The Impact of Anti-Black Racism on the Sentencing of "Black Offenders" in Canada:

What Is the Correct Approach?

Wayne K. Gorman

Should the approach to the sentencing of "Black offenders" in Canada be different from the approach to non-Black offenders as a result of the history of racism and discrimination suffered by Black people in Canada?

INTRODUCTION

In this column, I am going to review two recent Canadian Court of Appeal decisions (*R. v. Anderson*, 2021 NSCA 62, and *R. v. Morris*, 2021 ONCA 680), which have considered this question. As will be seen, two very different answers have been provided, sparking a debate in Canada about the appropriate approach to be taken to the sentencing of individuals who are members of a group that have been the subject of historical racism and discrimination.

I intend to review the circumstances of the offences committed by the offenders in both cases and then review how each Court of Appeal addresses the proper approach to the imposition of sentence upon Black offenders in Canada. However, to place the debate in context, I intend to commence with a review of the approach to sentencing that applies in Canada. In particular, I will set out how it applies to Indigenous offenders, for which Canada has adopted an approach which differs significantly from that applied to non-Indigenous offenders. In *R. v. Mero*, 2021 BCCA 399, for instance, the British Columbia Court of Appeal recently pointed out that "Indigenous offenders are different from other offenders because…they 'are victims of systemic and direct discrimination.'" *Mero,* para. 69 (citation omitted). This is important because at the core of the debate over the sentencing of Black offenders in Canada is whether the approach applied to Indigenous offenders should be applied to Black offenders because Black Canadians have also been the victims of systemic and direct discrimination.

SENTENCING IN CANADA

In Canada, judges have a broad discretion in the imposition of sentence based upon the circumstances of the offence and the offender. They are not bound by statutory guidelines other than minimum and mandatory penalties set out in the *Criminal Code of Canada*, R.S.C. 1985 [hereinafter *Criminal Code*].

The Canadian approach to sentencing is an individualized one. Thus, in *R. v. Boudreault*, [2018] 3 S.C.R. 559 (Can.), the Supreme Court of Canada indicated that "sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing, while taking into account the particular circumstances of the offender as well as the nature and number of his or her crimes." *Boudreault*, para. 58. On its face, this appears inconsistent with an approach based upon racism suffered by an ethnic or race community.

Any sentence imposed in Canada must be consistent with the purposes and principles of sentencing set out in the *Criminal Code*. The *Criminal Code* states that the fundamental purpose of sentencing "is to contribute...to respect for the law and the maintenance of a just, peaceful, and safe society. " *See Criminal Code,* § 718. It also indicates that any sentence imposed must be "proportionate to the gravity of the offence and the degree of responsibility of the offender." *See Criminal Code,* § 718.1.

In *R. v. Friesen*, 2020 S.C.C. 9, the Supreme Court of Canada indicated that "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing… and is now codified as the 'fundamental principle' of sentencing in s. 718.1 of the *Criminal Code*." *Friesen*, para. 30. More recently, in *R. v. Parranto*, 2021 S.C.C. 46, the Supreme Court held that "[p]roportionality is the organizing principle in reaching this goal ['a fair, fit and principled sanction']. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading 'Fundamental principle' (s. 718.1)… The principles of parity and individualization, while important, are secondary principles." *Parranto*, para. 10.

THE SENTENCING OF INDIGENOUS OFFENDERS

The principles set out earlier apply to all offenders, regardless of their specific racial backgrounds or cultural heritage. However, the *Criminal Code of Canada* also contains one sentencing provision that applies based solely upon cultural heritage. Section 718.2(e) of the *Criminal Code* applies specifically to Indigenous offenders. This legislation was designed, in part, to reduce the overrepresentation of Indigenous offenders in Canadian prisons.[1] Section 718.2(e) of the *Criminal Code* states as follows:

> *A court that imposes a sentence shall also take into consideration the following principles:*
>
> *(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should*

