected to remedy entrenched and "profoundly complex" social problems on its own.[360] Similarly, Dr. Ivan Zinger, the Correctional Investigator, has suggested that we should "look upstream"[361] to improve the "socioeconomic, cultural, and political rights of vulnerable segments of the Canadian population…."[362]

Multiple interventions are necessary. Interventions are needed in society in general, as Dr. Zinger suggests, and at all levels of the criminal justice system. Overincarceration is not simply a result of racist sentencing practices. It is a direct result of centuries-long systemic racism that is pervasive in all aspects of Canadian society including, for example, policing, education, housing, employment, and health.[363] It is also a direct result of the criminal justice system disproportionately targeting Black Canadians, from policing and surveillance, through bail, to conviction,

address overincarceration, and also "reinscribes racism in criminal justice processes" (*ibid*).

358. See e.g. Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470; The Canadian Bar Association, "Fifteen years after Gladue, what progress?" *The Canadian Bar Association* (15 April 2014), online: <www.nationalmagazine.ca> [https://perma.cc/N6Q9-QCLE]; Jonathan Rudin, "Aboriginal Overrepresentation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" in Jamie Cameron & James Stribopoulos, eds, *The Charter and Criminal Justice: TwentyFive Years Later*, (Ontario: LexisNexis Canada, 2008) at 687, 700-704; Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 Crim LQ 447; David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84; Brian R Pfefferle, "Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration" (2008) 32:2 Man LJ 113.

359. H Archibald Kaiser, "*Borde* and *Hamilton*: Facing the Uncomfortable Truth About Inequality, Discrimination and General Deterrence" (2003) 8:6 CR-ART 289 at 2.

360. *Ibid* quoting *Gladue, supra* note 44 at para 65, and *R v Hamilton,* [2003] OJ No 532, 172 CCC (3d) 114 (trial decision) at para 150.

361. Bascaramuty, *supra* note 2.

362. Douglas Quan, "Consider impact of systemic racism before sentencing black offenders, Canadian judges urged," *The National Post* (25 April 2017), online: <www.nationalpost.com> [https://perma.cc/NTJ5-L6MH].

363. See e.g. Walker, *African Canadian Legal Odyssey, supra* note 87 at 21; Maynard, *supra* note 6 at 11.

sentencing, incarceration, parole and release conditions.[364] Considering background and systemic factors in sentencing is a vital component of the holistic approach needed to fully address overincarceration.

4. *Moving beyond "I have considered the systemic and background factors"*

Judges are not wrong to state that they have considered the systemic and background factors in sentencing. Instead, this part suggests that they should provide some analysis of how the systemic and background factors inform their sentence. For example, in firearm possession cases, courts will sometimes explain how possession on the "true crime" end of the spectrum is an aggravating factor, which will result in the accused receiving a harsher sentence.[365] This may be difficult to do for systemic factors, given that there is minimal case law on these issues. Further, certain systemic factors do not automatically bump an offence into a different sentencing range; instead they are part of the whole sentencing analysis and help inform the appropriate sentence.

There are two related concerns with "I have considered it"-type analyses. First, with respect, it is hard to know that the judiciary is mitigating the sentence in an appropriate way if there is no explanation other than "I have considered it." The main concern here is that the process for sentencing Black Canadians is new, and in the years since *Borde, Hamilton, X,* and even *Gabriel*, it has changed. For example, in *Gabriel*, Justice Campbell reasoned that "it would be wrong to suggest that there should be a lowered standard of moral responsibility" as a result of a person's racial background.[366] However, more recently, judges have concluded that systemic and background information is relevant to moral culpability.[367] For example, in *Morris*, Justice Nakatsaru found that systemic and case-specific factors lessened Morris' moral blameworthiness.[368] Similarly, in *NW*, Judge Buckle specifically addresses this aspect of *Gabriel*, with reference to *Ipeelee:*

> **[35]** In my view, the Supreme Court is not suggesting that a person's moral culpability is potentially diminished because of that person's

364. See e.g. Owusu-Bempah & Wortley, *supra* note 8 at 10; African Canadian Legal Clinic, *Civil and Political Wrong, supra* note 6; African Canadian Legal Clinic, *Errors and Omissions, supra* note 6; Canada, *Commission on Systemic Racism, supra* note 86; Tanovich, *The Colour of Justice, supra* note 10.

365. See e.g. *Elvira, supra* note 1 at para 12.

366. *Supra* note 1 at paras 52, 54, 89.

367. See e.g. *Jackson, supra* note 1 at paras 61, 66, 75; *Morris, supra* note 1 at para 75; *Elvira, supra* note 1 at para 26.

368. *Morris, supra* note 1 at para 75.

> race or cultural background. Rather, a person's moral culpability is potentially diminished because of the "constrained circumstances" which they may have found themselves in because of the operation of systemic and background factors that are connected to their race and cultural background.[369]

Second, this area of the law is unsettled and developing. Although judges are not obligated to explain how they have considered every relevant factor in sentencing, it would be helpful for them do so with respect to race-based arguments. This would create a growing body of case law that other judges could draw on for guidance in how to treat race-based arguments as mitigating factors. For example, Judge Sakalauskas raised some helpful questions in *Robinson*: (1) whether the defendant's moral culpability is affected by race and cultural factors; (2) how these systemic and race-based factors impacted the defendant's offending and contributed to them being before the court; and (3) whether there are specific sentencing options that should be applied because of (1) and (2).[370] These questions provide a helpful starting point, but should not be seen as an exhaustive explanation of how to treat race-based arguments as mitigating factors. Judge Williams' analysis in *Anderson* is also informative. She reviews Mr. Anderson's needs and considers whether they could be better addressed in custody or in the community.[371]

5. *IRCAs: who should write them and what to include*

IRCAs are only helpful if they are credible and informative. To this end, they must be written by qualified people, and contain information that is helpful to the court. *Boutilier* is informative in this regard. Justice Chipman dictated who could write the report and what he wanted it to contain.[372] He specifically ordered that the author(s) have "specialized knowledge, education and experience in the completion of such reports relating to systemic and background factors affecting the African-Nova Scotian Community."[373] A review of the case law indicates that only nine people in Canada have written these reports[374]: Robert Wright,[375]

369. *NW, supra* note 1 at para 35.
370. *Supra* note 1 at para 23.
371. *Anderson, supra* note 1 at paras 75-79, 88-95, 104-107.
372. *Boutilier, supra* note 1 at para 17.
373. *Ibid*.
374. Mr. Wright is currently in the process of training other people to write IRCAs.
375. See e.g. *Jackson, supra* note 1 at para 93; *R v X, supra* note 1 at para 178; *Boutilier, supra* note 1 at para 29; *Riley, supra* note 1 at para 18; *Middleton, supra* note 1; *Faulkner, supra* note 1 at para 17, *Anderson, supra* note 1 at para 39.

