NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Anderson*, 2021 NSCA 62

Date: 20210817
Docket: CAC 497430
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Rakeem Rayshon Anderson

Respondent

and

African Nova Scotia Decade for People of African Descent Coalition and the Criminal Lawyers' Association

Intervenors

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	**March 30, 2021, in Halifax, Nova Scotia**
Final Written Submissions:	**April 13, 2021**
Subject:	Sentencing. Use of Impact of Race and Culture Assessments (IRCAs) in sentencing African Nova Scotian offenders. Background and systemic factors. Judicial notice. Constrained circumstances and the principle of proportionality. Principles of sentencing. Section 718.2(e) of the *Criminal Code*.
Summary:	The respondent received a conditional sentence of two years less a day, followed by a probationary term of two years, for offences charged following a random motor vehicle checkpoint stop during which he was found to be in possession of a loaded .22 calibre revolver. The judge considered an Impact of Race and Culture Assessment and heard evidence from the authors of the IRCA and two other witnesses. The Crown at sentencing sought a federal penitentiary term in the range of two to three

years. Appellate Crown took a very different approach. He took the position the conditional sentence was a fit and proportionate sentence, crafted without error by the judge. He consistently approached the appeal as a request for guidance from this Court. There was a shared emphasis between the Crown and the intervenors on the need for guidance in applying the principles of sentencing to offenders like the respondent who are of African descent. The respondent saw little need for guidance in light of the judge's application of the sentencing principles having produced a fit and proper sentence.

Issues: How should IRCAs and information about historic injustice and racial discrimination inform the sentencing of African Nova Scotian offenders?

Result: Leave to appeal granted. The appeal is dismissed. IRCAs can be a valuable resource for sentencing judges. They are conduits of information about the history of anti-Black racism and discrimination and its effects. Mining the rich seam of information in IRCAs ensures relevant systemic and background factors are integrated into crafting a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender. They can play a role in reducing reliance on incarceration for African Nova Scotian offenders. The systemic factors described in the respondent's IRCA and his experiences as an African Nova Scotian navigating racism and marginalization are not unique. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into the systemic and background factors detailed in an IRCA or otherwise raised in the sentencing of an African Nova Scotian offender. It should be possible on appeal for the court to determine, based on the record or the judge's reasons, that proper attention was given to the offender's circumstances and the deeply entrenched historical disadvantage and systemic racism that more than likely had a hand in bringing them before the courts. Where this cannot be discerned, appellate intervention may be warranted.

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Judges:	Beveridge, Fichaud, Farrar, Derrick and Beaton, JJ.A.
Appeal Heard:	March 30, 2021, in Halifax, Nova Scotia
Final Written Submissions:	April 13, 2021
Held:	Leave to appeal granted; appeal dismissed, per reasons for judgment of Derrick, J.A.; Beveridge, Fichaud, Farrar and Beaton, JJ.A. concurring
Counsel:	Mark Scott, Q.C., for the appellant Roger Burrill and Drew Rogers, for the respondent Lee Seshagiri and Brandon Rolle, for the African Nova Scotia Decade for People of African Descent Coalition Faisal Mirza, for the Criminal Lawyers' Association

Reasons for judgment:

Introduction

[1] This Crown appeal concerns the conditional sentence Rakeem Anderson received for firearms offences related to his possession of a loaded .22 calibre revolver. A conditional sentence of imprisonment has permitted Mr. Anderson to serve his sentence in the community under strict conditions. Mr. Anderson is African Nova Scotian.

[2] This is not a conventional appeal. We are not being asked to find the sentencing judge erred in law or imposed a manifestly unfit sentence. The issues look beyond typical sentence appeal considerations. There is a shared emphasis between the Crown and the Intervenors[1] on the need for guidance for courts tasked with applying the principles of sentencing to offenders like Mr. Anderson who are of African descent. What that guidance should comprise is at the heart of this appeal. Challenging questions have been raised. These reasons endeavour to address those questions and the issues they engage, in the context of the conditional sentence regime, and sentencing more broadly.

[3] Directly relevant to this appeal is the now widely accepted fact that certain groups in society are disproportionately incarcerated, notably Indigenous offenders[2] and Black offenders.[3] Parliament introduced the conditional sentencing regime in an "attempt to remedy the problem of overincarceration".[4]

[4] As the Ontario Court of Appeal observed in *Borde* nearly twenty years ago, the underlying reasons for the over-representation of Indigenous offenders in Canada's prisons – poverty, substance abuse, lack of education, lack of employment opportunities, and vulnerable, marginalized communities – are also factors in the over-representation of offenders of African descent.

