

# Impact of Race and Culture Assessments

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# Overview

1. Introduction to IRCAs?
  1. What are they?
  2. How do we get them?
  3. Why do we need them?
2. The current state of the law
  1. *Criminal Code* provisions
  2. Development of case law
  3. Problematic arguments and reasoning



# What is an IRCA?

- A report that provides the court with information regarding:
    - Historical and contemporary context of systemic anti-black racism in Canada
    - How those systemic factors:
      - Impact the circumstances of the person being sentenced
      - Contribute to bringing that person before the court
  - “A founding premise of IRCAs is that a person’s race and cultural heritage should be considered as a significant factor in considering their sentence in a criminal matter.”
    - *R. v. Jackson*, 2018 ONSC 2528, at para 28
  - “An IRCA offers insights not otherwise available about the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and communities.”
    - *R v Anderson*, 2021 NSCA 62, at para 106
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# How do we get them?

- Nova Scotia:
    - Ordered by the court → ANSJI/Peoples' Counseling Clinic → Report Writer → Court and Lawyers
  - Federal Funding
    - \$6.64mil over 5 years, 1.6mil annual, ongoing
    - Support implementation of IRCAs across Canada
  - Recent report in BC authored by ANSJI + Ruth Unaegbu
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# Why do we need them?

- Combat legally entrenched and systemic racism
    - In the justice system and our other institutions that contribute to criminality
    - Legal problem requires a legal remedy
    - Need to explicitly bring in Black experiences and perspectives
    - Address overincarceration
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# Systemic oppression/anti-Black racism

- Examples of legally entrenched racism
  - Racist policies and practices enforced through law:
    - Immigration policies
    - Segregation
- Wage Inequality/unemployment
- Enslaved *longer* than we have been “free”
- Black skin associated with criminality

# R U N A W A Y



**T**HE 18th Instant at Night from the Subscriber, in the City of New-York, four Negro Men, Viz. LESTER, about 40 Years of Age, had on a white Flannel Jacket and Drawers, Duck Trowsers and Home-spun Shirt. CÆSAR, about 18 Years of Age, clothed in the same Manner. ISAAC, aged 17 Years clothed in the same Manner, except that his

Breeches were Leather; and MINGO, 15 Years of Age, with the the same Clothing as the 2 first, all of them of a middling Size, Whoever delivers either of the said Negroes to the Subscriber, shall receive **TWENTY SHILLINGS** Reward for each beside all reasonable Charges. If any person can give Intelligence of their being harbour'd, a reward of **TEN POUNDS** will be paid upon conviction of the Offender. All Masters of Vessels and others are forewarn'd not to Transport them from the City, as I am resolv'd to prosecute as far as the Law will allow.

**WILLIAM BULL.**

**N. B.** If the Negroes return, they shall be pardon'd. - 88

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# Mass Incarceration

- Black Canadians = ~3.5% of the Canadian population
  - 2021-2022: 9.2% of Incarcerated population
  - One of the fastest growing sub-groups in federal corrections
  - “very little has changed for Black persons and in many respects, their situation has deteriorated even further. All of the issues identified in 2013 remain today.”
    - 2021-2022 OCI Report
  - 37% of Black people in federal institutions were convicted of MMP offences
- Harsher experience while incarcerated
  - 2008-2018: 37% of *all* discrimination complaints, despite representing 8% of the incarcerated population
  - More likely to be rated higher risk by Correctional Services Canada, “based solely on... race”
    - “Bias behind bars: A Globe investigation finds a prison system stacked against Black and Indigenous inmates” *The Globe and Mail* (24 October 2020)
- United Nations, *Report of the Working Group of Experts on People of African Descent on its mission to Canada*, 2017 at para 34.
  - “particularly concerned about the overrepresentation of African Canadians in the criminal justice system”



# Judicial recognition of overincarceration

- *R v Anderson*, 2021 NSCA 62:
  - [3] Directly relevant to this appeal is the now widely accepted fact that certain groups in society are disproportionately incarcerated, notably Indigenous offenders and Black offenders.
  - [5] We are now well aware that the disproportionate incarceration of Black offenders reflects the systemic discrimination and racism that permeates the criminal justice system.