Lana MacLean,[376] Camisha Sibblis,[377] Dr. Hansen,[378] Professor Owusu-Bempah,[379] Professor James,[380] Natalie Hodgson,[381] Sonya Paris,[382] and Professor Marta-Marika Urbanik.[383] This does not mean that these professionals are the only people capable of writing an IRCA. However, it does mean that the Canadian government should expend the funds necessary to train more writers. They have an obligation to do so in light of the overrepresentation of Black Canadians in prison. Regardless of whether IRCAs become mandatory, nine people is certainly too few to meet the potential demand across the country. If and when the government does decide to train more writers, they should do so in consultation with Mr. Wright, Ms. MacLean, Ms. Sibblis, Dr. Hansen, Professor Owusu-Bempah, Professor James, Ms. Hodgson, Ms. Paris and Professor Urbanik.

The objective of an IRCA is to examine the role that systemic factors have played in the offences before the court. It must therefore address systemic anti-Black racism and how it manifests in Canadian society and connect these factors to the particular circumstances of the offender and their offences. An IRCA should therefore include information relating to, but not limited by, the following factors: the history of Black Canadians in the region where the offender has lived, barriers to employment, education, including the school-to-prison pipeline, community fragmentation, intergenerational trauma, the overrepresentation of African Canadians in the criminal justice system, and mental health. The author should be careful to connect the broader systemic factors to the lived experiences of the offender and then explain how this contributes to the offences.[384] For example, the education system in this country systemically underserves Black Canadians.[385] In *Nimaga*, the evidence showed how this led to

376. See e.g. *Perry, supra* note 1 at para 7; *Gabriel, supra* note 1 at para 43; *Downey, supra* note 1 at para 6, *Robinson, supra* note 1 at para 5.
377. *Morris, supra* note 1 at para 14.
378. Dr. Hansen prepared the s 34 assessment in *NW, supra* note 1 at para 28, which included a "race and culture component."
379. Professor Owusu-Bempah wrote the IRCA in *TJT, supra* note 1 at para 42 and co-authored the reports in *Morris, supra* note 1 at para 18.
380. Professor James co-authored the report in *Morris, supra* note 1 at para 18.
381. In *Anderson, supra* note 1 at para 39, Ms. Natalie Hodgson co-authored the IRCA with Mr. Wright. She is an African Nova Scotian School Counsellor and earned her second Master of Education in Counselling as part of an Afrocentric cohort, aimed at addressing the needs of African Nova Scotian learners.
382. In *Robinson, supra* note 1 at para 5, Ms. Sonya Paris co-authored the IRCA with Ms. McLean.
383. See *Husbands, supra* note 1 at para 80.
384. Judge Williams provides a detailed account of the information presented in the IRCA in *Anderson, supra* note 1. This may be a helpful starting point for those looking to understand what kind of information and detail should go into IRCAs.
385. See e.g. Black Learners Advisory Committee, *supra* note 86; *Morris, supra* note 1 at para 74; Carl James, *Towards Race Equity in Education, supra* note 9. See also *Anderson, supra* note 1 at paras

Nimaga not receiving proper interventions for his learning disabilities, which led to him getting in trouble at school, dropping out of school, and becoming addicted to drugs and involved in the criminal justice system.[386]

6. *The role of defence counsel and the need for training in race-based arguments*

Finally, it goes without saying that defence counsel play a key role in their clients' interaction with the criminal justice system; defence counsel are the people who must ensure that their clients' interests are before the court. As such, they play a pivotal role in helping to ensure that the court takes systemic and background factors into account in sentencing their clients. As indicated in some of the cases above, courts are reluctant to treat systemic anti-Black racism as a mitigating factor where they do not have evidence regarding the effects of that racism on the person before the court.[387] Defence counsel therefore need to know that they must present this information to the court. They also need to know that they must make arguments about *how* it should mitigate sentence. This should not be left to the IRCA's author, nor should the evidence be left to speak for itself.[388] The task of sentencing cannot be delegated.[389] While defence counsel can and should use social workers or other professionals to get systemic and background evidence before the court, it is ultimately their responsibility to make sentencing submissions on their client's behalf. Then it is up to the judge to apply the law and arrive and a just sentence.

One way to ensure that defence lawyers are aware of their ability and responsibility to raise race-based arguments is through proper training. Various law schools and Barristers' societies require law students and lawyers to take some form of legal ethics and cultural competency training. These institutions should incorporate mandatory training on how to raise race-based arguments. This work should be done in consultation with the lawyers, academics, and other professionals who are on the frontlines. It would also be helpful to provide this training to the community *pro*

52-54.

386. *Nimaga, supra* note 1 at paras 52, 60. In *Robinson*, *supra* note 1 at para 24, Judge Sakalauskas concluded that neither the *Gladue* report nor the IRCA provided enough information about the accused's offending to support either report's recommended sentence. Despite containing information about Robinson's lived experience, worldview, and life context, the reports did not connect this to, or provide information about, her offending behaviour.

387. See *supra* note 247.

388. For example, in *Cromwell, supra* note 1 at para 51, Justice Jamieson states that she "was given very little by way of submissions" on how to take Cromwell's cultural background into account. Although this case did not involve an IRCA, the caution about defence counsel needing to make submissions on how systemic information mitigates sentence is relevant.

389. *Jackson, supra* note 1 at para 104.

bono to ensure there is a broad awareness of the ability to make race-based arguments at sentencing. These measures will help to ensure that the criminal justice system operates more fairly.