[5] We are now well aware that the disproportionate incarceration of Black offenders reflects the systemic discrimination and racism that permeates the

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[1] Mr. Burrill representing Mr. Anderson indicated in oral submissions he saw little need for guidance as the judge's application of the sentencing principles had produced a fit and proper sentence.
[2] *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]; *R. v. Ipeelee*, 2012 SCC 13 [*Ipeelee*]
[3] *R. v. Hudson*, 2021 ONCA 76; *R. v. Borde*, [2003] O.J. No. 354 (C.A.) [*Borde*]; *R. v. "X"*, 2014 NSPC 95 [*X*]; *R. v. Gabriel*, 2017 NSSC 90 at para. 50 [*Gabriel*]; *R. v. Desmond*, 2018 NSSC 338 at para. 29 [*Desmond*]
[4] *R. v. Proulx*, 2000 SCC 5 at para. 1 [*Proulx*]

criminal justice system. As the Supreme Court of Canada very recently noted, since *R. v. Parks*[5], "courts have acknowledged the wide range of ways the criminal justice system can disproportionately affect accused persons" who are Indigenous or racialized.[6]

[6] In *Parks*, the Ontario Court of Appeal noted the existence of anti-Black racism in Nova Scotia as identified by the Royal Commission on the Donald Marshall, Jr. Prosecution:

> Examination of racism as it impacts specifically on black persons suggests that they are prime victims of racial prejudice. In Nova Scotia, anti-black racism has been described by both blacks and non-blacks as "pervasive": W. Head & D.H. Clairmont, Discrimination Against Blacks in Nova Scotia: The Criminal Justice System, A Research Study Prepared for the Royal Commission on the Donald Marshall Jr. Prosecution (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) at pp. 43-47; see also Nova Scotia Royal Commission on the Donald Marshall Jr. Prosecution, Findings and Recommendations, vol. 1 (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) (Chair: T.A. Hickman C.J.N.S.) at pp. 148-84…[7]

[7] Anti-Black racism was described in *Parks* as a pervasive societal phenomenon: "Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes". Black people were identified as "among the primary victims" of the "evil of racism". Systemic racism was identified in Mr. Anderson's experience: the judge heard evidence about it and, as I will describe, its reality was reflected in her approach to his sentence.

[8] The experience of African Nova Scotian offenders like Mr. Anderson must be better reflected than it has been in the sentencing process and outcomes. In its intervention the Criminal Lawyers' Association has said: "…it is time that the distinct mistreatment of Black people in society be given its due recognition in criminal sentencing".

[9] This appeal gives us the opportunity to take up the challenge set by the Supreme Court of Canada in *R. v. Friesen* for appellate courts to "set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or *the degree of responsibility of certain offenders*…"[8]

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[5] (1993), 15 O.R. (3D) 324 (C.A.) [*Parks*]
[6] *R. v. C.P.*, 2021 SCC 19 at para. 89
[7] *Parks*, *supra* note 5 at page 11 (QL version)
[8] *R. v. Friesen*, 2020 SCC 9 at para. 35 (emphasis added) [*Friesen*]

Appellate courts have a responsibility in such circumstances to equip judges sentencing offenders of African descent with the tools to craft fit sentences. Where current sentencing practices in relation to African Nova Scotian offenders do not further the objectives of sentencing to "effectively deter criminality and rehabilitate offenders", then "those practices must change"[9] in order to meet the needs of those offenders and their communities.

[10] These reasons will explain the context for the appeal, the evolution of the Crown's approach to it, and the issues addressed by the parties. The Crown approach settled on a proposed framework for sentencing African Nova Scotian offenders, which was provided to us in the form of what is entitled "Analytical Roadmap Re: Availability and Appropriateness of a Conditional Sentence of Imprisonment". In an introductory paragraph, the Crown explained its roadmap as follows:

> This roadmap aims to provide a principled means to arrive at a meaningful Conditional Sentence of Imprisonment (CSO) is [*sic*] the case of Rakeem Anderson. It hopes to reconcile the tension between deterrent sentences mandated for gun offences and overreliance on imprisonment for peoples [*sic*] who have suffered the effects of historical and systemic discrimination, and, consequently, have been overrepresented in the criminal justice system.

[11] The participants in this appeal, and the sentencing judge, have endeavoured to formulate a remedial approach to sentencing African Nova Scotian offenders. While the Intervenors agree with the aim of the Crown's roadmap, they took issue with certain of its features. What all the parties agree on is that every dimension of the highly individualized sentencing process should be informed by evidence from what have come to be known as Impact of Race and Culture Assessments (IRCAs). IRCAs bring into sharp focus both the historic injustices and systemic racism perpetrated against persons of African descent and the specific offender's life experiences.

[12] The parties to this appeal have expressed a clear consensus that IRCAs are a necessary resource for judges tasked with balancing the objectives and principles of sentencing. IRCAs set a new table for sentencing offenders of African descent in a regime that has been shaped through an overreliance on incarceration for Black offenders and their concomitant disproportionate representation in Canada's prisons and jails.

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[9] *Ipeelee*, *supra* note 2 at para. 66

[13] With this abbreviated background, I will now discuss Mr. Anderson's offence, the evidence and the submissions presented to the sentencing judge, her analysis and the sentence she imposed, the issues that were raised initially by the Crown on appeal, the approach taken at the appeal hearing, and the arguments of the respondent and the intervenors. My analysis will follow.

[14] These reasons are intended as guidance for judges sentencing African Nova Scotian offenders. An explanation about language: a variety of terms for offenders of African descent was used in this case by witnesses who testified at Mr. Anderson's sentencing hearing and by counsel at sentencing and on appeal. This is also reflected in case law and public discourses where references are found to offenders of African descent, African Canadians, African Nova Scotians, and Black offenders[10]. (I note, for example, the most recent clarion call for racial justice titled itself "Black Lives Matter".) In these reasons, I use these terms interchangeably and also the term "racialized offenders".

Facts of the Offence

[15] On November 2, 2018 at 10 p.m., Rakeem Anderson was stopped by police at a random motor vehicle checkpoint on Highway 102. He was alone. A pat-down search located a loaded .22 calibre revolver in his waist band.

