# Measuring and Assessing the Impact of Race and Culture Assessments in Sentencing

by

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**ABSTRACT**

Sentencing is a highly individualized process, requiring the consideration of both the circumstances of the offence and the offender. In recent years, the use of Impact of Race and Culture Assessments ("IRCA") emerged in sentencing across Canada, especially in Nova Scotia and Ontario. IRCAs have been recognized as having "the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration" (*R v Jackson*, 2018 ONSC 2527). Consequently, they aim to assist sentencing judges in achieving fit and proportional sentences as contemplated by section 718 of the *Criminal Code*. Given the recent emergence of IRCAs, there is little literature evaluating whether IRCAs have achieved their stated aim. Consequently, this thesis focuses on a mixed methods approach to determine the impact of IRCAs on sentencing decision. First, this thesis relies on content analysis to examine how judges interpret and apply IRCAs in crafting sentences. Second, this thesis turns to descriptive statistics and attempts to measure whether IRCAs translate into any differential sentencing outcomes. Finally, this thesis articulates future directions for criminal lawyers – both Crown counsel and defence counsel – and legal academics. All three have a critical role to play vis-à-vis the application of IRCAs and addressing the effects of systemic anti-Black racism in areas beyond sentencing.

## LIST OF ABBREVIATIONS USED

CSO – Conditional Sentence Order

NCS – Non-custodial sentence

ONCA – Court of Appeal for Ontario

NSCA – Court of Appeal for Nova Scotia

IRCA – Impact of Race and Culture Assessments

LTSO – Long-term Supervision Order

PSR – Pre-Sentence Report

EPSR – Enhanced Pre-Sentence Report

J. – Judge

J.A – Judge on appeal

C.J – Chief Justice

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## CHAPTER 1: INTRODUCTION

African Nova Scotians and Black Canadians are "among the founding settler societies" in Canada.[1] And yet, they are the only group in North America whose immigration was completely involuntary.[2] The history of colonialism, including forced migration, slavery, and racism continues to reverberate in Black communities to this day.[3]

One of the legacies of this history is the current overrepresentation of Black and Indigenous people.[4] In the last decade, the number of federally incarcerated Black inmates has increased by 75%.[5] In 2018-19, Black individuals in custody accounted for 7.2% of the federal prison population while representing nearly 3% of the Canadian population.[6] While Parliament introduced remedial provisions to address mass Indigenous incarceration,

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[1] Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal L J 419 at 425 ["Williams"]. Government of Nova Scotia, *"Office apology to the residents of the Nova Scotia Home for Colored Children"* (10 October 2014) online: <https://restorativeinquiry.ca/docs/NSHCC-Apology.pdf> at paras 6-7. As well, this thesis will refer to several terms including Black Canadians, African Nova Scotians, African Canadians and people of African descent will be used. Each term possesses a different meaning. However, some of these terms may be used interchangeably throughout this thesis.

[2] Testimony of Robert Wright (*R v Anderson*, 2020 NSPC 10 at para 48 ["*R v Anderson*, 2020 NSPC"].

[3] *Ibid.,* at para 48; see also Barrington Walker, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) at 3 ["African Canadian Legal Odyssey"]; Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010) at 25 ["Race on trial"]; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to Present* (Black Point, Nova Scotia: Fernwood, 2017)["Maynard"].

[4] Jurisprudence and academic literature often refers to "overrepresentation". This work may refer to overrepresentation and "mass incarceration" interchangeably. The latter signals that there is no "right amount of incarceration". Maria C. Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ at 106 ["Dugas"]; *R v Ipeelee,* 2012 SCC 13 at 77 ["*R v Ipeelee"*].

[5] Canada, Office of the Correctional Investigator*, A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report,* by Ivan Zinger (Ottawa: 2013), online: < https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx#_ftn7> at para 3 [OCI, *Diversity in Corrections*].

[6] Canada, Public Safety Canada, *2019 Corrections and Conditional Release Statistical Overview,* (Ottawa:2020), online (pdf) at < https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ccrso-2019/ccrso-2019-en.pdf > at 56.

described below, political and judicial actions to acknowledge and address anti-Black systemic racism in the criminal justice system have been much slower.

In the last eight years, efforts to recognize and account for anti-Black systemic racism in sentencing has accelerated. These efforts culminated in the creation and recognition of Impact of Race and Culture Assessments ("IRCAs"). These reports provide systemic and individualized information about the person being sentenced, including their race and cultural heritage. It also connects the realities of anti-Black racism, historical and contemporary injustices to the circumstances of the person being sentenced. [7] The Nova Scotia Court of Appeal ("NSCA") in *R v Anderson* recognized that IRCAs offer indispensable insights not "otherwise available about the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and communities."[8] As a result, this thesis will focus on the emergence of IRCAs and their impact on the sentencing process.

### 1.1 Historical context of race and culture in sentencing

Codified in 1996, section 718 of the *Criminal Code* sets out the governing sentencing principles. It includes section 718.2(e), which aimed to address and reduce the disproportionate number of Indigenous individuals serving custodial sentences. At the time, Indigenous persons represented roughly 2% of the Canadian population. Yet, they accounted for 10.6% of persons in prison.[9] As a remedial provision, s 718.2(e) calls for judicial restraint in imposing custodial sentences and the expansion of restorative justice principles. Three years later, the Supreme Court in *R v Gladue* articulated a framework for

[7] *R v Desmond*, 2018 NSSC 338 at para 28 ["*R v Desmond*"].
[8] *R v Anderson,* 2021 NSCA 62 at para 106 ["*R v Anderson,* 2021 NSCA 62"].
[9] *R v Gladue,* [1999] 1 SCR 688 at para 47 ["*R v Gladue*"].

sentencing Indigenous individuals, rooted in s 718.2(e), which also promoted a restorative approach.[10] Consequently, sentencing courts must consider the following when sentencing an Indigenous person: "(a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender".[11] While judges may take judicial notice of broad systemic factors in relation to Indigenous communities, case-specific information relating to the offender must be provided by counsel and/or through a pre-sentence report or *Gladue* report.[12]

However, s 718.2(e) and the consideration of systemic and background factors is not limited to Indigenous individuals being sentenced. In *Gladue*, the Supreme Court clarified that these factors apply to all offenders.[13] Indeed, systemic racism and anti-Black racism has been considered in sentencing.[14] In 2004, the Court of Appeal for Ontario in *R v Hamilton* confirmed that section 718.2(e) applied to Black individuals where there was a nexus between the systemic and background factors and the commission of the offence.[15] Despite the Court of Appeal's decision in *Hamilton*, the consideration and application of systemic and background factors in the context of sentencing Black individuals remained unclear. As noted by Professor Maria Dugas, "there have been growing pains and lessons that needed to be learned along the way".[16]

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[10] *Ibid.*
[11] *Ibid.,* at paras 37, 93.
[12] *Ibid.,* at paras 83-84.
[13] *Ibid.,* at para 69; *R v Ipeelee, supra* note 4 at para 77.
[14] In *Borde,* the Court of Appeal found that the seriousness of the violent offences outweighed any mitigating afforded by the consideration of the systemic and background factors (paras 2 and 35). *R v Borde,* 2003 CanLII 4187 (ON CA) ["*R v Borde*"].
[15] *R v Hamilton,* [2004] OJ No 3252 at para 135 ["*R v Hamilton*"].
[16] Dugas, *supra* note 4 at 116.

Since 2014, the use of IRCAs emerged in sentencing across Canada, although most cases are concentrated in both Nova Scotia and Ontario. These reports were borne out of necessity given that the sentencing process, including pre-sentence reports, typically failed to meaningfully consider the context surrounding race and culture. Several sentencing decisions appreciate the insights offered by IRCAs.[17] For instance, IRCAs contextualize moral blameworthiness and provide "a more textured, multi-dimensional framework for understanding the defendant, [their] background and [their] behaviours."[18] Similarly, IRCAs may cast aggravating, mitigating or even "neutral factors" under a different light.[19] As well, IRCAs are helpful in "identifying rehabilitative and restorative options" for the person being sentenced. As a result, IRCAs also aim to reduce the reliance on incarceration.[20]

Consequently, IRCAs aim to assist sentencing judges in achieving fit and proportional sentences as contemplated by section 718 of the *Criminal Code*. Therefore, IRCAs "have the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration".[21] Since 2021, there are two appellate authorities on the treatment and application of IRCAs and the consideration of systemic racism at sentencing.[22]

The recent emergence of IRCAs means that there is currently little legal scholarship devoted to IRCAs nor is there much scholarship addressing the impact of anti-Black racism

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[17] *R v Anderson,* 2021 NSCA 62 at para 106 ["*R v Anderson,* 2021 NSCA 62"].
[18] *Ibid.,* at paras 109-110; *R v Morris,* 2021 ONCA 680 at para 99 ["*R v Morris*"]; *R v X,* 2014 NSPC 95 at para 198 ["*R v X*"].
[19] *R v Anderson,* 2021 NSCA 62, *supra* note 7 at paras 121, 138.
[20] *Ibid.,* at para 121.
[21] *R v Jackson*, 2018 ONSC 2527 at para 101 ["*R v Jackson*"].
[22] *R v Morris, supra* note 18; *R v Anderson,* 2021 NSCA 62, *supra* note 7.

on sentencing decisions.[23] Currently, there is no research evaluating whether IRCAs have achieved their stated aims (i.e achieving more proportionate sentences and reducing overincarceration). Although, some cases already demonstrate that IRCAs can positively impact sentencing, its benefits cannot be assumed. Nearly twenty years after *Gladue*, the rates of overrepresentation of Indigenous people are accelerating. As noted by the Supreme Court in *R v Ipeelee,* "the statistics indicate [that] section 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system."[24] There are several reasons underlying this lack of discernable impact including the limited availability of *Gladue* reports and specialized courts across Canada.[25] Consequently, research should continuously inquire and measure the availability and the impact of IRCAs on sentencing to mitigate similar implementational challenges.

### 1.2 Objective

This thesis intends to investigate whether IRCAs have achieved their stated aim (i.e reducing reliance on incarceration and promoting rehabilitation and restorative justice in sentencing). Consequently, it will contribute to the literature by examining IRCAs through a legal empirical lens. Through a mixed-methods approach, this thesis will first assess how judges interpret and apply IRCAs in crafting sentences by way of content analysis. Then, it will rely on quantitative data analysis to determine whether the use of IRCAs lead to differential outcomes in sentencing. The study design and analysis of the data are inspired by two theoretical approaches: critical race theory and restorative justice. Second, this

[23] Danardo S Jones, *Punishing Black Bodies in Canada: Making Blackness Visible in Criminal Sentencing* (Master of Laws Thesis, York University, Osgoode Hall Law School, 2019) [Unpublished] at 103 ["Jones"].
[24] *R v Ipeelee, supra* note 5 at para 63.
[25] Canada, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*, by the Research and Statistics Division (Ottawa: Department of Justice, 2017) at 20-29 ["Spotlight on Gladue"].

research project aims to formulate recommendations to ensure that sentencing judges are mandated to and properly consider systemic factors at sentencing. Given that our legal systems have been used as tools of marginalization, sentencing can, and should, be used as a tool for reparative justice given that it can consider historic and systemic inequities.[26] These recommendations are aimed towards criminal practitioners, the judiciary, and legal scholars.

Finally, this thesis has also been a process of self-inquiry. I am mindful of my own perspective and my positionality. First, I am not African Canadian nor African Nova Scotian. Consequently, I cannot speak for these communities. Throughout this research, I remained mindful of the privileges that come with my Whiteness. Second, I recognize that as a federal prosecutor, I am a criminal justice participant with considerable discretionary powers. Having worked at the Courthouse at Old City Hall for both Legal Aid Ontario and, later, the Public Prosecution Service of Canada, these experiences informed my perspective vis-à-vis the criminal justice system and its impact on people who have been criminally charged and convicted. All views expressed in my thesis are my own and in no way represent the views of my employer, the Public Prosecution Service of Canada. None of my research is based on any privileged or confidential information relayed to me while working as a federal prosecutor.

### 1.3 Thesis outline

This thesis is divided into nine chapters. Chapter Two provides a literature review in two parts. First, it briefly focuses on systemic anti-Black racism from a historical and contemporary perspective. It will demonstrate that systemic anti-Black racism continues to

[26]See e.g. Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBS Press, 2013) at 4 [“Murdocca”].

permeate through social institutions. Second, it demonstrates that the criminal justice system is no exception to this pervasive systemic racism. From over-policing to mass incarceration, systemic racism can be traced at every step in the criminal justice system. Chapter Three focuses on sentencing principles and how identity, race, and racism factor in the sentencing process. Then, Chapter Four reviews the case law that contributed to the development of IRCAs. Despite some of the risks associated with raising systemic racism in sentencing, IRCAs are nevertheless critical to ensure truly individualized sentences and to confront systemic anti-Black racism and the role played by judges, Crown prosecutors, defence counsel and other criminal justice workers.

Chapter Five addresses the conceptual frameworks in this research. Critical Race Theory and Restorative Justice represent the two fundamental conceptual frameworks that inspired this thesis' study design and data analysis. Critical Race Theory interrogates the role of race and culture in social institutions, including the criminal justice system while restorative justice offers an alternative to the current retributive sentencing paradigm. Both frameworks challenge the *status quo.* This section will briefly define these conceptual frameworks and how they informed the study design and data analysis.

Then, Chapter Six sets out the methodological approaches underlying this research. More specifically, this research is grounded in a mixed-methods approach utilizing content analysis complemented by doctrinal analysis and quantitative data analysis. This chapter will justify the methodological choices underpinning this research and described the methodology and its implementation. This chapter also acknowledges some of the inherent limitations to the methodological choices made, particularly with respect to quantitative data analysis. It will also propose an alternative study design for further researchers once

there is a critical mass of available data. This proposed study design would resolve some of the methodological limitations while ensuring higher quality and reliability results.

Chapter Seven discusses the findings of this research in two phases. In the first phase, the findings of the content analysis will be addressed thematically. The emerging patterns for each theme will be set out with references to relevant jurisprudence. At this stage, this chapter will also engage in a doctrinal analysis of the case law informed by both theoretical frameworks discussed in chapter three. In the second phase, this chapter will set out its findings resulting from quantitative data analysis. When assessing the qualitative and quantitative findings together, IRCAs have some impact on sentencing. They appear to influence the types of conditions imposed in conditional sentence orders and probation orders. While IRCAs are generally embraced by sentencing judges, it is unclear at this time whether these reports truly impact the type of sentence imposed and reduce reliance on incarceration.

Finally, Chapter Eight will conclude that sentencing approaches alone will not dismantle systemic anti-Black racism. Sentencing represents the last step in the criminal justice process. As well, it is only one small piece in the societal fabric which maintains anti-Black racism. Nevertheless, IRCAs remain a critical tool to increase "awareness and understanding of judges, Crown prosecutors, defence counsel, probation officers, correctional officials, parole officers and others who are dealing with the offender."[27] Consequently, this chapter addresses future directions for some stakeholders in the criminal justice system, namely Crown attorneys, Defence counsel and legal a scholars. First,

[27] *R v Anderson*, 2021 NSCA 62, *supra* note 7 at 111.

IRCAs should be adapted to uses outside of the sentencing context given that anti-Black racism can be traced at every step of the criminal justice system. As a result, the impact of systemic racism and IRCAs should be deployed beyond sentencing and should be relied upon at bail hearings, parole hearings and could be deployed even beyond the confines of the criminal law. Second, raising systemic anti-Black racism in the criminal justice system does not only fall on the shoulders of defence counsel at trial and/or sentencing. Rather, Crown attorneys should consider and raise the impact of systemic racism in the execution of their duties.

## CHAPTER 2: BACKGROUND

Behind Canada's reputation of promoting equality and diversity hides a painful past.[28] Past atrocities swept under the rug. Barrington Walker remarked that "there has been indeed a tradition of Canadian historians ignoring the institution of slavery [in Canada] or giving it only passing reference".[29] Contrary to the national narrative, Canada's legacy is not constrained to one of a "haven" from slavery and oppression.[30] Instead, slavery and oppression are foundational characteristics of our nation. Slavery was practiced in New France, Île Royale, and later British North America.[31] While an empire fell in the hands of another, slavery endured and expanded as a legal institution.[32] In the late 18th century, slavery accelerated in British North America. Indeed, slavery was ubiquitous in Loyalist settlements until the practice's demise in 1833.[33] Contemporary society and its institutions are still suffused with the legacy of slavery and anti-Black racism.

This chapter will contextualize the historical and contemporary manifestations of systemic racism in Canada in three parts. First, this chapter briefly summarizes the history of slavery in Canada, which lasted until 1833. Second, this chapter will demonstrate how the legacy of slavery persisted beyond emancipation. This brief history underscores that,

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[28] Wanda Bernard & Holly Smith, "Injustice, Justice, And Africentric Practice in Canada" (2018) 35:1 Canadian Social Work 149 at 149 ["Bernard & Smith"]; 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].

[29] Walker, Race on trial, *supra* note 3 at 25.

[30] African Canadian Legal Odyssey, *supra* note 3 at 4; Esmaralda Thornhill, "So Seldom for Us, So Often Against Us: Blacks and Law in Canada" (2008) 38:2 Journal of Black Studies 321 at 322 ["Thornhill"].

[31] African Canadian Legal Odyssey, *supra* note 3 at 7. See also Afua Cooper. *The hanging of Angelique : the untold story of Canadian slavery and the burning of Old Montreal* (Athens, University of Georgia Press, 2007); Kenneth Donovan, "Slaves and their Owners in Ile Royal, 1713–1760" (Autumn 1995) 25:1 Acadiensis.

[32] Walker, Race on trial, *supra* note 3 at 27.

[33] *Ibid.,* at 28

despite its permutations throughout time, the law had a central role in the lives of individuals of African descent.[34] Third, this chapter will demonstrate that systemic anti-Black racism currently permeates social institutions, including the criminal justice system.

## 2.1 Slavery in New France and British North America

In the 17th and 18th century, France's colonial empire included slaveholdings in New France comprised of both enslaved people of Indigenous or African descent.[35] During that time, a small number of people of African descent arrived in Nova Scotia as enslaved persons.[36] Some were imported to Halifax by local merchants as early as 1752 and sold at public auctions.[37] As a legally sanctioned practice, slavery was regulated by the *Code Noir*, which outlined the protections afforded to enslaved people and their "master's" obligations.[38] While slavery was present in New France, "it was not a dominant feature of economic and social life".[39]

The French colonial empires endured until the British Conquest in 1760. Although slavery ended in 1772 in Britain, slavery persisted in North America under the British empire.[40] In 1793, the legislative assembly of Upper Canada passed "*An Act to prevent the further introduction of Slaves, and to limit the term of contracts or servitude within this*

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[34] African Canadian Legal Odyssey, *supra* note 3 at 3.
[35] Walker, Race on trial, *supra* note 3 at 26.
[36] Nova Scotia Home for Colored Children Restorative Inquiry, *Journey to Light: A Different Way Forward: Final Report of the Restorative Inquiry – Nova Scotia Home for Colored Children* (Halifax, NS: Council of Parties of the Nova Scotia Home for Colored Children Restorative Inquiry, 2019) at 81 ["Journey to Light"].
[37] *Ibid.,* at 81.
[38] Walker, Race on trial, *supra* note 3 at 27.
[39] Allen P. Stouffer, Light of Nature and the Law of God: Antislavery in Ontario, 1833-1877 (Baton Rouge, Louisiana State University Press, 1992) at 9 ["Allen"].
[40]According to Allen, the James Somerset case sealed slavery's fate in Britain. Mr. Somerset, who was enslaved and brought to England, escaped and was "freed when the court decided that slavery violated the common law and therefore could not exist in Britain". This court case resulted in the liberation of some ten thousand people who were enslaved in Britain. (*Ibid,* at 19)

*Province"*.[41] The Act did not outright abolish slavery. Rather, it contemplated the abolition of slavery while adopting a gradual approach to avoid "violating private property" rights.[42] Meanwhile, efforts in Nova Scotia did not yield the same results: there were two failed attempts to pass legislation regulating the practice of slavery in the post-revolutionary era.[43] In 1787, a great majority of the House of Assembly rejected a bill regulating servitude, in which one of the clauses explicitly referred to slavery.[44] While the bill passed the first and second reading, it was not enacted as "slavery did not exist in this province and ought not to be mentioned".[45] Two years later, legislators rejected another bill, which aimed to regulate slavery. Cahill described the 1789 bill as nothing more than an attempt to "prevent the illegal re-enslavement of free Blacks" while doing nothing to improve the conditions of enslaved people.[46] Had either or both bills been enacted, the institution of slavery would not be legalized but rather, the institution would have been recognized as "lawful until such time as it was statutorily or judicially abolished".[47]

By 1807, Britain's *Slave Trade Act* received royal sanction and ended the transatlantic slave trade.[48] These legislative efforts reflected a growing abolitionist movement. Five years later, the British offered emancipation to those who were enslaved and who volunteered to fight against the Americans during both the American Revolution

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[41] David Gilles, « La norme esclavagiste, entre pratique coutumière et norme étatique : les esclaves panis et leur statut juridique au Canada (XVIIe-XVIIIe s.) », (2008) 40 :1 Revue de Droit d'Ottawa 73 at 96 ["Gilles"].
[42] *Ibid.,* at 96.
[43] Walker, Race on trial, *supra* note 3 at 29.
[44] T. Watson Smith, "The Slave in Canada," in *Collections of the Nova Scotia Historical Society, Volume 10* (Halifax: Nova Scotia Printing Company, 1899) at 109 ["Smith"]; Barry Cahill, "Slavery and the Judges of Loyalist Nova Scotia" (1994) 43 UNBLJ 73 at 84 ["Cahill"].
[45] Smith, supra note 44 at 109; Cahill, *supra* note 44 at 85.
[46] Cahill, *supra* note 44 at 85.
[47] *Ibid.,* at 86.
[48] Gilles, *supra* note 41 at 95.

and the War of 1812.[49] Those volunteers thus gained full legal status and citizenship in Canada.[50] Later, more than three thousand Black loyalists – some free, some enslaved– came to Nova Scotia after the American Revolutionary War.[51] The promise of emancipation was not animated by benevolence or opposition to slavery. This misperception was rebutted by "the fact that, though thousands of freed Blacks migrated to pre-Confederation Canada after the Revolutionary War, thousands more enslaved Blacks arrived into Nova Scotia as property of white loyalists."[52] Rather, the offer of emancipation was arguably a ploy to steal "rebel 'property' and help win the war".[53] Following the War of 1812, more than two thousand African-Americans sought refuge in Nova Scotia.[54] The Court in *Beals v. Nova Scotia (Attorney General),* noted that:

> These settlers arrived in Nova Scotia under the pretence of offers of generous land grants from the British government. Unlike their white counterparts who typically received at least 100 acres of fertile land, black families were given ten-acre lots of poor-quality land. That land was segregated from the lands given to white families. In addition, while white settlers were given deeds to their land, black settlers were given "tickets of location" and "licenses of occupation". Without legal title to their land, black settlers could not sell or mortgage their property, or legally pass it down to their descendants upon their death. Although a limited number of land titles were eventually issued in Preston, and some settlers were able to purchase land, most black families never attained clear title to their land. Lack of clear title and the segregated nature of their

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[49] African Canadian Legal Odyssey, *supra* note 3 at 168.
[50] *Ibid.*
[51] Maynard noted that during this period, many free Black individuals were caught and re-enslaved. (Maynard, *supra* note 3 at 27); Journey to Light, *supra* note 36 at 81See also Kenneth [Donovan, Kenneth Donovan, "Slavery and Freedom in Atlantic Canada's African Diaspora: Introduction," (2014) 43:1 Acadiensis; Harvey Amani Whitfield, Blacks on the Border: The Black Refugee in British North America, 1815-1860, (Burlington, Vermont: University of Vermont Press, 2006); 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.
[52] *Ibid.,* at 26-27.
[53] *Ibid.,* at 26.
[54] Journey to Light, *supra* note 36 at 81.

> land triggered a cycle of poverty for African Nova Scotian families that persisted for generation.[55]

In Ontario, larger communities of individuals of African descent steadily grew during the early 19th century and accelerated after the promulgation of the *Fugitive Slave Law of 1850* in the United States.[56] As a result, "Canada became the destination of choice for many Black individuals from the United States, some of whom had escaped slavery by travelling through the Underground Railroad."[57] At the time, most settled in Chatham and Essex.[58] Just as in Nova Scotia, these communities experienced hostility and discrimination.[59]

**2.2 Post-Emancipation**

Oppression did not vanish following the emancipation of 1833.[60] Instead, the institution of slavery "cast a long shadow over Black's lives for years after abolition".[61] Refugees were not widely accepted or welcomed with open arms. Instead, there was a corresponding increase in hostility and prejudice.[62] Worst yet, some periods of Canadian history are tainted with race riots and burning crosses that terrorized communities.[63]

Despite their contributions to Canadian society, Black and African Canadian communities across Canada faced segregation in public spaces, housing, education and

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[55] 2020 NSSC 60 at para 22.
[56] Stouffer, *supra* note 39 at 82; Maynard, *supra* note 3 at 29.
[57] African Canadian Legal Odyssey, *supra* note 3 at 168.
[58] Race on trial, *supra* note 3 at 32.
[59] *Ibid.,* at 34.
[60] United Nations' Working Group, "Report of the Working Group of Experts on People of African Descent on its mission to Canada" (29 September 2017), online: <www.ochr.org> at 3 ["Report of the Working Group"]; Race on trial, *supra* note 3 at 30.
[61] Race on trial, *supra* note 29 at 30-31.
[62] Stouffer, *supra* note 39 at 82.
[63] Maynard, *supra* note 3 at 28 (First Race Riot was recorded in 1784 in Shelburne, Nova Scotia). Backhouse, Constance. C*olour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 185-187 ["Backhouse"].

employment post-emancipation.[64] With respect to education, the law authorized segregation.[65] In both Ontario and Nova Scotia, education authorities were permitted to establish separate "buildings for pupils of 'different color'".[66] According to Backhouse, white officials in Ontario often relied on coercive tactics to push students into segregated schools.[67] In Nova Scotia, Black students also faced intentional discrimination in education. They studied in "unheated, dilapidated buildings, [and were] taught by poorly trained teachers and faced significant underfunding."[68] Some children were outright excluded from accessing public education.[69]

The movement of Black individuals in public spaces was also restricted. For example, "sundown" laws, by-laws and curfews, mandated that Black individuals had to be indoors at a certain time in the evening.[70] As highlighted in the Viola Desmond case, several institutions practiced legally sanctioned racial segregation such as cinemas, theatres, restaurants and taverns.[71] In November 1946, Ms. Desmond – an African Nova Scotian beautician – was refused access to the downstairs seating of the Roseland Theater in New Glasgow. Instead, Ms. Desmond purchased a ticket for the upstairs balcony. Recognizing that the refusal was racially motivated, Ms. Desmond decided to challenge

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[64] Report of the Working Group, *supra* note 60 at 3.
[65] Backhouse, *supra* note 63 at 251.
[66] *Ibid.,* at 250-251.
[67] *Ibid.,* at 251; Nova Scotia, Black Learners Advisory Committee, BLAC Report on Education: Redressing Inequity—Empowering Black Learners (Nova Scotia: Black Learners Advisory Committee, 1994) vol I at 18-26 [BLAC Report Vol I].
[68] Maynard, *supra* note 3 at 34.
[69] Kristin McLaren, "" We had no desire to be set apart ": Forced Segregation of Black Students in Canada West Public Schools and Myths of British Egalitarianism" (2004) 37:73 Social History/Histoire Sociale 27 at 36; Afua Cooper, "Epilogue" in Boulou Ebanda de B'béri, Nina Reid-Maroney, Handel Kashope Wright, *The Promised Land: History and Historiography of the Black Experience in Chatham-Kent's Settlements and Beyond* (Toronto: University of Toronto Press, 2014) at 195
[70] Maynard, *supra* note 3 at 37.
[71] African Canadian Legal Odyssey, *supra* note 3 at 170.

this segregation and "took a seat in the partially filled downstairs portion of the theatre".[72] Ms. Desmond was forcibly removed and arrested for transgressing unspoken racial and social boundaries.[73] She spent 12 hours in custody[74] and was charged with violating the *Theatres, Cinematographs and Amusements Act*.[75] This provincial statute mandated the payment of an amusement tax on any tickets purchased in provincial theatres.[76] Given that Ms. Desmond paid for an upper balcony ticket but sat in the downstairs area, Ms. Desmond was essentially charged with defrauding the government "of 1 cent in amusement tax on the basis that the tax was levied for an upstairs seat" ticket, which was 10 cents cheaper than the downstairs ticket.[77] After trial, Ms. Desmond was convicted and sentenced to a $20.00 fine.[78] While the trial itself was silent on Ms. Desmond's race and gender, Ms. Desmond was one of the first Black women in Canada to challenge racial segregation in the courts.[79] In 2010, the Government of Nova Scotia posthumously pardoned Ms. Desmond for her wrongful arrest and conviction.[80] In his speech, Former Premier Darrel Dexter recognized that Ms. Desmond's arrest, detention and conviction illustrated how "the law was used to perpetrate racism and racial segregation".[81]

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[72] Backhouse, *supra* note 63 at 288.
[73] Thornhill, *supra* note 3 at 330, Backhouse, *supra* note 63 at 229.
[74] *Ibid.,* at 330.
[75] *Theatres, Cinematographs, and Amusements Act*, RSNS, 1923, c 162, s 8(8). Backhouse, *supra* note 63 at 229.
[76] Backhouse, *supra* note 63 at 230
[77] Thornhill, *supra* note 30 at 330
[78] *Ibid.,* at 330
[79] Backhouse, *supra* note 63 at 243.
[80] Province of Nova Scotia, "Grant of Free Pardon to Viola Desmond" (15 April 2010) online (pdf): <https://novascotia.ca/news/smr/media/2010-04-15-pardon/DesmondPardonCertificate.pdf>.
[81] "In rare posthumous pardon, Nova Scotia apologizes for black woman's 1946 arrest" *The Globe and Mail* (15 April 2010), online: <https://www.theglobeandmail.com/news/national/in-rare-posthumous-pardon-nova-scotia-apologizes-for-black-womans-1946-arrest/article4315080/> at para 3.

Anti-Black racism also severely limited educational, employment and financial opportunities.[82] Until the Second World War, Black women's employment prospects were often limited to domestic service.[83] Black men, on the other hand, laboured in dangerous conditions.[84] Both received exploitative remuneration.[85] Immigration policies were also steeped in racist attitudes: in 1911, the federal government prohibited Black immigration on the basis that "Black people were unsuited to the cold Canadian climate".[86] The federal government continued to restrict immigration based on nationality and race until the introduction of the points system in the 1960s.[87] Consequently, the majority of Black Canadians and African Nova Scotians at the time were direct descendants of people who had been enslaved, loyalists, refugees and maroons.

While British North American justice purportedly espoused legal equality for all, it was implemented by men who implicitly and uncritically accepted racial hierarchies, ultimately leading to different justice for those who were white and those who were not.[88]

### 2.3 Contemporary disparities

The history of colonialism, slavery and systemic racism translates into the disparities that persist today.[89] These disparities and inequalities are expressed in various

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[82] Journey to Light, *supra* note 36 at 82.
[83] Maynard, *supra* note 3 at 39
[84] *Ibid.,* at 390
[85] *Ibid.,* at 38; Nova Scotia, Black Learners Advisory Committee, BLAC Report on Education: Redressing Inequity—Empowering Black Learners (Nova Scotia: Black Learners Advisory Committee, 1994) vol III at 55 [BLAC Report Vol III].
[86]African Canadian Legal Odyssey, *supra* note 3 at 170.
[87] Alan Green, "The Goals of Canada's Immigration Policy: A Historical Perspective" (2004) 13:1 Can J of Urban Research 102 at 113-114; Joseph Mensah, "On The Ethno-Cultural Heterogeneity Of Blacks In Our "Ethnicities" (2005) Canadian Issues 72 at 72.
[88] African Canadian Legal Odyssey, *supra* note 3 at 191.
[89] *R v Nur,* 2011 ONSC 4874 (As noted by Code J., "it is not difficult to establish that anti-black discrimination undoubtedly contributes to many of these underlying societal causes at para 79).

areas and institutions, which have consequences on the social determinants of health, which mirrors the social determinants of criminal behavior.[90] In terms of social determinants of criminal behaviour, Greg Caruso identified poverty, socioeconomic status, abuse, violence, housing, mental health, access to healthcare, education, environmental healthas key factors.

In the education system, the impact of systemic racism manifests in several ways. For instance, there is research associating opportunity gaps with discrimination targeting minority students. The discriminatory application of policies and patterns of socialization in education are part of what has become known as a "school to prison pipeline" for some students.[91] For instance, Black high school students are more likely to be streamed into "applied courses", special education programs or "individual program plans", which results in barriers in accessing post-secondary education.[92]

Additionally, the 2017 Report *Towards Race Equity in Education* found that curriculums were lacking in culturally relevant content.[93] As one participant put it, "Black history is being "white-washed" in the school curriculum."[94] Similarly, the education

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[90]Public Health Agency of Canada, Social Determinants and Inequities in Health for Black Canadians: A Snapshot, by Ifrah Abdillahi and Ashley Shaw, (Ottawa: Public Health Agency of Canada, 2020) online (pdf) at <https://www.canada.ca/content/dam/phac-aspc/documents/services/health-promotion/population-health/what-determines-health/social-determinants-inequities-black-canadians-snapshot/health-inequities-black-canadians.pdf >["Social Determinants and Inequities in Health for Black Canadians"]; *Gregg D. Caruso. 2017. Public Health and Safety: The Social Determinants of Health and Criminal Behavior. UK: ResearchLinks Books at 27* ["Caruso"].

[91] Wanda Bernard & Holly Smith, "Injustice, Justice, And Africentric Practice in Canada" (2018) 35:1 Canadian Social Work 149 at 151 ["Bernard & Smith"]. See also Black Legal Action Centre, "Links to Justice" (17 August 2021), online: <https://www.blacklegalactioncentre.ca/links-to-justice/>.

[92] *R v Anderson, supra* note 27 at paras, 37-38, 54; BLAC Report Vol III *supra* note 85 at 24.

[93] Carl James & Tana Turner, *Towards Race Equity In Education: The Schooling of Black Students in the Greater Toronto Area* (Toronto: York University, 2017) online (pdf) at <https://edu.yorku.ca/files/2017/04/Towards-Race-Equity-in-Education-April-2017.pdf> ["Towards Race Equity in Education"]; BLAC Report Vol III, *supra* note 85 at 56.

