On a *Gladue*-style approach to sentencing Black accused in Canada *by C. Undi*

In *R v Jackson*, Superior Court Justice Shaun Nakatsuru took judicial notice of "the historical and systemic injustices committed against African Canadians" during the sentencing hearing of a Nova Scotian man of mixed African and Indigenous heritage.[1] The defence argued that the analysis applied by courts to Indigenous offenders, as prescribed in *R v Gladue*, should also be applied to offenders of African descent, due to the similarities between both communities in terms of sources and outcomes of discrimination, and submitted an Impact of Race and Culture Assessment (IRCA) in support of this submission.[2]

Although Justice Nakatsuru rejected this approach, the court did acknowledge that jurisprudence about sentencing Indigenous persons, while not providing a ready-made template for sentencing African-Canadians, nevertheless provided some guidance for this process.[3]

In *R v Gladue,* the Supreme Court of Canada stated that judges, when sentencing an Indigenous offender, should consider the "unique background and systemic factors" which may have contributed to the circumstances that placed the Indigenous offender in that courtroom.[4]

The Court noted that these factors were to be considered in the sentencing of Indigenous offenders "because many [A]boriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions".[5] This decision provided context for section 718.2(e) of the *Criminal Code*, mandates that courts imposing a sentence consider reasonable sanctions other than imprisonment for all offenders and particularly for Aboriginal offenders.[6] The Court notes that this section was enacted to ameliorate systemic discrimination in the criminal justice system, and to address the "drastic overrepresentation of [A]boriginal people within both the Canadian prison population and the criminal justice system".[7]

The consideration of systemic factors when sentencing an offender may but does not automatically result in a reduction sentence but, where factors such as poverty, substance abuse, lack of education and lack of employment opportunities have played a significant role in an Indigenous accused's life, courts are to assess the availability of restorative alternatives to imprisonment, which are geared towards "individual and social healing".[8]

Indigenous people, as the first people of the land colonially known as Canada, are often and rightfully centred in conversations about criminal justice reform. No discussion about acknowledging and addressing anti-Black racism and its systemic impacts in Canada should be imagined as in opposition to the advancement of Indigenous sovereignty, equity and justice, but rather in solidarity with it.[9]

Importantly, the experiences of Indigenous peoples and those of Black Canadians often overlap in significant ways.[10] Both Indigenous people and Black people are vastly overrepresented at "all levels of the justice system, from arrest to incarceration".[11] The United Nations Committee on the Elimination of Racial Discrimination (CERD) traces this overrepresentation to poverty, subpar social services, racist drug policies, the lack of evidence-based alternatives for non-violent drug users, and, crucially, racially biased sentencing.[12] These factors closely mirror those elucidated in *R v Gladue*, and impact those groups at every stage of the so-called "school to prison pipeline".[13]

The CERD notes, for instance, that Indigenous and African-Canadian children are similarly discriminated against in the education system: Indigenous-majority schools, such as those on-reserve. are incredibly underfunded, and Black children are reportedly disciplined more harshly than non-Black students.[14]

A 2018 report from the Ontario Human Rights Commission provided support for a claim Black communities and activists had repeatedly made: Black people in Toronto are disproportionately subjected to police force.[15] Black people, who comprised 8.8% of the population in 2016, were involved in 70% of police shootings resulting in civilian death, 36% of all police shootings and more than a quarter of investigations by Ontario's Special Investigations Unit, which has the statutory mandate to conduct criminal investigations into incidents in which police and civilians are involved, and which have resulted in serious injury, death or allegations of sexual assault.[16] The same report revealed a pattern of unnecessary stops, questioning and searches, which complainants felt was the result of racial profiling.