[16] Mr. Anderson was arrested and charged with a number of firearms-related offences. His trial proceeded on June 17, 2019 before Chief Judge Pamela Williams of the Provincial Court. A *voir dire* on the constitutionality of Mr. Anderson's investigative detention and subsequent search concluded with a determination that no *Charter* breaches had occurred.[11] The judge noted Mr. Anderson was "very respectful, polite and calm" in his interactions with police.[12]

[17] The judge concluded her *voir dire* decision by examining, pursuant to *R. v. Grant*, 2009 SCC 32, the issue of the admissibility of the gun, an analysis she undertook in the event she had erred in dismissing Mr. Anderson's *Charter* claim. In that analysis, she said:

[10] There is no consensus in current commentary by persons of African descent on whether, when referring to a person's race, "black" should be capitalized or not. I have chosen to capitalize.
[11] *R. v. Anderson*, 2019 NSPC 29 [*Anderson*]
[12] *Ibid* at para. 24

> **[33]** Moreover, this is a highly dangerous situation. One cannot overstate the public interest in prosecuting cases involving the illegal possession of loaded restricted firearms…

[18] The judge admitted the hand gun into evidence, and Mr. Anderson was convicted of five related offences:

- Count 1 Transporting a restricted weapon, a .22 calibre revolver in a careless manner contrary to s. 86(1) of the *Criminal Code of Canada* (CCC).

- Count 2 Carrying a concealed weapon, a .22 calibre revolver, not being authorized under the *Firearms Act* to carry it concealed contrary to section 90(1) of the CCC.

- Count 3 Possession of a restricted weapon, a .22 calibre revolver for which he did not have a registration certificate issued to him contrary to section 91(1) of the CCC.

- Count 4 Possession of a loaded restricted weapon, a .22 calibre revolver with ammunition contrary to section 95(2)(a) of the CCC.

- Count 6 Being the occupant of a motor vehicle in which he knew there was a restricted weapon, a .22 calibre revolver, contrary to section 94(1) of the CCC.

[19] Two other counts in the Information were stayed by application of the *Kienapple* principle[13] which prohibits multiple convictions for the same unlawful conduct.

[20] Mr. Anderson's sentencing proceeded with evidence and submissions on November 4, 2019 and January 20, 2020. On February 10, 2020, the judge sentenced Mr. Anderson to a conditional sentence of imprisonment of two years less a day to be served in the community under a host of conditions. This was to be followed by two years' probation (reported 2020 NSPC 10).

[13] (1975) 1 S.C.R. 729

The Evidence and Submissions that Underpinned Mr. Anderson's Sentence

The Lead Up to Mr. Anderson's Sentencing Hearing

[21] In preparation for sentencing, Mr. Anderson's counsel asked for an update to a pre-sentence report that had been prepared for an earlier sentencing of Mr. Anderson, his first as an adult.[14]

[22] The judge scheduled Mr. Anderson's sentencing for July 29, 2019. She directed that the updating of the pre-sentence report include a "cultural awareness component". The update was prepared without it. The defence requested, and the judge ordered a more substantial report, an Impact of Race and Culture Assessment ("IRCA"). Obviously familiar with the use of IRCAs in sentencing African Nova Scotian offenders, she indicated the cost of the assessment would be borne by the provincial Department of Justice. Three months were required for its preparation. Mr. Anderson's sentencing hearing was adjourned from July 29 to November 4, 2019.

[23] On November 4, the Crown advised they were seeking a sentence in the range of two to three years in a federal penitentiary. Counsel for Mr. Anderson said a non-custodial sentence was more appropriate, either a suspended sentence with "the maximum amount of allowable probation" or a conditional sentence order. In the alternative, defence counsel said, as a "last-resort submission" that if the judge found incarceration was required, it should be an intermittent sentence of "90 days or less to be served on weekends".

[24] There was no dispute that a conditional sentence was an available sentence for Mr. Anderson. The three-year mandatory minimum for the s. 95(2)(a) offence had been struck down by the Supreme Court of Canada in *R. v. Nur* [15] with the result that conditional sentences were amongst the sentencing options available to the judge.

[25] The Crown argued denunciation and deterrence should be foregrounded for firearms offences with rehabilitation taking "a back seat". Crown counsel acknowledged the relevance of Mr. Anderson's "background" and "the history of African Nova Scotians" as "certainly something to be taken into account". She said, "…we need to balance that with personal responsibility, as well". Mr.

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[14] On January 7, 2015, in accordance with a joint recommendation, Mr. Anderson had received two years' imprisonment in a federal penitentiary for a 2013 break and enter into a dwelling house.
[15] 2015 SCC 15 [*Nur* SCC]

Anderson, she said, "…must be held responsible for what I submit is a danger to society and to himself that he posed that day".

[26] In his submissions, counsel for Mr. Anderson asked the judge:

> So what do we do in this case? Do we throw another young Black man in jail for a significant period of time because of society's approach to gun violence while blinding ourselves to the cultural reality that he was facing, or do we look at his motivations for doing so and, once we do that, placing his moral blameworthiness on the lower end of the scale while still recognizing the seriousness of gun charges?