[94] Towards Race Equity in Education*, supra* note 95 at 55*; R v Kandhai,* 2020 ONSC 3582 at para 37 ["*R v Kandhai*"].

system lacks representation among educators – in 2016, only 1.8% of elementary and high school teachers in Canada were Black.[95] The 1994 BLAC Report remarked that these low number of Black educators "has ensured that white interests, cultural and assumptions and the racial status quo are maintained".[96]

Beyond education, systemic racism also fuels the heavy scrutiny, racial profiling, and surveillance of Black families. As a result, they are overreported to child welfare agencies by teachers, school personnel and other professionals with a duty to report.[97] In 2013, approximately 8% of Black children in Ontario were the subject of a child welfare investigation in comparison to 5% of White children.[98] They were also nearly three times more likely to be placed in care than their White counterparts.[99] In Toronto, Black children and youth represent 41% of those in care of the Toronto Children's Aid Society despite representing 8% of the city's population.[100] Similarly, African Nova Scotian children and youth account for 15% of child welfare cases in Nova Scotia.[101] Yet, African Nova

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[95] Martin Turcotte, "*Results from the 2016 Census: Education and labour market integration of Black youth in Canada"*, (Ottawa: Statistics Canada, 2020) online (pdf) at <https://www150.statcan.gc.ca/n1/en/pub/75-006-x/2020001/article/00002-eng.pdf?st=_3kEvUhR> . ["Turcotte"]

[96] BLAC Report Vol III, *supra* note 85 at 35.

[97] Maynard, *supra* note 3 at 193 ["Maynard"]; Faisa Mohamud et al, "Racial Disparity in the Ontario Child Welfare System: Conceptualizing Policies and Practices That Drive Involvement for Black Families" (2021) 120 *Children and youth services review* 105711 at 8 ["Mohamud et al."].

[98] Ontario Human Rights Commission, *Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare*, (Toronto: Ontario Human Rights Commission, 2018) online (pdf) at <https://www.ohrc.on.ca/sites/default/files/Interrupted%20childhoods_Over-representation%20of%20Indigenous%20and%20Black%20children%20in%20Ontario%20child%20welfare_accessible.pdf> at 21.

[99] *Ibid.,* at 22.

[100] Sandro Contenta et al., "Why are so many black children in foster and group homes?", Toronto Star, (December 2011) online at <https://www.thestar.com/news/canada/2014/12/11/why_are_so_many_black_children_in_foster_and_group_homes.html>.

[101] Sherri Borden Colley, "Black Social Workers Prompt Change in Child Welfare System", CBC News, (September 19, 2019) online at https://www.cbc.ca/news/canada/nova-scotia/black-social-workers-child-welfare-conference-changes-1.5288185 at para 16.

Scotians represent less than 3% of Nova Scotia's population.[102] These disparities are also due, in part, due to the absence of culturally relevant meanings of "risk" in the context of child welfare and community-led strategies to mitigate these risks.[103]

Systemic racism permeates within the Canadian job market at all levels – from hiring to promotions and retention.[104] Robyn Maynard pointed to the gendered and racialized dimensions of the wealth gap: by the late 1980s, "Black women earned less than other immigration population, and 27 per cent less than other women."[105] These disparities in earnings persists. More recent Canadian studies revealed that Black workers earned less than White and other racialized workers.[106] For instance, Feng and Coulombe found that Black men and women's "earnings disadvantage originates mostly from lower pay for the same job".[107]

Black Canadians also experience barriers to adequate housing. Statistics Canada revealed that among Black Canadians, 28.6% were living in unaffordable housing and 12.9% were living in crowed conditions in comparison to 16.1% and 1.1 % of their White counterparts respectively.[108] Additionally, research has shown that racism constitutes a barrier in the Canadian housing market.[109] The presence and consequence of systemic

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[102] Statistics Canada, *Census Profile, 2016 Census* (Ottawa: Statistics Canada, 2016), online: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=PR&Code1=12&Geo2=POPC&Code2=1458&SearchText=Black+Lake&SearchType=Begins&SearchPR=01&B1=All&TABID=1&type=1>.
[103] Mohamud et al., *supra* note 99 at 10.
[104] Turcotte, *supra* note 97.
[105] Maynard, *supra* note 3 at 73
[106] Theresa Qiu and Grant Schellenberg, "The weekly earnings of Canadian-born individuals in designated visible minority and White categories in the mid-2010s" (Ottawa: Statistics Canada, January 2022) online at: <https://www150.statcan.gc.ca/n1/en/pub/36-28-0001/2022001/article/00004-eng.pdf?st=THIuya8o>; Feng Hou & Simon Coulombe, ""Earnings Gaps for Canadian-Born Visible Minorities in the Public and Private Sectors." (2010) 36: 1 *Canadian public policy* 29 ["Hou & Coulombe"].
[107] Hou & Coulombe, *supra* note 108 at 39.
[108] Social Determinants and Inequities in Health for Black Canadians, *supra* note 90 at 7.
[109] Carlos Teixeira, "Barriers and outcomes in the housing searches of new immigrants and refugees: a case study of ''Black'' Africans in Toronto's rental market" (2008) J Hous and the Built Environ 253 at 268.

racism within different institutions have a compounding impact on individuals. As well, the collateral consequences of criminal involvement and convictions aggravates this compounding effect. In its report *Legally Bound*, the John Howard Society explained that:

> involvement in the criminal justice system can trap these individuals in a complex web of civil legal issues that threaten access to basic needs such as housing and income. These civil legal issues further marginalize justice-involved populations and contribute to poor socio-economic conditions, all while increasing the likelihood of recidivism.[110]

Criminal records restrict employment opportunities.[111] Involvement with the criminal justice system may also lead to housing consequences. In Toronto, an individual may be evicted if there were "illegal act, trade, business, or occupation that were committed in the housing unit" – even if criminal charges are not ultimately laid.[112] Following incarceration, access to housing may be even more difficult.[113] The CMHC report found that the likelihood of housing difficulties increases following incarceration as many "prisoners have characteristics that make it more difficult to obtain housing, such as lack of education, lack of stable employment, addiction issues, and mental health issues."[114] The report also noted that individuals are released from correctional facilities "without sufficient financial resources to provide for first and last months' rent, which is required

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[110] John Howard Society, "Legally-Bound: Addressing the Civil Legal Needs of Justice-Involved Ontarians" (2020) online at : <https://johnhoward.on.ca/wp-content/uploads/2020/07/Legally-Bound-The-Civil-Legal-Needs-of-Justice-Involved-Populations.pdf> at 5.
[111] Bryan Warde, "Black Male Disproportionality in the Criminal Justice Systems of the USA, Canada, and England: a Comparative Analysis of Incarceration" (2013) 17J Afr Am St 461 at 473.
[112] For instance, the *Housing Services Act,* social housing provider can bar members of accessing social housing if they have been evicted from social housing unit for an illegal act for 5 years. Similarly, rent geared to income may no longer apply if a tenant is serving a sentence longer than 90 days. Toronto Community Housing, "Absences from rent-to-geared income units", online: <https://www.torontohousing.ca/residents/your-tenancy/Pages/absence-from-RGI-unit.aspx>.See also *Residential Tenancies Act*, 2006, SO 2006, c 17, s 75.
[113] Canada, *Housing Options Upon Discharge from Correctional Facilities: Final Report*, by Rochelle Zorzi et al. (Ottawa: Canada Mortgage and Housing Corporation, 2006) online (pdf): < https://publications.gc.ca/collections/collection_2011/schl-cmhc/nh18-1/NH18-1-332-2006-eng.pdf> at 23.
[114] *Ibid.*

by most landlords. They are also unable to pay the credit check fee that landlords often require, and often have no recent credit history."[115]

## 2.4 Contemporary disparities in the criminal justice system

The criminal justice system is not immune to the pervasiveness of systemic anti-Black racism. The works of Barrington Walker, Clayton Mosher and other scholars revealed the prevalence of systemic discrimination in society, including the criminal justice system.[116] Likewise, several commissions and inquiries, such as the *Stephen Lewis Report on Race Relations in Ontario*, document the impact and the reach of systemic racism in Canadian institutions. The 1995 *Commission on Systemic Racism in the Ontario Criminal Justice System* found that systemic racism permeated throughout the criminal justice system in Ontario from policing, court dynamics and within custodial settings.[117] Similarly, the *Royal Commission on the Donald Marshall Jr. Prosecution* exposed the effect of systemic racism on African Nova Scotians and Indigenous peoples in Nova Scotia, including within the criminal justice system.[118]

Thus, "the law [remains] an imperfect instrument in offering protections from social prejudice and contrarily, often enabled it."[119] Systemic racism has *slowly* been acknowledged among the judiciary. The Supreme Court's decision in *R v R.D.S* signalled a move away from its reluctance to address race in the context of criminal law. In *R v*

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[115] *Ibid.,* at 78.
[116] African Canadian Legal Odyssey, *supra* note 3 at 27.
[117] *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) ["1995 Commission on Systemic Racism in Ontario"].
[118] *Royal Commission on the Donald Marshall, Jr. Prosecution*: *Digest of Findings and Recommendations* (Halifax: Nova Scotia, 1989) ["Royal Commission on the Donald Marshall*"*]
[119] African Canadian Legal Odyssey, *supra* note 32 at 27; *R v S (R. D.),* [1997] 3 SCR 484 at para 47["*R v RDS*"].

*R.D.S*, the Nova Scotia Court of Appeal found that the trial judge's comments that police officers tend to "overreact, particularly when they are dealing with non-white groups" gave rise to a reasonable apprehension of bias. [120] However, the Supreme Court was split on whether it was proper to engage in contextual judging. According to L'Heureux-Dubé and McLachlin JJ., it was entirely proper to engage in contextualized judging. [121] On the facts, there was no reasonable apprehension of bias. Similarly, Cory J. held that Sparks J.'s reasons did not disclose a reasonable apprehension of bias.[122] However, Cory J. disagreed with L'Heureux-Dubé and McLachlin JJ.'s conclusions on contextual judging. Instead, references to social conditions should be based upon expert evidence.[123] In this case, there was no evidence before Sparks J. linking anti-Black racism with the impugned actions of the police officer.[124] Meanwhile, Lamer C.J, Sopinka and Major JJ. arrived at a different outcome. In their view, trial judges must base their findings on the evidence before them. Contextual judging or life experiences are "not a substitute for evidence".[125] In the case at bar, there was no evidence that the police officer lied or was motivated by racism. In sum, Lamer C.J found that Sparks J.'s assessment of the evidence or lack of evidence amounted to an error of law.[126]

In *Parks*, the Court of Appeal for Ontario recognized the pervasiveness of systemic anti-Black racism in society, including the criminal justice system: "Canadian institutions, including the criminal justice system, reflect and perpetuate these negative stereotypes.

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[120] *Ibid.,* at 74.
[121] *Ibid.,* at 42.
[122] *Ibid.,* at 30.
[123] *Ibid.,* at 127.
[124] *Ibid.,* at 150.
[125] *Ibid.,* at 13.
[126] *Ibid.,* at 24

These elements combine to infect our society as a whole with the evil of racism".[127] As a result, marginalized and racialized communities have "disproportionate levels of contact with the police and the criminal justice system in Canada".[128] In 2019, the Supreme Court in *R v Le* recognized the relevance of race in *Charter* litigation and acknowledged the pervasive practice of racial profiling by police services across Canada.[129] In *R v Le*, the Supreme Court revisited the psychological detention test as set out ten years earlier in *R v Grant* and *R v Suberu*.[130] The Court's decision marked a significant departure from *R v Grant* and *R v Suberu*, where race was not meaningfully addressed.[131] In *R v Le*, the Court confirmed that race and race relations may inform the psychological detention analysis.[132] Social context evidence, focusing on issues on race and race relations, may be tendered by way of direct evidence, admissions, or by the taking of judicial notice.[133] However, "the knowledge imputed to the reasonable person comes into evidence" by way of judicial notice.[134] The Court then surveyed several reports and studies to establish the social context evidence of disproportionate policing in racialized and low-income communities.[135] In the Court's view, these findings sufficiently inform the reasonable person "standing in the accused's shoes, of the social context to this encounter".[136] Therefore, direct testimonial

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[127] *R v Parks,* [1993] OJ No 2157 at para 57.
[128] *R v Le*, 2019 SCC 34 at para 90 ["*R v Le*"].
[129] *Ibid.* at para 106.
[130] *R v Suberu*, 2009 SCC 33; *R v Grant*, 2009 SCC 32.
[131] *R v Grant*, 2009 SCC 32 (The majority in *Grant* did, however, include someone's "minority status", rather than race or ethnicity, as a relevant factor, among others, when assessing psychological detention. (para 44) Yet, in Grant, the Supreme Court appeared to focus on his age and inexperience in their analysis without meaningfully considering his race at para 50)
[132] *R v Le, supra* note 130 at para 83; the Supreme Court later confirmed the principles from Le in *R v Lafrance*, 2022 SCC 32 at paras 55-59.
[133] *Ibid.*
[134] *Ibid.,* at para 84.
[135] *Ibid.,* at paras 89- 97.
[136] *Ibid.,* at para 98.

evidence is not necessary to inform the reasonable person analysis.[137] Put differently, the absence of testimonial evidence does not negate the trial judge's obligation to consider "what a reasonable person would know about how race may affect such interactions".[138]

The existing body of academic literature, government reports and jurisprudence establishes the differential treatment of racialized communities in differing contexts, including every stage of the criminal justice process. Academic literature attributed the disproportionate representation of Black individuals in these statistics to overpolicing.[139] Instead, police decisions "taken on which crimes to focus on and where to look for them are deeply informed by race".[140]

Black males are more likely to be subject to street checks, police stops, detention and search practices.[141] These improper police interactions translate into pernicious psychological effects.[142] Despite accounting for only 3.6% of Ontario's population, nearly a third of all Special Investigation's Unit ("SIU") into police shootings involved a Black victim.[143] More recently, data from the Toronto Police Services revealed that 22 % use of

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[137] *Ibid.*
[138] *Ibid.,* at para 106.
[139] Maynard, *supra* note 3 at 88; 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; Faizal R. Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001)39:2 & 3 Osgoode Hall LJ 491 at 497, 505 ["Mirza"]
[140] Maynard, *supra* note 3 at 88.
[141] Ontario Human Rights Commission, *Racial Disparity in Arrests and Charges: An analysis of arrest and charge data from the Toronto Police Service*, S. Wortley and M. Jung (Toronto: 2020) at 109 ["Wortley"]. See also Dr Scot Wortley, *Halifax, Nova Scotia: Street Checks Report* (Halifax: Nova Scotia Human Rights Commission, 2019)
[142] *R v Kandhai, supra* note 96 at para 67.
[143] Scot Wortley, "Police Use of Force in Ontario: An Examination from the Special Investigations Unit, Final Report" (2006): online (pdf) at <https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/projects/pdf/AfricanCanadianClinicIpperwashProject_SIUStudybyScotWortley.pdf> at 41.

force incidents involve Black individuals while they represent only 10.2% of the City's population.[144] Black individuals are also more likely to be charged for simple drug possession.[145] Similarly, Black youth are stopped and searched more often than their white counterparts.[146] While race played a small yet statistically significant impact on arrest decisions, Black youth are also more likely to be charged than other youth.[147] The 1995 Commission on Systemic Racism revealed that, once arrested and brought to the station, Black individuals were held overnight for a bail hearing at twice the rate of their white counterparts.[148] These racial disparities in police treatment persisted "after other relevant factors – including age, criminal history, employment, immigration status and whether or not the person has a permanent home address – have been taken into statistical account".[149] The 1995 *Commission on Systemic Racism in the Ontario Criminal Justice System* found that Black accused were three times more likely to be refused bail.[150] Recent data suggests that these disparities at the bail stage have not changed.[151] The consequences of pre-trial imprisonment cannot be overstated: the inability to secure a release order can translate into economic and familial instability. In cases where a caregiver is held in custody, their loss

[144] Toronto Police Services, Race-based Data Collection Strategy, (June 2022) online at: <https://data.torontopolice.on.ca/pages/race-based-data>.
[145] *Ibid.,* at 7.
[146] Steven Hayle, Scot Wortley &Julian Tanner, "Race, Street Life, and Policing: Implications for Racial Profiling", (2016) 58:3 Canadian Journal of Criminology and Criminal Justice 322 at 343.
[147] Kanika Samuels-Wortley, "Youthful Discretion: Police Selection Bias in Access to Pre-Charge Diversion Programs in Canada" (2019) Race and Justice 1 at 20.
[148] 1995 Commission on Systemic Racism, *supra* note 119 at 7-8.
[149] *Ibid.*
[150] *Ibid.*, at 123.
[151] Nova Scotia Department of Justice, Remand in Nova Scotia 2005-2016 (Nova Scotia: Department of Justice, 2018) at 18; Anna Mehler Paperny, "Exclusive: New data shows race disparities in Canada's bail system" Reuters, October 19, 2017, (online: <https://www.reuters.com/article/canada-us-canada-jails-race-exclusive-idCAKBN1CO2RD-OCADN>).

of freedom and resulting inability to support dependants result in the removal of children from the home.[152]

As previously noted, Black people are disproportionately represented in provincial and federal correctional institutions. In Nova Scotia, the *Royal Commission on the Donald Marshall Jr. Prosecution* suggested that Black individuals were more likely to be incarcerated than their white counterparts.[153] Similarly, the 1995 *Commission on Systemic Racism in the Ontario Criminal Justice System* documented the disproportionate representation of Black individuals in custody.[154] Disproportionate representation has not diminished over time. Instead, the number of Black federally sentenced inmates increased by 90% from 2003 to 2013.[155] More recent data indicates that Black men were five times more likely to be incarcerated in a provincial correctional facility in Ontario than White men.[156] In addition to sentencing disparities, parole ineligibility periods are significantly longer among Black individuals and other racialized persons than their white or Indigenous counterparts.[157]

Systemic disparities, unsurprisingly, persist beyond the sentencing stage. While in custody, Black individuals who are incarcerated were "consistently more likely than the

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[152] Mirza, *supra* note 133 at 507.
[153] Dr Wilson Head & Don Clairmont, *Royal Commission on the Donald Marshall, Jr: Discrimination Against Blacks in Nova Scotia: The Criminal Justice System: A Research Study*, vol *4* (Halifax, Nova Scotia: 1989) at 40 ["Wilson Head & Clairmont"].
[154] 1995 Commission on Systemic Racism, *supra* note 119 at 2.
[155] Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2012-2013* at 3 ["Annual Report 2012-13"].
[156] Akwasi Owusu-Bempah et al., "Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada" (2021) Race and Justice 1 at 6.
[157] Debra Parkes, Jane Sprott & Isabel Grant, "The Evolution of Life Sentences for Second-Degree Murder: Parole Ineligibility and Time Spent in Prison" (2022) 100:1 Can Bar Rev 67 at 82.

general inmate population to be placed in maximum security”.[158] Likewise, they are more likely to be placed in segregation.[159] They are more likely to incur institutional charges and are over-represented in use of force incidents.[160] They are also less likely to receive temporary absences, which grants the inmate permission to leave their correctional institution for a period of time, and less likely to be granted full day parole.[161] Despite the concerning portrait depicted by the Office of the Correctional Investigator in its annual reports, “very little appears to have changed for Black people in federal custody”.[162]

### 2.5 Systemic racism and sentencing in legal literature

While there are several reports documenting the differential treatment among racial and cultural identities, there is little research addressing race and racism in Canadian academic literature. Singh and Sprott speculated that this void may be due to the “marked reluctance to openly discuss race and racism in criminology and in Canada more generally”.[163] While Canadian scholarship has written extensively about the relationship between indigeneity and sentencing, there is limited legal scholarship devoted to the impact of anti-Black racism on sentencing decisions.[164] Within the literature, several articles responded to legal developments such as the Court of Appeal’s decision in

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[158] OCI, *Diversity in Corrections*, *supra* note 5 at para 55.
[159] *Ibid.,* at paras 2, 85.
[160] *Ibid.,* at paras 60, 85. In the OCI’s annual report 2020-21 Black individuals were also over-represented in use of force incidents, accounting for 12% while only representing 9% of the prison population. (Correctional Investigator Canada, *Annual Reports of the Office of the Correctional Investigator 2020-2021* at 15. [“Annual Report 2020-2021”].
[161] OCI, *Diversity in Corrections*, *supra* note 5 at paras 35 and 62.
[162] *R v Jackson*, *supra* note 21 at para 54.
[163] *Ibid.,* at 287.
[164] Jones, *supra* note 23 at 3.

*Hamilton* and *Borde*.[165] For instance, David Tanovich expressed his disappointment in the Court's decision in "Race, Sentencing and the "War on Drugs"".[166] In Tanovich's view, one of the decision's failings was the complete absence of any reference to the *1995 Commission on Systemic Racism in the Ontario Criminal Justice System*.[167] Among several recommendations, the Commission proposed that the Court of Appeal reconsider some of its "sentencing principles in light of our findings that apparently neutral factors have an adverse impact on black accused".[168] Likewise, the Commission also proposed that the Attorney General of Ontario should seek intervener status in sentence appeals to submit evidence of systemic discrimination.[169] Similarly, Richard Devlin and Matthew Sherrard predicted that the tone of the Court of Appeal's decision would chill efforts by sentencing judges to craft individualized sentences that account for the realities of systemic and intersectional inequality in Canadian society.[170] Conversely, other scholars argued that race is irrelevant in sentencing. In "Nagging Doubts About the Use of Race (and Racism) in Sentencing", Michael Plaxton posited that there is no principled reason to rely on the existence of systemic racism alone as a mitigating factor on sentencing.[171] Echoing the Court of Appeal's pronouncement in *Hamilton*, Plaxton wrote:

> To make the sentencing hearing into the sort of forum where the fjudge 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

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[165] See Richard F. Devlin & Matthew Sherrard, "Big Chill: Contextual Judgment after R. v. Hamilton and Mason" (2005) 28:2 Dalhousie LJ 409 ["Devlin & Sherrard"].

[166] David Tanovich, "Race, Sentencing and the "War on Drugs" (2004) 22 CR (6th) 45 ["Tanovich, *War on Drugs*"].

[167] *Ibid.,* at para 12.

[168] *Ibid.*

[169] *Ibid.*

[170] Devlin & Sherrard, *supra* note 159 at 413-414.

[171] Michael Plaxton, "Nagging Doubts About the Use of Race (and Racism) in Sentencing" (2003) 8 CR-ART 299.

> generally. Neither Parliament, nor the Supreme Court, has made such wholesale changes.[172]

Similarly, legislative developments also drew academic attention from a critical race perspective. For example, Faisal Mirza argued that mandatory minimum penalties, namely mandatory prison sentences, would disproportionately and negatively impact Black Canadians given the "prevalence of racist policing and improper use of prosecutorial discretion".[173] Therefore, retaining mandatory prison sentences perpetuate systemic racism in the criminal justice system.[174]

Although several scholars tackled systemic racism in sentencing in their work, there is little legal scholarship on IRCAs given their recent emergence. At this time, there are two significant scholarly contributions on IRCAs. *Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders*[175] was the first academic article addressing IRCAs. Building from the framework articulated by Nakatsuru J. in *R v Morris*, 2018 ONSC 5186 and *R v Jackson*, 2018 ONSC 2527, Professor Maria Dugas surveyed the existing case law, the current legislative authority and sentencing principles to establish a framework for sentencing African Canadians. *Committing to Justice* also addressed the outstanding issues raised by the case law and articulated four key recommendations. First, both Crown and the judiciary should refrain from claiming that "this is not Gladue" to disregard a systematic approach to sentencing African Canadians and disregarding evidence of systemic racism.[176] Second, IRCAs should

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[172] *Ibid.*
[173] Mirza, *supra* note 141 at 492.
[174] *Ibid.,* at 511.
[175] Dugas, *supra* note 4.
[176] *Ibid.,* at 147.

be mandatory unless waived by the offender. Third, IRCAs are only one piece of the puzzle: multiple interventions are required to address overincarceration.[177] Finally, defence counsel (among other criminal justice participants) require proper race-based training to identify when and how to persuasively raise systemic racism at sentencing.[178] Professor Danardo Jones' "*Punishing Black Bodies in Canada*" critically examined Blackness in sentencing and IRCAs. While Professor Jones recognized that IRCAs may promote proportionality in sentencing, he raised the paradox of visibility in race and sentencing. Having interviewed racialized ex-offenders, Jones revealed that many of his interviewees were opposed to raising race as an explanation for their conduct. Instead, they desired to have their race "remain neutral –invisible".[179] Despite the fact that IRCAs may inadvertently perpetuate the pernicious stereotypes that socially disadvantage Black Canadians[180], Professor Jones mused that there is a chance that by addressing "anti-Blackness at a site where Black bodies are routinely degraded, we may force a more honest confrontation of Black over-incarceration".[181]

This chapter briefly highlighted the relationship between the law and systemic anti-Black racism from both a historical and contemporary perspective. It demonstrated how systemic anti-Black racism permeates through social institutions such as the criminal justice system. As noted by the Court of Appeal in *Anderson*, "[t]he history of slavery and racism, the trauma of marginalization and exclusion, discrimination and injustice are the threads that woven together are the fabric of the lives of many African Nova Scotian" and

[177] *Ibid.,* at 152.
[178] *Ibid.,* at 157.
[179] Jones, *supra* note 23 at 88.
[180] *Ibid.,* at 98.
[181] *Ibid.,* at 113.

Black individuals who are accused and convicted of criminal offences in Canada.[182] Within the criminal justice system, systemic racism can be traced at every step of the process. The next chapter will narrow its focus on the criminal justice system and in particular, how identity, race and racism play a role in the sentencing process.

[182] *R v Anderson,* 2021 NSCA 62, *supra* note 27 at para 102.

## CHAPTER 3: SENTENCING PRINCIPLES

### 3.1. Introduction

Crafting a fit sentence is a crucial, though challenging, task.[183] In fact, sentencing may be one of the most difficult tasks for judges.[184] In arriving at a fit sentence, the sentencing judge must consider and ascribe weight to the relevant sentencing objectives, principles, and aggravating and mitigating factors. It requires balancing societal interests and the application of law. Yet, it must also be tailored and contextualized to the circumstances of the person being sentenced.[185] While the criminal justice system espouses formal equality, identity, race, and racism play an important role in sentencing.

This chapters explores the guiding sentencing principles and, in particular, focuses on their relationship with race and identity. First, this chapter begins with a summary of sentencing principles. Second, it narrows its focus on the intersection of cultural identity and sentencing. In doing so, this chapter traces the emergence of explicit use of cultural identity in sentencing jurisprudence such as *R v Gladue* and *R v Ipeelee*. While the consideration of cultural identity arose in the Indigenous context, identity in sentencing is not limited to indigeneity. This chapter also canvasses the jurisprudence leading up to the recognition of anti-Black systemic racism and the consideration of IRCAs. Third, the intersection of traditional sentencing principles and cultural identity call for some reflection on two other sentencing principles: restorative justice and social responsibility. Given the

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[183] *R v Hamilton*, *supra* note 15 at para 1.
[184] *R v Parranto*, 2021 SCC 46 at 113 [*"R v Parranto"*]*;* *R v Lacasse*, 2015 SCC 64 at 58 ["*R v Lacasse*"]*;* *R v Anderson*, 2020 NSPC 10 at para 5.
[185] *R v Anderson*, 2020 NSPC 10 at para 5.

failures of the criminal justice system owing to retributive penal rationales, there should be a renewed emphasis on these two sentencing principles. Fourth, this chapter will canvass the implications of raising cultural and racial identity in sentencing, namely the risk of erring into essentialism. Finally, this chapter will demonstrate that sentencing objectives support the consideration of systemic anti-Black racism in determining fit and proportionate sentences. While sentencing has been used to reinforce structural violence, it is nevertheless one mechanism among many through which contemporary and historic systemic inequities can be confronted and addressed.

### 3.2 Sentencing principles

Section 718 of the *Criminal Code* governs the purpose and principles of sentencing. A fit sentence calls for a careful balance of "the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community."[186] The sentencing court must not lose sight of sentencing's fundamental purpose, which is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society".[187] To do so, sentencing judges must impose "just sanctions" reflecting one or more of the traditional sentencing objectives: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation to victims, and promoting a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community. Often, deterrence and denunciation are identified as paramount

[186] *R v M (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 SCR 500 at paras. 91 and 92
[187] Section 718

sentencing principles – particularly in serious offences.[188] On one hand, denunciation serves a communicative function: in some cases, "incarceration is the only suitable way to express society's condemnation of the offender's conduct".[189] On the other hand, general and specific deterrence rely on sentencing to discourage the offender and others from committing similar offences. However, it must be weighed and applied appropriately. In *Nur*, the Supreme Court remarked that "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending."[190] Although the Supreme Court in *Proulx* acknowledged the uncertainty vis-à-vis deterrence's efficacy, it did not suggest that deterrence ought to be disregarded.[191] Indeed, it is an error in law to completely disregard general deterrence.[192] The Supreme Court suggested, however, that alternative sentences to imprisonment, such as conditional sentences, can be constructed in a manner that gives effect to deterrence.[193] Section 718.2(d) also directs sentencing judges to exercise restraint, that is, not to impose imprisonment in cases where a less restrictive sanction would be appropriate. In *Anderson*, the Court of Appeal reiterated that restraint must be "considered as part of a sentencing matrix that includes denunciation and deterrence".[194]

While deterrence and denunciation are often emphasized in sentencing, rehabilitation cannot be overlooked. Indeed, section 718(d) of the *Code* identifies rehabilitation as a sentencing objective. Similarly, s 10 of the *Controlled Drugs and*

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[188] For instance, they are primary consideration in firearm offences (*R v Nur,* 2015 SCC 15 at para 52); drug offences among others.
[189] *R v Proulx,* [2000] 1 SCR 6 at para 106 ["*R v Proulx"*].
[190] *R v Nur*, 2015 SCC 15 at 45
[191] *R v Proulx*, *supra* note 183 at para 107.
[192] *R v Song*, 2009 ONCA 896 at paras 8-13.
[193] *R v Proulx*, *supra* note 183.
[194] *R v Anderson*, 2021 NSCA 62 at para 161.

*Substances Act ("CDSA")* encourages rehabilitation and treatment in appropriate cases involving controlled substances while also "acknowledging the harm done to victims and to the community."[195] As remarked by the Supreme Court in *R v Lacasse*, rehabilitation "is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate".[196]

Weighing and balancing these sentencing objectives is often a challenging exercise, which can be exacerbated by legislative constraints.[197] For instance, the *Criminal Code* may impose mandatory minimum penalties ("MMP") on specific offences, such as manslaughter with a firearm.[198] Likewise, conditional sentences ("CSO") are statutorily unavailable for a series of offences ranging from murder to sexual offences.[199] These constraints limit judicial discretion in sentencing and, therefore, restrain and extinguish some of the sentencing objectives identified by the sentencing judge.[200] Recently, the Supreme Court in *R v Bissonnette* shone a light on this tension in the context of consecutive parole ineligibility periods.[201] Mr. Bissonnette was sentenced to the mandatory sentence of imprisonment for life and was subject to a total parole ineligibility period of 40 years.[202] The Supreme Court confirmed that the provision which enabled consecutive parole ineligibility was unconstitutional given that the imposition of these consecutive sentences

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[195] SC 1996, c 19.
[196] *R v Lacasse*, *supra* note 178 at para 4.
[197] *R v Nasogaluak*, 2010 SCC 6 at paras 43-45 ["*R v Nasogaluak*"].
[198] *Criminal Code*, s 236(a).
[199] *Criminal Code*, s 742.1 (a) – (f).
[200] The unavailability of CSOs and the presence of MMPs in the sentencing landscape also arguably contribute to the issue of overincarceration. See also Spotlight on Gladue, *supra* note 9 at 25.
[201] 2022 SCC 22 ["*R v Bissonnette*"].
[202] *Ibid.,* at para 19.

which effectively deprives individuals of a realistic opportunity to be granted parole before their deaths. In the Court's view, consecutive parole ineligibility periods deprived individuals in advance of any possibility of re-integration into society, thereby negating the objective of rehabilitation from the time of sentencing.[203]

Incarceration arguably negatively impacts those serving custodial sentences and their families. First, the impact of separating an individual from their families and communities cannot be overlooked. Second, provincial correctional facilities often lack appropriate rehabilitative programming.[204] Similarly, federal correctional facilities do not always offer culturally appropriate rehabilitation programs.[205] Third, solitary confinement leaves deleterious consequences on inmates mental and physical health. [206] Therefore, the cumulative negative consequences of incarceration arguably diminish rehabilitation prospects. The court in *Anderson* captures this conflict. In her ruling, Williams J. wrote:

> I have spent many hours deliberating and agonizing over the determination of a fit and appropriate sentence for this offender and this offence. Sadly, both the federal and provincial systems of incarceration have failed to address the needs of African Nova Scotians […]
>
> Do I impose a sentence of incarceration that I know will not help or do I impose a jail term in the community, affording the opportunity to blend principles of deterrence, denunciation with restorative options of accountability and reparation?".[207]

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[203] *Ibid.,* at para 84.
[204] *R v Anderson,* 2020 NSPC 10 at paras 75, 81.
[205] Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries*, by Ivan Zinger (Ottawa: 2014), online(pdf): <https://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20131126-eng.pdf> at 14, 25; *R v Anderson,* 2021 NSCA 62 at paras 34, 43, 49-55.
[206] Mim[osa Luigi et al., "Shedding Light on "the Hole": A Systematic Review and Meta-Analysis on Adverse Psychological Effects and Mortality Following Solitary Confinement in Correctional Settings." (2020) 11:840 Front. Psychiatry [doi: 10.3389/fpsyt.2020.00840] (Systematic review supports the view that Solitary confinement translates into adverse mental and physical health consequences at 2.
[207] Paras 104- 105

Often, sentencing judges refer to sentencing ranges in their rulings. Sentencing ranges reflect judicial consensus regarding the seriousness of a particular offence and prevents substantial disparities among sentencing decisions, thus advancing parity.[208] Parity requires that "similar offenders who commit similar offences in similar circumstances [...] receive similar sentences".[209] For instance, trafficking in cocaine in Ontario often falls within a range of a sentence of imprisonment of 6 months to 2 years less a day.[210] These sentencing ranges are not meant to constrain judicial discretion. Instead, they are merely starting points or "navigational buoys" that operate to ensure sentences reflect the sentencing principles prescribed in the *Criminal Code*.[211] Sentencing ranges do not relieve the sentencing judge from conducting an individualized analysis considering all relevant factors and sentencing principles.[212] The Supreme Court in *Parranto* confirmed that parity, while important, is a secondary principle.[213]

Although sentencing considers societal interests, the court must craft an individualized sentence, which accords with the fundamental principle of proportionality.[214] Section 718.1 of the *Code* states that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[215] To do so, the sentencing judge cannot discharge their duty without "complete information as to the offender, his background, and his character. This necessarily includes whatever

[208] *R v Parranto*, 2021 SCC 46 at paras 5, 112.
[209] *Ibid.,* at 112.
[210] *R v Butters*, 2017 ONCA 973 at para 6; *R v Woolcock*, 2002 OJ No 4927 (ONCA) at para 15.
[211] *R v Parranto*, 2021 SCC 46 at para 16.
[212] *Ibid.*
[213] *Ibid.,* at para 5.
[214] *Ibid.,* at paras 111-115; *R v Lacasse, supra* note 161 at para 53.
[215] *Criminal Code*, s 718.1.

information is available about the background and other factors that have led to the offender being before the courts."[216]

As will be discussed throughout this thesis, pre-sentence reports ("PSR"), *Gladue* reports and IRCAs assist in achieving proportionality in sentencing, by providing judges with relevant information about the person being sentenced. Sentencing judges rely heavily on PSRs: in fact, Canadian research indicates that there is an 80 per cent concordance rate between PSR recommendations and dispositions.[217] Given that the PSR intends to provide a balanced "assessment of an offender, his background and his prospects for the future", it will typically include information relating to education, family and community ties, and criminal, antecedents among other areas.[218] PSRs are primarily focused on individual risk and their needs.