Footnotes

1. Danielle Sandhu, *A Reasonable Alternative to Guilt: Flight and Anti-Black Racism*, 42 WINDSOR REV. LEGAL & SOC. ISSUES 51, 51 (2021) (Danielle Sandhu notes that "Black people are disproportionately represented in police interactions ranging from street-checks to deadly use of force, and are disproportionately incarcerated across Canada.").

be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. [2]

In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada held that there "is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." *Gladue*, para. 82. Subsequently, in *R. v. Ipeelee*, [2012] 1 S.C.R. 433, the Supreme Court stressed the importance of judicial notice in the sentencing of Indigenous offenders. The Court held in *Ipeelee* that sentencing courts "must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." *Ipeelee*, para. 60. Finally, in *R. v. Boutilier*, [2017] 2 S.C.R. 936, the Supreme Court held that "through s. 718.2(e) of the *Criminal Code*, Parliament has directed sentencing judges to pay particular attention to the circumstances of Indigenous offenders. This recognizes that the systemic disadvantages and marginalization faced by Indigenous people inform moral blameworthiness and therefore the proportionality of sentences for Indigenous offenders." *Boutilier*, para. 108 (citation omitted).

Thus, it is clear that Canadian "sentencing judges are required to consider the *Gladue* principles in every case involving the sentencing of an Indigenous offender." *See R. v. Sanderson*, 2018 MBCA 63, para. 10. However, this approach to sentencing is not judge made. It flows form Parliament's decision to single out Indigenous offenders when it comes to sentencing. Section 718.2(e) of the *Criminal Code* mandates an approach to sentencing for Indigenous Canadians that is quite different from the approach to be adopted in relation to non-Indigenous offenders.

The *Criminal Code of Canada* does not contain a similar provision in relation to Black offenders. However, in a case comment on *Morris* and *Anderson*, Professor Tim Quigley suggests that "[t]he language of s. 718.2(e) is rather soft in its direction to judges, and therefore giving 'particular attention' to the circumstances of Aboriginal offenders does not mean that that same 'particular attention' cannot be paid to other groups suffering from systemic discrimination and over incarceration." *See NJI Criminal Law E-Letter 324*, 24.

THE CIRCUMSTANCES OF THE OFFENCES IN ANDERSON & MORRIS

In both cases, very serious crimes were committed.

R. V. ANDERSON

In *Anderson*, the accused, who is referred to in the judgment as an offender of "African descent," was convicted of a firearm offence relating to the possession of a loaded handgun. The Nova Scotia Court of Appeal indicated that "[o]n November 2, 2018 at 10 p.m., Rakeem Anderson was stopped by police at a random motor vehicle checkpoint on Highway 102. He was alone. A pat-down search located a loaded .22 calibre revolver in his waist band." *Anderson*, para. 15.

The Crown sought the imposition of a period of incarceration in the range of two to three years. The sentencing judge ordered that an Impact of Race and Culture Assessment Report be prepared (IRCA) and imposed a non custodial sentence. On appeal, the Crown did not seek an increase in sentence. Rather, it sought "guidance for courts tasked with applying the principles of sentencing to offenders like Mr. Anderson who are of African descent." The Court of Appeal affirmed the sentence imposed.

R. V. MORRIS

In *Morris*, the accused, who is referred to in the judgment as a "Black offender," was convicted of a number of firearm offences. The Ontario Court of Appeal indicated that after being arrested, the police found a "38 calibre Smith & Wesson handgun" in a jacket the accused had been wearing. *Morris*, para. 20.

Two reports were filed at the sentence hearing: (1) an "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", and (2) a report titled a "Social History of Kevin Morris" (the "Sibblis Report").

The trial judge in *Morris* also imposed a non-custodial sentence. On appeal, the Crown argued that the sentence imposed was "manifestly unfit and the trial judge made several material errors in his reasons, particularly in his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism." *Morris*, para. 4.

2. In *Sentencing Developments in the United States in 2020: The Pandemic, Black Lives Matter and Further Erosion of Mass Incarceration*, Mirko Bagaric and Peter Isham note that though "[r]educing the over-representation of African Americans in prisons is an objective which has gained renewed impetus since the killing of George Floyd," there "has been no concrete legislation or other developments which have been implemented to further this goal."