[27] After hearing the submissions of Crown and defence, the judge said she wanted more information about "services and resources" available for Mr. Anderson, which had been referenced in the IRCA. She adjourned the sentencing and directed the authors of the IRCA and other individuals interviewed for, or mentioned in, the assessment be made available to testify.[16] The Crown suggested it would also be helpful to hear from "somebody from the federal system to enlighten Your Honour as to what is and is not available within the prison system".

[28] The judge told Mr. Anderson:

> Mr. Anderson, by me doing this, you would understand that all options remain on the table. And I want to have a clear understanding of what is available before imposing sentence. And, of course, in considering whether or not a conditional sentence order is appropriate, I would need to be satisfied that your serving a term in the community would not endanger the safety of the public. And so those are questions that I would want to put to these various witnesses, as well.

[29] The sentencing hearing was adjourned to January 20, 2020.

The Testimony from the Authors of the IRCA and Other Witnesses

[30] Both authors of the IRCA, Robert Wright and Natalie Hodgson, testified on January 20, 2020, as did Jude Clyke, a community parole officer who had worked in federal corrections for 20 years, and Sobaz Benjamin, who was active in the African Nova Scotian community and used film as a problem-solving tool through a project he started in 2007 – IMOVE (In My Own Voice). The IRCA witnesses, all African Nova Scotians, responded to questions from the judge and were cross-

[16] The judge was well within her right to hear from witnesses. Section 723(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 provides: "The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence".

examined by Crown and defence counsel. The authors of the assessment provided opinion evidence. There was no challenge from the Crown to their qualifications as expert witnesses.

[31] Robert Wright authored the first IRCA in Nova Scotia in "*X*"[17], a sentencing under the *Youth Criminal Justice Act*, S.C. 2002, c. 1. He provided a detailed description of his experience and education – he holds a Masters in Social Work and is a Registered Social Worker. He is a private practitioner who manages a small community-based mental health clinic. He talked about the causes and consequences of gun violence in the African Nova Scotian (ANS) community. He said Mr. Anderson had "extreme proximity" to gun violence due to a best friend being shot dead. Mr. Wright observed this as having influenced Mr. Anderson's sense of personal vulnerability to threats that might confront him.

[32] In Mr. Wright's opinion, Mr. Anderson was in desperate need of therapeutic counselling and resources that were Afrocentric. He viewed such interventions as ideally delivered by people of African descent or at least, by people who are aware of the history of the ANS community and the resources, challenges and opportunities that exist there.

[33] Mr. Wright identified two community-based programs: 902 Man Up, an Afrocentric peer mentoring program run by community volunteers for young Black men involved in the criminal justice system, and Sobaz Benjamin's IMOVE project.

[34] Mr. Wright was asked by Crown counsel how community programming, rather than programming in the federal penitentiaries, was going to more effectively address Mr. Anderson's issues. Mr. Wright explained that programming in federal prisons is generic, not Afrocentric. It was his opinion that a non-custodial sentence would better ensure Mr. Anderson's rehabilitation and improve the chances of his long term ability to be a law-abiding and productive member of the community. He said about rehabilitation: "I would say that putting him in jail tomorrow would lessen our chances rather than increase them". In response to the Crown's questions, Mr. Wright asked: "Do we send him to a system we know will fail him or do we send him to a place that has a better chance of connecting to the issues that were identified in the [IRCA]?"

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[17] *X*, *supra* note 3

[35] Asked by the Crown whether denunciation and deterrence should be the primary considerations in the sentencing of Black offenders for gun crimes, Mr. Wright said:

> I think that these are principles of sentencing and I guess my observation would be that you need to apply those broad principles to a unique understanding of the individual in front of you and the unique community represented in front of you…
>
> …
>
> …similarly, when we think about certain kinds of behaviours coming out of a community's trauma and difficulty, to think that treating one individual who comes from that community harshly is going to reform them and deter other members of their community is, again, not understanding the dynamic properly.

[36] Natalie Hodgson co-authored the IRCA with Mr. Wright. She has an undergraduate degree in criminology and sociology, and Bachelor's and Master's degrees in Education. The judge directed her questions to the issue of Mr. Anderson as "an African Nova Scotia[n] learner". She told Ms. Hodgson she was also interested in the opportunities that were available to Mr. Anderson for "upgrading, literacy interventions…and…a readiness assessment".

[37] Ms. Hodgson described the education system in Nova Scotia as "Eurocentric" and not culturally responsive to Black students. She saw a connection between the deficits in the education system and involvement in the criminal justice system. She said the education system has failed African Nova Scotian students through all grade levels and placed a disproportionate number of them on Individual Program Plans (IPPs). It was Ms. Hodgson's evidence that an IPP education limits access to community college programs. According to her, university is not even an option: the door to admission is closed for high school graduates with an IPP on their transcripts.

[38] Mr. Anderson was placed in an IPP in Grade 2. Ms. Hodgson said this removed any opportunity to see if he could meet the standards of the regular curriculum.

[39] It was Ms. Hodgson's opinion that the under-representation of Black teachers, counsellors and administrators throughout the school system meant Black students were only exposed to "White excellence", undermining their self-esteem. Black faces and experiences are absent starting in the earliest grades. A Black child on an IPP experiences a constellation of negative and alienating forces.