Conclusion

Canada has a very real and pressing problem when it comes to the overincarceration of African Canadians. This issue has been repeatedly identified in the literature, by the government, the judiciary, and by international organizations.[390] Yet, little has been done to address the issue; African Canadians continue to be overrepresented in custody and continue to experience harsher conditions while in custody.[391] Perhaps this is because judges "seemingly [take race into account] with a degree of caution that may not account fully for the reality of racial injustice that is so conspicuous in Canada as to be undeniable."[392]

The time has come to take meaningful action to address this issue. Although the causes of overincarceration are complex and therefore a holistic, multi-faceted approach is needed, how judges approach sentencing African Canadian people plays an important role. Section 718.2(e) of the *Criminal Code* authorizes judges to include the remediation of systemic anti-Black racism in a proper sentencing analysis for African Canadians. This enables the court to treat systemic anti-Black racism, and the effect of this racism on the offender, as mitigating factors in sentencing. To do otherwise is to exclude African Canadians from a remedial protection intended to apply to "all offenders," perpetuating the systemic racism that pervades our history and continues today.

390. See e.g. *supra* notes 1, 86-87.
391. See e.g. *supra* notes 14-16, 19, 27.
392. *AL*, *supra* note 1 at para 86.

IV. Gladue Information

Obviously, the first source for information about a client's life is from the client them-self. But there are limitations in terms of the information a client may be able to provide. Very few Indigenous offenders, for example, when asked about their back-ground, will say, "I am the product of intergenerational trauma brought about by the impact of successive government policies designed to eradicate Indigenous people as a people in Canada," even though that might well be the case.

Often, when asked about their childhood, the response will be, "It was OK." The difficulty with this answer, of course, is that "OK" is a completely relational term and is understood only when compared to other people's experiences. The reality is that what is an OK childhood for many judges and lawyers may be far removed from an OK childhood for an Indigenous accused person.

At the other end of the spectrum, when asked about their life, some Indigenous people may provide a very specific, graphic, and difficult life history. Lawyers must be ready to hear these stories, many of which will be outside most lawyers' personal experiences and may cause vicarious trauma to the lawyer hearing the story. Tell-ing these stories can be difficult for the client, and hearing them can be difficult for the lawyer. It is worth looking at the Law Society of Ontario's *Guidelines for Lawyers Working with Indigenous Peoples*[26] to get a sense of what a lawyer and their client may experience when the client relates the story of their life.[27]

26 (June 2018), online (pdf): *Amazon S3* <https://s3.amazonaws.com/tld-documents.llnassets.com/0006000/6859/guidelines_on_lawyers_acting_irs_cases.pdf>.

27 With respect to working with clients, Guideline 14 states:

> Sensitivity to the emotional, spiritual and intellectual needs of clients is necessary in the provision of legal services. Lawyers should recognize and respect that clients have had control taken from their lives and may have been victims of child and sexual abuse and therefore, as clients, should be routinely informed about and consulted as much as possible on the direction of their case. Lawyers should ensure that they obtain instructions from clients at every stage of the legal process. Lawyers should also recognize and respect that for some Indigenous clients, interaction with lawyers and the legal process can be extremely stressful and difficult.

With respect to the challenges faced by lawyers engaging in this work, Guideline 2 states:

> Lawyers should be aware of the possible need for training for law office personnel to effectively manage the practice and maintain culturally competent legal service to clients. Lawyers acting in institutional abuse cases, for example, are encouraged to ensure that employee assistance programs and counselling are available for law office lawyers and staff.

A. Gladue Reports

Another way to obtain the necessary information is through a Gladue Report. The term "Gladue Report" is not a term of art. The idea of Gladue Reports did not come from the *Gladue* decision—that decision spoke only of the need for courts to obtain the necessary information about the life circumstances of the Indigenous offender before the court and the programs that might address those issues arising from the person's life. Aboriginal Legal Services of Toronto (now Aboriginal Legal Services [ALS]) wrote the first Gladue Reports in 2001 to provide assistance to the first Gladue (Aboriginal Persons) Court in Canada located at the Old City Hall Courts in Toronto, which began operation in the fall of that year.[28]

The first appellate mention of Gladue Reports came in the Ontario Court of Appeal decision *R v Kakekagamick*[29] in 2006. *Kakekagamick I* was a sentence appeal brought by the offender—an Indigenous man from a remote First Nation in northern Ontario. While the Court found that the trial judge had erred in not considering the *Gladue* factors relevant to the offender, it also noted that neither counsel for the offender nor the Crown had provided any information to the Court during the arguing of the appeal.[30] The Court, of its own motion, requested further information on Mr Kakekagamick.[31] The Court noted that Gladue Reports often provide this information and encouraged counsel to contact ALS to inquire about obtaining a Gladue Report.[32] This was not done, and a second pre-sentence report provided the subsequent information.[33]

The Supreme Court first mentioned Gladue Reports in *Ipeelee*. There, the Court noted that "[i]n current practice, it appears that case-specific information is often

28 Jonathan Rudin, "Addressing Aboriginal Over-Representation Post-Gladue: A Realistic Assessment of How Social Change Occurs" (2009) 54:4 Crim LQ 447 at 464-65.

29 2006 CanLII 11656, 69 WCB (2d) 157 (Ont CA) [*Kakekagamick I*].

30 *Kakekagamick II*, *supra* note 2 at paras 25, 60-62.

31 *Ibid* at para 62.

32 *Kakekagamick I*, *supra* note 29 at para 5.

33 The actual sentencing decision is found in *Kakekagamick II*. The trend since *Kakekagamick* has been for counsel to tender a Gladue Report as fresh evidence at the hearing of the appeal. In the case of inmate appeals, the Ontario Court of Appeal has developed a practice of adjourning the matter until a Gladue Report or relevant information can be provided and then having the matter proceed; see also *JN*, *supra* note 17 at paras 25-26. In *R v Legere*, 2016 PECA 7 [*Legere*], the Prince Edward Island Court of Appeal allowed a Gladue Report to be filed as fresh evidence, although the offender was represented by counsel at trial. At paras 8-9, the Court attenuated the *Palmer* test (*Palmer v The Queen*, [1980] 1 SCR 759, 1979 CanLII 8) for the admission of fresh evidence, finding that the requirement that would exclude fresh evidence if it could have been found with due diligence at first instance "must yield when its application might lead to a miscarriage of justice." On this point, see also the Ontario Court of Appeal's decision in *R v Chickekoo*, 2008 ONCA 488.

brought before the court by way of a Gladue report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders."[34]

Although the term "Gladue Report" has now entered the legal lexicon in Canada, there is no precise form for these reports or a specific manner in which the reports can be requested. Unlike pre-sentence reports, there is no provision in the Code that would specifically empower a judge to order such a report (this issue will be returned to later).[35] Although there has been widespread recognition that Gladue Reports perform an important function at sentencing, the availability of these reports depends on the particular funding mechanism that does or does not exist in each province and territory. The ability to obtain a Gladue Report for an Indigenous offender is not a question of need; rather, it is a question of whether the resources are available for the production of these reports.