> This goal is especially important given that African Americans have been imprisoned at a rate more than three times that of the rest of the community. More than one in 50 African Americans is currently incarcerated. As of March 2020, Black Americans made up 40% of the incarcerated population, yet they make up only 13% of the total US population. The likelihood of imprisonment of African American males changes depending on their age; for instance, about one in 20 African American males between ages 35 and 39 were imprisoned in 2018. There has been a similar trend in jails; despite an overall decrease in the total jail population, the rate of incarceration of African Americans in jails is still nearly four times as high as that of white and Hispanic individuals as of mid-2018.
>
> While the Black Lives Matter movement has added impetus to the need to reduce the over-representation of African Americans in prisons, there has been no concrete legislation or other developments which have been implemented to further this goal. The Brennan Centre has recently grounded recommendations for sentencing reforms (including repealing mandatory minimum sentences for drug offences and reducing prison numbers through retroactive changes).

Mirko Bagaric & Peter Isham, *Sentencing Developments in the United States in 2020: The Pandemic, Black Lives Matter and Further Erosion of Mass Incarceration*, 45 CRIM. L. J. 114, 118 (2021).

The Ontario Court of Appeal concluded that a period of three years of imprisonment was an appropriate sentence. It indicated that a "person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society." *Morris*, para. 68.

Though both Courts of Appeal agreed that anti-Black racism was a factor to be considered in sentencing, they reached very different conclusions as to the impact of that racism on determining what constituted an appropriate sentence, despite the similarities of the offences committed by the two offenders. This is the fundamental difference of opinion reflected by these two decisions and it illustrates the significant practical impact that can occur, depending on the approach to this issue that is taken.

THE APPROACHES ADOPTED

In *Anderson*, the Nova Scotia Court of Appeal indicated that "the disproportionate incarceration of Black offenders reflects the systemic discrimination and racism that permeates the criminal justice system.…The experience of African Nova Scotian offenders like Mr. Anderson must be better reflected than it has been in the sentencing process and outcomes. In its intervention the Criminal Lawyers' Association has said: '…it is time that the distinct mistreatment of Black people in society be given its due recognition in criminal sentencing.'" *Anderson*, para. 5, 8.

In *Morris*, though the Ontario Court of Appeal was willing to accept that "evidence relating to the impact of anti-Black racism on an offender will sometimes be an important consideration on sentencing," it concluded that the trial judge's "task is not primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles and objectives of sentencing laid down in Part XXIII of the *Criminal Code*." *Morris*, para. 56.[3]

HOW IS THE EXISTENCE OF ANTI-BLACK RACISM TO BE ESTABLISHED?

The Nova Scotia Court of Appeal held in *Anderson* that "the existence of anti-Black racism can be admitted on the basis of judicial notice without the need for evidence. Judges are entitled to take notice of racism in Nova Scotia and have done so. There is no justification for requiring offenders to produce *viva voce* evidence of this pernicious historical reality." *Anderson*, para. 111. This is identical to the approach mandated by the Supreme Court of Canada in relation to Indigenous offenders.

Similarly, in *Morris*, the Ontario Court of Appeal indicated that "[i]t is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis." *Morris*, para. 1.

The Ontario Court of Appeal concluded in *Morris* that Canadian judges "should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances." *Morris*, para. 123.

Though both Courts of Appeal agreed that sentencing judges can take judicial notice of the existence and impact of anti-Black racism, they reached different conclusions on the practicable impact of this notice. The primary reason for this divergence is their differing opinions on whether a "causal connection" between the existence of anti-Black racism and the offence committed by a Black offender is necessary for racism to become a mitigating factor in sentencing. In other words, does there have to be a connection between the racism suffered and the offence committed?[4]

IS A CAUSAL LINK NECESSARY?