While PSR assessors may occasionally refer to race and culture in some reports, PSRs are not intended to connect systemic racism to the offence and the individual being sentenced. In contrast with IRCAs and *Gladue* reports, PSRs do not situate individual risk factors within histories of race relations.[219] As a result, *Gladue* reports and IRCAs complement and supplement PSRs as they contextualize the circumstances of the individual being sentenced, such as their "family's experiences and his/her spiritual,

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[216] *R v Borde, supra* note 230 at para 35.
[217] Hannah-Moffat and Maurutto examined how risk is incorporated into presentence reports in contrast with Gladue reports. They also examine "how risk-based approaches to offender management has changed the structure of PSR and how it conflicts with recent legal reforms directing courts to foreground racial histories when sentencing Indigenous people" (Hannah-Moffat, K. & Maurutto, P., "Re-contextualizing pre-sentence reports: Risk and race" (2010) 12:3 Punishment & Society 262 at 263-264 ["Hannah-Moffat & Maurutto"])
[218] *Criminal Code*, s 721 (3)(a)-(d); *R v Junkert*, 2010 ONCA 549 at para 59; *R v Bartkow* (1978), 24 NSR (2d) 518 (App Div) at 522.
[219] Hannah-Moffat & Maurutto, *supra* note 219 at 278.

cultural, family and community support network".[220] This information is critical to ensure sentencing judges do not perpetuate "ongoing systemic racial discrimination."[221] In sum, *Gladue* reports and IRCAs assist in achieving fit sentences while also confronting and acknowledging colonialism and systemic anti-Black racism in our communities and our criminal justice system.

### 3.3 Codifying culturally based sentencing

Identity is a complex, multifaceted and elusive concept. It is constructed on an individual, relational, and collective level.[222] Encompassing several domains, identity can be described as a dynamic outcome of cognitive processes within a particular sociocultural and historical context.[223] Racial and cultural identity are products of social thought and relations.[224] From a critical race perspective, the social construction of identity and racial categories are designed by the dominant class.[225] Thus, "racial stereotypes of Black Canadians were (and are) intricately linked to their creation as colonial subjects".[226] The criminal justice system in Canada, among other institutions, is no exception to the production and reinscription of these constructs. Indeed, Barrington Walker's "Race on Trial" argued that when "Blacks appeared before the criminal courts, 'race,' whether tacitly or overtly, procedurally or rhetorically, was on trial. The criminal law was an integral part

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[220] Hannah-Moffat & Maurutto, *supra* note 219 at 273.
[221] *R v Ipeelee,* supra note 4 at para 67.
[222] S.J. Schwartz et al. (eds.), *Handbook of Identity Theory and Research*, (New York: Springer, 2011) at 3.
[223] Ibid, at 410. Identity can be broken down into several categories of "domains": moral, spiritual, family, gender, sexual, economic, civic, occupational, ethnic, cultural and national.
[224] Delgado, Richard & Stefancic, Jean, *Critical Race Theory: An Introduction, 3rd ed* (New York: NYU Press 2001) at 9 ["Delgado & Stefanjic"]; 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 283.
[225] Kolivoski, K., Weaver, A. & Constance-Higgins, M., "Critical Race Theory: Opportunities for Application in Social Work Practice and Policy" (2014) 95:4 Families in Society 269 at 270.
[226] Walker, Race on trial, *supra* note 29 at 12.

of how race was produced, managed, and expressed in the racial liberal order that framed the Black experience in Canada."[227] While the criminal justice system embraces formal equality and did not intend to explicitly mobilize race or cultural identity in sentencing, sentencing necessarily intersects with and considers identity. As evidenced in the disproportionate number of Black and Indigenous individuals serving custodial sentences, the sentencing disparities between white Canadians and racialized Canadians speaks for itself. Yet, the criminal justice system and legislators have recently begun addressing the intersection of cultural and racial identity and sentencing for some communities, such as Indigenous Canadians who find themselves entangled in the criminal justice system.

In 1996, Parliament introduced and passed Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*.[228] Among other significant amendments to the *Criminal Code ("Code")*, Bill C-41 codified the governing sentencing principles and objectives into section 718.[229] While the objectives outlined in s 718 reflected the utilitarian principles underpinning our criminal justice system, s 718.2(e) represented a departure from this conventional sentencing paradigm. At the second reading of Bill C-41, Minister of Justice Allan Rock emphasized Parliament's intent to improve the effectiveness of the sentencing process. The Honorable Minister Rock stated:

> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society. […] Therefore, this bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.

[227] *Ibid,* at 20.
[228] SC 1995, c 22; *R v Ipeelee*, *supra* note 5 at para 35.
[229] For instance, Bill C-41 introduced the conditional sentence of imprisonment into s 732 of the *Code.*

> It is not simply by being more harsh that we will achieve more effective criminal justice.[230]

Instead, section 718.2(e) is remedial in nature. Section 718.2(e) directs sentencing judges to consider "(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". Borne out of advocacy by and on behalf of Indigenous people, section 718.2(e) sought to address over-incarceration of Indigenous people and "mitigate the historical disadvantage and systemic discrimination offenders experienced in the criminal justice system".[231] Years later, the Supreme Court in *Gladue* and *Ipeelee* interpreted and clarified the scope and application of section 718.2(e) of the *Code* in sentencing.

- ***R v Gladue***

Three years following Bill C-41's royal assent, the Supreme Court in *R v Gladue* provided a sentencing framework in relation to Indigenous offenders.[232] The Court confirmed that s 718.2(e) was intended to address the overrepresentation of Indigenous people in Canadian prisons and to encourage the use of restorative justice.[233] Given the unique circumstances of Indigenous communities, section 718.2(e) calls upon sentencing

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[230] "Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*", 2nd reading, *House of Commons Debates,* 35-1, No 4 (20 September 1994) at p. 5873 (Hon Allan Rock).
[231] Gevikoglu, Jeanette, "Ipeelee/Ladue and the Conundrum of Indigenous Identity in Sentencing." (2013) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 63 at 211 ["Gevikoglu"]
[232] [1999] 1 SCR 688.
[233] *R v Gladue, supra* note 9 at para 93.

judges to utilize a different method of analysis in determining a fit sentence for Indigenous individuals. [234] Consequently, a sentencing judge must consider:

> (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[235]

While judges may take judicial notice of systemic and background factors, case-specific information impacting the person "will have to come from counsel and from the pre-sentence report".[236]

- ***R v Ipeelee***

Nearly fifteen years after the *Gladue* decision, the Supreme Court in *R v Ipeelee* revisited the framework. While the *Gladue* court remained cautiously optimistic given the power exerted by sentencing judges, the *Ipeelee* court acknowledged that "s. 718.2(e) of the *Criminal Code* has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system".[237] It recognized that the *Gladue* methodology alone cannot address the root causes of Indigenous overrepresentation in the criminal justice system.[238] Nevertheless, the Court found that fundamental misunderstandings of both s 718.2(e) and the *Gladue* principles resulted in their misapplication.[239] As a result, the *Ipeelee* court identified and addressed three major criticisms to the *Gladue* framework while also providing additional guidance to ensure its proper implementation. [240]

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[234] *Ibid.,* at para 37*, R v Ipeelee, supra* note 5 at para *59*
[235] *R v Gladue, supra* note 9 at para 66.
[236] *Ibid.,* at paras. 83-84
[237] *Ibid.,* at para 65; *R v Ipeelee, supra* note 5 at para 62.
[238] *R v Ipeelee, supra* note 5 at para 61.
[239] *Ibid.,* at para 63.
[240] *Ibid.,* at para 63.

First, Lebel J. rebuffed the claim that sentencing is inappropriate for addressing overrepresentation. On the contrary, sentences that effectively deter criminality and rehabilitate Indigenous offenders *can* play a role in reducing crime rates in Indigenous communities.[241] Moreover, sentencing judges can ensure that systemic factors do not lead inadvertently to discriminatory sentencing.[242] While the criminal justice system typically views socioeconomic factors as neutral, these factors conceal the "extremely strong bias in the sentencing process".[243] As a result, individuals on the lower socioeconomic scale, such as those experiencing poverty and unemployment, are more likely to serve prison sentences than their wealthier counterparts. Given that Indigenous people are disproportionately represented in lower socioeconomic ranks, the criminal justice system disproportionately sentences Indigenous people to jail. Consequently, Lebel J. argued that "[s]entencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination".[244] As Lebel J. put it, a just sanction is one that does "not operate in a discriminatory manner."[245]

Second, the *Gladue* framework does not call for a race-based discount nor does it operate as an excuse for criminal conduct.[246] Likewise, *Gladue* factors do not amount to discriminatory or preferential treatment. Rather, s 718.2(e) operates as a remedial provision to address the overrepresentation of Indigenous people in the criminal justice

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241 *Ibid.,* at para 66.
242 *Ibid.,* at para 67.
243 *Ibid.*
244 *Ibid.*
245 *Ibid.,* at para 68.
246 *R v Wells,* 2000 SCC 10 at para 30 ["*R v Wells*"]; *R v Ipeelee, supra* note 5 at paras 71, 83; *R v Gladue, supra* note 9 at para 88.

system.[247] While *Gladue* principles apply to all offences, this methodology does not necessarily mandate a different result.[248] Some violent and serious offences still warrant the imposition of terms of imprisonment on Indigenous individuals being sentenced.[249] Nevertheless, sentencing judges must consider the circumstances and systemic factors which may bear on the culpability of the person being sentenced.[250]

Third, s 718.2(*e*) does not require a nexus between background factors and the commission of an offence. Requiring a causal connection in the circumstances would amount to an unfair burden on Indigenous individuals being sentenced.[251] The *Ipeeelee* court explained that no causal connection is required given that “systemic and background factors do not operate as an excuse or justification for the criminal conduct.”[252] Instead, these factors contextualize and assist the court in reaching an appropriate sentence. However, “[t]his is not to say that those factors need not be tied in some way to the particular offender and offence”.[253]

While the Supreme Court interpreted the scope of section 718.2(e) to apply to non-Indigenous individuals, the consideration of systemic anti-Black racism in sentencing did not rapidly emerge.[254] As previously noted, systemic anti-Black racism in the criminal justice system has been documented for decades. For instance, both the 1995 *Commission on Systemic Racism in the Ontario Criminal Justice System* and *Royal Commission on the Donald Marshall Jr. Prosecution* revealed the pervasiveness of systemic racism in the

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[247] *R v Ipeelee, supra* note 5 at para 77.
[248] *R v Wells supra* note 248 at para 44.
[249] *Ibid.,* at para 50.
[250] *R v Ipeelee, supra* note 5 at 73.
[251] *Ibid.,* at paras 82-83.
[252] *Ibid.,* at para 83.
[253] *Ibid.,* at para 83.
[254] *R v Gladue, supra* note 9 at 69 (Cory and Iacobucci JJ. confirmed the opposite, that “background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender”).

criminal justice system.[255] Yet, the response from the government and the criminal justice system has been relatively muted.

### *3.3 Culturally based sentencing is not limited to indigeneity*

Given that section 718.2(e) extends to all individuals being sentenced, sentencing judges were called on to consider systemic and background factors, such as systemic anti-Black racism, and alternatives to imprisonment. Prior to the introduction of IRCAs, Ontario's Court of Appeal addressed the role of systemic racism in two decisions: *R v Borde* and *R v Hamilton*. Both decisions will be summarized in this section. Then, I will address the emerging jurisprudence involving IRCAs.

- ***R v Borde,* [2003] OJ No 354**

In 2003, the Court of Appeal for Ontario was urged to consider fresh evidence of systemic anti-Black racism on a sentence appeal. Mr. Borde pleaded guilty to a number of firearms offences.[256] The sentencing judge had the benefit of a presentence report which captured some details of Mr. Borde's upbringing: Mr. Borde grew up among seven other siblings, raised by a single mother who experienced mental illness.[257] Children's Aid Society was frequently involved and, eventually, Mr. Borde was apprehended and placed in foster homes.[258] In his teens, Mr. Borde became involved in criminal activity. Emphasizing Mr. Borde's youth record, and the serious and violent nature of the offence, the sentencing judge found that deterrence was paramount: "The law's attempts to control

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[255] 1995 Commission on Systemic Racism in Ontario, *supra* note 119; Royal Commission on the Donald Marshall, *supra* note 120.
[256] *R v Borde*, [2003] OJ No 354, 2003 CanLII 4187 at para 1 ["*R v Borde*"].
[257] *Ibid.,* at para 11.
[258] *Ibid.*

you and to help you have failed. You were in breach of bail conditions and a weapons prohibition when you committed these offences. This sentence must be a deterrent to you."[259]

On appeal, the Court of Appeal reduced Mr. Borde's sentence from five years to four years and two months[260] because the sentencing judge did not account properly for Mr. Borde's youth, which called for the shortest first penitentiary sentence.[261] However, the Court dismissed Mr. Borde's fresh evidence application. The fresh evidence filed included numerous reports, including the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*.[262] These reports underscored the general history of "poverty; discrimination in education, the media, employment and housing; and overrepresentation in the criminal justice system and in prisons."[263] Mr. Borde's counsel, David Tanovich, urged the Court of Appeal to consider background and systemic factors of the appellant. Given the similarities between systemic factors among Indigenous communities and African Canadian communities, Tanovich argued that the Court should adopt a sentencing methodology similar to the one employed in *Gladue*.[264] On behalf of the Court, Rosenberg J.A accepted the similarities between both communities, adding that background and systemic factors facing African Canadians might be taken in account in imposing sentence "where they are shown to have played a part in the offence".[265] Moreover, the *Gladue* methodology may be helpful for sentencing judges to draw upon in

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[259] *R v Borde*, 2001 CarswellOnt 5750, 67 WCB (2d) 337 at para 7.
[260] *Ibid.,*at para 3
[261] *Ibid.*
[262] *Ibid.,* at para 18.
[263] *R v Borde, supra* note 230 at paras 17-18.
[264] *Ibid.,* at paras 27-17.
[265] *Ibid.,* at para 27.

appropriate cases where the evidence of systemic racism "can be tested and its relevance to the particular offender explored".[266]

The Court of Appeal distinguished African Canadians from Indigenous communities as the evidence was silent on the existence of a particularized and distinctive concept of justice akin to those held by Indigenous communities.[267] In the Court's view, this missing link from the fresh evidence precluded African Canadians from a methodology similar to the one articulated in *Gladue.* Nevertheless, the Court reiterated that the principles set out in the *Criminal Code* are sufficiently broad and flexible to "enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes."[268] In Mr. Borde's case, the fresh evidence would not affect the sentence imposed having regard to the seriousness of the offence.[269] Moreover, the evidence of systemic racism should have been addressed at trial where the evidence and its relevance to Mr. Borde could have been tested and explored. [270]

- ***R v Hamilton and Mason,* [2004] OJ No 3252**

A year later, the Court of Appeal for Ontario confronted systemic anti-Black racism in the sentencing context once more. Ms. Hamilton and Ms. Mason were convicted separately of importing cocaine into Canada contrary to s 6(1) of the *Controlled Drugs and*

[266] *Ibid.,* at para 30.
[267] *Ibid.,* at para 33. See also *R v Morris*, 2021 ONCA 680 at paras 118-123, where the Court of Appeal adopts a similar position.
[268] *R v Borde, supra* note 230 at 33.
[269] *Ibid.,* at para 33.
[270] *Ibid.,* at para 30.

*Substances Act* ("*CDSA*").[271] Both Ms. Hamilton and Ms. Mason were single mothers, without criminal records, who agreed to act as drug couriers. To do so, both swallowed significant amounts of cocaine. At the sentencing hearing, Hill J. remarked that, throughout the years of presiding at the Brampton courthouse, "the face of importing that I see are black women charged with the crime of cocaine importing".[272] In his reasons, Hill J. acknowledged that Ms. Hamilton and Ms. Mason faced systemic economic inequality and the compounding disadvantage of systemic racism, which secured their poverty status.[273] Hill J. added that:

> These individuals, almost inevitably without a prior criminal record, are in turn conscripted by the drug distribution hierarchy targeting their vulnerability. Poor, then exploited in their poverty, these women when captured and convicted have been subjected to severe sentences perpetuating their position of disadvantage while effectively orphaning their young children for a period of time.[274]

Thus, the sentencing process perpetuates the harms caused by systemic racism. Given society's role in creating and maintaining these social conditions, Hill J. found that societal responsibility played a part in sentencing. While importing offences typically call for penitentiary sentences, Hill J. imposed conditional sentences on both women. Ms. Hamilton received a 20-month conditional sentence with 12 months under house arrest conditions whereas Ms. Mason received a conditional sentence of two years less a day with 15 months under house arrest.

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[271] SC 1996, c 19.
[272] *R v Hamilton*, [2003] OJ No 532 (QL) at para 102.
[273] *Ibid.,* at para 198.
[274] *Ibid.*

The Crown appealed both sentences to the Court of Appeal on the grounds that Hill J. exceeded his role as a sentencing judge.[275] The Court of Appeal shared the Crown's concern that Hill J. effectively monopolized the sentencing proceedings to include broad societal issues that were not raised by the parties.[276] At the sentencing hearing, Hill J. introduced, on his own initiative, voluminous social science research and invited both parties to make submissions on the new evidence.[277] His conduct, in that regard, was admonished by Doherty J.A for conducting his own research. [278] The Court concluded that Hill J. appeared to combine the role of advocate, witness and judge.[279] These combined roles contributed to the "errors in principle reflected in the sentences imposed".[280] Although section 723(3) of the *Code* recognizes that trial judges are permitted, on their own initiative, to make necessary inquiries and obtain the necessary evidence to reach a fit sentence, this power is not unlimited.[281] Indeed, the sentencing judge cannot threaten their impartiality by turning the sentencing hearing into a *de facto* commission of inquiry.[282]

Ultimately, the conditional sentences for both Ms. Hamilton and Ms. Mason were overturned on appeal. In terms of appropriate sentences, Doherty J. found that a term of imprisonment of 20 months would have been appropriate for Ms. Hamilton whereas Ms. Mason's circumstances called for a sentence of two years less a day.[283] Despite the

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[275] *R v Hamilton*, *supra* note 15 at para 7.
[276] *Ibid.,* at paras 3,52.
[277] Murdocca, *supra* note 26 at 124.
[278] Carole A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax, Nova Scotia: Fernwood, 1999) at 114 ["Aylward"]. (According to Aylward, in *R v Parks*, Doherty relied on his own research into the existence of systemic racism in Canadian society when neither counsel presented any evidence on that point).
[279] *R v Hamilton*, *supra* note 15 at para 65.
[280] *Ibid.,* at para 64.
[281] *Ibid.,* at para 66
[282] *Ibid.,* at paras 67-70
[283] *Ibid.,* at para 164 (However, the Court allowed both women to complete their conditional sentences.)

overarching principle of restraint in sentencing, Doherty J.A emphasized that s 718.2(e) cannot justify a sentence that deprecates the seriousness of the offence.[284] Importing cocaine attracts a significant term of imprisonment, regardless of the mitigating effects of an individuals' personal circumstances. [285] Given that both Ms. Hamilton and Ms. Mason imported a significant amount of cocaine, these offences cried out for a substantial term of imprisonment. Thus, the role of social context evidence is diminished in cases involving serious and violent offenders.[286] Doherty J.A also underscored that sentencing is not "the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime".[287]

After the Court's decisions in *Borde,* and *Hamilton and Mason,* the consideration of systemic anti-Black racism in sentencing re-emerged in Nova Scotia in 2014 and in Ontario in 2018. Since then, the consideration of systemic anti-Black racism has gained more traction in sentencing. The next chapter will explore the leading cases with respect to the application of IRCAs in sentencing.

[284] *R v Hamilton*, *supra* note 15 at para 100.
[285] *R v Hamilton and Mason,* [2004] OJ No 3252 at para 7.
[286] *Ibid.,* at para 139.
[287] *Ibid.,* at para 2.

## CHAPTER 4: EMERGENCE OF IRCA JURISPRUDENCE

IRCAs were borne out of necessity. Similar to *Gladue* reports, they are often prepared by clinical social workers and scholars operating within an anti-oppression and anti-racism paradigm.[288] IRCAs operate from the assumption that a fit sentence must consider a person's race and culture.[289] These reports assess the background and social circumstances of the person being sentenced, the impact of systemic anti-Black racism in their lives, and how these factors played a role in the decision to commit the offence for which they are being sentenced and "how it might inform the offender's experience of the carceral state".[290] In this respect, IRCAs and *Gladue* reports differ from conventional section 721 PSRs.[291] While PSRs are helpful in sentencing, these reports typically decontextualize criminogenic factors and needs and provide an actuarial risk assessment of the person being sentenced.[292] PSRs do not situate these factors within the histories of race relations and oppression.[293]As a result, these risk-based strategies have produced discriminatory outcomes for minorities and entrench systemic racism in sentencing.[294] Similar to *Gladue* reports, IRCAs also recommend culturally appropriate sentences.[295] As a result, IRCAs embody the individualized sentencing process by providing a fulsome portrait of the circumstances of the person being sentenced and the offence they committed. Their ethos and practice are wholly compatible with the principles outlined in s 718 of the *Code.*

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[288] Jones, *supra* note 141 at 64; *R v Boutilier,* 2017 NSSC 308 at paras 16-20 ["*R v Boutilier*"].
[289] Dugas, *supra* note 4 at 105.
[290] Dugas, *supra* note 4 at 103; Jones, *supra* note 141 at 64; *R v Gabriel*, 2017 NSSC 90 at para 51 ["*R v Gabriel*"].
[291] Jones, *supra* note 141 at 63.
[292] Hannah-Moffat & Maurutto, *supra* note 219 at 278.
[293] *Ibid.,*
[294] Hannah-Moffat & Maurutto, *supra* note 219 at 273, 278, 280; Dugas, *supra* note 4 at 140.
[295] See *R v Anderson,* 2021 NSCA 62 for instance.

Nearly fifteen years following the introduction of *Gladue* reports, the decision in *R v "X"* is credited as the first reported case relying on an IRCA.[296] In this section, the emergence of IRCAs will be briefly canvassed. In particular, this chapter summarizes four significant cases: *R v "X", R v Anderson, R v Jackson and R v Morris.*

### ***4.1 R v X*, 2014 NSPC 95: The first reported IRCA in Nova Scotia**

In 2013, "X" – a sixteen-year-old African Nova Scotian – attempted to kill his cousin.[297] A year later, "X" was convicted of attempted murder and other firearm-related offences.[298] Given the severity of the offence, the Crown attorney sought an adult sentence of life imprisonment with seven years' parole ineligibility.[299] Defence counsel argued, instead, that "X" should be sentenced as a young person and receive a custody and supervision order. Unlike most sentencing hearings, ten witnesses were called and four of reports were filed as exhibits.[300] Three of these reports portrayed "X" as troubled and defiant young person involved in criminal activity. None of these reports meaningfully considered race and culture.[301] Consequently, defence counsel introduced social context evidence by way of an IRCA and argued that "X"'s race and culture were relevant considerations in determining the appropriate sentence.[302] The Crown resisted the receipt of the IRCA as well as the qualifications of the author, Mr. Robert Wright, as the proposed expert.[303] Following a lengthy *voir dire*, Derrick J. (as she then was) admitted the IRCA

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[296] *R v X,* 2014 NSPC 95.
[297] *Ibid.,* at para 1.
[298] *Ibid.,* at para 2.
[299] *Ibid.,* at para 120.
[300] *Ibid.,* at para 158. The reports filed included: 1) Section 34 Psychological Assessment; 2) Psycho-Educational Report; 3) Psychiatric Report; 4) Pre-Sentence Report; and 5) a Report from The Nova Scotia Youth Facility at Waterville.
[301] *Ibid.,* at para 163.
[302] *Ibid.,* at para 158.
[303] *Ibid.,* at para 163.

and qualified Mr. Wright to opine on the social factors relating to "X", including rehabilitative recommendations for "X".[304] He also opined about the "absence in the psychological and psychiatric assessments of any reference to race and culture".[305]

Mr. Wright's evidence provided the sentencing judge with a different lens of analysis. In Mr. Wright's opinion, the assessment of an African-Nova Scotian needs to be "open to the phenomenon of racial trauma and its effects."[306] In his view, it was "highly likely" that "X" experienced racial traumas. Mr. Wright viewed "X" as a very conflicted young man who tried to embody the persona of a criminalized tough guy while also experiencing "shame, guilt, distress at what he's done to his family".[307] His evidence portrayed "X" as both a perpetrator of and a victim of violence in the context of his criminally impacted community.[308] "X" experienced familial disruptions such as the incarceration of his father and older sibling.[309] When X was fourteen years old, he was seriously stabbed, which required emergency surgery.[310] Gun shots were fired at X's home on two separate occasions.[311]

Derrick J. found that Mr. Wright's evidence contextualized the aggravating factors underscored by the Crown. The IRCA assisted Derrick J. in finding that "X" was an "immature, dependent 16-year-old caught up in the dysfunctional dynamics of his community, dynamics that are relevant to my understanding of his context, background,

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[304] *Ibid.,* at para 163.
[305] *Ibid.,* at para 158.
[306] *Ibid.,* at para 186.
[307] *Ibid.,* at para 187.
[308] *Ibid.,* at para 187.
[309] *Ibid.,* at para 89.
[310] *Ibid.,* at para 91.
[311] *Ibid.*

and choices".[312] Balancing the circumstances of the offence and those of "X", the Crown did not rebut the presumption of diminished responsibility.[313] The evidence, including Mr. Wright's report and testimony, persuaded the Court that an adult sentence would derail any chance of rehabilitation.[314] Accordingly, the Crown's application to impose an adult sentence was dismissed. Instead, a three-year custody and supervision order was imposed.[315]

The decision in *R v "X"* was significant. It renewed momentum to consider social context evidence involving systemic anti-Black racism, particularly through IRCAs. Following *R v "X"*, several sentencing decisions in Nova Scotia relied on IRCAs.[316] However, the preparation of an IRCA can be cost prohibitive and thus, they are not necessarily readily accessible to those who want one, depending on the jurisdiction.[317] As a result, there is a rising number of sentencing decisions where systemic racism is raised without an IRCA.[318] While it is the most expeditious and cost-efficient strategy, raising systemic anti-Black racism in sentencing through judicial notice in the absence of an IRCA may be challenging.[319] In *R v Martin,* Barnes J. was unable to conclude that the sentence imposed on Mr. Martin was a fit sentence given the absence of adequate information into

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[312] *Ibid.,* at para 252.
[313] *Ibid.,* at para 53.
[314] *Ibid.,* at para 252.
[315] *Ibid.,* at para 266.
[316] For instance, see *R v Perry*, 2018 NSSC 16; *R v Gabriel*, 2017 NSSC 90; *R v Elliot,* 2021 NSSC 78; *R v Middleton* (25 August 2016) Yarmouth (NS SC) [unreported decision].
[317] Dugas, *supra* note 4 at 152; *R v Morris*, 2021 ONCA 680 at para 128. In August 2021, the Department of Justice announced funding to support the implementation of IRCAs across Canada, which includes contribution agreements with legal aid plans and community organizations (Canada, Department of Justice, "Supporting Impact of Race and Culture Assessments" (August 2021) online: <https://www.justice.gc.ca/eng/fund-fina/gov-gouv/supporting-soutien.html>.
[318] *R v Desmond*, 2018 NSSC 338, *R v Brissett and Francis*, 2018 ONSC 4957; *R v Elvira*, 2018 ONSC 7008 are just some notable examples.
[319] The time to prepare an IRCA varies. In *R v Niyongabo*, 2020 ONSC 3960, the Sentencing and Parole Project advised that out-of-custody assessments take about 60-90 days to complete from start to finish (para 9).

unique systemic and background factors.[320] Mr. Martin could not afford an IRCA report, which was not covered by legal aid.[321] Consequently, defence counsel submitted information in lieu of an IRCA. Unfortunately, Barnes J. found the information was inadequate.[322] Similarly, the sentencing judge in *R v Desmond* lamented the absence of an IRCA to assist her to "connect the issues of Anti-Black racism, over-incarceration of African Canadians, and historical and systemic injustices committed to the issue before this Court".[323] In other cases, sentencing judges refuse to consider the impact of systemic racism in the absence of an IRCA or information connecting these issues to the individual being sentenced.[324] In *R v Shallow*, Spies J. took judicial notice of the history of colonialism, slavery, and systemic racism on sentencing. However, Spies J. noted that she was provided with no information that connected systemic racism to the difficulties in Mr. Shallow's life and decision to possess crack cocaine for the purpose of trafficking.[325]

In the absence of appellate guidance, sentencing judges treated and applied social context evidence differently.[326] In 2021, two appellate courts provided guidance on these issues: the Court of Appeal for Nova Scotia in *R v Anderson*[327] and the Court of Appeal for Ontario in *R v Morris.*[328]

### ***4.2 R v Anderson*: Appellate guidance from Nova Scotia's Court of Appeal**

[320] *R v Martin,* 2021 ONSC 4711 at para 5.
[321] *Ibid.,* at para 3.
[322] *Ibid.*
[323] *R v Desmond*, *supra* note 7 at para 28.
[324] See Dugas, *supra* note 4 at 137-139;
[325] *R v Shallow*, 2019 ONSC 403 at para 48.
[326] See *R v Brissett and Francis*, 2018 ONSC 4957, *R v Biya*, 2018 ONSC 6887, *R v Downey*, 2017 NSSC 302.
[327] 2021 NSCA 62.
[328] 2021 ONCA 680.

In November 2018, Mr. Anderson was arrested with a loaded revolver in his waistband.[329] Following Mr. Anderson's convictions on firearm offences, the Crown attorney advocated for a two to three-year period of incarceration while defence counsel urged the Court to consider a conditional sentence, "that is a jail term of less than two years to be served in the community".[330] At the request of defence counsel, the Court ordered an IRCA. The report was prepared by both Nathalie Hodgson and Robert Wright. Both testified at the sentencing hearing and were extensively cross-examined.[331]

As in *R v "X"*, the IRCA and its contents played a vital role in arriving at a fit and appropriate sentence.[332] It contextualized how "growing up as a biracial African Nova Scotian in North End Halifax contributed to Mr. Anderson's pathway to criminality".[333] In particular, Mr. Anderson grew up surrounded by poverty, substandard housing instability, and crime.[334] As well, Mr. Anderson, like many African Nova Scotians, was placed on an "Individual Program Plans ("IPPs") which limit future career possibilities because of barriers in accessing post-secondary education".[335] As well, Mr. Anderson's life was punctuated with loss – the loss of his father at eight years old and the loss of four of his close friends due to violence.[336] Williams J. remarked that "[d]isrupted residences, lost opportunities in education and losses of loved ones has had a traumatic effect on Mr. Anderson. This does not excuse, condone, or justify him having a loaded revolver in his

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[329] *Ibid.,* at para 3.
[330] *R v Anderson,* 2020 NSPC 110 at para 4.
[331] *R v Anderson*, 2021 NSCA 62 at para 30.
[332] *Ibid.,* at para 38
[333] *R v Anderson*, 2020 NSPC 10 at para 44
[334] *Ibid.,* at para 50.
[335] *Ibid.,* at para 54.
[336] *Ibid.,* at paras 71-72.

waist band. But cultural orientation needs to be part of his therapy and his rehabilitation must be informed by his history of trauma".[337]

Consequently, Williams J. imposed a conditional sentence order for two years less a day followed by two years probation. Mr. Anderson was bound by numerous conditions, some of which were influenced by the IRCA.[338] For instance, Mr. Anderson was ordered to "attend Afrocentric therapy interventions" and "to attend literacy and education interventions with an Afrocentric focus" among other conditions.[339] In Williams J.'s view, the conditional sentence blended "principles of deterrence, denunciation with restorative options of accountability and reparation".[340] In the Crown's view, this sentence was manifestly unfit as it fell well below the typical range of sentences for firearm offences.

The Court of Appeal decision

This was an unconventional appeal.[341] While this case first began as a sentence appeal, the Crown's position shifted. Originally, the Crown argued that Mr. Anderson's sentence was unfit and recommended that CSOs be imposed solely in "exceptional circumstances" despite its apparent incompatibility with the framework set out in *Proulx*.[342] At the appeal hearing, the Crown abandoned this argument as it would "further disadvantage offenders already burdened by intergenerational trauma".[343] The Crown also conceded the fitness of Mr. Anderson's sentence as the conditions achieved denunciation

[337] *Ibid.,* at para 70.
[338] *Ibid.,* at paras 32, 34 and 42
[339] *R v Anderson*, 2020 NSPC 10 at para 107
[340] *Ibid.,* at para 108.
[341] *R v Anderson*, 2021 NSCA 62 at para 2.
[342] *Ibid.,* at paras74, 86.
[343] *Ibid.,* at para 76.

and deterrence.[344] Consequently, the appeal was framed as a call for guidance on reconciling the tension between remedial sentencing to address overincarceration with the paramount sentencing factors in gun cases, namely deterrence and denunciation.[345] Both the African Nova Scotian Decade for People of African Descent Coalition ("ANSDPAD") and the Criminal Lawyers' Association ("CLA") intervened on appeal. Three themes underpinned the ANSDPAD's position that African Nova Scotians need a culturally sensitive and historically contextual application of the existing principles of sentencing.[346] First, the unique history of African Nova Scotians which justifies a remedial response in sentencing. [347] Second, "IRCA reports should be consistently ordered for offenders who seek them, and substantively applied by judges".[348] Finally, they addressed the substantive and procedural implementation of IRCA reports.[349] The CLA's main submission echoed those advanced by Mr. Anderson and the ANSDPAD. The CLA also emphasized the role of judicial notice rather than requiring an IRCA to "establish the historic underpinnings of anti-Black racism."[350]

In August 2021, the Court of Appeal released its unanimous decision: it addressed how IRCAs should inform the sentencing of African-Nova Scotians and affirmed the fitness of Mr. Anderson's sentence. The Court recognized that IRCAs provide "indispensable" content, which holistically informs the sentencing judge's task in finding a fit sentence.[351] Put differently, IRCAs are applicable and helpful in several ways. For

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[344] *Ibid.,* at para 80.
[345] *Ibid.,* at para 78.
[346] *R v Anderson*, 2021 NSCA 62 at paras 87, 95-100.
[347] *Ibid.*
[348] *R v Anderson*, 2021 NSCA 62 (Factum of ANSPAD at para 88).
[349] *R v Anderson*, 2021 NSCA 62 *at* paras 87, 121.
[350] *Ibid.*
[351] *Ibid.,* at para 119.

instance, IRCAs contextualize the presence of aggravating factors and the degree of responsibility of the person being sentenced. An IRCA may also reveal "the existence of mitigating factors or explain their absence".[352] Moreover, it can identify rehabilitative and restorative options. As a result, it may reduce the reliance on incarceration.[353] Applying the Supreme Court's pronouncement in *Gladue* and *Ipeelee*, Derrick J.A held that a causal link need not be established between the systemic and background factors and the commission of the offence.[354] In sum, IRCAs assist judges in their duty to craft an individualized sentence.[355]

The Court also cautioned sentencing judges to make "more than passing reference to the background of an African Nova Scotian".[356] Instead, a sentencing judge should explicitly pay proper attention to the circumstances of the person being sentenced. Otherwise, the sentencing judge may attract appellate intervention.[357] Given that IRCAs address systemic racism, historical disadvantages and their impact on the individual being sentenced, the Court found that IRCAs will enhance the credibility of the criminal justice system by meting out just and appropriate sanctions.[358] Derrick J.A held that the administration of justice is not served "by putting disproportionate numbers of Black and Indigenous offenders behind bars having left unaddressed […] the deeply entrenched historical disadvantage and systemic racism that more than likely had a hand in bringing them before the courts."[359] Given that the history of racism against African Nova Scotians

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[352] *Ibid.,* at para 119 and 121.
[353] *Ibid.,* at para 121.
[354] *Ibid.*
[355] *Ibid.,* at para 119.
[356] *Ibid.,* at para 123.
[357] *Ibid.*
[358] *Ibid.,* at para 124.
[359] *Ibid.*

is antithetical to societal values of equality and inclusion, Derrick J.A. held that the consideration of societal responsibility may justify a different sentence: differential treatment may be needed to achieve substantive equality "otherwise how are historic inequalities confronted and addressed, ongoing systemic discrimination ameliorated, and continued disadvantage avoided?"[360]

Finally, the Court of Appeal turned to the application of IRCAs in the context of the CSO regime. Section 742.1(a) of the *Code* calls for a two-step process: the sentencing judges must decide to impose a sentence of imprisonment of less than two years before determining whether the sentence should be served in the community. The information provided by an IRCA will be relevant at both stages.