1. Availability of Gladue Reports

In Newfoundland, New Brunswick, Manitoba, most of Saskatchewan, the Northwest Territories, and Nunavut, there is no formal process that allows for Gladue Reports to be prepared. This does not mean they have not, occasionally, been prepared in those locations, but these exceptional events are largely due to the creativity of defence counsel and often the ability of the client to pay for the production of these reports. Gladue Reports are more or less available in the other jurisdictions in Canada.[36]

Prince Edward Island: In Prince Edward Island, the Mi'kmaq Confederacy of PEI prepares Gladue Reports. Trained contract writers prepare the reports on an as-requested basis. The program produced 20 Gladue Reports in the 2019-2020 fiscal year. Funding for these reports comes from the province.

Nova Scotia: In Nova Scotia, Mi'kmaq Legal Services Network (MLSN) prepares Gladue Reports. MLSN hires contractors who generally prepare the reports. The writers receive approximately $2,000 per report and $500 as a travel allowance. In 2019-2020, the program produced 121 reports. The program is funded by the province.

Quebec: In Quebec, Gladue Reports are prepared by a number of Indigenous organizations. Most of the reports are written by contract writers who receive $62.50 an hour to a maximum of 20 hours, although up to an additional 10 hours can be granted for particularly challenging reports. Some programs have full-time Gladue Writers. Most of the funding for Gladue Reports comes from the provincial Justice

34 *Ipeelee*, *supra* note 3 at para 60.

35 Tim Quigley, "Gladue Reports: Some Issues and Proposals" (2016) 31 CR (7th) 405 at 406.

36 For a more detailed analysis of Gladue Reports, see Patricia M Barkaskas et al, *Production and Delivery of Gladue Pre-Sentence Reports—A Review of Selected Canadian Programs* (October 2019), online: *International Centre for Criminal Law Reform and Criminal Justice Policy* <https://icclr.org/publications/production-and-delivery-of-gladue-pre-sentence-reports-a-review-of-selected-canadian-programs/>.

Ministry, but the federal Department of Justice provides some funding as well. In 2019-2020, 211 Gladue Reports were produced in the province.

Ontario: Ontario has approximately 30 full-time Gladue Writers and roughly the same number of Gladue Caseworkers or Aftercare Workers employed by a number of Indigenous agencies. Their sole responsibility is writing Gladue Reports or Gladue Letters[37] or being engaged in other Gladue-related activities. In 2019-2020, these individuals wrote 568 Gladue Reports, 150 Gladue Letters, and 3 reports for probation purposes. Funding for these reports flows to the agencies responsible for the program in their communities. The funding for the agencies comes from the provincial Ministry of the Attorney General and Legal Aid Ontario, and a small amount of funding comes from the federal government. Most of the province now has access to Gladue Reports. In some locations, staff from a First Nation or a tribal organization prepare the reports. In some cases, those organizations provide reports only for their members. An Indigenous person in those jurisdictions but not a member of the First Nation or the tribal organization may still have difficulty obtaining a Gladue Report.

Saskatchewan: In Regina, the Integrated Justice Program (IJP), based at the University of Regina, began in the fall of 2019. Members of the program include Gladue Writers and practicum students. Reports for bail and sentencing purposes started approximately a year later. The program's focus is on those individuals who are affected by Fetal Alcohol Spectrum Disorder (FASD). Through the middle of 2021, 25 reports were submitted. If funding commitments are renewed in 2022, the IJP could complete 50 reports per year.

Alberta: Alberta's Gladue program has independent contractors who write Gladue Reports for Indigenous offenders across the province. In 2019-2020, these writers produced 883 reports. Writers receive $1,200 per report with an additional $300 available for expenses. Alberta Justice undertakes the funding, contracting of writers, assignment of reports, and the review of those reports.

British Columbia: Until March 31, 2021, Legal Aid BC was responsible for the writing of Gladue Reports. That work encompassed assigning and reviewing the work of independent contractors who wrote the reports. In 2019-2020, Legal Aid BC produced 289 Gladue Reports. On April 1, 2021, responsibility for Gladue Reports was moved to the Gladue Services Department of the BC First Nations Justice Council (BCFNJC). This move was part of the BC First Nations Justice Strategy, signed by the BCFNJC, the British Columbia Ministry of Attorney General, and the British Columbia Ministry of Public Safety and Solicitor General. The program now receives

37 Gladue Letters are generally produced when the Crown is seeking a sentence of 90 days or less. These letters go into less detail regarding the Indigenous person's individual circumstances but focus more on alternatives to incarceration available to them. For more information, see "Gladue" (last visited 21 March 2022), online: *Aboriginal Legal Services* <https://aboriginallegal.ca/courts/gladue>.

its funding directly from the British Columbia government and anticipates increasing the number of Gladue Reports written annually.

Yukon: In 2018, the Yukon Territorial Government announced funding for a three-year pilot program to provide Gladue Reports to the courts when requested. The pilot was evaluated, and the program was found to be a success, and so funding was renewed. The program is now administered by the Council of Yukon First Nations working with a Gladue Management Committee that includes a number of stakeholders. Reports are written by a roster of six trained contract writers. With current funding, the goal is to produce 35 Gladue Reports a year. If additional funding is secured, then the program could take on more reports. The target group for reports are members of Yukon First Nations, but reports are written for other Indigenous people with some connection to a territorial First Nations community.

In addition to these providers, there are independent contractors who offer Gladue Report writing services as part of a for-profit business. It is difficult to determine how many Gladue Reports these independent contractors prepare.