Though it is not debatable that Black-Canadians have been the subject of historical and ongoing discrimination and racism, the question remains: for this to be a mitigating factor in sentencing does there have to be a causal link between the racism suffered and the specific offence committed? In *Ipeelee*, the Supreme Court rejected the proposition that an Indigenous offender need "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." *Ipeelee*, para. 81. However, the Supreme Court went on to say that "[u]nless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence." *Ipeelee*, para. 83.

In *Anderson*, it was suggested that a sentencing judge "does not have to be satisfied a causal link has been established 'between the systemic and background factors and commission of the offence….'" *Anderson*, para. 118. The Nova Scotia Court of Appeal's rational for this approach involved the adoption of the Supreme Court's jurisprudence in relation to the sentencing of Indigenous offenders:

> These principles parallel the requirements in law established by the Supreme Court of Canada in relation to *Gladue* factors in the sentencing of Indigenous offenders. As

3. A similar approach has been adopted in New Zealand. In Tipene v. R [2021] NZCA 565, para. 23, for instance, the New Zealand Court of Appeal indicated that "[d]iscounts for systemic deprivation and disadvantaged backgrounds can range widely depending upon the identifiable linkage between the offender's personal circumstances and their offending, and thus their moral culpability. Recent decisions of this Court have approved discounts of some 15 per cent as being appropriate in cases of serious offending in the context of a culturally alienated and marginalised upbringing."

4. R. v. Abdisalam, 2021 MBCA 97, para. 10 (the accused, a "permanent resident" of Canada from Somalia, argued on appeal that the sentencing judge failed "in assessing his moral culpability…to take into account his experience with anti-Black racism as a youth." In rejecting this argument, the Manitoba Court of Appeal indicated that "unlike the situation in *R v Anderson*, 2021 NSCA 62 and *R v Morris*, 2021 ONCA 680, there was no evidentiary foundation before the judge regarding overt and systemic anti-Black racism or its impact on this particular accused.").

with Indigenous offenders, while an African Nova Scotian offender can decide not to request an IRCA, a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law. *Anderson*, para. 118.

In *Morris*, however, the Ontario Court of Appeal concluded that a causal link was required. It held that though evidence of "the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices" is relevant, it is not enough to cause a reduction in sentence:

> There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. *Morris*, para. 97.

This difference of opinion is fundamental to the different results in sentencing reflected by the two appellate decisions. For the Nova Scotia Court of Appeal, the history of anti-Black racism is a factor that lessens the moral culpability of the offender, regardless of the circumstances, just as it does for Indigenous offenders. For the Ontario Court of Appeal, something more than the existence of anti-Black racism is necessary for it to constitute a mitigating factor in a specific case. For that Court of Appeal, the sentencing principle of proportionality requires an analysis beyond the presence of anti-Black racism.

THE PROPORTIONALITY PRINCIPLE OF SENTENCING

As was pointed out earlier, this is the fundamental principle of sentencing in Canada. The "principle of proportionality is central to Canadian sentencing.…A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle is based upon the fundamental notion that the degree of punishment must reflect the seriousness of the offence and the moral blameworthiness of the offender." *See R. v. SADF*, 2021 MBCA 22, para. 22. In "other words, the ultimate sentence must correspond to the degree of 'gravity of the offence' (i.e., how serious the offence is); and the degree of responsibility of the offender (i.e., their moral blameworthiness)." *See R. v. Suter*, [2018] 2 S.C.R. 496, para. 168.

THE SERIOUSNESS OF THE OFFENCE

The seriousness of an offence is determined by the nature of the offence and its consequences. Thus, the "more serious the crime and its consequences…the heavier the sentence will be." *See R. v. Lacasse*, [2015] 3 S.C.R. 1089, para. 12.

In *Morris*, the Ontario Court of Appeal held that "when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence." *Morris*, para. 3. The Court of Appeal indicated that "[p]ossession of a loaded, concealed handgun in public is made no less serious, dangerous, and harmful to the community by evidence that the offender's possession of the loaded handgun can be explained by factors, including systemic anti-Black racism, which will mitigate, to some extent, the offender's responsibility." *Morris*, para. 76.