Further, the 2016/17 Annual Report of the Office of the Correctional Investigator painted a grim picture of the relationship between Black people and Canadian corrections. Black inmates comprise 8.6% of the total incarcerated population and 2.5% of the population of Canada.[17] When incarcerated, Black inmates are subject to poorer outcomes than the total inmate population: they are more likely to be classified as maximum security, are disproportionately

subjected to solitary confinement, and overrepresented in use of force incidents.[18] Arguments that African Canadians are overrepresented in the criminal justice system were accepted by the Supreme Court in *Golden v the Queen*.[19]

Interestingly, the CERD recommends that the Canadian government implement the recommendations of the Truth and Reconciliation Committee, anticipating that this will "reduce the incarceration of African-Canadians and Indigenous peoples".[20] This suggests that the solutions to the vast overrepresentation of marginalized communities in the criminal justice systems are neither identical nor completely separate, but are intertwined.

Teasing out the similarity of poor treatment and poor outcomes experienced by Black and Indigenous people is not an attempt to "analogize the historical and current circumstances" of each group, nor to take away from the hard and important self-advocacy done by Indigenous communities, but rather to highlight how the court's analyses of section 718.2(e) in *Gladue*, can be reasonably extended to other groups that are overrepresented and underserved by the criminal justice system.[21]

The development and integration of a judicial analysis that formally acknowledges the systemic barriers and disadvantages faced by Black inmates will neither dismantle those barriers nor remedy those disadvantages. Neither will it address the disproportionate mistreatment of Black people at every stage of the legal system. It is also true that judges have the discretion to consider the circumstances of every offender that stands before them.

However, it is also true that systemic problems are comprised of individual instances, and the imposition of a positive duty on judges, Crowns and defence counsel[22] to acknowledge those systemic problems is a concrete step in the right direction. While respecting the unique position of Indigenous people in Canada and its criminal justice system, a measure of this kind could serve as a reminder to the legal profession to consider how many systems have failed an offender before they appear in a courtroom, and as a acknowledgment by the court of the desperate need for equity and justice for Black people within and beyond the criminal justice system.

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[1] 2018 ONSC 2527, para 30 [*Jackson*].
[2] *Ibid* at para 56.
[3] *Ibid* at para 60.
[4] [1999] 1 S.C.R. 688, para 69 [*Gladue*].
[5] *Ibid* at para 68.
[6] *Criminal Code,* RSC 1985, c C-46, s 718.2(e).
[7] *Gladue*, *supra* note 4 at para 64.
[8] *Ibid.* at paras 67 - 69.

[9] Zainab Amadahy & Bonita Lawrence, "Indigenous Peoples and Black People in Canada: Settlers or Allies?" in Arlo Kempf, ed, *Breaching the Colonial Contract: Anti-Colonialism in the US and Canada* (Dordrecht: Springer, 2009), 105 at 130.
[10] Ed Buller, *Common Ground: An examination of similarities between black and aboriginal communities* (Ottawa: Aboriginal Corrections Policy Unit, Public Safety Canada, 2009). online: <https://perma.cc/P25T-9SCB>.
[11] Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD/C/CAN/21-23 (2017) at 4 [CERD Report].
[12] *Ibid* at 4.
[13] *Ibid* at 7; see also Abigail Tsionne Salole & Zakaria Abdulle, "Quick to Punihs: An examination of the school to prison pipeline for marginalized youth" (2015) 72 Canadian Review of Social Policy 124.
[14] *Ibid.*
[15] Zane Schwartz, "How a Black Lives Matter Toronto co-founder sees Canada". *Maclean's* (8 July 2016), online: <https://perma.cc/YNV3-MLLX>.
[16] Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Toronto: Government of Ontario, November 2018), online: <https://perma.cc/H4HE-V8YB>; Special Investigations Unit, "What We Do" (28 March 2016), online: <https://perma.cc/9QT3-29BT>.
[17] Canada, *Annual Report of the Office of the Correctional Investigator 2016-2017* (Ottawa: Office of the Correctional Investigator, 2017), online: <https://perma.cc/X2XB-NH2V> [OCI Report].
[18] *Ibid.*
[19] [2001] 3 S.C.R. 679, 2001 SCC 83 at para 83.
[20] CERD Report, *supra* note 11 at 4.
[21] *Jackson*, *supra* note 1 at para 73.
[22] *R v Kakekagumick* (2006), 81 OR (3d) 664 at para 44.