[40] Ms. Hodgson identified the effects of marginalizing Black students:

> And that's why I speak highly of Afrocentric education because when you don't see yourself in the material and you don't see yourself in the curriculum, you don't see your experience or your people as part of learning, as part of achievement, as part of success; well, how can you obtain it? And so you see a higher percentage of black students getting kicked out of school, being sent to the office, being suspended, you know, dropping out. And so this…his path already begun as a very early age.

[41] Ms. Hodgson testified "When you look at education through a cultural lens, you see a different person. You see a different student".

[42] Ms. Hodgson told the judge the Black Educators Association was currently offering a Continuation of Adult Education Program (CAEP) in Dartmouth North that is Afrocentric for General Equivalency Diploma (GED) and high school completion. The program utilizes materials that coincide with the Nova Scotia curriculum with added Afrocentric content and emphasis.

[43] In response to questions from defence and Crown counsel on the issue of education, Ms. Hodgson indicated:

- To her knowledge there are no Afrocentric education upgrading opportunities in either the provincial or Federal correctional institutions.
- Mr. Anderson had already had negative experiences and outcomes in the Nova Scotia education system.
- If upgrading his education was part of the conditions of a community-based sentence, Mr. Anderson would be able to access the CAEP program offered by the Black Educators Association. He had expressed a desire to continue his education.
- Historically, Black students learned only about themselves in connection to slavery. They were not learning about Black excellence: "Your people came from slaves and that's who you are".

[44] Both counsel also asked Ms. Hodgson questions about Mr. Anderson's decision to arm himself with a loaded handgun. She told defence counsel that "a heightened sense of self-security" can lead people from "trauma and marginalized

communities where gun prevalence and activity is…manifesting" to arm themselves for protection without any intention of carrying out an act of violence.

[45] Ms. Hodgson spoke of how Mr. Anderson's friends being killed would heighten his feelings of vulnerability:

> …that I guess would cause heightened alarm from affiliation. So a lot of times in the black communities or just in crime-infested communities, when certain people are killed, then some…their…people that are affiliated with closely then would have a heightened sense of fear due to…" 'Am I next, type of thinking'".

[46] It was Ms. Hodgson's opinion that Afrocentric programs can re-direct people who are being ensnared by negative factors and activities in their community "by showing them success and getting them prepared for other opportunities".

[47] Like Mr. Wright, Ms. Hodgson viewed diverting Mr. Anderson from involvement in the criminal justice system was more likely to be achieved through a community-based sentence than by incarcerating him.

[48] Jude Clyke testified to having been employed by the Correctional Service of Canada for twenty years. He has worked in various capacities: as a correctional officer and a parole officer at Springhill Penitentiary, and as a parole officer in the community.

[49] Mr. Clyke told the judge that throughout his experience with corrections, there has always been an over-representation of African Canadian offenders. He indicated there was "absolutely nothing" in either the institutional or community contexts "that is Afrocentric in scope or positioning. And there are no culturally specific supports or interventions for the population". He gave the judge a stark picture of correctional programming for offenders of African descent:

> …There is no strategic planning that I am aware of and, most times, funding is based on … funding is sporadic and there's nothing kind of consistent associated with this. There is no dedicated staffing. There is no dedicated resources within the whole region for African Canadian offenders.
>
> So Mr. Anderson, in all likelihood, will not have a supervisor who understands his cultural/historical context. He will not have program officers who are culturally responsive within their classrooms. He will not have psychologists who, again, have that cultural relevancy, that cultural education piece. And there will be no Afrocentric or culturally specific programming.

[50] Mr. Clyke indicated that if Mr. Anderson was sentenced to a federal penitentiary, he would receive "generic" programming from the time he entered the correctional system until warrant expiry.

[51] It was Mr. Clyke's evidence that successful community reintegration is a process that has to be started before the offender is released from prison:

> It should start as soon as that individual is incarcerated. There have been efforts to engage community-based resources and get them inside the institution. In my mind, it's incumbent on Corrections to cultivate those relationships. Unfortunately, that hasn't happened.

[52] In Mr. Clyke's opinion, Afrocentric interventions, that is, culturally specific programming, will create better outcomes for African Canadian offenders returning to the community.

[53] Sobaz Benjamin testified about IMOVE, a community initiative he developed to raise cultural self-esteem among African Nova Scotians. Mr. Benjamin holds degrees in Political Science and Communications and a Bachelor of Fine Arts in Film and Video Production.

[54] Mr. Benjamin described IMOVE's approach as using narrative theory to problem solve. It is intended to help participants move beyond their past of trauma to avoid being stuck "in this place where…I can only become who I have been. So if I have hurt people or people have hurt me, then my present reflects that and also my future reflects that". IMOVE uses multi-media production to reflect the personal narratives developed by participants. The process, involving "a supportive environment of peers", helps participants redefine themselves.

[55] Mr. Benjamin testified to having worked extensively with incarcerated youth and adult offenders and indicated he was "more than willing to work on a voluntary basis with Mr. Anderson".

The Judge's Decision

[56] The judge understood the challenge that confronted her:

> [5] Sentencing is one of the most difficult, yet crucial functions of a trial judge. On the one hand, sentencing is a very individualized and contextualized process; on the other, it also requires the balancing of societal interests and the application of the law. The Supreme Court of Canada in *R. v. M.(C.A.)*, [1996] 1

> SCR 500 at paras. 91 and 92 stated that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and current conditions in the community.
>
> [6] I struggle however as often the principles of sentencing do not address the underlying root causes of offending. This is particularly so for marginalized segments of the public whose offending is linked to systemic racism and poverty. If I am to consider the circumstances of the offender as well as the circumstances of the offence, it is essential that I understand the reasons leading to criminal behaviours.