In contrast, in *Anderson*, it held that "[e]ven where the offence is very serious, consideration must be given to the impact of systemic racism and its effects on the offender. The objective gravity of a crime is not the sole driver of the sentencing determination which must reflect a careful weighing of all sentencing objectives." *Anderson*, para. 145.

THE MORAL CULPABILITY OF THE OFFENDER

The "severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender." *Lacassse*, para. 12.

In *Anderson*, the Nova Scotia Court of Appeal held that the "moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism.… The African Nova Scotian offender's background and social context may have a mitigating effect on moral blameworthiness." *Anderson*, para. 146. The Court of Appeal went on to say that "the use of denunciation and deterrence to protect societal values should be informed by a recognition of society's role in undermining the offender's prospects as a pro-social and law-abiding citizen." *Anderson*, para. 160.

Once again, the Nova Scotia Court of Appeal found support for this conclusion in the Supreme Court's Indigenous sentencing jurisprudence. Thus, the Court of Appeal noted that "[i]n *Ipeelee*, the Supreme Court of Canada recognized this principle in relation to Indigenous offenders. It should be applied in sentencing African Nova Scotians. Sentencing judges should take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility" *Anderson*, para. 146. In other words, a Black offender's degree of responsibility for her or his offence is lessened as a result of anti-Black racism without any specific evidence of the impact it has had upon the specific offender.

The Ontario Court of Appeal adopted a different approach. In *Morris*, it held that "as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances." *Morris*, para. 123.

The key distinction being the use of the words "in a given case."

THE COMPARISON TO INDIGENOUS OFFENDERS: SECTION 718.2(E) OF THE CRIMINAL CODE

As noted earlier, § 718.2(e) of the *Criminal Code* makes specific reference to Aboriginal offenders. The *Criminal Code* does not single out any other ethnic or racial community, including Black or African Canadian offenders. As we also saw, this did not discourage the Nova Scotia Court of Appeal from taking Indige-

nous sentencing principles and applying them directly to the sentencing of Black offenders. Interestingly, in *Gladue*, the Supreme Court indicated that "the circumstances of aboriginal people are unique." *Gladue*, para. 93(6).

The Ontario Court of Appeal rejected this approach. In *Morris*, it held that the sentencing principles applicable to Indigenous offenders do "not apply to Black offenders.…We do not agree that this court should equate Indigenous offenders and Black offenders for the purposes of s. 718.2(e). We come to that conclusion for two reasons.…Sentencing policy falls to be set, first and foremost, by Parliament. Parliament chose to specifically single out one group—Aboriginal offenders—in the context of the operation of the restraint principle in sentencing, especially as applied to imprisonment." *Morris*, para. 13, 118-119.

In reaching this conclusion, the Ontario Court of Appeal placed great reliance on Parliament's decision to make an "exclusive reference" to Aboriginal offenders in § 718.2(e) of the *Criminal Code*:

> …the rationale offered in *Gladue* and *Ipeelee* for applying the restraint principle differently in respect of Indigenous offenders does not apply to Black offenders. Although there can be no doubt that the impact of anti-Black racism on a specific offender may mitigate that offender's responsibility for the crime, just as with Indigenous offenders, there is no basis to conclude that Black offenders, or Black communities, share a fundamentally different view of justice, or what constitutes a "just" sentence in any given situation. The Indigenous offender's culture and historical relationship with non-Indigenous Canada is truly unique. That uniqueness explains the very specific and exclusive reference to "Aboriginal offenders" in s. 718.2(e). *Morris*, para. 122.

Interestingly, in *Morris* the Aboriginal Legal Services, which was granted intervener status, took the position that the Indigenous sentencing jurisprudence "developed in reference to the application to Indigenous offenders of the restraint principle in s. 718.2(e) of the *Criminal Code*, cannot be applied to non-Indigenous offenders." *Morris*, para. 10. In *Anderson*, though there were interveners, none of them represented the Indigenous community. As a result, the Nova Scotia Court of Appeal has adopted an approach which the Indigenous community appears to have rejected, without having heard from them.