First, the IRCA can inform the determination of the sentencing range.[361] Derrick J.A agreed with one of the intervenors that "IRCAs should be employed to individualize sentences, taking account of factors that have previously been absent from the analysis."[362] Second, the sentencing judge must decide whether the sentence should be served in the community after determining that the appropriate sentence is one of imprisonment below two years.[363] A CSO is appropriate where it is both consistent with the fundamental purpose of sentencing and where there is no danger to the safety of the community.[364] Community safety encompasses two components: the risk of re-offence and the gravity of damage in the event of a re-offence.[365] In the case of African Nova Scotian individuals being

[360] *Ibid.,* at para 125.
[361] *Ibid.,* at para 131.
[362] *Ibid.,* at para 132.
[363] *Ibid.,* at para 135.
[364] *Ibid.*
[365] *Ibid.,* at para 136.

sentenced, the Court found that the information provided in the IRCA should inform the risk analysis undertaken by the sentencing judge.[366] Derrick J.A explained that:

> [an] IRCA may cast previous non-compliance with court orders and the offender having a criminal record in a different light, one that does not preclude the appropriateness of a non-custodial sentence. Systemic racism, over-policing, and constrained opportunities for African Nova Scotians mean the existence of a criminal record must be considered in a contextualized manner.[367]

Likewise, the determination of the risk of re-offence may be attenuated by appropriate conditions, including culturally relevant supports in the community for a Black individual being sentenced.[368] Therefore, sentencing judges will need to consider "what an IRCA can tell them about the options available for the offender and the offender's openness to engage in community-based rehabilitation".[369]

Although much of the jurisprudence involving the use of IRCAs originate from Nova Scotia, IRCAs are not limited to Nova Scotia. In 2018, Nakatsuru J. considered two IRCAs in two cases, *R v Jackson* and *R v Morris*.[370] Ontario's Court of Appeal delivered its judgement in *R v Morris* a couple of months after *Anderson*.

### ***R v Jackson*: The first reported IRCA in Ontario**

Four years following *R v "X"*, *R v Jackson* was the first reported decision to address IRCAs in Ontario.[371] Mr. Jackson, an African Nova Scotian, was arrested by police

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[366] *Ibid.,* at para 138.
[367] *Ibid.,* at para 139.
[368] *Ibid.,* at para 141.
[369] *Ibid.*
[370] 2018 ONSC 2527 ["*R v Jackson*"]; *R v Morris*, 2018 ONSC 5186, rev'd 2021 ONCA 680.
[371] *R v Jackson*, *supra* note 21.

following a firearms investigation. Searched incident to arrest, police seized a loaded handgun in Jackson's waistband.[372]

At the sentencing hearing, the Crown attorney sought a sentence of 8.5 to 10 years while the defence counsel asked for a four year sentence.[373] In support of their position, defence counsel argued that the *Gladue* framework should also apply to African Canadians given the disproportionate rate of incarcerated African Canadians.[374] Similarly, Mr. Jackson's background and race informed his moral culpability.[375] Consequently, the decision in *R v Jackson* is not limited to Mr. Jackson's sentencing. It also formulated a framework for sentencing and "how the criminal justice system treats African Canadians".[376] While Nakatsuru J. found that it was unnecessary and inappropriate to transplant the *Gladue* methodology to individuals of African descent, he concluded that there is room to "build a framework of analysis that can begin to address the issue of disproportionate incarceration of African Canadians."[377]

First, the remedial nature of section 718.2(e) empowers sentencing judges to address the disproportionate incarceration of African Canadians.[378] Second, IRCAs provide critical social context evidence that has "the potential to provide a bridge between an accused's experience with racial discrimination and the problem of over-incarceration".[379] However, not "every offender will be able to access or afford the type

[372] *Ibid.,* at para 9.
[373] *Ibid.,* at para 36.
[374] *Ibid.,* at para 38.
[375] *Ibid.*
[376] *Ibid.,* at para 6.
[377] *Ibid.,* at paras 67,73.
[378] *Ibid.,* at para 79.
[379] *Ibid.,* at para 101.

of information provided by [an IRCA]".[380] Thus, sentencing judges must take judicial notice of the history of colonialism in Canada, including slavery, segregation, intergenerational trauma, and "racism both overt and systemic as they relate to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration".[381] Judicial notice of these historical and systemic injustices is an important first step in contextualizing the case-specific information in sentencing.[382] Third, sentencing judges should take any relevant systemic and background factors into consideration at sentencing. These factors can be mitigating where they played a role in the offender's conduct.[383] However, Nakatsuru J. clarified that a direct causal connection is not required – such a requirement would "simply impose a systemic barrier that would only perpetuate inequality for African Canadians".[384]

Finally, sentencing African Canadians requires "careful, culturally appropriate, and sensitive assessments". [385] Put differently, sentencing should not only take judicial notice of systemic and background factors. Sentencing judges must also consider these factors in a meaningful fashion given their relevance in sentencing. For instance, they also inform "in part the incidence of crime and recidivism for offenders".[386] Similarly, social context evidence ensures that "systemic factors do not lead inadvertently to discrimination in sentencing."[387]

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[380] *Ibid.,* at para 90.
[381] *Ibid.,* at para 82.
[382] *Ibid.*
[383] *Ibid.,* at para 109.
[384] *Ibid.,* at para 112.
[385] *Ibid.,* at para 108.
[386] *Ibid.,* at para 105.
[387] *Ibid.,* at para 107.

Nakatsuru J. then turned to Mr. Jackson's sentence. As in *R v "X"* and *R v Anderson*, Mr. Robert Wright, also prepared an IRCA for Mr. Jackson. The report connected the history of slavery and systemic anti-Black racism to Mr. Jackson's life, his family's and his communities.[388] It also identified factors that related to Mr. Jackson's development and led to bringing him before the courts.[389] For instance, Mr. Wright remarked that the dynamics in Mr. Jackson's immediate family – namely, paternal absence and his mother's mental illness – resulted in developmental and emotional needs that Mr. Jackson sought to meet in unhealthy ways.[390] Mr. Jackson's criminal affiliation appeared to "be a 'seeking' after cultural and gender affirming role models and associates".[391] The IRCA also contextualized some of the aggravating features, such as Mr. Jackson's lengthy criminal record. While Mr. Jackson's criminal record was a "serious aggravating factor", Nakatsuru J. found that it reflected sentences that were formulated by judges who did not have the benefit of the kind of information that he had been given, such as the IRCA.[392]

Nakatsuru J. found that six years of imprisonment was a just sanction. After deducting for pre-trial custody, Mr. Jackson had two years and eight months left to serve.[393] Neither the Crown nor Mr. Jackson appealed the sentence.

Nearly six months after *Jackson*, Nakatsuru J. delivered his judgement on sentence in *Morris*. As with Jackson, Nakatsuru J. considered systemic racism and relied upon an

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[388] *Ibid.,* at paras 119, 123, 133, 138.
[389] *Ibid.,* at para 124.
[390] *Ibid.,* at paras 35, 146-148.
[391] *Ibid.,* at para 34.
[392] *Ibid.,* at para 164.
[393] *Ibid.,* at paras 175-176.

IRCA at sentencing. Unlike *Jackson*, the decision in *R v Morris* attracted appellate intervention.

### 4.3 *R v Morris*: Appellate guidance from the Court of Appeal for Ontario

Mr. Morris was charged with several firearms offences. After unsuccessful *Charter* applications and a jury trial, Mr. Morris was convicted for possession of a loaded firearm among other offences.[394] At sentencing, the Crown sought a custodial sentence between four and four years and a half. Meanwhile, the defence asked for one year before accounting for the *Charter* breaches.[395] Moreover, defence urged the Court to take the same approach as in *R v Jackson*, which accounted for the disproportionate number of Black individuals in custody.[396] In support of their position, defence counsel tendered two documents relating to systemic anti-Black racism: an IRCA and an "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario".[397] While the Expert Report analyzed generally the research relating to the existence, causes and impact of anti-Black racism, the IRCA connected these realities to Mr. Morris' life.[398] It conveyed the difficult circumstances in which Mr. Morris grew up: having lost his father at a young age, Mr. Morris was raised by his mother, who worked long hours as a sole provider.[399] Growing up, Mr. Morris was confronted with the harsh realities of social

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[394] *R v Morris*, 2018 ONSC 5186 at para 5. Prior to Mr. Morris' jury trial, he brought a *Charter* application to stay the charges. While Nakatsuru J. agreed that there were indeed Charter breaches, they did not rise to the level of a stay of proceedings. Instead, they would be relevant to sentencing.
[395] *Ibid.,* at para 6. Nakatsuru J. found that Mr. Morris' s 7 and s 10(b) rights were violated. Briefly, one of the police officers chased Mr. Morris. While driving, the police officer struck and ran over Mr. Morris' foot. Moreover, police officers did not refrain from questioning Mr. Morris despite his expressed desire to speak to counsel (*R v Morris*, [2017] OJ No 3882)
[396] *Ibid.,* at para 7.
[397] The appeal and sentencing decisions refer to the IRCA as the "Sibblis Report".
[398] *Ibid.,* at paras 39, 43.
[399] *Ibid.,* at para 46.

housing and encountered difficulties with the education system.[400] Additionally, the IRCA revealed how these experiences, suffused in anti-Black racism, aggravated his mental health, which "fostered a greater sense of hopelessness and desperation".[401] The IRCA along with the expert report assisted Nakatsuru J. in formulating Mr. Morris' sentence. Weighing these factors, along with the absence of a criminal record and the circumstances of the offence, Nakatsuru J. imposed a 15-month sentence followed by a period of probation of 18-months. In his view, it was fit and proportionate for a first time young offender in Mr. Morris' circumstances. After crediting Mr. Morris with pre-trial and enhanced credit and deducting three months for police misconduct, Mr. Morris' sentence amounted to an additional day in jail.[402]

As in *Anderson*, the Crown pursued a sentence appeal. The Crown contested the fitness of the sentence on the basis that Nakatsuru J.'s consideration of the impact of anti-Black racism overwhelmed all other relevant sentencing principles.[403] Consequently, the sentence imposed was far below the sentencing range and failed to reflect the seriousness of the offence. Instead, the Crown urged the Court to vary Mr. Morris' sentence to three years and permanently stay the imposition of the sentence.[404]

<u>The Court of Appeal decision</u>

Nearly two months after the Nova Scotia Court of Appeal's decision in *Anderson*, the Court of Appeal for Ontario released their decision in *Morris*. Similar to *Anderson*, the

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[400] *Ibid.*
[401] *Ibid.,* at paras 46, 77.
[402] Moreover, he wrote that sentencing judges and society alike must overcome the idea that leniency is reserved for the virtuous. Although Mr. Morris was in custody on different charges and was alleged to have breached his release order, Nakatsuru J. nevertheless found that he was deserving of leniency. (*Ibid.,* at paras 96-97).
[403] *R v Morris*, 2021 ONCA 680, *supra* note 330 at para 6.
[404] *Ibid.,* at para 7.

decision provided guidance to judges in Ontario on how to take evidence of anti-Black racism into account on sentencing. Before addressing the issues on appeal, the Court recognized the pervasiveness of overt and systemic anti-Black racism in Canadian society, including the criminal justice system: "[a]nti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased." [405] The decision in *R v Morris* addressed three main issues: the relevance of anti-Black racism in sentencing; the role of judicial notice; and its application to Mr. Morris' case.

First, the Court of Appeal addressed the relevance of evidence of anti-black racism on sentencing. Their analysis focused on proportionality, which balances both the seriousness of the crime while also accounting for the offender's culpability and responsibility.[406] With respect to the gravity of the offence, the Court clarified that this accounts for the normative wrongfulness of the conduct and the harm posed or caused by the conduct.[407] Given the public safety harms associated to firearms, these offences typically call for denunciation and deterrence, often in the form of imprisonment.[408] Although Nakatsuru J. identified denunciation and deterrence as paramount principles, he found that systemic racism effectively limited Mr. Morris' choices, and therefore, "general deterrence and denunciation should have a less significant role in sentencing."[409] The Court of Appeal held that Nakatsuru J. erred in asserting that "the gravity or seriousness of Mr. Morris's offences is diminished by evidence which sheds light on why he chose to commit those crimes."[410] In short, evidence of the impact of anti-Black racism cannot diminish the

[405] *Ibid.,* at para 1.
[406] *Ibid.,* at paras 65-66.
[407] *Ibid.,* at paras 67-68.
[408] *Ibid.,* at paras 70-71
[409] *Ibid.,* at para 74.
[410] *Ibid.,* at para 75.

seriousness of the offence.[411] Instead, the Court argued that such evidence speaks to the individuals' moral responsibility.[412] Indeed, social context evidence describing systemic racism and its effects is not only admissible but, in many cases, "essential to the obtaining of an accurate picture of the offender as a person and a part of society."[413]

Within the discussion of social context evidence, the Court of Appeal addressed two corollary issues. The first relates to the role of systemic racism in sentencing objectives. Some of the intervenors argued that society's complicity in anti-Black racism diminishes the Court's moral authority to denounce "the offender's conduct through the sentence imposed."[414] While the Court rejected this position, they agreed that society's complicity in systemic racism must be acknowledged, and sentencing judges must be "alert to the possibility that the sentencing process itself may foster that complicity".[415] The second corollary issue pertained to the causation required between racism and the commission of the offence. In *Hamilton and Borde*, systemic and background factors could be considered where they played a role in the commission of the offence.[416] In *Morris*, some of the intervenors argued that *Hamilton* wrongly required a direct causal link between the offence and the negative effects of anti-Black racism.[417] The Court of Appeal agreed that "the concept of causation, as it is used in the substantive criminal law, plays no role when considering the impact of an offender's background or circumstances on sentencing".[418] Unlike the Court of Appeal for Nova Scotia in *Anderson*, the Court

[411] *Ibid.,* at para 87.
[412] *Ibid.*
[413] *Ibid.,* at para 91.
[414] *Ibid.,* at para 82.
[415] *Ibid.,* at para 86.
[416] *R v Borde, supra* note 230 at para 35; *R v Hamilton, supra* note 15 at para 135.
[417] *R v Morris*, 2021 ONCA 680 at para 96.
[418] *Ibid.*

clarified that there must be some connection, otherwise, "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."[419]

While evidence of anti-Black racism may be an important sentencing consideration, the Court cautioned that "the trial judge's task is not primarily aimed at holding the criminal justice system accountable for systemic failures".[420] The Court also addressed the principle of restraint, which operates within the boundaries set by the fundamental principle of proportionality.[421] Having regard to the similarities Indigenous and Black communities – such as systemic disadvantage, racism, and negative experiences with the criminal justice system – some of the intervenors urged the Court to extend the *Gladue* framework to Black individuals being sentenced.[422] The Court in *Morris* declined to do so. First, sentencing policy belongs to Parliament, who explicitly identified Indigenous people in section 718.2€ for the purposes of the restraint principle.[423] Thus, it "does not fall to the court to effectively amend that language to include other identifiable groups."[424] Second, there was no evidence before the Court that "Black offenders, or Black communities, share a fundamentally different view of justice, or what constitutes a "just" sentence in any given situation". [425] In the Court's view, this contrasts with Indigenous communities, whose unique context is specifically referred to s. 718.2(e). Nonetheless, the Court found that the *Gladue*/*Ipeelee* jurisprudence can inform the sentencing of Black offenders in several

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[419] *Ibid.,* at para 97.
[420] *Ibid.,* at para 56.
[421] *Ibid.,* at para 112.
[422] *Ibid.,* at para 113 -117.
[423] *Ibid.,* at paras 119-121.
[424] *Ibid.,* at para 121.
[425] *Ibid.,* at para 122. *Contra* Michelle Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013) 36:2 Dal L J 419.

respects.[426] In particular, the Court instructed sentencing judges to consider "the well-established over-incarceration of Black offenders, particularly young male offenders" as well as the impact of systemic anti-Black racism on moral culpability in crafting a fit sentence.[427] In the Court's view, CSOs are one way to address the ongoing disproportionate incarceration of young Black individuals. However, conditional sentences are not always available or appropriate. Therefore, the Court remarked that restraint must still be exercised when imposing incarceration and suggested that some cases may warrant a shorter period of incarceration paired with a term of probation to assist in rehabilitation.[428]

Secondly, the decision in *Morris* confirmed that Courts may acquire relevant social context evidence through the proper application of judicial notice or as social context evidence describing the existence, causes and impact of anti-Black racism in Canadian society, and the specific effect of anti-Black racism on the offender. In this case, the Court focused on the admissibility of the IRCA and Ms. Sibblis' evidence. While much of the IRCA could have been the subject of judicial notice, the Court emphasized the value of the report for sentencing purposes. Therefore, "a generous gateway for the admission of objective and balanced social context evidence should be provided".[429] Although an IRCA author does not require a particular expertise to chronicle an individual's background history and circumstances, expertise is required to opine on the lived experiences and the

[426] *Ibid.,* at para 123.
[427] *Ibid.*
[428] *Ibid.,* at para 130.
[429] *Ibid.,* at para 13.

impact of Black racism.[430] The Court also cautioned that authors of IRCAs must provide an objective assessment and avoid adopting an advocacy role.[431]

Finally, the Court turned to Mr. Morris' sentence and the alleged errors in the sentencing judge's analysis.[432] The Court of Appeal found several errors, including the sentencing judge's treatment of the seriousness of the offence. Moreover, the Court of Appeal found that the record did not support a finding of remorse as previously indicated by the sentencing judge.[433] Given these errors among others, the Court of Appeal re-determined the appropriate sentence for Mr. Morris. Mr. Morris' life experiences, shaped by systemic anti-Black racism, mitigated his moral blameworthiness. The Court also retained the three-month deduction that accounted for police misconduct during Mr. Morris' arrest.[434] After balancing the other aggravating and mitigators factors, the Court of Appeal imposed a sentence of two years less a day with a period of probation. The sentence was permanently stayed.[435]

*Anderson* and *Morris* finally provided some clarity on the application and treatment of systemic anti-Black racism in sentencing. While both decisions shared some similarities, such as their endorsement for increased reliance on IRCAs, there are some differences. For instance, the *Anderson* Court found that a causal link is not required between the systemic anti-Black racism experienced and the commission of the offence whereas the *Morris* Court held that there must be some connection. Additionally, an IRCA's scope of

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[430] *Ibid.,* at para 139.
[431] *Ibid.,* at para 147.
[432] *Ibid.,* at paras 148 – 183.
[433] *Ibid.,* at paras 156-158, 160.
[434] *Ibid.,* at para 179.
[435] *Ibid.,* at para 184.

application is much narrower in *Morris* than in *Anderson*. Both Courts also part ways on the role of societal responsibility in sentencing. These differences will arguably translate into different outcomes depending on jurisdictions, which ought to be eventually addressed by the Supreme Court of Canada.

### 4.4 Proceeding with caution: Essentializing racial & cultural identity

As previously mentioned, IRCAs are critical to achieving fit and proportionate sentences. Nevertheless, this section will highlight some of the important risks that must be acknowledged and mitigated when drafting or relying on IRCAs at sentencing.

While members of a particular group may share similarities, their individual experiences cannot be distilled into a single unitary and homogenous experience.[436] Forms of oppression vary from group to group and can be divided along socioeconomic status, politics, religion, sexual orientation, and national origin, each of which generates intersectional individuals.[437] Thus, essentializing risks overlooking the intersectionality and complexities of one's identity. Given the social construction of race and cultural identity, legal discourse pertaining to racial and cultural identity must avoid falling into essentialism and perpetuating harmful stereotypes. As noted by Barrington Walker, "legal discourse, preconceptions and myths […] about black criminality or Muslim terrorism, shape mindset – the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion, place the burden of proof on one party or the other".[438] Sentencing judges, Crown prosecutors and defence counsel must address and confront cultural and

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[436] Delgado & Stefanjic, *supra* note 226 at 61-63.
[437] *Ibid.,* at 63.
[438] Walker, Race on trial, *supra* note 29 at 287.

racial identity with care. Otherwise, they risk essentializing and dehumanizing the individuals being sentenced. As Carmela Murddoca put it: “[n]aming and codifying past injustice and systemic racism in the law does not address the production of gendered, cultural and racial degeneracy that plagues the sentencing hearing.”[439]

The criminal justice system has and continues to engage in essentialism in varying degrees. These concerns were raised by scholars with respect to indigeneity and sentencing. Mobilizing Indigenous identity in the sentencing process has been characterized as problematic. While the *Ipeelee* court is mindful of the challenges of adjudicating Indigenous individuals, Gevikoglu argued that:

> …the Court paid little attention, for instance, to what effects differentiating offenders on the basis of Indigenous identity has for Indigenous communities. The particularized focus on Indigenous identity takes on a character that subsumes other considerations, including differences within Indigenous communities and the purpose behind the implementation of section 718.2(e).[440]

Despite section 718.2(e)’s remedial aspirations, it mobilizes identity and cultural difference in a way that reproduces the colonial, racialized and gendered management of individuals being sentenced.[441] Moreover, Gevikoglu queried whether “the implementation of section 718.2(e) can ever respond to what Indigenous advocates and critics of the criminal justice system called for: power and autonomy for Indigenous people in the criminal justice system”.[442]

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[439] Murdocca, *supra* note 26 at 133.
[440] Gevikoglu, *supra* note 194 at 216.
[441] Murdocca, *supra* note 26 at 181; Gevikoglu, *supra* note 194 at 215.
[442] Gevikoglu, *supra* note 194 at 218.

These concerns cannot be circumscribed to Indigenous communities and those being sentenced. They apply equally to other racialized individuals before the courts. For instance, racial tropes suffused the death penalty trials of Black men in the nineteenth and twentieth century in Ontario. White condescension and paternalism towards these men was palpable. Barrington Walker remarked that the Courts assumed that these racialized defendants were "incapable of premeditation, unable to control their passions, and incapable of appreciating the gravity of their crimes. It was a dehumanizing strategy that was quite often rather effective."[443] Similarly, the defence counsel's conduct in *Mason* and *Hamilton* illustrates this concern. On sentencing, defence counsel contended that general deterrence was of limited value and had a speculative purpose.[444] Although general deterrence relies on rational actors, defence counsel argued that Ms. Mason was not a rational actor. Instead, she was "irrational, unsophisticated, and unintelligent woman."[445] As noted by Carmela Murdocca, this ploy not only reinscribed racialized and gendered inferiority, but also dehumanized Ms. Mason.[446] While Justice Hill's decision in *Hamilton* and *Mason* attempted to address overrepresentation, "the culturalization and gendered racialization at work in *Hamilton* also serve to confine or circumscribe the historical narrative of past injustice".[447]

In a similar vein, Danardo Jones raised the paradox of visibility with respect to race and sentencing. Although Jones recognized the role of IRCAs in promoting fairer and more proportional sentences, his research revealed that many of his interviewees were opposed

[443] Walker, Race on Trial, *supra* note 29 at 87.
[444] Murdocca, *supra* note 26 at 122.
[445] *Ibid.,* at 123.
[446] Murdocca, *supra* note26 at 123.
[447] *Ibid.,* at 133

to raising race as an explanation for their conduct. Instead, they desired to have their race "remain neutral –invisible".[448] In their view, whiteness appeared to be a "barometer for fair treatment".[449] Moreover, the mobilization and magnification of the race of the individual before the court may be traumatic for them, particularly given that "Blackness typically operates against people's favour in our courts and society".[450] Jones posited that IRCAS may inadvertently perpetuate pernicious stereotypes against Black Canadians. Nevertheless, IRCAs may serve to address anti-Blackness in the criminal justice system, thereby forcing a "more honest confrontation of Black over-incarceration".[451]

These risks are not limited to the judiciary and counsel. First, IRCAs may act as a double-edged sword. For instance, the report may reveal that the individual being sentenced is connected to other individuals who are criminally involved and may be involved in gangs.[452] While these types of references may be overlooked by the sentencing judge, they may be interpreted differently by correctional authorities. The relationship with individuals who are affiliated with gangs may factor into an inmate's risk assessment.[453] Yet, gang "affiliation" is not synonymous with gang membership. The Office of the Correctional Investigator remarked that while Black individuals in federal custody were two times more likely to have a gang affiliation, 79% of them are not in a gang.[454] Nevertheless, the gang affiliation label continues to "distinguish and define the Black

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[448] Jones, *supra* note 141 at 88.
[449] *Ibid.,* at 88.
[450] *Ibid.,* at 89.
[451] *Ibid.,* at 113.
[452] *R v Johnson,* 2022 ONSC 2688 at para 25 (In *R v Johnson,* the PSR disclosed Mr. Johnson's association with the Fire Point Generals, a street gang in Toronto).
[453] OCI, *Diversity in Corrections*, *supra* note 5 at para 43. (The OCI explained that the risk assessment is based on objective factors, which are "discretionary and prone to confirmation bias".) See also Canada, Correctional Service of Canada, *Commissioner's Directive 568-3: Identification and Management of Security Threat Groups*, (Ottawa, 2016).
[454] OCI, *Diversity in Corrections*, *supra* note 5 at para 42.

inmate experience in federal penitentiaries."[455] Thus, an IRCA may inadvertently lead to further stigmatization and negative treatment while incarcerated.

Jones raised a second concern with respect to the psychological impact of preparing an IRCA. He cautioned that IRCA writers must exercise great care given that IRCAs may also retraumatize the individual being sentenced by soliciting traumatic and sensitive information relating to their experiences with structural violence.[456] Judges are not the only ones who risk essentializing the individual before the Court: Jones also expressed concern regarding the portrait provided by IRCAs to sentencing judges given that it "often aligns with many of the pernicious stereotypes that socially disadvantage Black Canadians."[457] Hopefully, these risks are mitigated by the trauma-informed and anti-racist lens through which specially trained IRCA writers assess their clients.

**Conclusion**

This chapter set out the sentencing principles that underly the Canadian criminal justice system. Given the emphasis on individualized sentencing, identity, culture, and race are relevant considerations. While the consideration of race and culture first arose in the context of sentencing Indigenous individuals, courts have recently begun to consider the impact of systemic anti-Black racism in sentencing proceedings. In particular, IRCAs and other means of social context evidence have been helpful to judges to better understand the individuals before them and to craft fit sentences.

[455] *Ibid.*
[456] Jones, *supra* note 141 at 98.
[457] *Ibid.,* at 98.

Sentencing alone will not dismantle systemic anti-Black racism and disparities that occur at every step within the criminal justice system. However, raising systemic anti-Black racism and its impact on the individuals being sentenced will "contribute to deepening the awareness and understanding of judges, Crown prosecutors, defence counsel, probation officers, correctional officials, parole officers and others who are dealing with the offender."[458]

With this context in mind, the next chapter will introduce the conceptual frameworks and methodological choices that underpin this thesis.

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[458] *R v Anderson*, 2021 NSCA 62 at 111.

## CHAPTER 5: CONCEPTUAL FRAMEWORK

Legal theory and research are closely interconnected.[459] Legal theory recognizes "jurisprudence as a multi-dimensional and multi-tiered interrogative process in the pursuit of a greater understanding of the nature and functions of law, which itself must be understood as a complex, controversial, and problematic phenomenon."[460] Theory also integrates assumptions and propositions that shed light on relationships between several variables.[461] Legal theory contributed to the development of empirical legal research.[462] Likewise, empirical research interrogates the predictive ability of theories, uncovers areas of further study and its findings can refine older theories or develop new ones.[463] Consequently, this thesis mobilizes two theoretical frameworks, namely Critical Race Theory ("CRT") and Restorative Justice. Both conceptual frameworks informed the research questions, the methods utilized and the lens through which the findings are analysed. This chapter briefly defines both frameworks and justifies their role in this thesis.

### 5.1 Critical race theory

CRT emerged in the 1970s in response to the slowing pace of the civil rights movement of the 1960s and the growing need to consider the "more subtle, but just as deeply entrenched, varieties of racism".[464] CRT advances a number of insights, including the following four premises. First, racism is ordinary and not aberrant.[465] In fact, North

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[459] Dean J. Champion, *Research Methods for Criminal Justice and Criminology* (Hooken, New Jersey: Regents/Prentice Hall, 1993).
[460] Richard F. Devlin, "The Charter and Anglophone Legal Theory" (1997) 4 Rev Const Stud 19 at 23.
[461] Champion, *supra* note 449.
[462] Kritzer, *supra* note 68 at 879 and 894.
[463] Champion, *supra* note 449.
[464] Richard Delgado, *Critical Race Theory: The Cutting Edge* edited by Richard Delgado (Philadelphia: Temple Press, 1995) at xiii ["Delgado, The Cutting Edge"].
[465] Delgado, The Cutting Edge, *supra* note 466 at xiv.

American society is deeply imbedded in systemic racism to maintain white privilege.[466] The justice system is no exception despite its veneer of legal and formal equality.[467] Second, CRT advances the notion of "interest convergence", which suggests that white elites will only encourage change when it advances their own interests.[468] Third, CRT embraces social construction, which holds that race is a product of social thoughts and relations.[469] Fourth, CRT also sometimes challenges the status quo by way of storytelling and counter-storytelling. Both draw on narratives, history, perspective and "the power of stories and persuasion to come to a deeper understanding" of how race is perceived and assigned meaning.[470]

In criminal legal research, scholars have incorporated CRT to understand and challenge substantive criminal law and to investigate how criminal law perpetuates racial oppression.[471] Indeed, the Canadian criminal justice system played a critical role in preserving the "relative economic, educational, political, and social segregation and marginalization of African Nova Scotians and Mi'kmaq" and other marginalized communities.[472] Unlike conventional scholarship, CRT calls for a "race-conscious approach to examining law and the legal system".[473] To do so, CRT considers the history and lived experiences of racialized peoples.[474] CRT and race-conscious legal storytelling

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[466] Bennett Capers, "Critical Race Theory", in Marcus D. Dubber & Tatjana Homle, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2015) at 25 ["Capers"]; Michelle Williams at 421.
[467] Delgado, The Cutting Edge, *supra* note 466 at xiv.
[468] *Ibid.,* at
[469] Delgado & Stefanjic, *supra* note 226 at 9.
[470] *Ibid.,* at 45.
[471] Capers, *supra* note 468 at 28; Williams, *supra* note 1 at 423.
[472] Williams, *supra* note 1 at 420.
[473] *Ibid.,* at 422.
[474] *Ibid.,* at 422; Delgado, The Cutting Edge, *supra* note 466 at xv.

can counter the criminal justice system's failure to pay attention to the relevance of race.[475] Amar Khoday noted that "there is obviously a needed place for race-conscious storytelling to occur within court decision, official storytelling and legal advocacy".[476]

Since this research intends to assess how judges interpret and apply IRCAs, which mobilize race and culture in sentencing, CRT is a well-suited conceptual framework to guide the study design and interpret the data collected. However, this thesis also draws from restorative justice principles. Both frameworks are relevant in criminal justice and sentencing issues.

### 5.2 Restorative justice

Restorative justice is incrementally gaining prominence in the sentencing landscape and pairs well with a CRT perspective. While both restorative justice and retributive justice are concerned with (re)establishing social equality between parties involved in conflict, they have divergent approaches in achieving equality. On one hand, retributive justice identifies restoration with punishment. On the other hand, restorative justice "problematizes the issue of what set of practices can or should, in a given context, achieve the goal of restoring social equality. Accordingly, for restorative justice theory, identification of these practices requires social dialogue".[477] Unlike its retributive counterpart, restorative justice is not solely focused on victims: in fact, it expands its focus to include the perpetrator and the community in attempting to respond to the harm done to the victim.[478] As noted by

[475] Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions – Examining R. v. Le." (2021) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 100 at 171.
[476] *Ibid.*
[477] Jennifer Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Law Commission of Canada, 1998) at 33 ["Llewellyn and Howse"].
[478] *Ibid.,* at 2 3.

Professor Williams, the consideration of root causes and the context in which the wrongdoing occurred underscores restorative justice's transformative potential.[479]

Restorative justice is also consonant with CRT as some critical race scholars reject the traditional utilitarian and retributive rationales underpinning our criminal justice system.[480] For instance, Professor Williams opined that a relational theory of restorative justice aligns with African Nova Scotian concepts of justice.[481]

Overincarceration represents one symptom of the current sentencing paradigm. Shifting towards a focus on rehabilitation and reintegration, including culturally appropriate sentencing, arguably advances the interests of justice. Equipped with an IRCA, sentencing judges are better placed to craft a proportionate sentence.[482] Therefore, the use of IRCAs align well with the goals of restorative justice. The following passage from Danardo Jones is apposite:

> IRCARs/CIARs can be deployed as a tool for restoring broken social bonds and also as a means of edifying judges, crowns and defence lawyers about the impact that criminal sentencing continues to have on Black communities. A restorative justice approach may prioritize healing broken social bonds and repairing the diabolic image of Blackness that is pervasive in Canada.[483]

In sum, both conceptual frameworks align with the research questions articulated in this thesis. For instance, statistical analysis, one of the methods deployed in this thesis, examines whether IRCAs lead to different sentences, including whether IRCAs encourage judges to emphasize rehabilitation and restorative justice as sentencing principles.

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[479] Williams, *supra* note 68 at 440.
[480] Capers, *supra* note 69 at 34.
[481] Williams, *supra* note 68 at 445.
[482] *R v Anderson, supra* note 471 para 116.
[483] Jones, *supra* note 30 at 102.

Likewise, they both inform the research methodology employed and provide insight into the interpretation of the data. They also inform the recommendations at the conclusion of this thesis. The next chapter will define and justify the methodological approaches adopted in this thesis.

# CHAPTER 6: METHODOLOGY

Given that thesis aims to investigate the impact of IRCAs on sentencing decisions, this thesis adopts a mixed-methods approach, which draws from both qualitative and quantitative methods. More specifically, this research will be powered by content analysis and statistical analysis. This chapter has three objectives. First, it will justify the choice of employing a mixed-methods approach. Second, it will refer to content analysis and its implementation in this thesis. Finally, it will describe how quantitative data analysis was employed in this research and attempt to lay foundations for future research.