# *Criminal Code*



# *Criminal Code*, Part XXIII

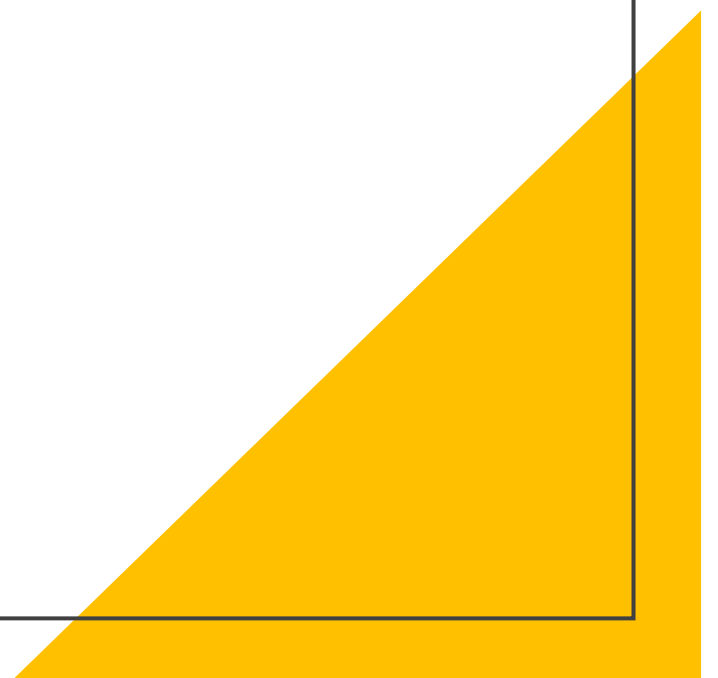
## **Other sentencing principles**

- **718.2 (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 be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

# *Criminal Code*, Part XXIII

- Sentencing factors:
  - aggravating / mitigating factors
  - deterrence
  - denunciation
  - rehabilitation
  - the seriousness of the crime
  - moral blameworthiness

# Case Law



# Early N.S. Case Law

- *R v X*, 2014 NSPC 90
  - First reported case to consider an IRCA, Youth Court
  - 34 psychological assessment, psycho-educational assessment, and psychiatric assessment did not address race
  - IRCA provided “a more textured, multi-dimensional framework for understanding “X”, his background and his behaviours” (para 198)
- *Middleton*
  - IRCAs in adult context, Provincial Court
  - First case where court ordered (and paid for) IRCA
- *R v Gabriel*, 2017 NSSC 90
  - IRCAs in adult context, Supreme Court
  - Importance of IRCA info to judges
  - Evolution of moral blameworthiness

# Moral Blameworthiness

*R v Gabriel*, 2017 NSSC 90

- [52] The purpose is not to justify a discount with respect to an otherwise appropriate criminal sentence. In a community wracked by violence and struggling to find ways to deal with the complex web of causes that have its young men being killed or sent to jail, **it would be wrong to suggest that there should be a lowered standard of moral responsibility. The purpose of the Cultural Assessment is not to justify lower expectations or to offer excuses.** It is to provide some level of understanding (emphasis added).

*R v NW*, 2018 NSPC 14

- [35] In my view, the Supreme Court [in *Ipeelee* ] is not suggesting that a person’s moral culpability is potentially diminished because of that person’s 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.


*Anderson*, 2021 NSCA 62

- [146] The moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism, as was done in this case. The African Nova Scotian offender’s background and social context may have a mitigating effect on moral blameworthiness. ...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.

# Additional NS Cases

- *R v Steed*, 2021 NSSC 71
  - [21] While exceptions may arise, ordering such reports should be limited to cases of ANS offenders “who are facing *serious* sentences”. I interpret this as referencing terms of imprisonment in a federal penitentiary.
- *R v Downey*, 2017 NSSC 302
  - [10] In the circumstances of this case, there was no social injustice trigger; no racial or discriminatory [black versus white] trigger evident
- *R v Boutilier*, 2017 NSSC 308
  - Like *Middleton*, dictates who can write the report, and what information it must contain
  - Crown sought to exclude report
- *R v Faulkner*, 2019 NSPC 36
  - IRCA relevant to range-setting, need to consider whether the range-setting cases involved an IRCA
  - Also relevant to when reviewing accused’s record, if not prior IRCA, maybe over sentenced
- *R v Cromwell*, 2020 NSSC 14
  - Defence counsel *must* make submissions on *how* to take systemic information into account
- “I have considered it” reasoning





# *R v Anderson*, 2021 NSCA 62

- Possession of loaded firearm during traffic stop
  - Sentence: CSO and probation
  - Crown appeal for guidance re: how use of IRCAs in sentencing
  - 5-person panel
  - 2 Intervenors
    - Justice Society Working Group, African Nova Scotian Decade for People of African Descent Coalition
    - Criminal Lawyer's Association
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# *R v Anderson*, 2021 NSCA 62

- Importance of IRCAs/systemic and background evidence
    - Background and systemic factors relevant to sentencing people of African descent (paras 92-93, 103)
    - IRCAs should be available in any sentencing for person of African descent (para 122)
    - Can provide foundation for sentences other than incarceration (paras 120-122)
    - Can take judicial notice of anti-Black racism, but report is helpful (para 111)
  - Holistic approach to the evidence – informs all purposes and principles of sentencing (para 122)
  - Failure to consider systemic and background evidence *or* provide detailed reasons may be an error of law (paras 118, 123)
  - “...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.” (para 159)
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# *Jackson & Morris*