Finally, in *R. v. F.L.*, 2018 ONCA 83, the Ontario Court of Appeal pointed out that though sentencing judges are "obliged to take judicial notice of [*Gladue*] factors, they do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel." *F.L.*, para. 39. In contrast, in *Morris*, the Nova Scotia Court of Appeal appears to be suggesting that African-Canadian offenders should receive lesser sentences based upon the historical impact of anti-Black racism. If adopted, this would result in Black offenders being treated more leniently than Indigenous offenders in Canada, despite Parliament's decision to exclusively refer to Aboriginal offenders in § 718.2(e) of the *Criminal Code*.

WHAT IF THE VICTIM IS FROM A COMMUNITY THAT SUFFERS FROM HISTORICAL PREJUDICE AND RACISM?

Neither Court of Appeal commented upon the problem of Black offenders committing offences against Black victims. This is important because, as noted by the Supreme Court: "Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people.… Children who belong to other groups that face discrimination or marginalization in society are also especially vulnerable to sexual violence. For instance, children and youth in government care are particularly vulnerable to victimization." *Friesen*, para. 70-71.

Parliament has specifically addressed this problem by enacting §§ 718.04 and 718.201 of the *Criminal Code*. These provisions read as follows:

> *718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.*
>
> *718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.*

The decision in *Anderson* did not consider these provisions, and the Nova Scotia Court of Appeal may take a different view if the victim is also an African Canadian. Having said this, the Court's decision in *Anderson* reflects an approach that is inconsistent with these provisions in that it concentrates primarily, if not exclusively, on a historical factor of which both victims and offenders have been impacted, but only to the benefit of the offender. To change direction, the Nova Scotia Court of Appeal is going to have to apply the above provisions to offences committed by African Canadian offenders against African Canadian children and women.

CONCLUSION

Though the two Courts of Appeal differ significantly in relation to how historical racism effects the sentencing of Black offenders, they agree that it is a significant factor. This latter conclusion is not universally accepted in Canada. Michael C. Plaxton, for instance, in *Nagging Doubts About the Use of Race (and Racism) in Sentencing*, 8 C.R. (6th) 299, 300-302 (2003), suggests that racism against a particular community should not "affect" the sentence imposed:

> Racism pervades social life; as a result, people of certain ethnic groups are over-represented in the criminal justice system. One finds it difficult to state precisely how or why this fact, standing alone, ought to affect the sentencing process. First and foremost, sentencing hearings determine the level of moral blameworthiness of offenders, and calculate fit sentences on that basis. Unless a factor affects one's

understanding of the offender's moral blameworthiness or affects the offender's experience of a sentence, one cannot clearly see why that factor should affect the result....

There seems no principled means of using the sheer fact of systemic racism as a factor in mitigation of sentence. To make the sentencing hearing into the sort of forum where the judge could make statements about specific social ills through the sentence itself requires one to completely re-conceive the nature and purpose of the sentence; and, possibly, the nature of criminal justice generally. Neither Parliament, nor the Supreme Court, has made such wholesale changes.[5]

In *R. v. Wells*, [2000] 1 S.C.R. 207, the Supreme Court indicated that that "the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance." *Wells*, para. 42. The Supreme Court also held that though § 718.2(e) "requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result." *Wells*, para. 44.

In *Gladue*, the Supreme Court indicated, however, that "jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence." *Gladue*, para. 95. When read in light of *Wells*, this suggests a limited approach to sentence reduction based upon Indigenous heritage.

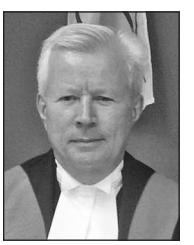
It is interesting to contrast the reasoning in *Anderson* with that in *R. v. Lavergne*, 2017 ONCA 642. In *Lavergne*, the offender was described as being "Indigenous." However, the Ontario Court of Appeal noted that "the record does not disclose anything else beyond his statement of his Indigenous heritage. There is no evidence of any systemic or background factors which may have played a part in bringing this accused before the court." The Court of Appeal held that a "bare assertion of Indigenous heritage, without more, would not have had any impact on the sentence imposed." *Lavergne*, para. 33 (citation omitted). *Anderson*, in contrast, takes the position that there is no need to consider whether the offender's Black heritage played a part in bringing the specific offender before the court. His or her Black heritage is deemed to be a mitigating factor in sentencing.