To describe the availability of Gladue Reports across the country as a patchwork quilt would do a disservice to quilt makers. Even patchwork quilts do not have huge holes in them. Where there is funding for Gladue Reports, that funding comes from provincial governments or legal aid plans (or, to a much lesser degree, the federal government). In most jurisdictions, the actual assignment and review of Gladue Reports rests with Indigenous organizations. The exception is Alberta, where Alberta Justice not only funds but also assigns and reviews Gladue Reports. The specific reason why Gladue Reports in Alberta are handled in this way is particular to that province. The challenges potentially posed by this process will be discussed later in this chapter.

For courts or defence counsel who do not have access to Gladue Reports and who do not view the production of a pre-sentence report with a *Gladue* component as an adequate substitute, one response they may be able to find is in the decision of Hill J of the Ontario Superior Court of Justice in *R v Knockwood*.[38] While a Gladue Report was eventually prepared in that case, the very long period of time it took for this to occur led to Hill J finding that the delay violated the security of the person of the offender. He adjusted the sentence in that case to take that breach of the *Canadian Charter of Rights and Freedoms* into account.[39] Pursuing section 24 remedies to section 7 Charter breaches may push more recalcitrant jurisdictions to explore the provision of Gladue Reports with more vigour.

In *Perley v R*,[40] counsel for the Indigenous offender sought to have charges against her client stayed because of the failure of the province, in this case New Brunswick, to

38 2012 ONSC 2238.

39 *Ibid* at para 72; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

40 2019 NBCA 88.

fund a Gladue Report.[41] Ms Perley's appeal was dismissed by the Court of Appeal in large part because she had received a non-custodial sentence for an aggravated assault, and counsel had taken no objection to the terms of sentence.[42] Nevertheless, the Court did comment on the fact that Gladue Reports were not available in the province:

> In the criminal law context, it is the state that seeks to take away an offender's liberty, whether through imprisonment or by other constraints. It is also the state that has the resources to ensure that information relevant to sentencing is brought before the courts, usually in the form of a pre-sentence report. It is common knowledge that most offenders are represented by legal aid lawyers who do not have resources of the kind available to the state. It would seem to us reasonable to expect that the practice of the state providing resources for the preparation of *proper* reports to address the Gladue factors, which has evolved in other provinces, should be universally implemented. As Green J.A., for this Court, recently pointed out in *Jackson v. R.*, 2019 NBCA 37, [2019] N.B.J. No. 114 (QL), "[u]nlike some Canadian jurisdictions, we appear to have no administrative protocol designed to provide trial courts with consistently fulsome pre-sentence reports which reflect the positive obligations imposed by *Gladue* and *Ipeelee*" (para. 24). As he points out, "it would be beneficial to all interested parties if such a protocol existed" (para. 24). Otherwise, judges, whose duty it is to consider the *Gladue* factors, will have to resort to adjournments to require supplementary reports (as occurred in the present case) or to summon witnesses from the community to address the missing information … .[43]

2. What Is Contained in a Gladue Report?

Because of the variety of models for preparing Gladue Reports, it is impossible to speak of what the ideal Gladue Report would be. In many jurisdictions, the concern is not the attainment of the ideal but simply obtaining a report at all. Nevertheless, there are some important distinctions between a Gladue Report and other reports that come to courts' attention, and they merit discussion.[44]

As the Supreme Court made clear in *Gladue*, courts need information on the systemic and background factors that have brought the specific Indigenous offender before the court.[45] The Court in *Gladue* said that judges could take judicial notice of many of these systemic factors.[46] What the Supreme Court did not make clear was how judges were to obtain the necessary information about the offender or learn about the things of which they could take judicial notice. Courts also need to know what

41 *Ibid* at para 10.

42 *Ibid* at para 21.

43 *Ibid* at para 18 (emphasis in original).

44 If you have never seen a Gladue Report, you can find a mock Gladue Report prepared by ALS for a Crown conference in 2016 at Appendix B of this book.

45 *Gladue*, *supra* note 1 at paras 66-69.

46 *Ibid* at para 83.

services or programs that may be available for the offender, either in or out of custody, might be able to address those circumstances. Ideally, Gladue Reports address all of these issues.

Gladue Reports tell the story of the offender, but they tell that story in a broader sweep than is often before the court. The story of the offender often begins with their parents, grandparents, or great-grandparents. The story includes not only specific events that occurred in the family, but also a discussion of larger disruptions to Indigenous communities and nations such as the imposition of the residential school system.

Gladue Reports try to let those interviewed speak for themselves. Long quotes from individuals in the reports are not uncommon. In this way, Gladue Reports provide the court with many voices and perspectives on the individual before the court.

The reports also contain information on some of the systemic factors that have played a part in the offender's life. Often, the person who is the subject of the report is not clear how these broader events have affected them. This observation is not meant to blame these individuals for not knowing this information. For example, for many Indigenous people (as well as other Canadians) the history of residential schools only really began to become known through the work of the Truth and Reconciliation Commission of Canada (TRC). Testimony before the TRC revealed that many Survivors of residential schools did not discuss their experiences at all with their children or grandchildren. This has, in part, been responsible for the intergenerational impacts of residential schools being felt in Indigenous communities across Canada.

But residential schools are not the only aspect of colonialism that has had an impact on Indigenous people. For example, there was the 60s Scoop (the mass apprehension of Indigenous children by child welfare authorities and their subsequent placement into foster care and adopted homes),[47] the current overrepresentation of Indigenous children in child welfare,[48] and the unique nature of addictions in Indigenous communities.[49] There are also specific events, such as the forced relocation of the Inuit and the mercury contamination of reserves in northern Ontario, to name just a few.

47 *Brown v Canada (Attorney General)*, 2017 ONSC 251 at paras 4-7 [*Brown*].

48 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 137-39, online (pdf): *National Centre for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf>.

49 Cynthia C Wesley-Esquimaux & Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Ottawa: Aboriginal Healing Foundation, 2004) at 36, online (pdf): *Aboriginal Healing Foundation* <https://www.ahf.ca/downloads/historic-trauma.pdf>; Deborah Chansonneuve, *Addictive Behaviours Among Aboriginal People in Canada* (Ottawa: Aboriginal Healing Foundation, 2007) at 20, online (pdf): *Aboriginal Healing Foundation* <https://www.ahf.ca/downloads/addictive-behaviours.pdf>.