## 6. 1 Mixed-method approach

A mixed-methods approach employs multiple methodological approaches into a single study.[484] Adopting a mixed-methods approach is advantageous as it overcomes the limitations associated with a single methods approach.[485] The strength of a mixed-methods approach is particularly salient in sentencing research. For instance, empirical research on sentencing issues is replete with statistical analyses.[486] Yet, a purely quantitative approach is not "highly useful for shedding light about the sources or meaning of racial disparities".[487] As a result, some scholars recommend pairing quantitative research with additional methodologies.[488] For instance, qualitative analysis may be useful in examining the "nuances and mechanisms underlying the themes that have emerged during the

[484] Richard D. Hartley.; Snapshots of Research: Readings in Criminology and Criminal Justice at 374
[485] *Ibid.,* at 374
[486] Eric P Baumer,"Reassessing and Redirecting Research on Race and Sentencing" (2013) 30:2 Justice Quarterly 231 at 243.
[487]*Ibid.*
[488] *Ibid.,* at 247.

quantitative phase".[489] A mixed-methods approach also blends both inductive and deductive strategies.[490] Consequently, neither type of scholarship on their own is as strong as the combination of both methodologies.[491]

Given that a mixed-methods approach triangulates both methods and complements one another, this approach is critical to capture a better sense of the impact of IRCAs on sentencing outcomes.

## 6.2 Phase I: Content analysis

As this thesis seeks to understand how judges interpret and apply IRCAs in their sentencing decisions, content analysis can achieve this objective. This section will first define content analysis and its value in legal research. Second, the study design in this research will be set out, including the selection of the sample for analysis and the coding protocol for data collection. Third, this section will address the limitations associated to the methodology and its implementation in this research.

### 6.2.1 Content analysis as a legal empirical method

Content analysis refers to systematically searching through texts and images to measure and uncover emerging patterns and themes. It generally involves identifying, organizing, and classifying the content of narrative text to draw inferences about their meaning.[492] Content analysis can be a "relatively highly systematized mode of qualitative

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[489] Lisa Webley, "Qualitative Approaches to Empirical Legal Research" in Peter Cane & Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford, UK: Oxford University Press, 2010) at 933 ["Webley"].
[490] Michael Quinn Patton, *Qualitative Research & Evaluation Methods: Integrating Theory and Practice*, (Thousand Oaks, California: SAGE, 2015) ["Patton"].
[491] Mark Hall & Ronald F. Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96 California L R 63 at 83. ["Hall et al."]
[492] Patton, *supra* note 43 at 551; Champion, *supra* note 449 at 185.

data analysis, with relatively well-developed rules of sampling, selection of codes, analysis of those codes and reporting of findings”.[493]

Given that classic content analysis involves a thematic categorization (“coding”) where themes and codes are tracked for frequency, it has been described as sitting on the cusp between the qualitative and quantitative methodologies.[494] Content analysis can rely on the use of descriptive statistics while also undertaking a qualitative analysis of the data.[495] Qualitative content analysis may involve “interpretations of latent content and meaning”. However, unlike discourse analysis, content analysis is not primarily focused on critical analysis. Instead, it maintains a more descriptive focus.[496]

Content analysis is well-suited for this thesis having regard to the research questions it advances. In the context of legal research, content analysis “aims for a scientific understanding of the *law itself* as found in judicial opinions and other legal texts”.[497] According to Hall and Wright, one of the strengths of content analyses is their objective understanding and assessment of a large number of cases.[498]

### 6.2.2 Data collection

To collect data, I searched through three case reporting services – CanLii, Westlaw and LexisNexis – to obtain reported sentencing decisions involving the use of IRCAs. The search strategy involved varying combinations of key search terms such as “Impact of Race

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[493] *Ibid.,* at 942.
[494] Webley, *supra* note 42 at 941.
[495] James Drisko &Tina Maschi, *Content Analysis,* (New York, NY: Oxford University Press, 2016) at 22, 82 [“Drisko”].
[496] *Ibid.,* at 82.
[497] Hall et al., *supra* note 44 at 64.
[498] *Ibid.,* at at 78.

and Culture Assessments"; "Enhanced Pre-Sentence Report"; "Cultural Impact Assessment Reports"; "Social history" among other terms. Results were recorded and cross-referenced with results from the other case reporting services. These terms all refer to the same type of report and have been used interchangeably. The particular search strategy can be found at Appendix A.

### 6.2.3 Case selection protocol

The selection and retention of sentencing cases for my sample followed a case selection protocol. For the purposes of this thesis, I created and followed a protocol to ensure that my sample contained sentencing decisions rendered on and after January 1, 2015 to April 15, 2022 involving adult males sentenced in Nova Scotia and Ontario. This timeline represents the period during which most cases involving IRCAs were heard and reported. The case selection protocol excluded two groups of individuals from the sample: young persons convicted under the *Youth Criminal Justice Act* ("*YCJA*") and convicted persons who were identified as female. [499] These two groups were excluded as they may distort the results. For instance, the *YCJA* calls for a different sentencing regime for young persons. Likewise, gender may be a cofounding variable, leading to differing outcomes.[500] Currently, there are only a handful of cases involving women tendering IRCAs. [501] As a result, a small sample size limits the ability to draw generalities and inferences.

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[499] *Youth Criminal Justice Act*, SC 2002 c 1.
[500] Stephanie Bontrager, Kelle Barrick & Elizabeth Stupi, "Gender and Sentencing: A Meta-Analysis of Contemporary Research" (2013) 16:2 J Gender Race & Just 349; Michael J. Leiber and Maude Beaudry-Cyr, "The Intersection of Race/ Ethnicity, Gender And The Treatment Of Probation Violators In Juvenile Justice Proceedings", Race, Ethnicity and Law Sociology of Crime, Law and Deviance, Volume 22, 269_290… AT 271
[501] See, for example, *R c Orestil,* 2022 ONCJ 135; *R v Elliott,* 2021 NSSC 78 and *R v Robinson*, 2020 NSPC 1.

After filtering through the cases and excluding them based on ruling-type (e.g a judgement rather than sentencing ruling), gender, and province, thirty-six (36) sentencing decisions were included in the sample.[502]

**6.2.4 Data analysis**

The study design and data analysis draw upon several sources.[503] In terms of methodological guidelines, this study design entailed the creation of a detailed coding system to guide, collect and analyse the data arising from the sentencing decisions involving the use of IRCAs. Consequently, the first step in this process required a preliminary review of the case sample. Throughout the review, I made notes of emerging themes. For instance, I recorded judicial comments about the use of presentence reports and IRCAs, paramount sentencing objectives in each case and how systemic racism factored into the sentencing, if at all. As noted by Barth et al., the coding process is iterative and is continuously refined.[504] Indeed, the coding system was finalized after conducting preliminary review of the sample.

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[502] *R v Riley,* 2020 ONSC 6145; *R v Martin*, 2021 ONSC 4711; *R v Abdullahi*, 2022 ONSC 543; *R v Cromwell*, 2021 NSCA 36; *R v Etmanskie*, 2019 NSPC 74; *R v White*, 2021 NSCA 33; *R v Robinson*, 2020 NSPC 1; *R v Simmonds*, 2021 NSSC 54; *R v Murphy*, 2020 NSSC 265; *R v Jolly,* 2022 ONCJ 3; *R v Boutilier,* 2017 NSSC 308; *R v Donison*, 2021 ONSC 741; *R v Prince,* 2020 ONSC 6121; *R v Ansah*, 2021 ONSC 6339; *R v Anderson*, 2021 NSCA; *R v Perry*, 2018 NSSC 16; *R v Steed*, 2021 NSSC 71;*R v Williams*, 2018 ONSC 5409; *R v Nethersole*, 2021 ONSC*; R v Marfo,* 2020 ONSC 5663; *R v Kandhai*, 2020 ONSC 3580; *R v Jackson*, 2018 ONSC 2527; *R v Lewis*, 2022 ONCJ 29; *R v T.M*, 2020 NSPC 57; *R v Beals,* 2019 NSPC 68; *R v Downey*, 2017 NSSC 302; *R v Husbands,* 2021 ONSC 6824; *R v Faulkner*, 2019 NSPC 36; *R v Dykeman,* 2019 NSSC 361;*R v Groves-Bennett*,2021 ONSC 3178; *R v Fisher,* 2020 NSSC 325; *R v Dubois*, 2022 ONCJ 88; *R v Milton,* 2021 NSSC; *R v Goodridge,* 2022 ONCJ 1; *R v Whittaker*, 2021 ONSC 5; *R v Martin*, 2022 ONSC 2354; *R v Bishop*, 2021 ONSC 4545.

[503] Mark Hall & Ronald F. Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96 California L R 63 ["Hall & Wright"]; Johnny Saldana, *The Coding Manual for Qualitative Researchers*, (London, UK: Sage, 2016) ["Saldana"].

[504] Barth J Harvey et al., *The Research Guide: A Primer For Residents, Other Health Care Trainees, And Practitioners*, (Ottawa: Royal College of Physicians and Surgeons of Canada, 2012) at 64 ["Barth et al."].; Saldana, *supra* note 505 at 7.

### 6.2.5 Coding protocol and the data set

Once the sample was collected, the cases were organized into an excel spreadsheet and the following variables were recorded:

1. case name, year and citation;
2. province and level of court;
3. Crown counsel and Defence counsel's position on sentence;
4. category of sentence imposed;
5. duration of the sentence in days.

In addition to case details, the following relevant characteristics of the individual being sentenced were recorded: (1) existence of a criminal record; (2) age in years; and (3) plea. The coding protocol is set out in Appendix A.

To measure and evaluate how judges interact with IRCAs and systemic racism at sentencing, the following questions were included in the coding manual:

1. How does the judge characterize IRCA?
2. Does the sentencing judge describe how systemic racism contributes to over-representation?
3. If raised, does the judge take judicial notice of systemic racism?
4. If the judge acknowledges systemic racism, how does it factor in the sentence?
5. Does the case involve any *Charter* breaches? If so, what is the nature of the breach (i.e racial profiling?) and how does it factor at sentencing?
6. Are there any mandatory minimum penalties ("MMPs") present in this case and/or are conditional sentence orders ("CSO") unavailable for the offence in this case?
7. How does the IRCA influence orders?
8. Does the sentencing judge raise and/or require a causal connection between social context evidence and the commission of the offence?
9. How does the principle of rehabilitation factor into sentencing?
10. How many paragraphs are dedicated to the contents of the IRCA and consideration of systemic racism in the judge's sentencing analysis?
11. What is the paramount sentencing objective identified by the sentencing judge?
12. Does the sentencing decision address society's complicity in anti-Black racism?

Question 1 seeks to determine how sentencing judges characterize IRCAs. For instance, does the sentencing judge engage with the contents provided in the IRCA or do they superficially refer to the report?[505] Given that one of the ancillary purposes of IRCAs is to reduce the reliance on incarceration, Question 2 inquires whether sentencing judges mention or discuss how systemic racism contributes to mass incarceration of Black individuals. Although appellate decisions confirm that sentencing judges can take judicial notice of systemic anti-Black racism, Question 3 examines whether judges take judicial notice and measure how many courts resisted taking judicial notice prior to appellate case law. Question 4 examines how systemic racism factors into the sentencing calculus. For instance, a sentencing judge could explicitly find that systemic racism is mitigating in the circumstances, and/or could find that it calls for specific conditions in sentencing, such as Afrocentric counselling as was the case in *Anderson*.[506] Question 5 is interested in *Charter* breaches in the context of sentencing and whether the sentencing judge connects these breaches to systemic anti-Black racism (i.e racial profiling?).[507] Question 6 records the presence of MMPS and the unavailability of CSOs. These factors must be recorded as they may impede the judge's sentencing discretion, and, as a result, may skew the results. [508] The presence of MMPs and unavailability of CSOs are contributing factors to the overrepresentation of both Black and Indigenous offenders in custody. Question 7 examines whether the recommendations advanced in IRCAs assist judges in crafting conditions in the context of CSOs and probation orders. Question 8 assesses whether

[505] See *R v Anderson,* 2021 NSCA 62 at para 123.
[506] *Ibid.,* at para 72.
[507] *R v Nasogaluak, supra* note 198.
[508] However, the Court of Appeal for Ontario in *R v Sharma*, 2020 ONCA 478 struck down sections 742.1(c) and 742.1(e)(ii) of the *Criminal Code*, which limited the availability of conditional sentences for certain categories of offences, including trafficking Schedule I drugs. This case is currently on appeal to the Supreme Court of Canada.

sentencing judges require a nexus between systemic racism and the commission of the offence and if so, what type of connection is required. This question is influenced by the divergent views expressed in both *R v Anderson* and *R v Morris*: the Nova Scotia Court of Appeal held that no causation is required whereas the Court of Appeal for Ontario found that there should be some connection between systemic racism and the offence.[509] Question 9 inquires about the role of IRCAs in shining a light on rehabilitation prospects in sentencing. Question 10 records the number of paragraphs dedicated to systemic racism and other information divulged in the IRCA. Influenced by restorative justice, question 11 aims to examine whether IRCAs influence the paramount sentencing objective in a given case (i.e does it push judges to emphasize rehabilitation rather than applying by passing reference to deterrence and denunciation?).[510] Finally, Question 12 tracks whether sentencing judges address society's complicity in anti-Black racism given that complicity was raised to some degree in both *R v Anderson* and *R v Morris.*

### 6.2.6 Limitations

There are some limits on both practical and theoretical bases. This section will first address the limitations arising out of the implementation of content analysis in this thesis, such as bias in case selection, the absence of inter-rater reliability and judicial uncertainty. Then, it will address two limitations associated to content analysis on a conceptual level, namely the risk of factual incompleteness and reductionism.

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[509] *R v Morris*, 2021 ONCA 680, *supra* note 130 at paras 96-97 and *R v Anderson*., 2021 NSCA 62, *supra* note 471 at para 118

[510] *R v Anderson, supra* note 471 at paras 114, 119, 121; *R v Morris*, 2021 ONCA 680, *supra* note 130 at paras 79-81.

First, there are three issues arising out of the implementation of content analysis in this research. The first limitation is the biased case selection. While the case reporting services are typically extensive, they do not report all sentencing cases. The pool of available cases is therefore subject to bias from those submitting cases for publishing and those who select cases for publishing. As well, there is selection bias on my end. Typically, sampling calls for a representative or random sampling of documents/texts.[511] Absent representative or random sampling, any findings cannot be generalizable to an entire population.[512] However, this study does not intend to draw generalizations that apply to all sentencing decisions involving IRCAs. It does, however, seek to provide some insight into a phenomenon.

The second limitation is the absence of inter-rater reliability in this research.[513] Inter-rater reliability refers to the process that ensures minimal inconsistencies and enhances the reliability of the coding protocol and its application. The process calls for two independent reviewers to read the randomly selected cases and complete the coding protocol. Then, a comparison of the reviewers' records will reflect the consistency "with which information in the sentencing cases were recording in the coding protocol".[514] The reliability is then determined by a mathematical formula. However, reliability testing is not mandatory and may not be necessary in some cases.[515] Instead, a detailed coding

[511] Webley, *supra* note 42 at 941.
[512] *Ibid.,* at 934.
[513] Andrew Welsh & James R. P. Ogloff, "Progressive Reforms or Maintaining the Status Quo - An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50:4 Canadian J Criminology & Crim Just 491 at 500 ["Welsh & Ogloff"].
[514] *Ibid*.
[515] Mark Hall & Ronald F. Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96 California L R 63 at 112 ["Hall & Wright"].

protocol will suffice to ensure replicability and reliability.[516] This chapter as well as Appendices A and B sufficiently describe the selection and coding protocol to ensure that this research can be replicated and verified for its reliability.[517]

A third limitation that must be acknowledged is the environment in which judges determined sentence. Most of the sentencing decisions forming part of the sample were decided before the Courts of Appeal's decisions in *Morris* and *Anderson* in 2021. Therefore, there may be conflicting themes and patterns, which arguably reflects the uncertainty and lack of appellate guidance at the time the sentencing decisions were made. However, this does not necessarily diminish the inherent value of employing content analysis. It can provide a starting point for systemic data on the law at this particular point in time and can be evaluated against future sentencing decisions post-*Anderson* and *Morris*.

In the context of sentencing research, content analysis encounters two conceptual limitations. First, content analysis can be reductive by distilling complex ideas to limited themes and categories. Both content analysis and doctrinal analysis emphasize "the role of the investigator in the construction of the meaning of texts".[518] While the doctrinal method – at its core – analysis synthesizes and systematically exposes the guiding principles, rules and concepts in a particular legal area, content analysis identifies patterns and themes emerging from selected texts. According to Hutchinson and Duncan, content analysis is used by critical legal scholars to deconstruct text rather than "reading and synthesising meaning from the text.[519] Given their differences, I will mitigate the risk of "reduction"

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[516] *Ibid,* at 112.
[517] *Ibid,* at 79.
[518] Terry Hutchinson & Duncan, Nigel, "Defining and Describing What We Do: Doctrinal Legal Research", (2012) 17:1 Deakin L Rev 84 at 118.
[519] *Ibid*.

by engaging in a doctrinal analysis.[520] Pairing doctrinal and content analysis will complement one another and ultimately enrich the analysis.

Second, the risk of factual incompleteness must be acknowledged.[521] Given that judicial reasons are the judge's story justifying the judgement, they may not be complete and objective. [522] Therefore, Hall et al. caution that judges may distort the facts reported to justify their legal results, despite the fact judges are presumed to perform their duties guided by impartiality and devoid of "result-oriented reasoning."[523] This limitation is only relevant for those who use content analysis to predict case outcomes. Although factual distortion or results-oriented reasoning exists, content analysis enables the study of judicial reasoning retrospectively. It does not the diminish the inherent value of critically examining judicial reasons. Despite its limitations, content analysis nevertheless provides enriching information, which can be supplemented by doctrinal analysis and other methodologies, such as quantitative data analysis.[524]

## 6.3 Phase II: Quantitative data analysis

In addition to qualitative analysis of sentencing decisions involving IRCAs, this thesis undertakes a quantitative analysis by employing descriptive statistics and inferential statistics. This section will first describe the methodology employed. Second, it will address some of the challenges associated to the study design in this thesis.

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[520] Dawn Watkins & Mandy Burton, *Research Methods in Law*, (Abingdon: Routledge, 2013) at 28.
[521] Hall & Wright, *supra* note 515 at 95.
[522] *Ibid*.
[523] *Ibid.,* at 96; *R v Teskey*, 2007 SCC 25 at paras 19-21.
[524] Champion, *supra* note 449 at 190.

#### 6.3.1 Study design

This thesis draws upon quantitative data analysis, namely descriptive and inferential statistics, to measure whether IRCAs lead to differential outcomes in sentencing. Descriptive and inferential statistics can shed light on the following:

1. Whether IRCAs reduce the number of days in jail; and
2. Whether IRCAs increase the prevalence of non-custodial alternatives, namely conditional sentence orders ("CSO")[525] or suspended sentences.

Data analysis will generally begin with descriptive statistics, which summarizes the data collected.[526] Often, descriptive statistics will be represented graphically to visually depict frequency distribution and other trends. As a result, it helps researchers discern patterns arising from a set of data.[527] After summarizing the data by way of descriptive statistics, this thesis engages in inferential statistics, also known as hypothesis testing. This refers to a set of statistical tests that allow for comparisons and other analyses.[528] Inferential statistics begins with a null hypothesis, which refers to the assumption that the intervention or phenomenon of interest has no effect on measured outcomes.[529] In this research, the null hypothesis is that IRCAs would have no discernable impact on sentencing decisions. Then, the null hypothesis is tested by way of linear regression. Relying on linear regression allows

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[525] While I recognize that CSOs are considered custodial sentences, I distinguish them from a "true" custodial sentence for the purposes of this research as they are served in the community and serve a dual *rehabilitative* and punitive purpose.
[526] Barth et al. *supra* note 506 at 198.
[527] *Ibid.*
[528] *Ibid.,* at 213.
[529] Barth et al. *supra* note 506 at 215; Champion, *supra* note 449 at 328.

researchers to assess "potentially causal relationships between one or more exposure/predictor variables and an outcome variable".[530]

### 6.3.2 Sample

Similar to the sample relied upon in section 6.2.2, this project focuses exclusively on sentencing decisions from Nova Scotia and Ontario as most reported cases originate from both jurisdictions. Under this methodology, two samples are created and cases are gathered from case reporting services.

The first group mirrors the case sample utilized for content analysis and the case selection protocol was the same. In other words, the first group of cases involve individuals who were sentenced with an IRCA. The second sample includes Black individuals who were sentenced without an IRCA. This second group, also referred to as the "control group", only included sentencing decisions where race was explicitly mentioned in the sentencing decision itself or prior decisions such as a *Charter* ruling or trial decision. It is worth noting that within this sample, there are some cases where systemic racism is raised without an IRCA. As with the methodology set out in sections 6.2.3 and 6.2.6, the two samples record several variables which are often considered by sentencing judges, such as plea, age, and category of offence. Originally, offences were labeled for each sentencing case and there were nine separate offence categories in both samples. However, statistical tests, such as the Chi-squared test, could not work with such a small sample size. [531] As a result, offences were re-classified under the Modified Offence Severity Scale from the

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[530] Barth et al. *supra* note 506 at 219.

[531] John H. McDonald, *Handbook of Biological Statistics*, (Baltimore, MD: Sparky House Publishing, 2014) at 29.

Correctional Service of Canada's ("CSC") Offender Intake Assessment procedure.[532] This scale categorizes offences into four categories which reflect differing levels of severity: major, serious, moderate, and minor.[533] Pursuant to the Modified Offence Severity Scale, Extreme offences are the most severe offences and include murder.[534] Major offences include attempted murder; sexual assault offences and assault causing serious injury. Serious offences include armed robbery, trafficking and/or possession for the purpose of trafficking in schedule I substances; use of firearm during the commission of an offence, assault that results in wounding and manslaughter. Robbery, criminal negligence causing death or bodily harm, fraud offences, assault causing bodily harm (no serious injury); possession of a restricted or prohibited weapon, such as a firearm, are deemed moderate offences. Finally, minor offences include possession of stolen property under $5,000, breach of probation, simple assault, driving while impaired among other offences. Table 10 in Appendix B illustrates the original frequency distribution of cases among the nine categories of offences in contrast with the Modified Offence Severity Scale.[535]

Sentencing dispositions were coded into three different categories: imprisonment, CSO, and non-custodial sentence. Imprisonment includes sentences such as intermittent sentences and sentences that combine both a period of imprisonment and a fine, for example. Similarly, non-custodial sentences include fines and suspended sentences. While CSOs are considered custodial sentences, they are distinguished from a "true" custodial sentence given that the sentence is served in the community and serves a dual *rehabilitative*

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[532] Welsh & Ogloff, *supra* note 513 at 499. Welsh and Ogloff also utilized the CSC's modified offence severity scale to categorize the offences in their study.

[533] Canada, Correctional Service of Canada, *Commissioner's 705:7: Annex D – Modified CSC Offence Severity Scale* (Ottawa, 2021) online: < https://www.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml#annexD>. See Appendix A for a reproduction of the Modified Offence Severity Scale

[534] *Ibid*.

[535] See Appendix B.

and punitive purpose.[536] Given the limited sample size in this research, sentencing dispositions were grouped into these three categories as was done by Welsh and Ogloff for the purpose of inferential analysis.[537]

Some cases were excluded from the sample. Just as with the case selection for content analysis, individuals who were sentenced as young persons under *YCJA* and individuals who were not identified as male (i.e. women, non-binary, etc.) were excluded from the sample.[538]

### 6.3.3 Study limitations and challenges

Given the variety of sentencing factors that sentencing judges must consider and balance against one another, it is "extremely difficult to empirically untangle the extent to which extra-legal factors, such as race, affect sentencing decisions".[539] The reliance on statistical analysis in this thesis raises three significant limitations. First, the sample of cases are drawn from 2015 to 2022. As previously noted in section 6.2.6, most sentencing decisions were made during a time of judicial uncertainty and a lack of appellate guidance vis-à-vis the application of IRCAs and consideration of systemic anti-Black racism in sentencing. Consequently, the outcomes will only represent trends within a specific period. Nonetheless, this snapshot may provide insight into judicial reasoning and measurable outcomes, if any.

Second, the sample size was the most significant challenge in conducting quantitative analysis of sentencing decisions. Strong statistical power relies on a sufficient

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[536] *R v Proulx, supra* note 183 at para 23.
[537] Welsh & Ogloff, *supra* note 513 at 499.
[538] Stephanie Bontrager, Kelle Barrick & Elizabeth Stupi, "Gender and Sentencing: A Meta-Analysis of Contemporary Research" (2013) 16:2 J Gender Race & Just 349.
[539] Welsh & Ogloff, *supra* note 513 at 494.

sample size.[540] Given the limited availability of reported sentencing decisions and the inability to obtain data from police services, the sample size in this study is small. Some questions cannot be answered by way of statistical inference given the limited size. As well, the limited data available solely on case reporting services also entailed case selection bias as discussed in section 6.2.6. Nevertheless, descriptive, and inferential statistics may provide some insight. An inference can be drawn, albeit not a statistically significant one, that IRCAs may and do have a positive impact on sentencing. Sentences can still be compared to the typical range of sentences in each province to examine whether there is any divergence from the established ranges, such as the *Woolcock* range in Ontario where the typical range of trafficking cocaine (up to an ounce) is 6 months to 2 years less a day. For instance, both *Morris* and *Anderson* diverge from the typical range of firearm sentencing in their respective provinces.[541]

These limitations are the product of the challenges encountered in the process of data collection. While all the cases were selected by way of case reporting services, I originally intended to gather a larger sample through access to information requests. In November 2021, I requested data through an access to information request to both Toronto Police Service and Halifax Regional Police. My request sought data from their Versadex system regarding charges laid which resulted in a conviction between January 1, 2015 and September 1, 2021 with respect to the following charges: murder, manslaughter, robbery, possession of a substance for the purpose of trafficking of a schedule I substance and possession of restricted or prohibited firearms. I selected these charges given that they most

[540] Barth et al. *supra* note 506 at 222.
[541] In *Morris*, the Court of Appeal substituted the 15-month custodial sentence with two years less a day (para 183). In *Anderson*, Derrick J.A affirmed the CSO imposed by the lower court.

frequently appeared in sentencing decisions involving IRCAs. In January 2022, I received a response from Halifax Regional Police indicating that due to privacy concerns, I could not access data that revealed criminal history or race. Information pertaining to race was refused on the basis that it may be "potentially inaccurate and unreliable", thus withheld pursuant to section 480(2)(g) of the *Municipal Government Act*.[542] Similarly, information relating to criminal records was withheld as it may constitute an invasion of a third party's personal privacy.[543] This response reflects the longstanding unavailability of accessing disaggregated data from the Canadian criminal justice system. The following passage from Owusu-Bempah and Wortley underscores the unfortunate consequence of unavailable data:

> The suppression of disaggregated racial data from Canadian criminal justice institutions hinders criminological research on race, crime, and criminal justice. It is thus difficult for Canadian academics to study racial disparity and discrimination within our system. This ban on data collection, however, serves to protect criminal justice agencies from allegations of racial bias.[544]

A similar sentiment was echoed in the *Report of the Independent Police Oversight Review* ("*Report*"). In the *Report*, Justice Tulloch condemned the police's refusal to collect race-based statistics as it resulted into less insight into the relationship between race and policing.[545] Encouraging the collection and analysis of racial data, the *Report* cited the American Sociological Association, which argued that "[r]efusing to acknowledge the fact

[542] SNS 1998, c 18.
[543] *Municipal Government Act*, SNS 1998, ss 480(1).
[544]Akwasi Owusu-Bempah, & Wortley, Scot, "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 282-283.
[545] *Report of the Independent Police Oversight Review* (Toronto: Queen's Printer for Ontario, 2017) at para 41.

of racial classification, feelings, and actions, and refusing to measure their consequences will not eliminate racial inequalities. At best, it will preserve the status quo..."[546]

As a result, I had to re-adjust my study design in light of the unavailable data. Chapter 7 will outline a stronger study design for future research, once there is either available data from police services or a greater number of relevant sentencing decisions are available on case reporting services.

## Conclusion

In this chapter, the mixed-method approach utilizing both quantitative and qualitative methods was described. Despite the limitations identified, both methods will nevertheless provide some insight into the research questions advanced in this thesis. Moreover, both methodologies are congruent with the conceptual frameworks employed in this project, namely CRT and restorative justice, as they examine the impact of IRCAs on sentencing decisions from varying angles. In the next chapter, the findings flowing from both methodological approaches will be discussed.

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[546] *Ibid.*

# CHAPTER 7: RESULTS AND DISCUSSION

This thesis aims to explore how judges rely on IRCAs to determine fit sentences using both qualitative and quantitative methods. This chapter will first address the qualitative results derived from employing content analysis. Next, the findings from descriptive and inferential statistics will be reviewed. Viewing both the qualitative and quantitative results together, IRCAs have an impact, though not overwhelming, on sentencing. While sentencing judges overall appear to welcome IRCAs, and incorporate their content into their sentencing decisions, it is too early to determine whether these reports can effect change and reduce reliance on incarceration.

## 7.1 Phase I: Content analysis

The first phase of this research entailed reviewing sentencing decisions involving IRCAs under a content analysis methodology. The following section is two-fold. First, it will provide a summary of the sample and the results to orient the reader in a tabular format. Then, it will discuss the results in a thematic manner.

### 7.1.1 Descriptive summary of results

The following tables capture the results: Table 1 provides a descriptive summary of the sample, which recorded characteristics of the person being sentenced and the type of offence for which they have been convicted. Table 2 summarizes the results from the implementation of the content analysis protocol. Then, table 3 indicates the minimum, maximum and median number of paragraphs in the sentencing decisions that referenced issues raised in the IRCA.

**Table 1:** Descriptive statistics of content analysis sample

| **1. Category of offence** | **Frequency (n)** | **Percent (%)** |
|---|---|---|
| Firearm Related Offences | 11 | 32.4% |
| CDSA | 4 | 11.8% |
| CDSA and Firearm | 3 | 8.8% |
| Robbery | 3 | 8.8% |
| Murder | 3 | 8.8% |
| Manslaughter | 2 | 5.9% |
| Sex Related Offences | 2 | 5.9% |
| Attempted Murder | 2 | 5.9% |
| Assault | 1 | 2.9% |
| Impaired | 2 | 5.9% |
| Criminal Negligence | 1 | 2.9% |
| **2. Offence severity** | | |
| Extreme Offences | 3 | 8.8% |
| Major Offences | 4 | 11.8% |
| Serious Offences | 13 | 38.2% |
| Moderate Offences | 13 | 38.2% |
| Minor Offences | 1 | 2.9% |
| **3. Plea** | | |
| Not Guilty | 16 | 47.1% |
| Guilty Plea | 18 | 52.9% |
| **4. Criminal antecedent(s)** | | |
| No Record | 12 | 35.3% |
| Criminal Record | 22 | 64.7% |
| **5. Sentence imposed** | | |
| Jail | 28 | 82.4% |
| Conditional Sentence Order | 4 | 11.8% |
| Non-Custodial Sentence | 2 | 5.9% |
| **6. Statutory bars to sentencing discretion**[1] | | |
| Yes | 5 | 14.7% |
| No | 29 | 85.3% |
| **7. Age** | **Years** | |
| Mean | 27.7 | |
| Std. deviation | 7.41 | |
| Maximum | 45 | |
| Minimum | 18 | |
| **8. Breach(es)**[2] | | |
| Yes | 9 | 26.5% |
| No | 25 | 73.5% |
| Total | 34 | 100% |

[1] Yes means that there is a statutory MMP or that CSOs are statutorily unavailable.
[2] A “Breach” here contemplates breaches of the following: release order, probation or CSO order; firearms prohibition order, statutory release.

**Table 2:** Summary of the results

| Theme | | Categories | IRCA | |
|---|---|---|---|---|
| | | | **Frequency (n)** | **Percent (%)** |
| **1.** | **Was Systemic Racism raised at sentencing (by way of IRCA and submissions)?** | Not mentioned | 0 | 0% |
| | | Raised | 34 | 100% |
| **2.** | **How was the IRCA characterized by the sentencing judge?** | No reference | 1 | 3% |
| | | Superficial reference | 4 | 10% |
| | | Reference and analysis | 11 | 35% |
| | | Positive reference and analysis | 15 | 48% |
| **3.** | **Did the sentencing judge take judicial notice of systemic racism as a result of the IRCA and systemic racism being raised?** | Yes, takes judicial notice of systemic racism | 3 | 10% |
| | | Systemic racism is implicitly recognized though judicial notice not explicitly made | 6 | 19% |
| | | Declined judicial notice | 0 | 0% |
| | | Need an expert | 0 | 0% |
| | | No need to take JN | 0 | 0% |
| | | Not discussed | 22 | 71% |
| **4.** | **What was the mitigating impact of systemic racism on sentencing?** | Mitigation | 8 | 23% |
| | | Some mitigation | 13 | 38% |
| | | No mitigation | 3 | 9% |
| | | Not discussed | 10 | 30% |
| **5.** | **Was the mass incarceration of Black Canadians addressed?** | No reference | 19 | 63% |
| | | Superficial reference | 6 | 20% |
| | | Reference and analysis | 5 | 17% |
| **6.** | **Was there a *Charter* breach?** | Yes - Considered as mitigating on sentence | 1 | 3% |
| | | Reference to breach w/o mitigation | 0 | 0% |
| | | No breaches mentioned | 30 | 97% |

**Table 2:** Summary of the results (continued)

| | | | |
|---|---|---|---|
| **7. Existence of MMP or CSO that curtailed judicial discretion** | Yes - MMP or unavailability of CSO | 2 | 6% |
| | No | 29 | 94% |
| **8. Did the IRCA influence the orders made by sentencing judge?** | Yes | 14 | 47% |
| | No | 7 | 23% |
| | Not discussed or unclear | 9 | 30% |
| **9. Is a nexus required between the systemic or background factors and the commission of the offence?** | Yes | 3 | 10% |
| | No | 1 | 3% |
| | Not discussed | 24 | 77% |
| | Reference to nexus, but unclear | 1 | 3% |
| | Reference to contextual approach per Anderson | 2 | 6% |
| | Refers to some causation | 0 | 0% |
| **10. Did rehabilitation factor as a sentencing objective?** | Yes, primary sentencing objective | 9 | 30% |
| | yes, secondary objective | 16 | 53% |
| | Not a sentencing objective | 1 | 3% |
| | Not discussed or superficial reference | 4 | 13% |
| **11. Was societal responsibility for anti-Black racism addressed at sentencing?** | Yes | 0 | 0% |
| | No | 31 | 100% |

**Table 3:** Descriptive statistics regarding paragraphs dedicated to contents of IRCA and systemic racism

| **Cases (n)** | **Minimum (paragraphs)** | **Maximum (paragraphs)** | **Median (paragraphs)** | **Std. Deviation** |
|---|---|---|---|---|
| 34 | 2.00 | 86.00 | 18 | 18.076 |

### 7.1.2 Discussion of the results

This section will interpret the results reported in Tables 1-3. In particular, it will address nine findings arising from the results in Table 2 and 3. First, sentencing judges generally appreciate IRCAs. Second, mass incarceration is largely neglected in sentencing reasons. Third, judicial notice of systemic racism is generally taken implicitly. Fourth, systemic racism is generally mitigating. Fifth, IRCAs influence probation and conditional sentence orders. Sixth, a nexus between systemic racism and the commission of the offence is not always required. Seventh, IRCAs promote rehabilitation as a sentencing objective. Eighth, sentencing decisions generally address IRCAs in detail rather than making "passing references". Ninth, societal responsibility or complicity in perpetuating systemic racism is unaddressed in sentencing decisions.