The Supreme Court of Canada has encouraged Canadian judge to impose "weighty sentences" for gun-related crimes. *See R. v. Nur*, [2015] 1 S.C.R. 773, para. 120. As we have seen, the sentencing principles of denunciation and general deterrence are of prime importance in Canada in sentencing for firearm offences. *Anderson*, para. 68. It has been pointed out that "ownership of firearms is very strictly controlled in Canada and sentences for firearms offences tend to be high, with an emphasis on deterrence as a priority objective of sentencing." *See R. v. Carter*, 2021 ONCJ 561, para. 18.

In *R. v. Letkeman*, 2021 MBCA 68, the Manitoba Court of Appeal pointed out that "[i]t is well established that when the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is to be more on the offence committed, rather than on the offender…Where denunciation and deterrence are the paramount sentencing principles, the accused's conduct is more important than his personal circumstances." *Letkeman*, para. 51, 126.

The decision of the Ontario Court of Appeal in *Morris* is consistent with this approach. The decision of the Nova Scotia Court of Appeal in *Anderson*, rejects it. *Anderson* requires that the sentencing judge concentrate primarily upon the circumstances of the offender. The circumstances of the offence are seen as significantly less important. It could be argued that the Nova Scotia Court of Appeal has made proportionality a secondary principle of sentencing in relation to Black offenders.

It appears that the Nova Scotia Court of Appeal is going much further than the Supreme Court in *Gladue* and *Ipeelee*. Based upon the Court of Appeal's analysis in *Anderson*, it seems that it is being suggested that the impact of anti-Black racism should almost always result in a significantly reduced sentence for Black offenders. If this is a correct interpretation of *Anderson*, and if it is adopted by other Canadian courts, then this constitutes a seismic shift in Canadian sentencing policy. I say this because it has been noted that "[a]s with all sentencing decisions, those involving Aboriginal offenders must proceed on an individual (or case-by-case) basis; that is, for this offence, committed by this offender, harming this victim, in this community." *See R. v. Cortez*, 2021 BCPC 263, para. 19. The approach adopted in *Anderson* would delete the use of the word "this."



Wayne Gorman is a judge of the Provincial Court of Newfoundland and Labrador. His blog (Keeping Up Is Hard to Do: A Trial Judge's Reading Blog) can be found on the web page of the Canadian Association of Provincial Court Judges. He also writes a regular column (Of Particular Interest to Provincial Court Judges) for the Canadian Provincial Judges' Journal. *Judge Gorman's work has been widely published. Comments or suggestions to Judge Gorman may be sent to wgorman@provincial.court.nl.ca.*

5. Matthew Clair and Alix S. Winter interviewed state judges in a Northeastern state to study "the implications of judges' understandings of racial disparities at arraignment, plea hearings, jury selection, and sentencing." Matthew Clair and Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 332 (2016). The authors concluded as follows as to what the interviews revealed about racism and sentencing:

> When asked whether they account for racial disparities when determining individual sentences, most judges in our sample (41 of 48, 85 percent) told us that they do not—and that they feel they cannot. There is a strong normative understanding that sentencing must be specially tailored to the particular factors and mitigating/aggravating circumstances of the case at hand. Similar to the plea stage, post-trial sentencing is complex and deliberative. Comparison between similarly situated defendants is particularly difficult at post-trial sentencing because of the great amount of information that becomes available over the course of a trial. Consequently, many judges in our sample see little way of drawing comparisons between racial groups. As one Judge told us, the problem of racial disparities is not part of her "decision-making" because "you have to look at each person and try to craft something that can help that person succeed."

Id. at 350.