[57] The judge went on to identify the purpose and principles of sentencing as found in ss. 718, 718.1 and 718.2 of the *Criminal Code*. She recognized that proportionality is the fundamental principle of sentencing and that sentences for firearms offences consistently emphasize denunciation and deterrence by the imposition of incarceration in a federal institution. She noted that rehabilitation is a significant objective notwithstanding.

[58] The judge reviewed sentencing decisions for s. 95 offences from Nova Scotia, Ontario, British Columbia, Newfoundland and Labrador, Manitoba, and Saskatchewan. She went on to assess aggravating and mitigating factors. She described "…the potential for violence and physical harm arising from the possession of a loaded handgun" as an aggravating factor that was "to be given significant weight".[18] Although not explicitly stated, the judge appears to have been referring to mitigating factors in these comments:

> [29] Mr. Anderson is a young African Nova Scotian with a dated record consisting of eight convictions as a youth including two assaults with a weapon and a charge of possession of a weapon when he was 15 years old. Mr. Anderson has one conviction as an adult, Break, Enter and Theft that occurred six years ago. He received a 2-year federal sentence of incarceration.
>
> [30] The loaded firearm was found as a result of a routine traffic stop. Mr. Anderson was not otherwise engaged in criminal activity at the time. I accept that having a loaded gun for defensive purposes is a "true crime" as set out in *Nur*. But there are *true crimes* and then there are *really true crimes*. Then there are crimes that courts consider more regulatory in nature like *MacDonald*, even though it

[18] *R. v. Anderson*, 2020 NSPC at para. 28 [*Anderson* (2020)]

> involved the accused pointing a loaded handgun at police. It is important to therefore consider the context. [19]

[59] I pause here to comment on the judge's discussion of the aggravating and mitigating factors. The "potential for violence and physical harm arising from the possession of a loaded handgun" is not so much an aggravating factor in relation to the charges for which Mr. Anderson was convicted as it is an indication of the gravity of the offences. And the judge's distinction between "true crimes" versus "really true crimes" is not recognized in the case law. The judge was referring to the characterization by Justice Doherty, writing for the majority of the Ontario Court of Appeal in *R. v. Nur*[20], about the factual breadth of s. 95 offences:

> [51] The scope of s. 95 is best understood by considering the range of potential offenders caught by that section. At one end of the spectrum stands the outlaw who carries a loaded prohibited or restricted firearm in public places as a tool of his or her criminal trade. By any reasonable measure, this person is engaged in truly criminal conduct and poses a real and immediate danger to the public. At the other end of the spectrum stands the otherwise law-abiding responsible gun owner who has possession of an unloaded restricted or prohibited firearm, but with readily accessible ammunition stored nearby. That person has a licence and registration certificate for the firearm, but knowingly possesses the firearm at a place that falls outside of the terms of that licence. That person's conduct may well pose little, if any, risk to others. I would characterize that misconduct as more in the nature of a regulatory offence.

[60] Justice Doherty proceeded to say: "There is no doubt that the vast majority of persons charged under s. 95 fall at the true crime end of the spectrum". As he noted: "Possession is criminal under s. 95 even if it is entirely untainted by any other unlawful activity".[21]

[61] Mr. Anderson should be understood as having committed a "true crime" firearms offence albeit not for the purpose of pursuing a criminal enterprise. The evidence established Mr. Anderson had the loaded gun in his possession out of fear that he might be targeted for violence. This does not resemble the end of the

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[19] The judge was incorrect in recalling the facts in *R. v. MacDonald*, 2014 NSCA 102. Mr. MacDonald did not point a loaded handgun at the police officer who was responding to a noise complaint. As noted by Justice Beveridge (in dissent on the issue of sentence only), the trial judge in *MacDonald* concluded that Mr. MacDonald did not intentionally point the handgun at the police officer. Mr. MacDonald had testified the gun he was holding only became visible when the police officer pushed open the door of Mr. MacDonald's condominium, knocking him off balance.

[20] 2013 ONCA 677 [*Nur*]

[21] *Ibid* at paras. 50 and 52

spectrum that Justice Doherty described as more in the nature of a regulatory offence – a person with a license and registration certificate who "knowingly possesses the firearm at a place that falls outside of the terms of that licence".[22]

[62] The judge distinguished Mr. Anderson's offending from the cases to which she had been referred: it was not incidental to drug trafficking, did not involve multiple firearms, nor was there impairment by drugs or alcohol. She noted that Mr. Anderson was "sober, polite, respectful and cooperative throughout his involvement with police".[23] He only had the one prior conviction.

[63] She then focused her attention on what she had learned from the IRCA and the witnesses who had testified, describing this evidence as the "systemic and background factors impacting Mr. Anderson's involvement with police and more generally".[24] She recognized the importance of context in determining his sentence:

> [37] The Courts have widely accepted that there is an overrepresentation of Black persons in custody in Canada as a result of systemic forms of discrimination. Given the individualized nature of sentencing, Courts must take into consideration the historical and social context for the lived experiences of Black Canadians: *R. v. Jamal Jackson,* 2018 ONSC 2527, at paras. 82, 85, 87, 97, and 105-113.
>
> [38] It is important to consider the impact that environment has in shaping peoples' choices. That is why it is vital to consider the contents of the IRCA in arriving at a fit and appropriate sentence.