As the TRC's Executive Summary Report explained, the education system in Canada has done a poor job in telling the story of Indigenous people.[50] Legal education is as guilty of this as any other institution.[51] As a result, it is not surprising that most judges and lawyers have little knowledge of the systemic factors that the court remarked upon in *Gladue*. Gladue Reports are often the vehicle through which this information can be conveyed.

Gladue Reports can also provide context regarding Indigenous cultural practices. For example, an offender may speak of the importance of sweatlodges or the Longhouse or another practice particular to their community. Without some cultural interpretation, the significance of this information may be missed. Similarly, the reports often point out Indigenous-specific programs and services that the court may not be familiar with.

Where Gladue Reports are not available, courts may rely on pre-sentence reports (PSRs). In some jurisdictions, PSRs for Indigenous offenders are distinguished from other PSRs. These PSRs are sometimes referred to as "PSRs with a Gladue Component" or some similar term. As with the term "Gladue Report," the term "PSR with a Gladue Component" (or some similar wording) does not mean the same thing in every jurisdiction.

In *R v Noble*,[52] Joy PCJ of the Newfoundland and Labrador Provincial Court expressed surprise when hearing the testimony of an experienced probation officer regarding probation officers' reports for Indigenous offenders. In Labrador, the court regularly ordered "Gladue Pre-Sentence Reports" and received from probation "Pre-Sentence Reports (Gladue Perspective)."[53] While judges, and presumably defence counsel and Crown prosecutors, assumed these terms were synonymous, in fact, the witness testified that "she and all the other Labrador probation officers had absolutely no training in the preparation of Gladue pre-sentence reports."[54] Upon learning this, Joy PCJ expressed the opinion that "the authorities who operate the probation system are likely in contempt of a court order by supplying only the adulterated 'Pre-Sentence Report (Gladue Perspective).' "[55] This experience suggests that evidence may well need to be called to determine the extent to which a PSR can actually address *Gladue* considerations.

50 Truth and Reconciliation Commission of Canada, *supra* note 48 at 234-41.

51 Call to Action 27 calls "upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training," and Call to Action 28 is for "law schools in Canada to require all law students to take a course in Aboriginal people and the law." Progress is being made on these fronts, but it cannot be said that the Calls to Action have been fully addressed. See Truth and Reconciliation Commission of Canada, *ibid* at 168.

52 2017 CanLII 32931 (NL Prov Ct).

53 *Ibid* at paras 38-39.

54 *Ibid* at para 38.

55 *Ibid* at para 39.

No matter the quality of the PSR, however, Gladue Reports are distinct and different from them in several important ways. For example, most PSRs do not include direct quotes from interview subjects. The PSR writer conveys their conclusions arising from the interview, but the raw material that allowed the writer to draw those conclusions is not before the reader.

Another important difference, as Kelly Hannah-Moffat and Paula Maurutto have pointed out,[56] is that PSRs are written from a risk-assessment perspective.[57] Whether the risk assessment is explicitly part of the report or done to inform the PSR writer and shape their conclusions, the risk assessment is a key factor in the report. Risk assessments generally address the dynamic and static factors at play in the life of the offender. Dynamic factors refer to things that the person can change. Static factors look at those things that the offender has little control over, for example, the community into which they are born, family circumstances, etc. For the most part, Indigenous offenders do poorly on risk-assessment measurements largely due to the impact of static factors that themselves reflect the impacts of colonialism that judges are to take into account when sentencing.[58]

The decision of Martin J of the Manitoba Court of Queen's Bench in *R v Harper*[59] illustrates this point. Ms Harper, who was "a young, caring mother, with no prior criminal record"[60] from the remote St. Theresa Point First Nation, pleaded guilty to aggravated assault and assault with a weapon. The victims were her two children, and the offence had occurred while she had been using methamphetamines for a week.[61]

Speaking about the risk assessment that was part of the pre-sentence report, Martin J said:

> As usual, a Probation Services Level of Service/Case Management Inventory was completed. It assessed Ms. Harper as a high risk to reoffend, with significant contributing factors being her family, marital problems, education, employment situations and companions. I reject this. With the exception of her marital breakdown, all of the other factors have been present and at play throughout her life. Despite that, she had no criminal involvement and was a good person. Most of the significant factors identified as

56 "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12:3 Punishment & Society 262.

57 *Ibid* at 263-64.

58 The Supreme Court of Canada considered the issue of risk assessment tools in the context of the Correctional Service Canada in *Ewert v Canada*, 2018 SCC 30. At para 53, Wagner J, of the majority, found that concerns that risk-assessment tools had a disproportionately negative impact on Indigenous offenders were "credible." See also Hannah-Moffat & Maurutto, *supra* note 56 at 274-75.

59 2021 MBQB 60.

60 *Ibid* at para 1.

61 *Ibid* at paras 1, 2, 5.

> contributing to the high-risk assessment are ones that many Indigenous individuals are exposed to and are part of their life experience, factors they routinely live with every day. Aside from drug abuse, which regrettably is not uncommon in today's society, she has only this one incident of criminal offending. With proper support and programming, particularly for meth drug abuse, I expect that she is a low risk of reoffending.[62]

Hannah-Moffat and Maurutto pointed out that Gladue Reports contextualize risk factors and explain them in a way that allows the court to understand them as considerations other than risks.[63] By understanding where the risk factors come from and what the offender either has done or can do to address certain issues that these factors raise, the court can find a way to sentence Indigenous offenders differently, which is, after all, the core idea in *Gladue* and *Ipeelee*.

Importantly, Gladue Reports are not expert reports.[64] They report information but do not determine the veracity of the information provided. For example, if the offender speaks of a parent physically abusing them, and a sibling corroborates that information, while the parent denies the information, the report will not conclude which version of the facts is correct. That role is up to the judge, with submissions from counsel. As well, Gladue Reports are not conclusory—they do not determine if a person is a risk to reoffend. Gladue Reports are best seen as friend of the court reports. The most effective Gladue Reports do not hide the challenges and difficulties faced by the offender but put them in a context in which they can be better understood.