#### i. Sample

Table 1 summarizes the key characteristics of the individuals forming part of the sample. Although the sample reflects a variety of offences ranging from moderate to extreme severity, IRCAs do not appear to be tendered in minor offences. In the sample, only one case involved a minor offence. Rather, most common offences include firearm related offences, drug trafficking (or possession for the purpose of trafficking), robbery, or a combination of these offences. Guided by deterrence and denunciation, these offences often attract a significant jail sentence. As well, a high proportion (64%) of the individuals had a criminal record, which is typically considered an aggravating factor on a sentence. Therefore, it appears that IRCAs may be ordered in cases where the prospect of incarceration is high.

### ii. IRCAs are positively received by sentencing judges

As noted in Table 2, the first question sought to assess how sentencing judges characterize IRCAs. Characterizations (or absence thereof) were classified under five categories: (1) no reference; (2) superficial reference (which contemplated a passing reference to an IRCA in a sentencing decision without addressing any details of the report or its relevance to the sentencing calculus); (2) reference and analysis (where the IRCA is referred to but the normative value of the IRCA is not explicitly expressed or easily inferred) and (4) positive reference analysis (which is measured by the descriptions of the IRCAs and its adjectives employed by the sentencing judge). There was no category set aside for a negative reference given that, during the preliminary review of sentencing decisions, none of them explicitly criticized the contents of the IRCA. In fact, most sentencing judges relied on and reproduced the information provided by the IRCA in their decisions. Nearly half of the sentencing judges (n= 15) made positive references to the IRCA, describing it as "very detailed", "thorough", and "helpful" among other adjectives.[547] For instance, Jamieson J. in *Fisher* described the IRCA as having provided valuable insight and "an understanding of Mr. Fisher's background from a socio-cultural perspective".[548] Rosinski J. in *R v Steed* echoed this sentiment, noting that the IRCA deepened his understanding of Mr. Steed's background including the experience and history of the African Nova Scotian community.[549]

The sentencing decisions generally summarized the contents of the IRCA, which provided an in-depth psychosocial portrait of the person being sentenced. Many of these

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[547] *R v Donison,* 2022 ONSC 741 at para 12; *R v Fisher,* at para 85.
[548] *R v Fisher,* at 89.
[549] *R v Steed,* 2021 NSSC 71 at para 6.

experiences mirrored the disparities addressed in section 2.3 of this thesis. Many rulings recounted the individual's upbringing, experiences with family violence, negative experiences in education, loss of a close family member or friend, and negative experiences with police among other issues.[550] Therefore, IRCAs clearly achieve one of their stated aims: these reports contextualize the circumstances of the offence and those of the person before the Court.[551]

Although IRCAs were generally well-received by sentencing judges, that does not mean that they were uncritically accepted. For example, Berg J. in *R v Dubois* found that some passages in the IRCA did not represent strict objectivity as mandated by the Court of Appeal in *Morris.*[552] In Berg. J's view, the IRCA assessor occasionally strayed from her duty to remain objective.[553] For instance, the report indicated that, despite Mr. Dubois presenting himself with intelligence and self-awareness, his "level of consciousness did not extend far enough to prevent his [criminal] actions".[554] Although Berg J. did not understand this passage, he found that it amounted to advocacy. Moreover, this passage

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[550] Themes include the following: negative experiences with education (see *R v Kandhai,* 2020 ONSC 161 at paras 16, 37*; R v Jackson*, 2018 ONSC 2527; *R v Anderson, supra* note 7*; R v Morris, supra* note 130; *R v Jolly,* 2022 ONCJ 3at para 42; *R v Prince*, 2020 ONSC 6121 at paras 51-53; R *v Dykeman*, 2019 NSSC 361 at para 12). Loss of family or friend due to violence (*R v Whittaker,* 2021 ONSC 5278 at para 18; *R v Lewis*, *supra* note 505 at para 8; *R v Simmonds, 2021 NSSC 54; R v Husbands*, 2021 ONSC 6824*, R v Marfo,* 2020 ONSC 5663*; R v Beals,* 2019 NSPC 68*)*. Negative experiences with police (*R v Donison,* 2020 at paras 25-26; *R v Ansah*, 2021 ONSC 6339 at para 15; *R v Whittaker, 2021 ONSC 5278* at para 19; *R v Goodridge,* 2022 ONCJ 139 at para 19) Experiences with child welfare services (*R v Morris, supra* note 130 at para 48; *R v Riley*, 2019 NSSC 92*, R v Whynder*, 2019 NSSC 386 at para 24; *R v Groves-Bennett, supra* note 505 at para 16; R v Goodridge at para 15); family violence (*R v Jolly,* 2022 ONCJ 3 at para 42; *R v Johnson,* 2022 ONSC 2688; *R v Steed*, 2021 NSSC 71 at para 30; *R v Whynder*, 2019 NSSC 386 at para 24); experienced poverty (*R v Bishop,* 2021 ONSC 4545; *R v Goodridge*, 2022 ONCJ 139; *R v Prince*, 2020 ONSC 6121, *R v Kandhai,* 2020 ONSC 161; *R v Husbands*, 2021 ONSC 6824; *R v Simmonds*, 2021 NSSC 54*;R v Whittaker,* 2021 ONSC 5278 at para 19).

[551] *R v Dubois,* 2022 ONCJ 88 at para 5 ["*R v Dubois*"].

[552] *R v Morris, supra* note 130 at paras 144-146. The Court in *R v Morris* indicated that social context reports must provide an objective assessment rather than advocating on behalf of the person being sentenced. As well, it must distinguish between the facts and the beliefs of the person being sentenced.

[553] *R v Dubois, supra* note 5 at para 14.

[554] *Ibid.*

contradicted other passages in which Mr. Dubois expressed having given serious consideration to the consequences of firearm possession.[555] Berg J. concluded that "[w]hat the court seeks from the writers of these reports are the facts about the accused as well as rehabilitative recommendations. Issues such as deciding the level of moral responsibility are to be left to the court."[556] Nevertheless, the thrust of the report was not diminished and its value to the sentencing judge is apparent throughout the judgement.

### iii. How systemic racism contributes to over-representation

Given the nexus between systemic racism and the mass incarceration of Black Canadians and African Nova Scotians, this study was interested in how judges address this issue, if at all, in sentencing. As noted by Borden J. in *R v T.M.*, the stark reality of mass incarceration ought to be addressed and the "status quo of our sentencing system is fundamentally flawed. All justice system stakeholders can and must do better other than conducting business as usual".[557] Similarly, the Court in *R v Murphy* acknowledged the disproportionate number of African Nova Scotian men in custody, adding that:

> [t]he only way to fight against the effects of racism is for those in positions of authority to act in ways that may be perceived as radical and as departing from some norms. Sending this man, Lonnie Murphy, to jail to send a message to others seems to be compounding a problem rather than dealing with it.[558]

Although IRCAs serve as reminders of this stark reality, it is unclear how mass incarceration factors, if at all, into a judge's sentencing calculus. Nearly 60% of the

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[555] *Ibid.*
[556] *Ibid.,* at para 15.
[557] 2020 NSPC 57 at para 59.
[558] *R v Murphy*, 2020 NSSC 265 at para 13.

sentencing decisions made no reference to the mass incarceration of Black Canadians and African Scotians whereas 23.5% made a passing remark. In *R v Dykeman*, Scaravelli J. only referred to mass incarceration when describing the contents of the IRCA report: "[t]he report sets out the historical fact that African Nova Scotians have always been discriminated against and continue to face discrimination. It points to the over-representation of African Canadians in the Criminal Justice System."[559]

**iv. Only 17.5% of sentencing decisions addressed mass incarceration in greater detail.**

While sentencing judges appeared to welcome IRCAs, a small number of them addressed the increasing number of Black and African Nova Scotian individuals who are incarcerated. For instance, Ducharme J. in *R v Marfo* acknowledged that anti-Black systemic racism played a role in the mass incarceration of Black Canadians.[560] Similarly, mass incarceration was considered in *R v Goodridge.* The Court was tasked with sentencing Mr. Goodridge for drug and firearm offences. He had a limited criminal record. In arriving at the appropriate sentence, the Court relied on various documents, including the IRCA and the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario" ("Expert Report"), which demonstrated that "Black Canadians and youth are disproportionately represented, disadvantaged, marginalized, and disenfranchised within the child welfare system, in education, in employment opportunities and in their dealings with the criminal justice system".[561] These factors also play a role in the mass incarceration of Black Canadians. Afterwards, the Court connected these systemic factors outlined in the expert report to Mr. Goodridge's life, noting that "findings of the

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[559] *R v Dykeman,* 2019 NSSC 361 at para 11 ["*R v Dykeman*"].
[560] *R v Marfo,* 2020 ONSC 5663 at para 28.
[561] 2022 ONCJ 139 at paras 36-41.

expert report are the reality of Mr. Goodridge's life to date."[562] Given that Mr. Goodridge's moral blameworthiness was diminished by the disadvantages resulting from anti-Black racism, the Court found that a sentence of 2 years less a day was the appropriate sentence in this case. When considering the suitability of a conditional sentence order, the Court referred once more to the Expert Report, which reported that Black Canadians are overrepresented in both provincial and federal institutions. The Court then concluded that "Parliament's intention when enacting the conditional sentence provisions was to reduce the over-reliance on incarceration. It stands to reason that a conditional sentence can help address the overrepresentation of Black Canadians in jail."[563] The Court ultimately imposed a conditional sentence order as was the case in *R v Anderson*, 2021 NSCA 62; *R v Perry*, 2018 NSSC 16 and, *R v Dubois,* 2022 ONCJ 88.Therefore, an inference can be drawn that IRCAs are helpful in advocating for the imposition of a CSO despite the fact that they are sentences outside of the range of sentence for firearm and/or drug offences.[564] It is unclear why the remaining sentencing judges were silent on mass incarceration. Some reasons, however, are advanced in the next section as sentencing judges also did not explicitly refer to judicial notice.

### v. Judicial notice of systemic racism is mainly implicit

Before the appellate decisions in both *Anderson* and *Morris*, sentencing courts had divergent views on whether judicial notice of anti-Black systemic racism could and should

[562] *Ibid.,* at para 41.
[563] *Ibid.,* at para 49.
[564] For instance, the Court of Appeal in Ontario in *R v Butters*, 2017 ONCA 973 has reiterated that the sentencing range for schedule I substances (i.e, cocaine, fentanyl, heroin) call for custodial sentences of 6 months up to 2 years for quantities under an ounce. The Supreme Court in *R v Nur,* 2015 SCC 15 remarked that a three-year sentence may be appropriate "for the vast majority of offences" under s. 95 of the Code (para 82).

be taken. Social context evidence of systemic racism and other issues surrounding race can be proven by way of direct evidence, admission or by judicial notice.[565]

On one hand, some courts found that judges can rely on judicial notice to consider systemic racism in the absence of an IRCA.[566] For instance, in *R v Elvira*, Schrek J. took judicial notice of certain social factors, such as the existence of anti-Black racism and the overrepresentation of African Canadians in the criminal justice system.[567] He did not hesitate to take judicial notice as "[o]ne 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."[568] In Mr. Elvira's case, Schrek J. did not require an IRCA as he had no doubt that Mr. Elvira indeed experienced systemic racism despite the fact that Mr. Elvira did not establish the details and degree to which systemic racism impacted him. Schrek J. recognized that Mr. Elvira grew up in a socioeconomically "depressed area" and did not "enjoy many of the same advantages that many non-racialized Torontonians from other parts of the city take for granted."[569]

On the other hand, LeMay J. in *R v Brissett and Francis,* 2018 ONSC 4957 declined to take judicial notice of systemic racism.[570] He disagreed with Nakatsuru J.'s reasoning in *R v Jackson* that the Court of Appeal's decision in *Hamilton* "permits a Court to take judicial notice of systemic racism and then automatically consider it in individual cases".[571] LeMay J. found that mitigation grounded in systemic racial or gender bias required specific

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[565] *R v Le, supra* note 130 at para 83.
[566] *R v Morris*, 2018 ONSC 5186 at paras 9; *R v Nimaga*, 2018 ONCJ 795 at paras 45-46; *R v Reid,* 2016 ONSC 954 at paras 21-27; *R v Elvira*, 2018 ONSC 7008 at paras 22-23.
[567] *R v Elvira*, 2018 ONSC 7008 at para 22.
[568] *Ibid.,* at para 22.
[569] *Ibid.,* at para 23.
[570] *R v Brissett and Francis*, 2018 ONSC 4957 at para 72.
[571] *Ibid.,* at para 58.

information about the individual before the Court. In this case, neither Mr. Brissett nor Mr. Francis tendered an IRCA or any other information that "would tend to show any connection between the history of discrimination suffered by African-Canadians and the circumstances of the Offenders or the Offence".[572]

As a result, this study sought to track how many other cases in addition to *R v Brissett and Francis* declined to take judicial notice and whether there was any reluctance to do so after the release of *Morris* and *Anderson*. None of the cases involving IRCAs declined to take judicial notice. However, only 8.8% of cases (n=3) explicitly took judicial notice. The remainder of cases either implicitly took judicial notice (which was inferred by the language used by the court including passing reference to judicial notice) or did not raise judicial notice altogether while still recognizing the contents of IRCAs and that the person before the court was and is impacted by systemic anti-Black racism. There may be a few reasons why judicial notice is not overtly addressed, including the following two reasons. First, judicial notice of systemic racism is no longer controversial. The sentencing decisions demonstrate that there is general acceptance of the existence of systemic anti-Black racism, or worse yet, an absence of its explicit denial.[573] Second, this result may also reflect the heavy workload passing through the courts. The Supreme Court acknowledged that in "an ideal world, one might dream of judges recasting each proposition, principle

[572] *Ibid.,* at para 61.
[573] For instance, some politicians denied (and continue to do so) the existence of systemic racism. See René Bruemmer, "After Echaquan report, Legault repeats there is no systemic racism in Quebec", Montreal Gazette (5 October 2021), online: <https://montrealgazette.com/news/quebec/after-echaquan-report-legault-repeats-there-is-no-systemic-racism-in-quebec>; Phil Tsekouras, "Facing criticism, Ontario Premier Doug Ford backpedals comments on racism in Canada", CTV News (3 June 2020), online: <https://toronto.ctvnews.ca/facing-criticism-ontario-premier-doug-ford-backpedals-comments-on-racism-in-canada-1.4968052>; Graham Slaughter, "O'Toole sidesteps question on systemic racism, suggests some cops don't like the term", CTV News (1 September 2020), online at: < https://www.ctvnews.ca/politics/o-toole-sidesteps-question-on-systemic-racism-suggests-some-cops-don-t-like-the-term-1.5087522?cache=yes >.

and fact scenario before them in their own finely crafted prose”. [574] In practice, judges are busy, and their rulings may not adequately address each argument and principle, such as judicial notice, considered at sentencing.

### vi. Systemic racism is generally mitigating

IRCAs contextualize the degree of responsibility and blameworthiness of the person before the Court. They can also cast aggravating, mitigating or even “neutral factors” under a different light.[575] As a result, social context evidence may have a mitigating effect on sentencing**.** While it is difficult to gauge the degree to which judicial recognition of systemic racism mitigates the ultimate sentence imposed, this study attempted to track whether sentencing judges referred to systemic racism as mitigating. Generally, it appears that IRCAs have a mitigating effect on sentencing. When examining the sample of sentencing decisions, 23.5% referred to systemic racism and its impact on the person being sentenced as mitigating.

However, 35.3% of sentencing decisions considered systemic racism as *somewhat* mitigating or indirectly mitigating. For instance, in *R v Ansah*, the judge considered the IRCA tendered on sentencing, which described Mr. Ansah’s frequent residential moves during childhood, difficulties in the education system, negative experiences with police, and a lack of parental supervision. These circumstances heightened his vulnerability to negative peer influences.[576] Mr. Ansah was being sentenced for both firearm and drug

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[574] *Cojocaru* v *British Columbia Woman’s Hospital and Health Centre* 2013 SCC 30 at para 37; *R v RDS, supra* note 119 at para 50.
[575] *R v Anderson,* 2021 NSCA 62, *supra* note 7 at paras 121, 138; *R v Morris*, *supra* note 18 at paras 91-100.
[576] *R v Ansah,* 2021 ONSC 6339 at paras 13-18.

offences. On sentencing, the court found that this information had "some, but not an overwhelming" mitigating effect.[577]

Likewise, in *R v Donison*, Schreck J. found that the systemic and background factors outlined in the IRCA had less of a mitigating effect on the firearm offences than on the drug trafficking offences. Mr. Donison's childhood was marked by poverty, surrounded by crime and drug use. He had few adult role models other than drug dealers. Thus, Schreck J. found that "it is easy to see how Mr. Donison would be tempted by the lure of making easy money by selling drugs, an activity that was already part of life in the neighbourhood where he lived."[578] These systemic and background factors mitigated Mr. Donison's degree of responsibility with respect to the drug offences.[579] However, these factors were less mitigating regarding the firearm possession offences as there was no evidence as to why Mr. Donison chose to arm himself.[580] This absence of evidence contrasted with *R v Morris, R v Anderson, R v Marfo, R v Kandhai* and other cases where gun possession was motivated by self-protection.[581] In *R v Abdullahi*, Mr. Abdullahi revealed that possessing a gun made him feel safer and powerful given his upbringing surrounded by crime and gun violence.[582] Forestell J. found that Mr. Abdullahi had difficult upbringing in "an underserved area and experiencing poverty and systemic racism".[583]

In *R v Elvira*, as in other cases, it was unclear how systemic racism factored into the ultimate sentence imposed. For instance, Schreck J. indicated that systemic racism can

[577] *Ibid.,* at para 49.
[578] *R v Donison*, 2022 ONSC 741 at para 38.
[579] *Ibid.,* at para 39.
[580] *Ibid.,* at para 41.
[581] *R v Morris, supra* note 18; *R v Anderson, supra* note 17, *R v Marfo,* 2020 ONSC 5563 at para 18; *R v Kandhai,* 2020 ONSC 3580 at para 33.
[582] *R v Abdullahi*, 2022 ONSC 543 at paras 29, 48.
[583] *Ibid.,* at 40.

be mitigating and was prepared to take judicial notice of systemic anti-Black racism and inferred that Mr. Elvira suffered from its effects to some degree.[584] Despite this, it was not referred to under the heading "mitigating factors" and thus, it is unclear what influence, if any, submissions regarding systemic anti-Black racism had on the sentencing calculus.

Conversely, nearly a third of the sample did not explicitly or implicitly ascribe any mitigation to the influence of systemic racism on the person being sentenced. As result, those cases were coded as "not discussed' given that there was no discussion on whether systemic racism had a mitigating effect. In other cases, the mitigating effect could not be confidently inferred from the language used in the sentencing decision. A portion of judges did not refer to systemic racism as having a mitigating impact. Rather, they named the manifestations of systemic racism as mitigating. For example, the Court in *R v Simmonds* refers to Mr. Simmonds' "challenging background" as a mitigating factor without identifying systemic racism as the cause.[585] While it is unclear why some sentencing judges did not associate systemic racism with the challenges faced by the defendants, it does raise a concern that this may be due to a denial of systemic racism's existence and far-reaching impacts. The denial of systemic racism, or its erasure, is "at the heart of the continuing role that race, and racism play in law".[586]

A small number of sentencing decision (n=3) appeared to or declined to find the impact of systemic racism as mitigating. In *R v Dykeman*, Scaravelli J. was tasked with sentencing Mr. Dykeman for robbery with a firearm. Mr. Dykeman's IRCA disclosed adverse childhood events due to anti-Black racism, including the fact that he quit school

[584] *R v Elvira, supra* note 19 at para 22.
[585] *R v Simmonds, supra* note 4 para 19.
[586] Aylward, *supra* note 281 at 120.

by grade 9 as he was unable to endure the daily discrimination and aggressions.[587] Scaravelli J. found the IRCA relevant in highlighting the experiences of systemic discrimination in the African Nova Scotian community. While the IRCA contextualized how Mr. Dykeman came before the courts, the IRCA did not "diminish his degree of responsibility for his actions. Criminal behaviours are often a product of deep social issues".[588] Therefore, it appears as though the impact of systemic racism had little to no impact on mitigation.

In *R v Downey*, the Court also did not find that the impact of systemic racism provided any mitigation. Mr. Downey pleaded guilty to manslaughter after having punched Mr. Diggs, which caused Mr. Diggs to fatally fall to the ground. After summarizing the contents of the IRCA, Rosinski J. did not find that the impact of systemic racism had any mitigating effect. On the contrary, Rosinski J. wrote that, prior to the commission of the offence, "there was no social injustice trigger; no racial or discriminatory [black versus white] trigger evident; no realistic need to be hyper-vigilant […]".[589] Despite the assistance of the IRCA, Rosinski J. misunderstood the purpose of shining a light on the impact of systemic racism in sentencing. As well, the requirement of a "social injustice" trigger also implies that causation is required between systemic racism and the offence.[590] It also suggests that "systemic racism plays no role in Black-on-Black crime".[591] The reasoning exhibited in both *R v Dykeman* and *R v Downey* do not give adqueate weight to the systemic

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587 *R v Dykeman, supra* note 561 at para 12.
588 *Ibid.,* at para 32.
589 *R v Downey, supra* note 328 at para 10.
590 Dugas, *supra* note 4 at 143.
591 *Ibid.,* at 143.

background and systemic factors, which arguably amounts to an error in law as noted by Derrick J.A in *R v Anderson*. [592]

IRCAs also revealed the existence of mitigating factors and/or explained the presence of aggravating factors. The social context evidence in *R v Husbands* mitigated the seriousness of Mr. Husbands' criminal record, namely his drug convictions. The IRCA described how Mr. Husbands grew up in extreme poverty in Guyana and experienced financial distress while in Canada. Mr. Husband resorted to selling marijuana and crack cocaine for basic necessities of life. While O'Marra J. emphasized that this information did not justify nor excuse his criminal behaviour, Mr. Husbands' choices must "be understood in his specific context".[593] Although O'Marra J. clearly indicated that Mr. Husband's criminal record was mitigated by way of the information provided in the IRCA, it is unclear how the report otherwise influenced the sentence imposed. Mr. Husband was convicted of two manslaughter charges after having opened fire 14 times inside the Eaton Center Mall in Toronto. His actions killed two men and injured six others.

Finally, evidence of systemic racism was not limited to contextualizing moral blameworthiness or shedding light on aggravating/mitigating factors. In *R v Marfo*, evidence of systemic racism in federal custody was germane to the determination of an appropriate custodial sentence.[594] A search warrant executed in Mr. Marfo's home yielded a loaded handgun, two overcapacity magazines, and a small quantity of crack cocaine. Mr.

[592] *R v Anderson,* 2021 NSCA 62 at para 118, see also *R v Martin*, 2018 ONCA 1029. (In Martin, the sentencing judge acknowledged Mr. Martin's indigenous background and history of intergenerational trauma and abuse. Nevertheless, the sentencing judge held that this had virtually no impact on the sentence imposed given the seriousness of the offences and criminal record. The Court of Appeal found that the sentencing judge erred in making this finding and reduced the sentence imposed by 2 years.)
[593] *R v Husbands*, 2019 ONSC 6824 at paras 83-85.
[594] *R v Marfo*, 2020 ONSC 5663.

Marfo was charged and convicted of firearms related offences and simple possession of crack cocaine. At sentencing, defence counsel tendered an IRCA among other documents and focused their submissions on the effect of systemic anti-Black racism.[595] Ducharme J. accepted that Mr. Marfo was affected by systemic racism throughout his life, which played a role in his involvement in criminal activity.[596] Moreover, Ducharme J. was struck by the disturbing findings outlined in the 2013 report authored by the Office of the Correctional Investigator, which outlined the various inequalities faced by Black individuals in federal custody. Disturbed by the reports findings, Ducharme J. concluded that "[i]f a sentence is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact."[597] Weighing both the mitigating and aggravating factors, Ducharme J. sentenced Mr. Marfo to 24 months in custody, which was reduced to 10 months to reflect time spent in pre-trial custody.[598]

### vii. IRCAs influence probation and conditional sentence orders

While IRCAs provide individualized social context evidence, they may also recommend rehabilitative and restorative options on sentencing.[599] Therefore, this study examined whether IRCAs indeed influenced sentencing outcomes. Given that

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[595] *Ibid.,* at paras 6 & 52. Ducharme J. had the benefit of the IRCA, which was referred to as the "Social History of McKingsford Marfo" prepared by Ms. Sibblis, a pre-sentence report prepared by Probation Services and "the "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario" authored by Ms. Sibblis and two other academics".
[596] *Ibid.,* at para 55.
[597] *Ibid.,* at para 52. In *R v Anderson*, 2020 NSPC 10, Williams J. considered the dearth of culturally relevant programming and culturally competent psychologists available interventions while in federal custody or on parole (para 78). Given the failure to address the needs of African Nova Scotians in carceral settings, Williams J. found that a CSO was an appropriate disposition to address Mr. Anderson's needs (para 104).
[598] *Ibid.,* at para 60.
[599] *R v Anderson, supra* note 17 at para 121.

imprisonment is generally ill-suited for rehabilitation, this research question sought to determine whether IRCAs had a discernable impact on the types of conditions imposed by judges as part of a probation or conditional sentence order.

As noted in Table 2, the results indicate that IRCAs appear to influence the conditions imposed in nearly half (47%) of the sentencing decisions. The remainder of decisions either did not impose any conditions or did not expressly or implicitly draw inspiration from the IRCA in crafting conditions.

As IRCAs recommend suitable programs and treatment options, it is unsurprising that several sentencing judges heeded these recommendations. Many decisions ordered the individual before the Court to "culturally appropriate" counselling.[600] Mentorship and training programs were also recommended and endorsed by the Courts. For instance, in *R v Dubois*, Berg J. imposed a conditional sentence followed by a probation order on Mr. Dubois for his firearm conviction. As part of the conditions, Berg J. mentioned that he wished to "discuss the two programs recommended in the [IRCA], specifically: The Black African Caribbean Entrepreneurship Leadership Training Program offered by the Black Business and Professional Association as well as the FAMHAS Foundation Culturally Responsive Therapy Program".[601]

In *R v Steed*, Mr. Steed was convicted of several firearm offences, including possession of a loaded firearm.[602] While the Crown advocated for a sentence between 5 and 6 years in custody, Mr. Steed requested a four-year custodial sentence.[603] Rosinski J. had the benefit

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[600] See for example, *R v T.M* , *supra* note 504 at paras 64.; *R v Anderson*, *supra* note 17 at paras 108; *R v Perry,* supra note 504 at para 55.
[601] *R v Dubois*, supra note 504 at para 41.
[602] 2021 NSSC 71.
[603] *Ibid.,* at paras 61, 78.

of an IRCA, which portrayed Mr. Steed's upbringing as dysfunctional and surrounded by normalized violence.[604] The IRCA also "gave voice to his potential for rehabilitation" and outlined several recommendations for treatment.[605] For instance, the author of the IRCA recommended mentorship opportunities and trauma informed counselling provided by a Black or African Nova Scotian counsellor that will understand Mr. Steed's trauma "has affected him given his race and culture".[606] While Rosinski J. sentenced Mr. Steed to a four years imprisonment, he also imposed a two year probation order.[607] The conditions adopted several of the recommendations that were advanced in the IRCA such as Afrocentric therapy and performing community service in the African Nova Scotian community.[608] These results contrast with the sample of sentencing decisions where no IRCA was tendered. In those cases, culturally relevant programming and counselling was not discussed in sentencing reasons. It is unclear, however, if this absence is attributable to sentencing judges omitting these options or whether defence counsel did not recommend them at all.

### viii. Causation Is Not Always Required

While the Courts of Appeal in Nova Scotia and in Ontario clarified the use of systemic and background factors of Black Canadians and African Nova Scotians in sentencing, they part ways on whether causation is required between racism and the commission of the offence. In Nova Scotia, the decision in *Anderson* concluded that a sentencing judge does not have to be satisfied that a causal link has been established

[604] *Ibid.,* at para 47.
[605] *Ibid.,* at para 184.
[606] *Ibid.,* at para 57.
[607] *Ibid.,* at paras 190, 197.
[608] *Ibid.,* at appendix B.

between the systemic anti-Black racism experienced and the commission of the offence.[609] Conversely, the decision in *Morris* required that some connection must be established.[610] Consequently, this study examined the sample of sentencing decisions to determine how often the issue of causation arises and what type of discussions transpire. Generally, the results demonstrate that causation was not discussed, though it was raised in some cases in Ontario. Those cases all predated appellate authority. For instance, the Court in *R v Kandhai* found that systemic discrimination is a matter of context and, therefore, did not require direct proof of causation.[611] Interestingly, none of the sentencing decisions in Ontario addressed the issue of causation after the *R v Morris* decision. Table 4, below, demonstrates the differences between Nova Scotia and Ontario. These discrepancies cannot be attributed to their differing appellate authority.

**Table 4: Frequency and characterization of causation required per province**

| | **Nova Scotia** | | **Ontario** | |
|---|---|---|---|---|
| | Frequency (n) | Percent (%) | Frequency (n) | Percent (%) |
| 1. Causation required | 0 | 0% | 2 | 11% |
| 2. Causation not required | 0 | 0% | 1 | 5% |
| 3. Not discussed | 11 | 100% | 13 | 68% |
| 4. There is a reference to nexus, but obligation to establish one is unclear | 0 | 0% | 1 | 5% |
| 5. Reference to contextual approach per *Anderson* | 0 | 0% | 2 | 11% |

### ix. IRCAs promote rehabilitation as a sentencing objective

The social context evidence proffered by IRCAs support the use of rehabilitation in sentencing.[612] In addition to contextualizing the degree of responsibility of the person being sentenced, IRCAs can identify rehabilitative and restorative options for

[609] *R v Anderson, supra* note 17 at para 118.
[610] *R v Morris, supra* note 18 at para 97.
[611] *R v Kandhai, supra* note 144 at para 56.
[612] *R v Anderson, supra* note 17 at para 120.

sentencing.[613] IRCAs will assist judges in crafting a sentence which "includes terms that enhance the offender's rehabilitation by addressing, in a direct and positive way, the negative impact of systemic racism".[614] For instance, Williams J. in *R v Anderson* found that rehabilitative goals could not be achieved in jail given the scarcity of culturally relevant programming.[615] Put differently, IRCAs also aim to reduce the reliance on over-incarceration. Therefore, this study also assessed the prevalence of rehabilitation as a sentencing objective in cases involving IRCAs.

As previously indicated in Chapter 3, deterrence and denunciation are the core sentencing objectives, particularly in serious offences.[616] Given that most cases in the sample of sentencing decisions range from moderate to serious, the fact that only 26.5% of sentencing decisions identified rehabilitation as a significant or primary sentencing objective is not necessarily surprising. However, 52% of sentencing decisions identified rehabilitation as a secondary objective.

In *R v Johnson,* Goldstein J. identified the IRCA (and the other material filed by defence counsel) as shining a light on Mr. Johnson's rehabilitative potential. The materials described the numerous challenges in Mr. Johnson's life including that structural racism, "especially in Mr. Johnson's education, has also helped to bring Mr. Johnson to this point."[617] These materials also demonstrated the positive steps undertaken by Mr. Johnson.[618] While Mr. Johnson was convicted of a firearm offence which called for

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[613] *Ibid.,* at para 121.
[614] *R v Morris, supra* note 18 at para 105.
[615] *R v Anderson,* supra note 17 at paras 104-105.
[616] For instance, they are primary consideration in firearm offences (*R v Nur*, at para 52), drug offences among others.
[617] 2022 ONSC 2688 at para 16.
[618] *Ibid.,* at paras 16 & 45. Goldstein J. indicated that Mr. Johnson acknowledged his problems and sought help and support, while in custody, to turn his life around.

denunciation and deterrence, rehabilitation could not be overlooked. Consequently, Goldstein J. sentenced Mr. Johnson to three years of imprisonment followed by three years probation, which emphasized rehabilitation.

Likewise, in *R v Dubois*, Mr. Dubois was convicted of possession of a handgun. Berg J. found that the social context evidence militated in favour of rehabilitation as a sentencing objective, which could be achieved by way of a CSO. Such a sentence, even for a firearm offence, aligned with the fundamental purpose and principles of sentencing as it both recognizes the seriousness of the offence while giving greater weight to rehabilitation. Citing the Court of Appeal in *R v Morris*, Berg J. found the CSO could address "societal disadvantages caused to the offender by factors such as systemic racism."[619]

In *R v Donison*, Mr. Donison was also convicted of firearm offences. The evidence before Schrek J., including the IRCA, justified adding greater weight to rehabilitation while also giving less weight to specific deterrence.[620] In the circumstances, he was mindful of the well-established mass incarceration of Black individuals, particularly young men.[621] In his view, rehabilitation does not solely benefit the person sentenced. Rather, rehabilitation arguably better achieves the fundamental purpose of sentencing than "sentences designed to give effect to the objective of general deterrence, which empirical evidence suggests has uncertain effect".[622] In contrast, the IRCA in *R v Whynder* revealed "a great deal of information about Mr. Whynder's background and circumstances", including his limited prospects of rehabilitation.[623] Mr. Whynder, convicted of second-degree murder, was

[619] *R v Dubois, supra* note 504 at para 39.
[620] *R v Donison, supra* note 504 at paras 42-45.
[621] *Ibid.,* at para 56.
[622] *Ibid.,* at para 44.
[623] *R v Whynder*, 2019 NSSC 386 at para 22.

subjected to physical and sexual abuse in his youth.[624] Moreover, the IRCA indicated that Mr. Whynder was raised in several African Nova Scotian communities, which faced economic disenfranchisement, and poor educational outcomes due to systemic racism.[625] Mr. Whynder got "caught up in somewhat of a "normalization" of violence that exists in the lives of some African Nova Scotian males within this sub-culture".[626] The IRCA indicated that the normalization of criminality is a coping mechanism for "daily micro-racial aggressions".[627] Starting from the age of 13, Mr. Whynder accumulated several convictions for violent offences.[628] Finally, the report indicated that Mr. Whynder was entrenched in this mindset and "it is unlikely he will be able to free himself from it, and that for him to get out of that lifestyle would be enormously difficult because it would mean separating himself from everything he has ever known".[629] The IRCA provided the Court with a deeper understanding of how these experiences, including systemic racism, shaped Mr. Whynder.[630] While the IRCA was helpful, Boudreau J. also described it as a "bleak document to read" given the traumatic life experiences outlined in the report and the conclusion that rehabilitation was unlikely.[631]

While rehabilitation may not be feasible in every sentencing case, these results demonstrate that IRCAs successfully assist sentencing courts in contextualizing the gravity

[624] *Ibid.,* at para 24.
[625] *Ibid.,* at paras 29.
[626] *Ibid.,* at paras 29.
[627] *Ibid.,* at paras 30.
[628] *Ibid.,* at paras 25-26.
[629] *Ibid.,* at para 31.
[630] *Ibid.,* at para 32-34.
[631] *Ibid.,* at para 31.

of the offence and the person being sentenced; informing the principles of sentencing and identifying rehabilitative and restorative options for sentencing dispositions.[632]

**x. Sentencing decisions generally do not make "passing references" to IRCAs**

The Court of Appeal in *R v Anderson* warned trial judges that passing references to the background of an African Nova Scotian is insufficient in sentencing. Likewise, it may not be enough to describe their history in detail. Instead, a sentencing judge's reasons must disclose that "proper attention was given to the circumstances of the offender".[633] While this study did not assess in depth whether each sentencing decision was "appeal proof", it did count the number of paragraphs dedicated to discussions of systemic racism and the contents of the IRCA.