[64] The judge saw in Mr. Anderson's experiences as a racialized person, detailed in the IRCA, the factors that contributed to his "pathway to criminality"[25].

[65] After comprehensively reviewing the role and significance of the IRCA, the context and evolution of marginalization, and Mr. Anderson's experience, the judge discussed the IRCA evidence in the context of a number of enumerated themes: the African Nova Scotian experience and its influence on Mr. Anderson, Residential Instability in Impoverished Neighbourhoods, Lack of Educational and Employment Opportunities, Particular Patterns of African Nova Scotian Violence, Racial Profiling, North End Culture and No Hope, and Trauma and Loss.

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[22] *Ibid* at para. 51
[23] *Anderson* (2020), supra note 18 at para. 33
[24] *Ibid* at para. 36
[25] *Ibid* at para. 44

[66] I previously reviewed the evidence the judge had before her. I excerpt below certain passages from her discussion about Mr. Anderson's background and experience:

> Residential Instability in Impoverished Neighbourhoods
>
> [50] The neighbourhood of Uniacke Square, in Halifax, surrounded by its poverty and crime, and lack of productive opportunities, is where Rakeem Anderson spent most of his childhood. He experienced several periods of housing instability, including one when child protection services got involved. His father, originally from a rural Black community in Hammonds Plains, suffered from alcoholism. Mr. Anderson's parents separated when he was quite young, and he and his siblings moved between his parents' homes.
>
> [51] Much has been written about the social forces that are at the root causes of crime. Ms. Hodgson notes that Uniacke Square, lacking in both services and resources, has a large population of extremely low socio-economic and impoverished people. Mr. Anderson grew up in sub-standard housing plagued by mold, structural deficiencies, drafty windows, plumbing issues and pest and insect infestations.
>
> Lack of Educational and Employment Opportunities
>
> …
>
> [54] …Mr. Anderson was put on an IPP in Grade two and his highest attainment of education is a grade six IPP. He found school difficult and most of his behaviours were in response to his inability to understand the work. This lack of education and training "has crippled his ability and desire to pursue career possibilities".
>
> [55] Although Mr. Anderson has held several temporary jobs, he has not, according to his friend and employer, Mohammed Sabra, "taken full advantage of work availability, and doesn't recognize his potential in the workforce". Mr. Sabra is willing to give Mr. Anderson full time employment and assist him with transitioning to be a productive member of society – but Mr. Anderson must have that desire.
>
> [56] Ms. Hodgson says that Mr. Anderson's experience with the education system has been 'both disastrous and volatile'. In addition to the systemic impact noted above, Mr. Anderson has mental health issues which have affected his ability to learn – Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD) and Obsessive-Compulsive Disorder (OCD).
>
> [57] The IRCA outlines Mr. Anderson's social history and concludes that his is a story of a young Black male that 'the system has failed on all fronts':

> Rakeem was thrown into the world as a young adult lacking the skills and knowledge to thrive and survive; no resources, supports or interventions, without therapy for trauma and loss, and a very low elementary level education. This is a recipe for disaster.

…

Particular Patterns of African Nova Scotian Violence

[59] Ms. Hodgson states that gun presence is accepted as a cultural norm in North End Halifax. According to her:

> Many black males arm themselves with guns, not because they have plans to harm someone, but rather they feel the need to protect themselves *in case*. This *in case* mentally derives from affiliations with community members that have already been killed, have existing "beefs" or conflicts with peers that may result in violence.

[60] She says that this phenomenon is directly linked to Mr. Anderson and his possession of a loaded handgun. As she rightly points out, he was not arrested during criminal activity; he was the subject of a traffic stop.

[61] Ms. Hodgson urges me to look at Mr. Anderson's social position and the causal factors that led him to arm himself to begin with. In particular, she cites his "sense of paranoia" since his friend Tyler McInnis was murdered. He is fearful someone may target him by association, thereby feeling the need to arm himself *just in case*. As she put it, "Everyone knows everyone; Everyone knows where you live and what you drive. Avoidance is not an option". It takes time to steer oneself in another direction – it's a process and the Afrocentric programs help in this regard, according to Ms. Hodgson. In her discussions with Mr. Anderson she confirmed that he wants to continue his education and has made some contacts in this regard although she was not able to provide specifics.

…

Racial Profiling, North End Culture and No Hope:

[64] It is fair to say that systemic racism, mistrust of authority and frequent police presence plagues North End Halifax. According to the Wortley Report, 2019[26], people of African descent are six times more likely to be stopped by police than people of European descent and 30% of all Black males in Halifax have been arrested for a crime at some point in their lives, as compared to 6.8% of the white male population.

[26] Dr. Scott Wortley (University of Toronto Centre for Criminology & Sociological Studies),"Halifax, Nova Scotia Street Checks Report" (2019) Nova Scotia Human Rights Commission.