This is not to say that all Gladue Reports meet these criteria. There have been occasions where the reports have been found to stray from the goals and purposes outlined above. Gladue Reports have been subject to criticism in at least three cases in British Columbia.[65] For the most part, however, the contributions of Gladue Reports to the sentencing process have been widely accepted.[66]

3. Requesting Gladue Reports

Gladue Reports cannot be ordered in the same way that PSRs can be ordered. Rather than "being ordered," the better term would be "requested." Because there is no express provision in the Code for the production of these reports, they cannot be ordered because there is no direct relationship between those responsible for the production of these reports and the court.[67] In many jurisdictions where reports are

62 *Ibid* at para 21.

63 *Supra* note 56 at 276-78.

64 *R v Lawson*, 2012 BCCA 508 at para 30.

65 *Ibid*; *R v Florence*, 2015 BCCA 414; *R v DKDB*, 2013 BCSC 2321.

66 See e.g. *Legere*, *supra* note 33; *R v Kreko*, 2016 ONCA 367 [*Kreko*]; *R v Drysdale*, 2016 SKQB 312.

67 Alberta might be an exception to this rule because the province itself has taken on the responsibility of producing Gladue Reports as it does PSRs, which can be ordered by the court.

available, the funding arrangement is between the government or legal aid and the service provider. These agreements may set out the geographic region where such reports are prepared. The number of Gladue Report writers in a specific region or province may also limit the number of reports a particular agency can provide.

For example, in 2012, the Superior Court in Windsor, Ontario, attempted to order a Gladue Report for an offender only to be told by ALS, the organization that received the "order," that they were not funded to provide reports in Windsor and therefore could not do so.[68] As noted earlier, prior to 2021, Gladue Reports were the responsibility of Legal Aid BC. Legal Aid BC had limited funds for the production of Gladue Reports and could not always meet the need for such reports. Where counsel attempted to have the court order the production of these reports, and hence have the province pay for them, the Justice Ministry often sent lawyers (that is, Crown prosecutors or civil lawyers) to the hearing to argue against such an order.[69]

The issue of the ability of the court to order a Gladue Report has arisen a number of times in Saskatchewan where such reports are not generally available. In *R v Sand*,[70] Danyliuk J declined to order a state-funded Gladue Report but found that he had the authority to make such an order. He did note that even if he made such an order "it will likely be left open as to whom is selected to be the author of such a report, and even more likely the fee arrangements to be made."[71] In *R v Peepeetch*,[72] Kalmakoff JA, *ex officio*, did order the state to fund a Gladue Report. He took that step because he found the information sought was "essential" for properly carrying out the court's duty under section 718.2(e) and unavailable through other means. He noted that such orders should be made "sparingly" and only in response to "specific and exceptional circumstances" and where there is no other effective method of obtaining the necessary *Gladue* information in a timely fashion.[73] The Saskatchewan Court of Appeal in *Gamble* affirmed that judges had the authority to order the state to fund the preparation of a Gladue Report but that such orders are exceptional.[74]

One way to address this problem would be to have Gladue Reports seen as equivalent to PSRs and to provide for them in the Code. This approach is attractive because

68 *R v Corbiere*, 2012 ONSC 2405. Whether a judge requests or orders a Gladue Report was discussed at paras 79-86 in *R v Parent*, 2021 ONSC 3701, an appeal from a decision from the Ontario Court of Justice. The Court concluded that even if a judge feels they are ordering a Gladue Report, they are actually making a request of a service provider.

69 See e.g. *R v DR*, 2000 BCSC 136; *R v CJHI*, 2017 BCPC 121; *R v HGR*, 2015 BCSC 681.

70 2019 SKQB 18.

71 *Ibid* at para 43.

72 2019 SKQB 132.

73 *Ibid* at paras 27-28, 58. See also *R v Gamble*, 2019 SKQB 327 at paras 59-62; and *R v Angus*, 2020 SKQB 205 at paras 8-14.

74 *R v Gamble*, 2021 SKCA 72 at para 50.

it would address availability issues. Amending the Code in this fashion would likely be resisted by provinces and territories that do not currently fund such reports because the cost of the reports would, due to the division of powers, be borne by those governments, not the federal government. Perhaps the bigger problem with this approach is that, if adopted, it would likely mean moving Gladue Reports from Indigenous organizations to the branch of government responsible for PSRs. As noted earlier, PSRs and Gladue Reports are very different documents. The success of the reports is that, for the most part, Indigenous people working for Indigenous organizations write them. It is hard to imagine how a centralized government bureaucracy could produce the reports that are currently being produced. While increased funding for these programs is necessary, and there is certainly room for the federal government to step up in this regard, institutionalizing them in a government department would be a step in the wrong direction.[75]

In Ontario, the Crown, defence counsel, or the judge can request a Gladue Report following a plea or a finding of guilt. Because the reports are not expert reports, they are provided to all parties simultaneously. The party requesting the report does not get a first look, nor does it have the opportunity to request edits or the ability to decide not to provide the report at all.

In most provinces or territories where Gladue Reports are available, while the funding will often come from government or the legal aid plan, the actual responsibility for the assignment and review of reports rests with an Indigenous organization. As noted earlier, the exception to this is Alberta. Although independent writers produce the reports in that province, the assignment and review of reports is the responsibility of the Department of Justice. The conceptual difficulty with this arrangement is that one of the parties to the case—the Crown—is responsible for the commissioning and reviewing of the Gladue Reports. Such arrangements can lead to concerns about the neutrality of the reports and challenge the notion that they are really friend of the court documents. While there may well be valid reasons for the delivery of Gladue Report services in this manner, a move toward a model where Indigenous agencies are responsible for these reports is preferable.

4. Distribution of Gladue Reports Beyond the Court

An issue that defence counsel and the court should turn their mind to is the extent to which a Gladue Report should be distributed beyond the parties that originally receive it. Given that the reports provide such a rich and detailed history of the individual, there is an assumption that this information would be valuable to others working with the person, and thus it is helpful to ensure that it gets into the hands of probation officers or, if there is a custodial sentence, the correctional facility. There are two reasons this approach may not be appropriate.