As noted in Table 3, the median number of paragraphs dedicated to systemic racism and related issues from the IRCA is 22. Moreover, Table 3 reports the minimum and maximum number of paragraphs. Only one case wrote two paragraphs (the minimum) while one case poured over 86 paragraphs. The majority of cases (n=19 or ~55%) dedicated less than 20 paragraphs whereas the remainder spent more than 20 paragraphs. The standard deviation, the average distance between each data point, is 18 paragraphs. As illustrated in Figure 1, the results are fairly spread out with two bimodal peaks than clustering around the median like a bell curve or "normal distribution".[634]

There may be a few reasons that might explain the presence of two bimodal peaks. For instance, it may suggest that there are different styles of judging with two predominant groups. Both groups may have done so for several reasons such as varying writing styles,

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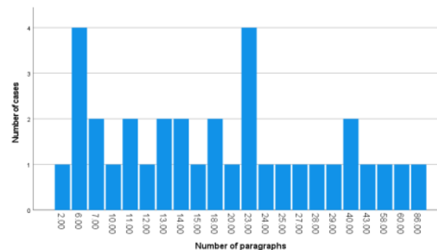
[632] *R v Anderson, supra* note 17 at para 121.
[633] *Ibid.,* at paras 118, 123.
[634] Barth et al., *supra* note 506 at 200-201.

differences in training, time restraints, type of sentencing decision (e.g. oral reasons which may be more succinct than a written decision), or interest in the issues at play.

As well, this study did not track the type of sentencing decision (e.g. oral reasons versus written judgements). Consequently, it could not track whether there was any association between the number of paragraphs dedicated to IRCAs, average length of decisions and the type of sentencing decision. However, this study found that there was no observable difference or association between the number of paragraphs and sentencing objectives (denunciation, deterrence versus rehabilitation) or sentencing dispositions. In other words, sentencing judges who spent more time addressing the impact of systemic racism were not necessarily more likely to find that rehabilitation was a predominant sentencing objective.

**Figure 1:** Histogram depicting the number of paragraphs dedicated to the contents of IRCAs and systemic racism in sentencing decisions




Despite the variability, this result is arguably positive. While these results could be dismissed as rote recitation of the contents of the IRCA, it does indicate that the issues addressed in the IRCA, and submissions of counsel did not go unnoticed. Considerable time was arguably spent on both reflecting on and reiterating the issues highlighted in the IRCA in sentencing decisions. Absent the assistance of IRCAs and their reflection in sentencing decisions, sentencing judges would arguably spend less time thinking about

systemic racism and its impact on the person being sentenced. Despite the presumption of judicial integrity, a legal realist and critical race lens acknowledges that judges may possess explicit and/or implicit biases that may taint their sentencing calculus.[635] Research on implicit bias reveals that the absence of explicit and concrete criteria for decision-making leads individuals to "disambiguate the situation using whatever information is most easily accessible—including stereotypes".[636] Thus, an IRCA is a helpful tool for sentencing judges to not only craft individualized sentences, but it may also confront sentencing judges to their positionality and role vis-à-vis realities of anti-Black racism outside and within the criminal justice system.

### xi. None of the sentencing judges addressed societal responsibility

Sentencing calls for consideration of the degree of responsibility of the person being sentenced. In assessing the degree of responsibility, sentencing judges may consider societal responsibility in producing and maintaining systemic racism, social and criminogenic conditions. Yet, it appears that sentencing courts are reluctant to actively engage in this exercise. Although several sentencing decisions consider the role of systemic

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[635] The Supreme Court in *R v RDS*, [1997] 3 SCR 484, noted that "judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives". (para 38); Jones, *supra* note 23 at 83. There are some examples of judges who are alleged to have engaged in racist conduct. See Meghan Grant, "Racism investigation urged for Alberta judge who ruled parents not guilty in son's death" (27 September 2019) CBC News, online at: <https://www.cbc.ca/news/canada/calgary/justice-terry-clackson-canadian-judicial-council-investigation-complaint-stephans-racism-1.5298752> ; Carrie Tait, "University of Calgary says judge apologizes after making comments 'insensitive to racial minorities'" (7 January 2018) The Globe and Mail, online at: <https://www.theglobeandmail.com/news/national/judge-reportedly-apologizes-after-comments-insensitive-to-racial-minorities-at-university-of-calgary/article37518624/>.

[636] National Center for State Courts, "Helping Courts address implicit bias: Strategies to Reduce the Influence of Implicit Bias", online (pdf): <https://horsley.yale.edu/sites/default/files/files/IB_Strategies_033012.pdf> at 2,12-13,15; Dana L. Marks, "Who, Me? Am I Guilty Of Implicit Bias?" (2015) 54:4 The Judge's Journal 20-25. See also Michelle Van Ryn et al., "Medical School Experiences Associated with Change in Implicit Racial Bias Among 3547 Students: A Medical Student CHANGES Study Report" 30(12) J Gen Intern Med 1748–56.

racism in sentencing, Table 2 reports that none of them broached societal responsibility. This result is arguably disappointing given that there is a jurisprudential basis to consider and address society's complicity in maintaining systemic racism at the sentencing stage. While societal responsibility is not a statutorily recognized sentencing objective, it ought to factor into sentencing considerations of individuals who have been impacted by systemic racism.

Societal responsibility was acknowledged and considered by the Supreme Court in *R v Gladue*, *R v Ipeelee* and *R v Ladue*. In *Gladue*, systemic and background factors were relevant in ensuring individualized sentencing.[637] Similarly, the decisions in *R v Ipeelee* and *R v Ladue* recognized the role of state and the criminal justice system in creating conditions of "social and economic deprivation that may create conflicts that are criminalized".[638] In Mr. Ladue's case, correctional authorities intended to release him to a culturally appropriate setting with access to an Elder. Instead, a result of bureaucratic errors placed Mr. Ladue in an environment where he was especially vulnerable to breaching his long-term supervision order ("LTSO").[639] The majority held that the correctional authority's error ought to have been considered at sentencing. Lebel J. associated Mr. Ladue's breach to his addiction to opiates, which began while Mr. Ladue was incarcerated in a federal penitentiary.[640] Similarly, Rothstein J. found that correctional authorities were partly responsible for Mr. Ladue's LTSO breach. Marie-Ève Sylvestre remarked that this recognition points to the "impact of incarceration and of the criminal justice system itself

[637] *R v Gladue, supra* note 9 at 418-419.
[638] Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR (2d) 461 at 473-475 ["Sylvestre"].
[639] *R v Ipeelee, supra* note 5 at paras 154-156.
[640] *Ibid.,* at para 96.

in the perpetration of crime. The connection between incarceration and crime is well documented."[641]

Justice Hill also considered societal responsibility in *R v Hamilton and Mason*, writing that society bears responsibility for creating the criminogenic conditions and, therefore, "has obligations towards offenders whose personal history suggests a link between the offending conduct and the presence of such conditions".[642] Societal complicity was also addressed in *R v Anderson* and *R v Morris.* The Nova Scotia Court of Appeal's approach in *R v Anderson* aligned with those expressed in *R v Gladue, R v Ladue* and *R v Ipeelee* given that experiences of systemic racism inform the degree of responsibility of the person being sentenced. However, the NSCA added that society's role in "undermining the offender's prospects as a pro-social and law-abiding citizen" should also inform the use of denunciation and deterrence to justify incarceration.[643]

Conversely, the Ontario Court of Appeal's decision in *R v Morris* was much more reserved. While systemic racism is relevant in sentencing, the Court of Appeal held a judge's task is "not primarily aimed at holding the criminal justice system accountable for systemic failures."[644] In a footnote, the Court responded to a passage in *R v Anderson*, which espoused a more liberal scope in considering the role of societal responsibility in sentencing. In *Anderson*, Derrick J.A held that the use of deterrence and denunciation should be informed by society's role in undermining the pro-social and law-abiding prospects of the person being sentenced.[645] In response, Doherty J.A wrote that "[if]

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[641] Sylvestre, *supra* note 639 at 476.
[642] *R v Hamilton,* [2003] OJ No 532 (QL) at para 192.
[643] *R v Anderson, supra* note 17 at para 159.
[644] *R v Morris*, 2021 ONCA 680, *supra* note 330 at para at para 56.
[645] *R v Anderson, supra* note 17 at para 159.

deterrence and denunciation take on less significance in sentencing for serious crimes if society is somehow complicit in the circumstances relevant to the commission of the offence, we must, with respect and for the reasons set out, disagree with that conclusion".[646]

The Court rejected some of the intervenors' submission that society's complicity diminished "its moral authority to denounce the offender's conduct through the sentence imposed".[647] If the submission were accepted, the Court mused that societal responsibility would translate into reduced sentences for Black individuals compared to "other similarly situated non-Black offenders."[648] Then, the Court suggested that members of Black communities – often victims of the harms caused by gun-related crimes – would not view "lenient" sentences as a positive step towards social equality.[649] This position appears speculative as the Court did not offer any evidence that any of the interveners such as Black Legal Action Centre ("BLAC") and Canadian Association of Black Lawyers ("CABL") or the communities themselves shared this view. In fact, BLAC noted that the disproportionate incarceration of Black individuals reproduces "the very conditions that contribute to incarceration in the first place"[650]. In BLAC's view, the Court of Appeal should have given more weight to this impact when assessing the appropriateness of "more lenient" sentences.[651]

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[646] *R v Morris*, 2021 ONCA 680, *supra* note 330 at footnote 3.
[647] *Ibid.,* at para 82.
[648] *Ibid.,* at para 84.
[649] *Ibid.,* at para 85.
[650] Black Legal Action Centre, "Analysis of Court of Appeal Decision" (14 October 2021), online (pdf) at: <https://www.blacklegalactioncentre.ca/wp-content/uploads/2021/10/20211014-Analysis-of-Court-of-Appeal-Decision.docx.pdf> at 5.
[651] *Ibid.,* at 5.

As neither jurisprudence nor s. 718 of the *Criminal Code* identify societal responsibility as a sentencing objective, it plays no role in crafting a fit sentence.[652] Nevertheless, the Court of Appeal reiterated that societal complicity in systemic racism must be acknowledged by sentencing judges and remain cognizant that the sentencing process can perpetuate this complicity.[653]

Despite its strong condemnation of systemic racism, the Court's resistance to incorporate societal responsibility within the sentencing paradigm suggests that the decision in *R v Morris* is more circumscribed in scope than in *R v Anderson* and the Court's condemnations ring hollow. This resistance also contradicts the individualized sentencing process: how can a sentencing court recognize the impact of systemic racism on an individual as mitigating without accounting or apportioning some responsibility to the society that created and maintained those systemic conditions? In sum, the decision in *Morris* is more tempered than *Anderson* in scope, and, in a sense, is more superficial than *Anderson* in its impact. Although it is too early to detect how these differences translate into sentencing outcomes, these disparities will have to be resolved by the Supreme Court.

The results from the content analysis suggest that sentencing judges are moving in the right direction, particularly post-*R v Anderson* and *R v Morris.* Systemic racism is being raised and considered in a growing number of sentencing decisions, both with and without the assistance of an IRCA. The results indicate that IRCAs are welcomed by sentencing judges and invite them to emphasize rehabilitation as a sentencing objective. However, the results from the content analysis must be viewed cautiously. The findings in the next

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[652] *R v Morris*, 2021 ONCA 680, *supra* note 330 at para 83.
[653] *Ibid.,* at para 86.

section suggest that, despite the language used by sentencing judges in their rulings, their inherent attitudes and (un)conscious biases might not have changed. While some judges may not know how to incorporate IRCAs into the sentencing calculus, others may be engaging in "performative activism". Put differently, the support expressed in sentencing decisions may merely be "shallow, artificial, ineffective, and done primarily to garner social capital for the one who offers the support".[654] As a result, IRCAs might not have an impact on sentences, including the length of time spent in jail.

## 7.2 Phase II: Quantitative data analysis

The second phase of this mixed-methods analysis utilized descriptive and inferential statistics to assess the impact of IRCA on sentencing decisions. First, this section will summarize the characteristics of the sample populations in a tabular format. Next, this section will report that two statistical tests did not demonstrate any association between the use of IRCAs and the number of days in jail when controlling for some factors, such as the type of offence. Third, this section will also demonstrate that two statistical tests did not show any association between the use of IRCAs and the increase in prevalence of non-custodial alternatives, namely conditional sentence orders ("CSO") or suspended sentences. Finally, this section will articulate some recommendations for future research. These recommendations will overcome the obstacles and limitations faced in this thesis.

### 7.2.1 Descriptive summary of the sample

Table 5 summarizes the salient characteristics of both groups that form the phase II sample. The first group includes individuals who were sentenced and relied upon an IRCA

[654] A. Freya Thimsen, "What is Performative Activism?" (2022) 55:1 Philosophy & Rhetoric 83 at 85.

whereas the second group of individuals were identified by the judge as a Black or African Nova Scotian and were not sentenced with an IRCA. Although both the IRCA and non-IRCA cohorts may have similar proportions in some categories such as breaches (item 4) and type of sentences (item 6), other categories have disparate proportions. These disparities may impact the findings and will be discussed below.

**Table 5: Descriptive characteristics of the sample**

| | | | IRCA | | No IRCA | |
|---|---|---|---|---|---|---|
| **Characteristics** | | | **Frequency (n)** | **Percent (%)** | **Frequency (n)** | **Percent (%)** |
| **1.** | **Province** | Ontario | 20 | 59% | 55 | 87% |
| | | Nova Scotia | 14 | 41% | 8 | 13% |
| **2.** | **Plea** | Guilty | 18 | 53% | 24 | 38% |
| | | Not Guilty | 16 | 57% | 39 | 62% |
| **3.** | **Criminal record** | No record | 32 | 60% | 29 | 69% |
| | | Criminal record | 21 | 40% | 13 | 31% |
| **4.** | **Breaches** | Breach | 9 | 29% | 21 | 33% |
| | | No breaches | 22 | 71% | 42 | 67% |
| **5.** | **Offence severity** | Major Offences | 4 | 12% | 17 | 27% |
| | | Serious Offences | 14 | 41% | 29 | 46% |
| | | Moderate Offences | 15 | 44% | 16 | 25% |
| | | Minor Offences | 1 | 3% | 1 | 2% |
| **6.** | **Sentence type** | Jail | 27 | 79% | 53 | 84% |
| | | Conditional Sentence Order | 5 | 15% | 8 | 13% |
| | | Non-Custodial Sentence | 2 | 6% | 2 | 3% |
| | | | **Frequency (n)** | **Mean, years (range)** | **Frequency (n)** | **Mean, years (range)** |
| **7.** | **Age** | Age at time of offence | 33 | 29.1, (18-54) | 58 | 26.6, (18-54) |

### i. There is no statistical significance or association between IRCAs and alternatives to incarceration

To determine whether there is a relationship between IRCAs and alternatives to incarceration, a Chi-Square Test of Independence was performed. This test is a non-parametric statistical test, which is used to assess the statistical significance of results with categorical data.[655] It determines the differences between the expected proportions ($f_e$) and the proportions of data derived from independent samples ($f_o$). The expected proportions ($f_e$) refer to the expected number in a bivariate table if the two variables were statistically independent.[656] It produces a *p* number, which indicates whether there is a statistical significance to the observed differences in the data.[657] In this case, the Chi-Square Test of Independence was used to examine the relationship between the use of IRCAs and sentencing outcomes. Given that Chi-Square tests are also sensitive to sample size, the frequency of CSOs and non-custodial sentences (e.g. suspended sentence, fine, etc.)("NCS") were grouped together as one category (see Table 6). In this case, there was no significant relationship between the two variables: the use of IRCAs and the sentence outcome, $X^2(1, N=97) = [0.34]$, p = 0.56. Given that the *P* value is not equal or less than the set threshold (α= 0.05)[658], there is no detectable association between the use of IRCAs and sentencing outcomes. When glancing at Table 5, item 6, similar proportions between both cohorts are observable: for instance, roughly 80% of individuals sentenced with and

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[655] Barth et al., *supra* note 506 at 219.
[656] Chava Frankfort-Nachmias & Anna Leon-Guerrero, *Social Statistics for a Diverse Society (Thousand Oaks, California:* Pine Forge Press, 2002) at 508 ["Frankfort-Nachmias & Leon-Guerrero"].
[657] Barth et al., *supra* note 506 at 219.
[658] As with the remainder of the tests employed in this section, the alpha ("α") represents the significance level, or threshold point, below which the *P* value must fall to reject the null hypothesis. Generally, the alpha is set at α= 0.05. (J. H McDonald, Handbook of Biological Statistics, (2014) online at:< http://www.biostathandbook.com/power.html> at para 5).

without an IRCA received a jail sentence whereas 13-15% received a conditional sentence order. Therefore, the Chi-Square result aligns with this observation.

**Table 6. Chi-Square test of Independence**

The association between IRCAs and sentencing outcomes

| | | Sentencing outcomes | | | | | |
|---|---|---|---|---|---|---|---|
| | | **Jail** | **CSO and NCS**[a] | Total | *Df*[b] | *p* | *Cramer's V* |
| **No IRCA** | $f_o$ | 53 | 10 | 63 | | | |
| | $f_e$ | 52.0 | 11.0 | 63.0 | | | |
| **IRCA** | $f_o$ | 27 | 7 | 34 | | | |
| | $f_e$ | 28.0 | 6.0 | 34.0 | | | |
| Total | $f_o$ | 80 | 17 | 97 | 1 | .560 | 0.59 |
| | $f_e$ | 80.0 | 17.0 | 97.0 | | | |

[a] NCS refers to non-custodial sentences such as a suspended sentence, fine, etc.
[b] DF refers to degrees of freedom.

resulted in a longer stay in custody. However, it should be noted there was a higher proportion of individuals sentenced with an IRCA that received a non-custodial sentence (see Table 5, item 6). Table 7 reports the mean length of incarceration in days per offence severity. For instance, individuals sentenced for a serious offence with an IRCA had a mean stay of 2185.45 days in custody in comparison with 1534.88 days for those who were sentenced without an IRCA. Yet, those differences may not be statistically significant as demonstrated in Table 7.I performed a Mann Whitney U test, which is a non-parametric statistical test used to determine whether the difference between these two cohorts was statistically significant.[659] The Mann Whitney U Test is typically used to determine "the number of times a score of the sample is ranked higher than a score from the other sample".[660] In this case, the test was used to compare the means of days spent in custody

[659] In this case, the number of days in custody were not normally distributed (i.e. like a bell curve), which calls for the use of a non-parametric test.
[660] Duncan & Cramer, *supra* note 520 at 333.

between both cohorts for two types of offence severity: serious, and moderate. In all three cases, the $p$ values are superior to 0.05. Thus, none of the differences are statistically significant (see Table 7). The effect size – an objective and standardized measure to detect the strength of a difference – was also calculated for all three categories. When assessing the effect of a correlation, there are three thresholds: 0.1 for a weak effect; 0.3 for a small to medium effect and 0.5 for a large effect.[661] In this case, all categories had an effect size below 0.3 and, therefore, had a small to medium effect. [662] Major offences were omitted from Table 7 as there were only four sentencing decisions involving an IRCA. It is unclear why there were fewer IRCAs obtained and tendered for individuals convicted of major offences, particularly given that such offences (e.g. armed robbery, attempted murder, etc.) typically attract significant penalties.

**Table 7. Mean number of days sentenced to incarceration per offence severity**

| | **IRCA** | | **No IRCA** | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Offence severity** | **Mean (in days)** | **Frequency (n)** | **Mean (in days)** | **Frequency (n)** | $U^a$ | $Z^b$ | $p^c$ | $r^d$ | ***Significant?*** |
| Serious Offences | 2185.45 | 12 | 1534.88 | 23 | 188 | -1.74 | 0.082 | 0.28 | No |
| Moderate Offences | 1280.80 | 10 | 1199.12 | 13 | 72 | -0.4 | 0.069 | 0.08 | No |

[a]= Mann Whitney U test score; [b] = $z$-score; [c]= $p$ value; [d]= $r$ refers to the effect size, which is calculated as $r = \frac{z}{\sqrt{N}}$.

Given the disparate proportion between cases from Nova Scotia and Ontario, I attempted to perform a Mann Whitney Test controlling for the province and offence

[661] Jacob Cohen, *Statistical Power Analysis for the Behavioral Sciences*, 2nd ed (Hillsdale, New Jersey: L. Erlbaum Associates, 1988) at 79-81; Andy Field, *Discovering Statistics Using SPSS*, 3rd ed (London, UK: SAGE, 2009) at 82 ["Field"].
[662] *Ibid.*

severity. The disparity between the number of provinces in my sample may be confounding as there may be regional differences in sentencing ranges and trends. Table 8 illustrates the few and substantially shorter sentences imposed in Nova Scotia – there are more outliers, which risk skewing the results. In *R v Lacasse*, the Supreme Court noted that "local characteristics in a given region may explain certain differences in the sentences imposed on offenders by the courts".[663] For instance, Parkes et al.'s work on parole ineligibility periods revealed that the Atlantic region "stood out as having longer parole ineligibility periods than any other region".[664] Their average parole ineligibility period was 14.3 years.[665] Strikingly, 36.1% received an ineligibility period of more than 15 years.[666] In contrast, the parole ineligibility period is far shorter in Ontario: only 9.8% of parole ineligibility periods were longer than 15 years.[667]

**Table 8: Frequency and mean length of incarceration based on province, IRCA use and offence severity**

| | No IRCA | | | | IRCA | | | |
|---|---|---|---|---|---|---|---|---|
| | Ontario | | Nova Scotia | | Ontario | | Nova Scotia | |
| **Offence severity** | **Mean length (days)** | **Cases (n)** | **Mean length (days)** | **Cases (n)** | **Mean length (days)** | **Cases (n)** | **Mean length (days)** | **Cases (days)** |
| Major Offences | 1863.18 | 12 | 498.4 | 5 | 4746.5 | 2 | 2875.2 | 2 |
| Serious Offences | 1600.56 | 22 | 90 | 1 | 2816.17 | 9 | 2185.45 | 4 |
| Moderate Offences | 1228.04 | 12 | 852 | 1 | 1203.64 | 8 | 1280.8 | 5 |
| Minor Offences | N/A | 0 | N/A | 0 | N/A | 0 | 90 | 1 |

[663] *R v Parranto, supra* note 178 at para 131 (The Supreme Court clarified that "the use of sentencing ranges or starting points should also be generally consistent in this country.")
[664] Debra Parkes, Jane Sprott & Isabel Grant, "The Evolution of Life Sentences for Second-Degree Murder: Parole Ineligibility and Time Spent in Prison" (2022) 100:1 Can Bar Rev 67 at 21.
[665] *Ibid.*
[666] *Ibid.*
[667] *Ibid.*

Due to limited sample size, the Mann Whitney U test focused on serious and moderate offences only. As there was a high number of firearm offences in Ontario, the test was conducted on these offences as well. There was no statistical significance detected for moderate or firearm offences. However, the test revealed a significant result for serious offences, suggesting an association between serious offences and the use of IRCAs in sentencing in Ontario. Although the p-value ($p>0.05$) identified a statistical significance between these variables, it does not necessarily mean that its effect is significant.[668] In this case, the effect size ($r = 0.48$) suggests a small to medium effect (although it is on the cusp of reaching 0.5 and representing a major effect). [669]

However, this result must be viewed within its limitations: this sample contains thirty sentencing decisions that were rated as "serious" offences per the CSC's Modified Severity Scale yet contains several different criminal charges ranging from firearm offences to manslaughter to drug trafficking offences.[670] As well, each case contains several confounding variables, some of which may aggravate the sentence imposed and skew the results.

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[668] Field, *supra* note 658 at 75.
[669] *Ibid.*, at 79.
[670] The Modified Severity Scale and the breakdown of specific offences in this sample organized by severity are included in Appendix B.

**Table 9. Mean number of days sentenced to incarceration per offence severity in Ontario**

| | No IRCA | | IRCA | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Offence severity** | **Mean (in days)** | **Frequency (n)** | **Mean (in days)** | **Frequency (n)** | ***U*[a]** | ***Z*[b]** | ***p*[c]** | ***r*[d]** | ***Significant?*** |
| Serious Offences | 1546.84 | 23 | 2816.17 | 7 | 134.5 | 2.65 | 0.006 | 0.48 | yes |
| Moderate Offences | 1152.77 | 15 | 1280.80 | 10 | 86.5 | 0.64 | 0.52 | 0.13 | No |
| Firearm offences only | 1791.79 | 12 | 1235.81 | 8 | 26 | -1.70 | 0.098 | -0.3 | No |

[a]= Mann Whitney U test score; [b] = $z$-score; [c]= $p$ value; [d]= $r$ refers to the effect size, which is calculated as $r = \frac{z}{\sqrt{N}}$.

### iii. Limitations

These findings must be interpreted with some key limitations in mind. Overall, these findings are influenced by the presence of confounding variables, which may distort the results. Given the limited sample size, it was not possible to control for all types of confounding variables which may have an impact on sentencing outcomes. Similarly, the Chi-Square test in this case did not account for age, offence severity, and the presence of mitigating and aggravating factors. While Chi-Square tests may be helpful in identifying a connection or a relationship between variables, they cannot reveal the nature and strength of the relationship.[671] Similarly, the Mann-Whitney U test did not account for confounding variables other than offence severity. While the results arising from content analysis may be positive, these preliminary quantitative findings suggest that the relationship between IRCAs and sentencing outcomes may not be statistically significant. These findings resemble those found in empirical research into the impact of *Gladue* reports on sentencing,

[671] Frankfort-Nachmias & Leon-Guerrero, *supra* note 605 at 217.

which also suggest that *Gladue* reports do not reduce the overreliance on incarceration.[672] Nevertheless, the findings from this research represent a starting point for subsequent research into the impact of IRCAs in sentencing.

### 7.4 Conclusion

This chapter reported and discussed the results from this mixed-methods study. Employing a content analysis approach revealed that sentencing judges welcome the information and assistance provided by IRCAs. It appears that IRCAs also promote the reliance on rehabilitation as a sentencing objective and influences the types of conditions ordered as part of a probation or conditional sentence order. At first blush, these results appear promising. Yet, these results must be approached cautiously. First, the sample is limited in size and generalizations cannot be inferred. Second, the findings that sentencing judges appreciate IRCAs and rely on them to some degree in crafting a fit sentence does not necessarily mean that they lead to different sentencing outcomes. The contents of the sentencing decisions, including the support of IRCAs and the consideration of systemic racism in sentencing, may be hollow or performative. Therefore, a quantitative approach provides a different lens of analysis. At this juncture, the small number of sentencing decisions involving IRCAs limits the types of statistical tests that can be employed. In this study, the preliminary results demonstrate that IRCAs do not have a measurable impact on reducing the use and the length of incarceration. In the next chapter, future directions for both legal empirical research and the criminal justice system will be canvassed.

[672] See Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' "Empty Promises"" (2002), 65 Sask L Rev 3 at 6; David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 87.

## CHAPTER 8: FUTURE DIRECTIONS

The preliminary findings of the mixed-methods study in this thesis support that IRCAs have some impact on the sentences imposed (i.e., the reports are associated with an increase in culturally relevant programming as part of a court orders) although they do not reduce the length of custodial sentences. Despite their recent endorsement by Nova Scotia and Ontario's Courts of Appeal, there is much more work ahead. While both appellate decisions focused on how IRCAs and the impact of systemic racism may be used by sentencing judges, who play an important role in addressing systemic anti-Black racism in the criminal justice system, these considerations are not limited to the judiciary. This chapter recommends future directions for three stakeholders in the criminal justice system. First, defence counsel should apply the principles from the IRCA jurisprudence beyond sentencing. Second, Crown attorneys must consider the impact of systemic racism in the execution of their duties at all stages of the criminal justice process. Finally, academia must continue to interrogate and critically examine the use of IRCAs and the impact of systemic racism in sentencing through a multidisciplinary lens of analysis. These non-exhaustive and modest recommendations, taken together, will hopefully accrue into positive change.

### 8.1 Role of defence counsel: Raising the impact of systemic racism beyond sentencing

Defence counsel owe a duty of loyalty to their clients, which encompasses representing their client resolutely and raising fearlessly every issue.[673] As noted by Dugas, defence counsel also "play a pivotal role in helping courts take systemic and background

[673] *R v Neil*, 2002 SCC 70 at para 19; Federation of Law Societies of Canada, "Model Code of Professional Conduct" (2019), online: <https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf> at rule 5.1(1) – (9) ["Model Code of Professional Conduct"].

factors into account at sentencing".[674] In light of their duties, information regarding systemic racism and its impacts on their clients should not be limited to sentencing. These arguments can and should be actively raised in bail hearings and parole board hearings.

First, defence counsel should raise the impact of systemic racism in bail hearings. In 2019, Bill C-75 received royal assent and brought several amendments to the *Criminal Code*.[675] Among them, Bill C-75 amended Part XVI, which governs judicial interim release, to incorporate the principle of restraint. Section 493.1 of the *Code* mandates a peace officer, justice, or judge to consider releasing an accused at the earliest opportunity and on the least onerous conditions. Further, s 493.2 of the *Code* directs particular attention to be paid to the circumstances of an Indigenous accused and an accused "who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release". Given the disproportionate numbers of Black Canadians and African Nova Scotians in pretrial custody, s 493.2 of the *Code* must be raised on every occasion as should the impact of systemic racism

As noted by Allen J., "Black accused persons should not be deprived of the court's attention to the systemic factors that might have brought them before the court because they have exercised their right to have their pre-trial custody reviewed at an early stage."[676] In Mr. L.W.B's case, Allen J. explained that despite the paucity of information about his life, she was satisfied that he is a member of a "population that is being adversely affected by over-policing and discriminatory biases and practices within the system".[677]

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[674] Dugas, *supra* note 4 at 157.
[675] 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, SC 2019, c. 25*
[676] *R v LWB*, 2021 ONSC 6152 at para 49.
[677] *Ibid.,* at para 48.

While judicial notice of systemic anti-Black racism and discrimination should inform the weight given to certain factors at a bail hearing, counsel should also draw the Court's attention to the additional harms of time spent in custody. Given s 493.2 of the *Code*, evidence of systemic anti-Black racism in the correctional system is relevant to the determination of the appropriate form of release.

Second, lawyers who appear before parole board hearings should raise systemic racism and the information contained in IRCAs. Although parole is a statutory privilege, it engages an offender's security and liberty rights.[678] Therefore, parole hearings should be conducted diligently.

The parole system involves a process that is independent of and distinct from the sentencing process.[679] While a period of parole ineligibility forms part of the punishment meted out by the sentencing judge, there is no guarantee that an individual will receive parole once their parole ineligibility period expires.[680] Given that public safety is a paramount concern in determining release, the individual seeking parole must demonstrate that they are no longer a risk to society and that their release will contribute to the protection of society by facilitating their reintegration into society. [681]

When assessing whether releasing someone from custody is appropriate, the Parole Board must turn their minds to all relevant aspects of the case, including criminal, social and conditional release history. The Parole Board of Canada's "Decision-Making Policy Manual for Board Members" directs Parole Board Members to assess:

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[678] *Ibid.,* at paras 41, 58.
[679] *R v Bissonnette*, 2022 SCC 23 at para 37.
[680] *Ibid.,* at para 58.
[681] *Corrections and Conditional Release Act*, SC 1992, c 20, s 102(a)-(b). *R v Bissonnette, supra* note 675 at 42.

> … any systemic or background factors that may have contributed to the offender's involvement in the criminal justice system, such as the effects of substance abuse, systemic discrimination, racism, family or community breakdown, unemployment, poverty, a lack of education and employment opportunities, dislocation from their community, community fragmentation, dysfunctional adoption and foster care, and residential school experience […].[682]

In assessing social context evidence, the Parole Board may refer to the record of the sentencing hearing including exhibits such as the IRCA and/or pre-sentence report.[683] Just as in the case of sentencing and bail hearings, defence counsel should continue to raise the impact of systemic anti-Black racism on their clients in the parole context. Arguments regarding systemic racism and social context evidence should inform not only the Parole Board's risk assessment but the type of release and conditions that may be imposed. Section 133(3) of the *Corrections and Conditional Release Act* provides that the Parole Board may impose conditions on the parole, statutory release, or unescorted temporary absence of an individual "that it considers reasonable and necessary in order to protect society and to facilitate the offender's successful reintegration into society".[684]

### 8.2 Role of the Crown attorney: prosecutorial discretion necessitates considerations of systemic anti-Black racism

A Crown attorney's duty is not to seek a conviction. Rather, their duty is to "see that justice is done through a fair trial on the merits".[685] Given their unique role as "Ministers of Justice", Crown attorneys must act as "fearless advocates" for the public

[682] Parole Board of Canada, "Decision-Making Policy Manual for Board Members", 2nd ed (Ottawa, Parole Board of Canada: 20 October 2021), online at: <https://www.canada.ca/en/parole-board/corporate/publications-and-forms/decision-making-policy-manual-for-board-members.html>
[683] *R v Junkert*, 2010 ONCA 549 at para 61.
[684] SC 1992, c 20,
[685] Model Code of Professional Conduct, *supra* note 669 at Rule 5.1-3.

interest. [686] While defence counsel should raise the impact of systemic racism and obtain IRCAs where possible, Crown attorneys must also consider systemic racism and its impact in the execution of their duties at all stages of a criminal case. As noted by Roger Shallow, Crown attorneys have a duty "to ensure that [they] do not compound or perpetuate systemic racism in the exercise of [their] discretion".[687] To do so, there are institutional and individual actions that should be taken.

### 8.2.1 Crown attorneys must reflect the public and be culturally competent

On an institutional level, prosecution offices should be staffed to reflect the diversity of the public that it serves.[688] Shallow remarked that it is "a trite observation that the need for increased presence of Black, Indigenous, and other racialized lawyers working in spaces where we have traditionally been embarrassingly under-represented is critical to a better informed, functioning and reputable criminal justice system".[689] In 2020, the Nova Scotia Public Prosecution Service announced that they would exclusively offer an articling position to a graduate of the Indigenous Black and Mi'kmaq Initiative at the Schulich School of Law at Dalhousie University.[690]

Additionally, considerations of systemic racism in prosecutorial discretion ought to be mandated at every step of the criminal justice process, not just sentencing. Put

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[686] *Boucher v The Queen*, [1955] SCR 16; *R v Regan*, 2002 SCC 12 at 66; Lisa Joyal, "Canada's Crown Counsel: Ministers of Justice and Public Advocates under Boucher and the Charter", (March 2022) 12 Crown's Newsletter 12 online: < https://canlii.ca/t/tvh8 > at 12.