- Framework:
  1. Judicial notice of historical and systemic information:
  2. Case-specific info about the person being sentenced/how systemic and background factors contributed to bring them before the court
  3. This information is treated as a mitigating factor in sentencing

# *R v Morris*, 2021 ONCA 680

- Weapons-related offences: possession, carrying concealed weapon
- Sentence: 15 months and probation
- Crown appeal:
  - Error in treatment of social context evidence & aggravating and mitigating factors
    - May be relevant to moral blameworthiness
    - Not relevant to denunciation for non-Indigenous people
  - Seeking “guidance”
- 5-person panel
- 10 Intervenor

# *R v Morris*, 2021 ONCA 680

- Importance of systemic and background evidence
  - Not only admissible, but “essential”
  - Judicial notice or as social context evidence (para 42)
  - Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario “bears reading and re-reading by those called upon to prosecute, defend, and sentence Black offenders...” (para 43)
  - Enhances legitimacy of the criminal justice system (para 106)
- Evidence goes to:
  - Balance to be achieved between sentencing principles (paras 79, 81, 102)
  - Moral blameworthiness (para 99)
  - Does not go to seriousness of the offence (paras 16, 68, 75)
- CSO for weapons offences

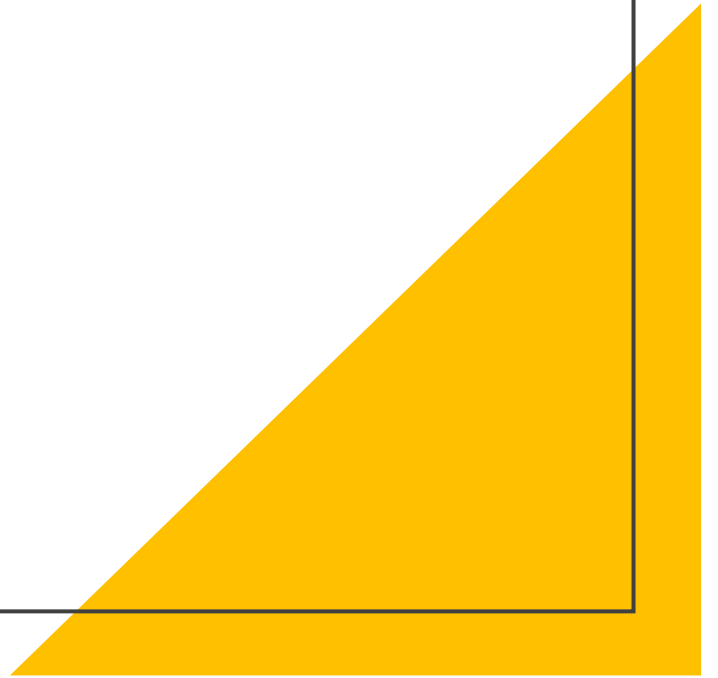
# *R v Morris*, 2021 ONCA 680

- Problematic reasoning:
  - Judge speaking on behalf of the Black community re: wanting person incarcerated (para 85).
  - “disassociate” the CJS process from society’s complicity in anti-Black racism (para 86).
  - “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.” (para 122)

# Comparing *Anderson & Morris*

- Nature of the nexus between systemic evidence and the commission of the offence
- Relevance of systemic evidence
- Agency and constrained choices
- Accounting for state fault re: systemic racism
- Black community having different conceptions of justice

# Problematic Arguments and Reasoning







# Role of the Crown

- “The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”
    - *Boucher v r*, [1955] SCR 16, 110 ccc 263 at 24
  - “When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.”
    - Federation of law societies of Canada, *Model Code of Professional Conduct*, amended 14 march 2017, at 5.1-3.
  - “When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately.”
    - Federation of law societies of Canada, *Model Code of Professional Conduct*, amended 14 march 2017, at 5.1-3, Commentary (1).
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# Problematic Arguments and Reasoning

- Not *Gladue*
- Race-based discount
- No bearing on the accused
- Not applicable because it is a serious offence / only applicable to serious offences
- Inadmissible opinion evidence / challenging the experts
- Society should not be “held responsible or hostage” for the accused’s life circumstances
  - CJS not accountable for systemic failures
- More pertinent to how the accused should be dealt with in jail
- No black vs white “trigger” / not racially motivated
- “I have considered it” without any analysis
- Other family members living “pro-social” life
- “Contacts with police” as aggravating factor
- Not getting the evidence before the court / asking court to infer impact
- No unique conceptions of justice (para 122)
- Judge speaking on behalf of the Black community re: wanting person incarcerated