75 Quigley, *supra* note 35 at 406-7.

The first concern is one of personal autonomy and safety. The people who are the subject of Gladue Reports often share very personal information with the writer. Family members may also share such information, both regarding the offender and themselves. They understand this information is relevant and necessary for the court, but they may be concerned with the dissemination of this information outside of the court.

A person who chooses to disclose that they were, for example, the victim of sexual abuse may not want that information widely known. They may rightly feel that their privacy has been violated if they walk into their first meeting with their probation officer or correctional social worker to discover that this person knows intimate details of their life. Even though a person has been convicted of a crime, they have not given up all aspects of their autonomy, and it is important to allow them to decide who should know anything about their personal lives.

In the correctional context, there may be information about the person that, if it became more widely known among people in the jail, might put their personal safety at risk. This is another reason to allow individuals to make their own decisions about what information to provide to people and at what time.

The second reason to be concerned about dissemination of the Gladue Report outside of the court relates to the discussion of risk factors outlined above. Jails continue to rely on risk assessments to determine classification levels of offenders, treatment options, and recommendations for various forms of release.[76] Although Gladue Reports contextualize risk, the information in the reports can be stripped of their context and used to find the person to be a high risk. In such cases, the report can, perversely, be used against the person in, for example, parole applications.[77]

There is middle ground here. Most Gladue Reports contain recommendations in terms of treatment issues that are likely helpful for correctional institutions and probation officers. In some cases, judges have asked that this information be sent on but that the report itself not be sent to corrections. The client can consent to have some or all of the information in the Gladue Report released, but that should be a full and informed consent. Where a probation officer requires a person to sign a consent-to-release document and suggests that failure to sign the form might in and of itself breach probation, then it is hard to see that consent as informed and voluntary. In any event, signed consent forms do not compel a third party to produce information, and Gladue Report providers may have their own rules regarding the dissemination of reports.

76 Gladue Reports are not the only way that personal information regarding the offender may come to the attention of correctional staff. In addition to PSRs, there is an Aboriginal Social History produced by Correctional Service Canada for Indigenous offenders entering the penitentiary system, and that information also feeds into the risk analysis process.

77 In *R v Spence and Debassige*, 2017 ONSC 4749 at para 43, the Court granted a request from defence counsel that the Gladue Report prepared for Mr Debassige be withheld from Correctional Service Canada due to concerns about the way the information might be used. The Crown did not oppose the motion.

Too often, defence counsel, Crown attorneys, and judges have little knowledge of what goes on within correctional centres and penitentiaries and in probation offices. The more discussion there is among all the justice system participants, and the more each party learns about what the other does, the better the results ultimately should be for those who are enmeshed in the system.

Because the information obtained in a Gladue Report is often very private and reveals a great deal of a person's life circumstances, as well as those of family members and others, counsel may seek to restrict access to its contents. To the extent that the report is discussed in court during submissions or the handing down of sentence, details inevitably emerge, although, as will be discussed later in this chapter, care should be taken with how this information is conveyed in court. One approach to keeping Gladue Reports from the public eye is to ask the judge to seal the report. Anecdotally, it appears that these requests are often acceded to, but it is not clear on what basis the sealing orders are made and whether they comply with the requirements for such an order.

The Supreme Court of Canada has set out the circumstances under which material can be sealed or otherwise kept away from the public in a series of cases beginning with *Dagenais v Canadian Broadcasting Corp*[78] in 1994, *R v Mentuck*[79] in 2001, *Sierra Club of Canada v Canada (Minister of Finance)*[80] in 2002, and most recently *Sherman Estate v Donovan*[81] in 2021. There are two themes that run through these cases. The first is that "the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy."[82] The second is that where it is proposed that documents be sealed, notice should be given to the media. Some provinces have developed a process to provide automatic notice to the media when publication bans are sought,[83] while other jurisdictions require notice to be provided on a case-by-case basis.

Because the sealing of Gladue Reports is usually done in court on an *ad hoc* basis, there are no reported cases on how this process should be undertaken. *Sherman* does provide guidance on how such issues should be resolved if they came to be litigated.

Sherman makes it clear that a desire to keep embarrassing details of a person's life from public scrutiny is not enough to justify sealing a document. Rather, the need to restrict access to information must arise "because of its highly sensitive character, its

78 [1994] 3 SCR 835, 1994 CanLII 39.

79 2001 SCC 76.

80 2002 SCC 41.

81 2021 SCC 25 [*Sherman*].

82 *Ibid* at para 1.

83 See e.g. "Notice of an Application for a Publication Ban" (last visited 21 March 2022), online: *The Courts of Nova Scotia* <https://www.courts.ns.ca/Publication_Ban_Notice/pubbanform.htm>.

dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting."[84] The Court set out a three-part test to guide judges in determining a request to seal a document:

> (1) court openness poses a serious risk to an important public interest;
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[85]

It is now beyond question that Gladue Reports address a vitally important public interest—they are necessary to help address the mass of incarceration of Indigenous people in Canada's prisons. The information in these reports does not just concern the offender, but it also often reveals very personal information regarding third parties as well. If the contents of Gladue Reports were routinely made public, then that would very likely have a chilling effect on the willingness of third parties to participate in the Gladue Report process; and without their participation, the value of the reports would be greatly diminished.

Because Gladue Reports arise in the sentencing context, even if the reports themselves are sealed, this does not mean that the public knows nothing of what is contained in them. Judges must give reasons for sentence, and those reasons must provide sufficient information to allow defence counsel and the Crown prosecutor as well as the public to understand how the sentence was determined. In giving reasons, the judge will necessarily have to make some reference to the circumstances of the offender and their family and community, although they need not recite all of the traumas these individuals have experienced. If the matter is appealed, then the Gladue Report will be before the appellate court, and the court too will have to give reasons for either upholding or striking down the sentence.

It is not possible to make a definitive statement that Gladue Reports can be sealed because the issue does not seem to have been the subject of a reported case. Nevertheless, it is hard to imagine a circumstance where such a sealing order could be successfully challenged.

B. Other Sources of Gladue Information

While not all jurisdictions have Gladue Reports available, there are other sources of information that counsel can rely on as alternatives or to supplement the information in a report: Indigenous Courtworkers, family and friends, professionals and service providers, and local knowledge keepers.

84 *Sherman*, *supra* note 81 at para 33.

85 *Ibid* at para 38.