[687] Roger Shallow, "Corrective Lenses for 20/20 Reflections on Systemic Racism and Racial Competence in Criminal Law Practice", (March 2021) 11 Crown's Newsletter 3, online: < https://canlii.ca/t/t2r4> at 6.

[688] *Ibid.,* at 4; Wilson Head & Clairmont *supra* note 142 at 57. Recommendation #14 called for a more representation with increasing the appointment of Black judges and Crown attorneys. See also *Royal Commission on the Donald Marshall, Jr. Prosecution*, *Digest of Findings and Recommendations, supra* note 119 at 10.

[689] *Ibid;* see also Wilson Head & Clairmont, *supra* note 142 at 54,

[690] Government of Nova Scotia, "Fair Treatment of African Nova Scotians" (15 June 2021), online at: <https://novascotia.ca/news/release/?id=20200615007> ["Fair Treatment of African Nova Scotians"].

differently, internal policies which bind Crown attorneys' conduct, often referred to as "Crown manuals", should be revisited and updated to reflect their commitment to combatting racism and direct Crown attorneys to integrate considerations of systemic racism in their prosecutorial discretion.[691] Some Crown manuals already integrate systemic racism. For instance, the Nova Scotia Public Prosecution Service mentions systemic racism in its Crown manual and is currently working on a comprehensive policy dedicated to "the fair treatment of African Nova Scotians in criminal prosecutions, which will be patterned after our policy Fair Treatment of Indigenous People in Criminal Prosecutions".[692] Meanwhile, the manual for federal prosecutors, the *PPSC Deskbook*, is silent on systemic anti-Black racism. However, directives are forthcoming.[693] The *Crown Prosecution Manual* in Ontario uses more tempered and broad language: "the Prosecutor must remain objective and be aware of the negative impact of stereotypes. In particular, stereotypes relating to race or ethnic origin, colour, religion, sex, sexual orientation, gender identity,

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[691] The following lead to publicly available Crown directives: Province of British Columbia, "Crown Counsel Policy Manual", online at: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>; Province of Alberta, "Attorney General guidelines for the Crown Prosecution Service", online at: <https://open.alberta.ca/publications/attorney-general-guidelines-for-the-crown-prosecution-service - summary>; Province of Manitoba, "Prosecution Policies", online at: <https://www.gov.mb.ca/justice/crown/prosecutions/policy.html>; Ontario, "Crown Prosecution Manual", online at : <https://www.ontario.ca/document/crown-prosecution-manual>; Gouvernement du Québec, « Directives et instructions du directeur des poursuites criminelles et pénales » online at : <https://www.quebec.ca/gouvernement/ministeres-et-organismes/directeur-poursuites-criminelles-penales/directives-instructions>.; Government of New Brunswick, Office of the Attorney General, "Public Prosecution Operational Manual", online at: < https://www2.gnb.ca/content/gnb/en/departments/public-safety/attorney-general/content/operational_manual.html>; Prince Edward Island, "Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island", online: <C:\Documents and Settings\bmaclean\Desktop\Conduct of Criminal Prosecutions in PEI-Reformatted.wpd (princeedwardisland.ca)>; Office of the Director of Public Prosecutions, "Guide Book of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador", (October 2007) online: <https://www.gov.nl.ca/jps/files/prosecutions-pp-guide-book.pdf>.

[692] Fair Treatment of African Nova Scotians, *supra* note 686 at para 10.

[693] Canada, Public Prosecution Service of Canada, "Departmental Plan 2022-23: Supplementary Information Tables" (2022) online at : <https://www.ppsc-sppc.gc.ca/eng/pub/dp-pm/2022_2023/table02-tableau02.html>. (In 2022, the PPSC's Departmental Plan announced that its National Prosecution Policy Committee will be reviewing Deskbook chapters "with an intersectional lens to ensure it contains guidance directing that prosecution decisions are made in a fair and equitable manner").

gender expression, political association or beliefs of the accused or any person involved in the case must be rejected."[694] Similarly, Crown attorneys in British Columbia are instructed to acknowledge and take reasonable steps to address "systemic biases, prejudices, and stereotyped assumptions" in their duty to protect against wrongful convictions.[695]

However, dismantling systemic racism requires an understanding of its permutations. Reciting statistics of disparities in the criminal justice system is insufficient; Crown attorneys – as other criminal justice participants – must be conscious to the "subtle, powerful, and malignant influences of racial bias, and competent to identify and effectively address it in all aspects" of prosecutions.[696] As noted by Shallow, racism often appears in criminal cases and "Crowns need to be alert to the subtle ways in which a case overlaps or intersects with racism. It follows that failure to analyze and approach files from a race critical, intersectional lens can cause us to miss the boat on important issues."[697] Crown attorneys require meaningful and in-depth cultural competency training to understand how bias influences values and decision-making processes.[698] In Nova Scotia, the *Royal Commission on the Donald Marshall, Jr. Prosecution* recommended that the Attorney General establish continuing education programs for Crown attorneys to familiarize themselves with systemic discrimination and "suggest ways in which they can reduce its impact".[699]

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[694]Ontario, "Crown Prosecution Manual: D.3: Charge screening", online at : <https://www.ontario.ca/document/crown-prosecution-manual/d-3-charge-screening>
[695] Province of British Columbia, "Guiding principles", online at: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/gui-1.pdf> at 7.
[696] *Ibid.,* at 4.
[697] *Ibid.*
[698] *Ibid.*
[699]*Royal Commission on the Donald Marshall, supra* note 119 at 10.

#### 8.2.2 Systemic Racism must inform prosecutorial discretion at every stage

As for individual actions, each individual Crown attorney must remain mindful of systemic racism at all stages of the criminal process. Rather than undertake an exhaustive approach, this section focuses on how systemic racism should inform both the decision to prosecute and the sentencing process.

**i. Charge screening and the decision to prosecute**

First, charge screening and the decision to prosecute should be informed by the realities of systemic racism. In Nova Scotia's Crown Attorney Manual, Crown attorneys are directed to consider systemic racism in their decision to prosecute.[700] When assessing for a realistic prospect of conviction ("RPC"), the Crown must be satisfied that there is sufficient evidence and public interest. Although Crown Manuals typically provide guidance on what is understood as sufficient evidence and the public interest, Nova Scotia's Crown Attorney Manual goes farther than the *PPSC Deskbook* or the Crown Prosecution Manual in Ontario. When assessing the public interest, the Crown Attorney Manual specifically directs Crown Attorneys to consider the "impact of direct or systemic racism and discrimination experienced by any victim or accused involved in the alleged offence, in accordance with the policies on Fair Treatment of Indigenous Peoples in Criminal Prosecutions and Fair Treatment of African Nova Scotians in Criminal Prosecutions".[701] Are the charges the product of racial profiling, or pretext or ruse stop (also dubbed 'driving while black')?[702] Although the answer may not always be clear, a

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[700] Government of Nova Scotia, "Decision to Prosecute", online at <https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/DecisionToProsecute.pdf>.
[701] *Ibid.,* at 1.
[702] See *Johnson v Halifax Regional Police Service*, 2003 CanLII 89397 (NS HRC)

critical examination is nevertheless necessary. The consideration of public interest encompasses *Charter* implications. For instance, Faisal Mirza argued that Crown attorneys should be mindful of over-policing of Black communities: "Prosecutorial filtration of charges premised on the acknowledgement of the prevalence of racial profiling would advance the goal of holding racist police officers accountable for their improper conduct".[703] When assessing the merits of a case, the Crown should not lose sight of power and racial dynamics at play. For instance, the determination of whether a detention occurred and its lawfulness relies on a contextual analysis, including "historic and social context of race relations between the police and the various racial groups and individuals in our society."[704] As cautioned by the Supreme Court in *R v Le*, considerations of race in analyzing detention differs from racial profiling. Rather;

> the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain.[705]

One of the outcomes from a critical application of the decision to prosecute test may reduce the mass incarceration of Black individuals.[706] While these considerations are important at the charge screening stage, a Crown's RPC analysis is an ongoing duty – it continues throughout the criminal justice process. Therefore, it is an ongoing obligation to consider the impact of systemic racism at all stages of the process, from initial file review to trial to sentencing and beyond.

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[703] Mirza, *supra* note 141 at 512.
[704] *R v Le*, supra note 130 at paras 74-75.
[705] *Ibid.*
[706] Mirza, *supra* note 141 at 512.

### ii. Sentencing

**Mandatory Minimum Penalty (MMP)**

Although many mandatory minimum penalties have been recently struck down as unconstitutional, some remain in force. In some of those cases, Crown attorneys have some discretion to pursue an MMP. For instance, the *PPSC Deskbook* provides that, where Crown counsel considers that the imposition of an MMP would likely lead to an unduly harsh punishment in the circumstances, Crown counsel may exercise discretion not to rely on the notice of intention to seek the MMP. However, this discretion may only be exercised with prior consent of the Chief Federal Prosecutor or their delegate. The *Deskbook* does not define "unduly harsh", though it cites an example in which Crown counsel may not seek the imposition of an MMP where an individual has "special needs, such as a medical condition that would make jail particularly onerous." [707]

Given the reality of mass incarceration, considerations of systemic racism should also inform a Crown attorney's decision to pursue an MMP. Indeed, Faisal Mirza argued that there is a "critical nexus between racist policing, the exercise of prosecutorial discretion, and the disproportionate imposition of mandatory prison sentences on Black-Canadians."[708]. Mirza also remarked that the presence of MMPs creates an additional pressure on individuals to accept plea bargains, especially individuals who have been unfairly targeted by the police for criminal behaviour."[709] The presence of a potentially

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[707] Canada, Public Prosecution Service of Canada, "The Federal Prosecution Service Deskbook" (19 July 2017) at Part VI: Chapter 6.2 online: <https://ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p6/ch02.html >.
[708] Mirza, *supra* note 133 at 492.
[709] *Ibid.,* at 505.

lengthy mandatory period of incarceration may lead the charged individual to feel pressure to plead guilty. [710]

However, the Supreme Court in *R v Anderson,* 2014 SCC 41 held that Crown attorneys are not constitutionally obligated to consider Indigenous status when seeking an MMP. Nevertheless, Crown attorneys in Nova Scotia are mandated by their internal policies to do so.[711] Despite the fact that there is no constitutional obligation to consider race and culture in the context of MMPs, the realities of overpolicing and mass incarceration of Black and African Nova Scotians ought to factor into a Crown attorney's decision-making process in formulating a sentencing position.

**Unrepresented accused**

Not all individuals charged or convicted with criminal offence(s) have the benefit of a defence lawyer's assistance. In cases involving unrepresented individuals, a Crown attorney's "fair and impartial exercise of [prosecutorial] discretion takes on an elevated importance".[712] Consequently, Crown Attorneys must be mindful of raising systemic racism or background factors in cases involving unrepresented individuals.

In the context of unrepresented accused who are Indigenous, sentencing judges are mandated to try to acquire information on the circumstances of the person being sentenced as an Indigenous person.[713] Sometimes, sentencing judges do not make those inquiries.[714]

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[710] *Ibid.*
[711] Government of Nova Scotia, "Fair Treatment of Indigenous Peoples" (2 October 2018), online at: <https://novascotia.ca/pps/publications/ca_manual/AdministrativePolicies/Fair-Treatment-of-Indigenous-Peoples.pdf > at 11.
[712] Craig A. Brannagan, "Legal-Ethical Responsibilities of Crown Counsel and Their Heightened Role in the Criminal Prosecution of Unrepresented Accused" (December 2019) 10 Crown's Newsletter 3 online: <https://canlii.ca/t/sq0f> at 6.
[713] *R v Gladue, supra* note 9 at para 84.
[714] See e.g, *R v Kakekagamick* (2006), 81 OR (3d) 664; *R v Oakoak*, 2011 NUCA 4.

Therefore, Crown attorneys are arguably mandated to raise their status before the sentencing court. For instance, the Court of Appeal for Ontario in *R v Kakekagamick* noted that Crown attorneys and defence counsel are obligated to provide information regarding the Indigenous status of the person being sentenced to ensure that it is considered on sentencing per s 718.2(e) of the *Code*.[715] With regards to Black or African Nova Scotian individuals being sentenced, the Court of Appeal in *R v Anderson* noted that, as with Indigenous offenders, a sentencing judge cannot dismiss information regarding systemic racism, 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".[716] Although Crown attorneys must be vigilant not to overstep their bounds by embodying a quasi-"duty counsel" role, their duty of fairness arguably requires them to raise systemic racism with the court on sentencing. Additionally, Crown attorneys should canvass with the Court to order an IRCA for an unrepresented individual.[717]

### 8.3 Legal academics should conduct more IRCA-related research

As noted in previous chapters, this study encountered some limitations and challenges on both methodological levels. Consequently, this section focuses on laying future foundations for both qualitative and, most particularly, quantitative legal empirical research.

[715] *R v Kakekagamick* (2006), 81 OR (3d) 664 at paras 52-53 (Mr. Kakegamick was sentenced without a *Gladue* report. Yet, the sentencing judge was aware of his indigenous status by way of a pre-sentence report. The Court of Appeal characterized the pre-sentence as deficient as it "failed to address adequately aboriginal circumstances and alternative approaches".[715] Further, the Court found that neither the trial judge nor counsel sought more information or considered his indigenous status in accordance with section 718.2(e) of the *Code*, thereby committing an error of law. In the Court's view, defence counsel, "and perhaps especially the Crown, could and should have raised the issue" at para 53); *R v Kanate*, 2011 ONCJ 770 at para 24.

[716] *R v Anderson,* 2021 NSCA at para 118.

[717] Government of Nova Scotia, "Fair Treatment of African Nova Scotians" (15 June 2021), online at: <https://novascotia.ca/news/release/?id=20200615007> at 9.

### i. Qualitative research should focus on lived experiences

First, there are future opportunities for qualitative research. For instance, legal researchers should investigate the lived experiences of those who were sentenced with an IRCA and explore how the process of preparing and tendering an IRCA for sentencing purposes impacted individuals. There are some anecdotes, however, suggesting that the preparation of IRCAs have a positive impact on individuals. For instance, Messrs. Middleton and Tynes shared with the Canadian Press their involvement with the criminal justice system and how their IRCAs helped them.[718] For Mr. Middleton, his IRCA helped forge a new path for him and helped him to recover from his troubled past. Academics should seek out these narratives to capture the lived experiences of those navigating the criminal justice system. Narrative analyses and case studies of these experiences may provide an opportunity to re-imagine how the criminal justice system and the sentencing process can be shaped to promote restorative justice, rehabilitation and increase all stakeholder's confidence (including those who are charged and accused) in the administration of justice – not just the public-at-large. Narrative analyses, case studies and other types of qualitative research should not be limited to men who have been sentenced. Future research should also explore judicial responses and the lived experiences from an intersectional feminist lens. Finally, judicial attitudes and decision-making could be further researched by way of experimental research. Although such experimental studies are time-consuming, costly and require the cooperation of judges, mock sentencing simulations could be performed to determine if and how IRCAs prompt judges to reflect on their own

[718] Michael Tutton, "Black history, both personal and communal, now a factor in Nova Scotia sentencing" SaskToday (3 February 2022), online : < https://www.sasktoday.ca/national-news/black-history-both-personal-and-communal-now-a-factor-in-nova-scotia-sentencing-5023160> ["Tutton"].

positionality and their biases.[719] For instance, do these reflections translate into any measurable outcomes in sentencing?

### ii. Quantitative research should focus on IRCA related trends

Second, future research in quantitative legal empirical research should continue to investigate disparities in sentencing once there is a critical mass of available data.[720] More specifically, a case control matching study design should be pursued. This study design would resolve some of the methodological obstacles confronted in this thesis while ensuring higher quality and reliable results.

Like the study design applied in this thesis, case control matching and retrospective cohort studies are observational studies, which measure outcomes between cohorts. Observational study designs typically involves two cohorts: one group of cases involving the exposure or outcome of interest (such as being sentenced with an IRCA) and the other group is a comparison or control group that share similar characteristics as the first group without having any exposure to the intervention of interest. They often investigate the association between a causal agent of interest (often suspected exposures or medical interventions) and outcomes of interest.[721] The association between the causal agent and outcomes can be measured by relative risk and/or risk difference. Relative risk refers to the frequency of a particular outcome among those exposed and the frequency among the control group (i.e, A/A+B ÷ C/C+D). Several study designs rely on control groups, including case control matching and retrospective cohort studies. Although these study

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[719] Prentiss Cox, "Fractured Justice: An Experimental Study of Pretrial Judicial Decision-Making" (2020) 88:2 U Cin L Rev 365 at 372.
[720] Tutton, *supra* note 717, at para 6. Since 2018, only 147 IRCAs have been prepared in Nova Scotia.
[721] Barth et al., *supra* note 506 at 60-61.

designs are more common in health sciences, case control and cohort studies have been used in criminal legal contexts. For instance, Hoff et al. conducted a cohort study to determine whether jail diversion programs reduced the length of incarceration among participants with serious mental illness.[722]

Case control matching and retrospective cohort studies are more reliable study designs as they seek to control conditions and variables which may be confounding.[723] To do so, these study designs contemplate matching between both cohorts. Matching can be done on individual levels (e.g. pairing together individuals with similar characteristics), group distributions or even assigned randomly.[724] However, individual matching is the most desirable process.

In this case, a case control matching design can shed light on whether IRCAs (the "*causal agent*") translate into any measurable differences in sentencing. Once there is more available data, matching can ensure that the analysis accounts for the circumstances of the specific offence (rather than focusing on "offence severity" as was the case in this thesis) and the circumstances of the person before the court (i.e., type of plea, province, criminal antecedent, etc.) Controlling for similar characteristics, also known as matching, reduces the risk of confounding variables.[725] In other words, matching based on factors or characteristics believed to be relevant and may influence the main associate between "cause" and "effect". [726] After controlling for other confounding variables (criminal

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[722] Hoff et al., "The Effects of Jail Diversion Program on Incarceration: A Retrospective Cohort Study" (1999) 27:3 J Am Acad Psychiatry Law 377.
[723] Barth et al., *supra* note 506 at 61.
[724] Champion, *supra* note 449 at 69-71.
[725] De Graaf, Michiel et al., "Matching, an Appealing Method to Avoid Confounding?" (2011) Nephron Clin Practice 315-318.
[726] Barth et al., *supra* note 506 at 59.

record, type of plea, etc.), matching will ensure that the only difference that will become relevant between the two groups will be the presence of an IRCA at sentencing. Thus, differences in sentencing outcomes can likely be attributed to the IRCA.

Cohort studies are relatively strong in determining causal relationships.[727] However, there is still a risk of potential confounding given the range of relevant sentencing characteristics such as plea, age, criminal antecedents, etc. As well, it is unclear what weight is attributed to each of these confounding variables in sentencing. Similarly, cohort studies which contemplate individual matching are difficult to implement given that it requires a large population to find adequate matches.[728] Put differently, the required sample size to match individuals increases with the number of variables that need to be controlled.

### 8.4 Conclusion

In sum, the work relating to IRCAs and sentencing is not over. In fact, there is much more to be done by all stakeholders in the criminal justice system, including from police, lawyers, judges, social workers, and academics. This Chapter focused on future directions for Crown attorneys, defence counsel and legal academics with respect to systemic racism and IRCAs in the criminal justice system.

[727] *Ibid.,* at 123.
[728] Champion, *supra* note 449 at 70.

## CHAPTER 9: CONCLUSION

This thesis focused on the emergence of IRCAs in sentencing, which is only one among many solutions to address the enduring presence of systemic anti-Black racism in the criminal justice system, including the mass incarceration of Black Canadians and African Nova Scotians. An increasing number of judges across Canada, though mostly concentrated in Ontario and Nova Scotia, are relying on IRCAs in sentencing. Although their scope of application differs, the Courts of Appeal in Ontario and Nova Scotia endorsed IRCAS in sentencing. They agree that IRCAs are helpful in achieving fit and proportional sentences as mandated by s. 718 of the *Code*. In doing so, IRCAs also identify rehabilitative or restorative options, thereby aiming to reduce reliance on incarceration. [729]

Consequently, this thesis undertook a mixed methods approach to investigate whether the emergence of IRCAs had any impact on the sentences imposed between 2015 and Spring 2022. to date. It contributes to the existing sentencing literature as its findings reveal that sentencing judges welcome IRCAs and rely on them in crafting sentences. For instance, IRCAs appear to influence the type of conditions included in cases where a conditional sentence order or a probation order is imposed. Nevertheless, IRCAs have not yet achieved one of their goals: reducing the reliance on incarceration. Statistical tests did not detect an association between the use of IRCAs and the length of incarceration. Therefore, an inference cannot be drawn that IRCAs are reducing the length of jail sentences. However, these statistical findings must be viewed in context: this study faced some challenges in obtaining institutional data from police services in Halifax and in

[729] *Ibid.,* at para 121.

Toronto. Therefore, this study had to rely on a limited sample of sentencing decisions, most of which were decided before there was any appellate guidance on IRCAs. The sample size limited the types of statistical tests conducted and constrains the types of inferences that can be drawn. Nonetheless, this thesis' findings are reminiscent of the emergence of *Gladue* reports. Two decades have passed since the recognition of *Gladue* reports and yet Indigenous individuals continue to be disproportionately incarcerated in provincial and federal institutions.

Despite its results and limitations, this study represents a starting point for future research once there is more available data. Given the recent emergence of IRCAs and appellate guidance in two provinces, there are many future directions for qualitative and quantitative research in this area. For instance, this thesis recommended qualitative case studies and case control matching.

No single recommendation, alone, is a panacea to erasing systemic racism, alleviating its enduring consequences, and undoing mass incarceration. Sentencing cannot dismantle centuries of systemic racism inside and outside the criminal justice system. The sentencing cases relied on in this thesis reflect the lives of young men who have been subject to systemic anti-Black racism in several, if not all, aspects of their lives. Systemic racism is manifest in education, health, housing, criminality, and other areas. These disparities must be addressed through multiple interventions at all stages of the criminal justice system and in all aspects of Canadian society.[730] With respect to the criminal justice system, most of the discussions regarding IRCAs focused on how sentencing judges may

[730] Dugas, *supra* note 4 at 153.

apply IRCAs in sentencing. Consequently, this thesis contemplated the role of criminal justice stakeholders other than sentencing judges, namely Crown attorneys and defence counsel. Crown attorneys, in addition to defence counsel, have a critical role to play vis-à-vis the application of IRCAs and addressing the effects of systemic anti-Black racism in areas beyond sentencing.

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## APPENDIX A

## <u>CODING MANUAL</u>

**Purpose:** This coding manual will set out the criteria to select the sample of case law as well as the pertinent information to record. The cases will be drawn and cross-referenced through searches of the following three case reporting services: CanLii, Westlaw and LexisNexis.

**Inclusion criteria for case law**

The sample of case law must adhere to the following criteria:

- The decision must originate from Nova Scotia or Ontario;
- The individual being sentenced must be identified as Black, African Canadian, Africadian, African-Nova Scotian or as an individual of African Descent.
- The decision must involve an Impact of Race and Culture Assessment ("IRCA"); CIA, CIAR, or Enhanced Pre-Sentence Report. Despite their different titles, these reports substantively address the same issues and can be referred to interchangeably.
- All offences may be considered.

### Protocol for coding case law

Once a case is selected for sampling, information falling within several categories should be recorded.

Basic information to record:

1. Case name
    - Include entire citation
2. Province
    - Record "Ontario" or "Nova Scotia"
3. Court level (Provincial, Superior Court or Court of Appeal)
4. Year
5. Plea
    - Record "Guilty" or "Not guilty"
6. Criminal record (if any)
    - Record "yes" if there is a criminal record (including a dated record). If there is a youth record and the sentencing judge relies on it, consider it as a "yes". If there is a youth record but judge disregards it, then "no". If no criminal record, then record "no".
7. Offence
8. Sentence imposed – Category
    - When recording the category of sentence imposed, the following categories must be used:
        i. Jail
        ii. Jail and probation

iii. Suspended sentence
iv. Fine and probation
v. Conditional Sentence Order
vi. Other

9. Sentence imposed in days
10. Defence position on sentence
    - If Defence counsel advances a range of sentence (i.e a sentence of two to four years), then record the average of the range proposed. Recording an average rather than a range is easier to track and measure.
11. Crown position on sentence
    - If Crown counsel advances a range of sentence (i.e a sentence of two to four years), then record the average of the range proposed.
12. Parole ineligibility (if applicable)
13. Allegations of breach of release order or parole
    - Mark "yes" or "no"
14. Age
    - Record in years

## Coding the content

In order to track the frequency of particular themes and patterns, each decision must be read in its entirety having regard to the following questions or themes. Afterwards, each decision must be coded as follows to answer the following questions:

**How does judge characterize IRCA?**

- AA "no reference"
- AB "superficial reference"
  - This contemplates capturing references that merely point out the presence of the IRCA without addressing how it was relied upon, whether it was helpful, etc.
- AC "reference and analysis"

**Does judge refer to the following?**

**How systemic racism contributes to over-representation**

- BA "no reference"
- BB "superficial reference"
  - This captures references that merely point out disproportionate representation or systemic racism without explaining its causes.
- BC "reference and analysis"

**If raised, does judge take judicial notice of systemic racism?**

- CA "Yes, explicitly takes judicial notice of systemic racism"
- CB "Systemic racism is implicitly recognized though judicial notice not explicitly made"
- CC "no"

- CD “need expert”
- CE “don’t need to take J.N”
- CF “no mention”

**If judge acknowledges systemic racism, where does this fit into sentence?**

- DA “mitigating factor”
- DB “no mention”
- DC “not a mitigating factor”
- DD “no mention or not mitigating factor but relevant to crafting conditions”
- DE “It is recognized as a mitigation factor but Court ‘mindful re: seriousness of the offence’”

**How does IRCA impact the sentence?**

- EA “No mention”
- EB “Some impact as it is a mitigating factor”
- EC “Some impact but unclear”
- ED “No evident impact”

**Charter breach**

- Yes – considered as mitigating in sentencing
- No – reference to a breach without considering it as mitigating in sentencing.
- N/A – no breaches mentioned in sentencing decision.

**MMP or CSO unavailable**

- Yes MMP
- No CSO available

**Does IRCA influence orders?**

- Y – Yes (whether or not the judge explicitly indicates its impact on orders)
- N – No
- ND – Not discussed
- YL – The sentence and the orders appear to be influenced by the IRCA

**Does sentencing judge require nexus between systemic racism and the offence?**

- Y – Yes
- N – No
- ND – Not discussed
- NR – There was reference to the nexus, unclear if it was a requirement
- NC – Reference to contextual approach

**Does the sentencing judge consider rehabilitation an important sentencing objective?**

- Y – Yes

- YP – Yes, it is a primary objective
- YS – Yes, but it is a secondary objective
- N – No
- ND – Not discussed
- SRR – Superficial reference to rehabilitation – no analysis on its application to the case

**How many paragraphs does the sentencing judge dedicate to the IRCA and systemic racism?**

- Include number of paragraphs
- Record the number of paragraphs addressing contents of IRCA
- For non-IRCA cases Number of paragraphs addressing systemic racism and how it relates to the case at hand-

**Does the sentencing judge refer to societal responsibility as playing a role in moral blameworthiness?**

- Yes, and follows the Court of Appeal's assertion in *R v Morris* that it does not play a role.[731]
- Yes, and considers societal responsibility as a factor to consider on sentencing.
- Not discussed.

**Which sentencing factors are identified as the primary or paramount objectives?**

- DD – Deterrence and Denunciation
- DR – Deterrence, Denunciation and Rehabilitation
- RR – Rehabilitation and Restraint

**N.B** While the *Criminal Code* sets out several more sentencing objectives, a cursory review of the sample revealed that none of the sentencing judges explicitly referenced other principles, such as incapacity, restorative justice or reparative aims as primary objectives. Thus, they were not included.

[731] *R v Morris*, 2021 ONCA 680 at paras 82-86.

## APPENDIX B

## EXCERPT FROM ANNEX D – MODIFIED SEVERITY SCALE[732]

**Extreme Offences**

- Murder or terrorism offences punishable by life

**Major Offences**

- Attempted murder
- Assault causing serious injury, risk of death, disfigurement, or mutilation
- Kidnapping, forcible detention, abduction and/or hostage taking
- Possession and/or detonation of explosives which are likely to cause death
- Armed robbery (with extreme violence, organized or notorious)
- Sexual assault offences

**Serious Offences**

- Armed robbery, attempted armed robbery, robbery with violence
- Trafficking, possession for the purpose of trafficking dangerous drugs
- Manslaughter
- Use of firearm during commission of an offence
- Escape with violence from any level of security, escape from escort
- Conspiracy to traffic or import a dangerous drug
- Trafficking in illegal firearms
- Assault (with or without weapon), wounding

**Moderate Offences**

- Possession of dangerous drugs
- Forgery, possession of instruments for forgery
- Breaking and entering, breaking out
- Non-violent sex offences (i.e., gross indecency, indecent assault)
- Escape without violence from minimum security or from escort
- Possession of stolen property over; Auto theft, conversion of auto
- Assault causing bodily harm (no serious injury)
- Parole or statutory release revocation, breach of probation (technical)
- Possession of a restricted or prohibited weapon
- Trafficking, conspiracy, possession for the purpose of trafficking (soft drugs)
- Fraud offences, false pretences
- Criminal negligence causing death/resulting in bodily harm, dangerous driving
- Robbery or theft
- Obstruction of justice and perjury, resist arrest, obstruct peace officer, etc.
- Possession of a weapon to commit an indictable offence, carry a concealed weapon
- Criminal harassment
- Conviction for a breach of a long-term supervision order (LTSO)

**Minor Offences**

- Possession of stolen property under
- Possession of soft drugs
- Public mischief, damage to property, causing a disturbance, willful damage
- Driving while impaired, driving with over 0.08, driving under suspension, , careless driving, etc.
- Unlawfully at large, failure to attend court, failure to comply with undertaking or recognizance, failure to appear
- Common assault
- Theft under
- Criminal negligence not resulting in bodily harm
- Possession of forged currency, passports, cheques
- Parole or statutory release revocation, breach of probation (technical)

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[732] Canada, Correctional Service of Canada, Commissioner's 705:7: Annex D – Modified CSC Offence Severity Scale (Ottawa, 2021) online: < https://www.csc-scc.gc.ca/acts-and-regulations/705-7-cd-eng.shtml#annexD>. See Appendix A for a reproduction of the Modified Offence Severity Scale

**Table 10. Frequency table of offences within each offence severity category**

| | Major Offences | | Serious Offences | | Moderate Offences | |
|---|---|---|---|---|---|---|
| | (n) | (%) | (n) | (%) | (n) | (%) |
| Firearm Related Offences | 2 | 10% | 3 | 7% | 21 | 68% |
| Manslaughter | 0 | 0% | 6 | 14% | 0 | 0% |
| Robbery | 1 | 5% | 3 | 7% | 2 | 6% |
| Sex Related Offences | 6 | 29% | 0 | 0% | 0 | 0% |
| Attempted murder | 3 | 14% | 0 | 0% | 0 | 0% |
| CDSA | 0 | 0% | 16 | 37% | 1 | 3% |
| CDSA and firearms | 0 | 0% | 12 | 28% | 0 | 0% |
| Assault | 9 | 43% | 3 | 7% | 0 | 0% |
| Fraud | 0 | 0% | 0 | 0% | 2 | 6% |
| Criminal Negligence | 0 | 0% | 0 | 0% | 3 | 10% |
| Impaired driving | 0 | 0% | 0 | 0% | 1 | 3% |
| Obstruct police officer | 0 | 0% | 0 | 0% | 1 | 3% |
| Total | 21 | 100% | 43 | 100% | 31 | 100% |

# APPENDIX C

## HISTOGRAMS

**Figure 2.** Histogram demonstrating the frequency of sentence lengths for jail sentences per offence severity

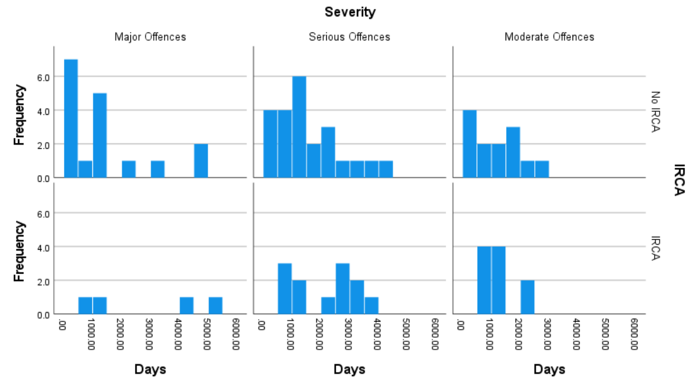


**Figure 3.** Histogram of age distribution per cohort (Non-IRCA vs. IRCA)

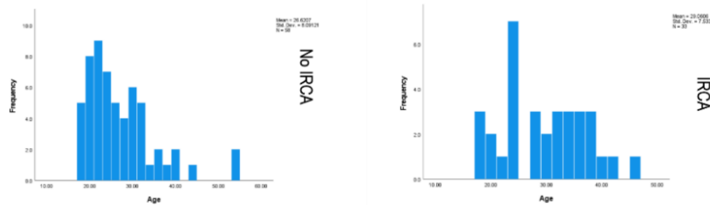


**Figure 4**. Histograms of Independent Samples – Mann Whitney U Test, accounting for both cases in Nova Scotia and Ontario

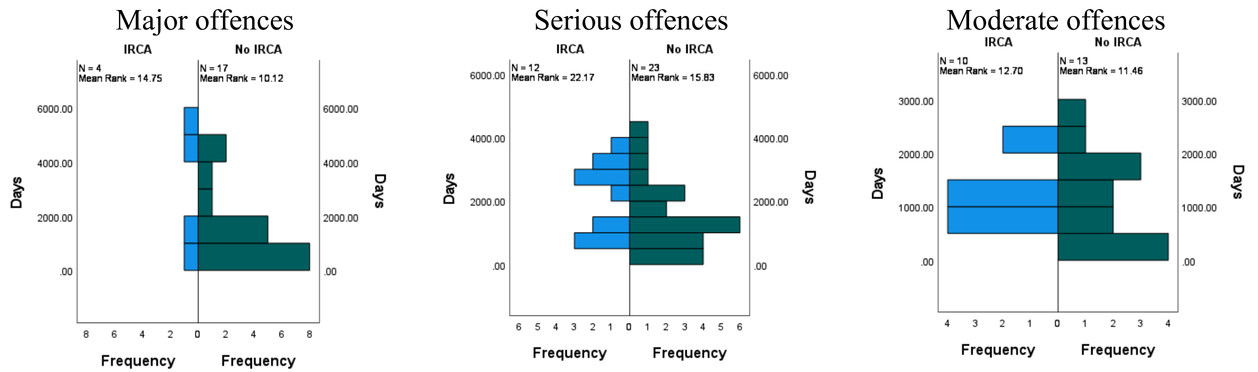

**Figure 5**. Histograms of Independent Samples – Mann Whitney U Test, accounting for cases in Ontario only