> [65] And according to the IRCA, "with the North End culture, there comes a normalized lack of achievement":
>
> > When you grow up surrounded by a large percentage of the population coming from lower socio-economic backgrounds; receiving social assistance, unemployed, earning minimum wage, dropping out of high school, or [resorting] to criminal activity for income, then you can easily fall into that pattern.
>
> [66] Given Mr. Anderson's *have-not* childhood experiences, including educational history, it is not surprising that his employment history is poor, having had but a few *under the table* temporary jobs. This lack of access to productive measures, positive role models, networking, and educational opportunities influenced his capacity to succeed and his choices with criminality, according to Ms. Hodgson.
>
> Trauma and Loss
>
> …
>
> [71] Mr. Anderson's dad died when he was eight years old, losing his only Black role model. He was very close to his father who suffered from a chronic illness and was an addict. Without his father, he spent less time in Hammonds Plains, which disrupted his community attachment. For a substantial period, Mr. Anderson had recurring nightmares but was not receptive to counselling. He had no positive means of working through that loss says Mr. Wright and he followed a path of hopelessness.
>
> [72] Mr. Anderson has also lost four friends as a result of violence. After his fourth friend was murdered, his fear for his own safety increased. As a member of the 'mainstream' community, I cannot begin to imagine how terrifying this must have been.
>
> [73] Mr. Wright reminds us that it is also well known that African Nova Scotians do not seek mental health support – it is seen as taboo or a sign of weakness. Furthermore, services tend to be inaccessible – they are not offered in the Black community. Rather African Nova Scotians look to family, community and faith rather than professionals to assist with personal challenges–often having mistrust and assumptions about not being able to relate to a counsellor they assume will be White.

[67] Situating Mr. Anderson in relation to gun cases she reviewed from other provinces, the judge concluded the facts in his case justified a sentence in the lower end of what she found to be the appropriate range of two years less a day to three years' incarceration.

[68] The judge noted what Mr. Wright had said about preventing Mr. Anderson's recidivism:

> [76] …Mr. Wright says we increase those chances by jailing him. But if the question is how we ensure or improve his chances of becoming a safe and productive member of the community, then jail lessens those chances…

[69] As she drilled into her analysis, the judge articulated the tensions between the sentencing principles to be applied and the possibilities of an enlightened approach:

> [88] Clearly, as a responsive modern society, we must identify and address root causes of offending, if we hope to reduce crime. Sadly, sentences that solely or primarily emphasize deterrence and denunciation have not made our communities safer places to in which to live. Punishment does not change behaviour when the actions are rooted in marginalization, discrimination and poverty. Incarceration is to be a last resort; restraint must be exercised, where appropriate. Having said that, offenders who pose a real risk to public safety must be separated from society.
>
> [89] As noted above, crime affects at least three parties: the victim, the community and the offender. In the case of possession of loaded handguns, the victim is the community at large – particularly the Black community. I ask myself how might a restorative justice approach attempt to remedy the adverse effects of illegal possession of loaded firearms in the community – addressing the needs of all involved?
>
> [90] As with any restorative approach it starts with accountability and reparation for harms done. Accountability and deterrence are two very distinct concepts. Accountability is about *doing* – an obligation on the offender to be responsible for his/her actions by doing something to make things better. Deterrence is about *receiving* – a punishment imposed on an offender intended to change future behaviour. The first requires active participation while the latter involves passive acceptance.
>
> [91] Deterrence assumes that offenders weigh the pros and cons of a certain course of action and make rational choices. It also assumes that people can freely choose their actions and behaviours – as opposed to their offending being driven by socio-economic factors such as poverty, limited education, mental health and addiction issues and systemic discrimination and marginalization.
>
> [92] Those of us who work in the Criminal Justice System know only too well that many times there is a causal connection between socio-economic factors and crime. Deterrence and denunciation do not address these factors. Our prisons and our jails are full of these marginalized individuals, for whom there are few resources to address the root causes of their offending. And the costs associated

> with incarceration – both human and fiscal – are substantial. It costs well over $100,000 per year per inmate in many prisons and jails, leaving little for Afrocentric planning and reintegration, for example.
>
> [93] Accountability demands that the offender take responsibility for their crime and is actively involved in a course of action to *right the wrong* and become a productive member of society. Accountability is difficult – some would say more difficult that [*sic*] serving a jail term. It requires a willingness to be supervised and supported to address one's shortcomings and be held accountable for reparation of harm and for their own rehabilitation. This takes much hard work and dedication.
>
> [94] Regardless of the sentence imposed on Mr. Anderson, it will likely do little to deter others in similar circumstances. The socio-economic forces at play are so powerful and are firmly entrenched in systemic racism and marginalization.
>
> [95] So, should the justice system continue to emphasize deterrence and denunciation by imposing stricter sentences on all offenses involving the possession of handguns or should it, on a case by case basis, employ a restorative yet denunciatory community option for those who are ready to make the necessary change? Harkening back to the words of Mr. Wright: Do I impose a period of incarceration that I know will not achieve the purpose and principles of sentencing or do I take a calculated risk management approach and create the opportunity for meaningful change?

[70] The judge noted the Crown's concession that the prerequisites for a conditional sentence had been met in Mr. Anderson's case, with the exception of the requirement that Mr. Anderson not pose a risk to the community. Section 742.1(a) of the *Criminal Code* required her to be satisfied that Mr. Anderson serving his sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*. Citing *Proulx*, the judge identified the two factors she had to consider: (1) the risk of Mr. Anderson re-offending; and (2) the gravity of the damage that could ensue in the event he re-offended. Her analysis addressed a range of facts and factors:

> [98] Mr. Anderson is described as a good-hearted young Black male and father of four young children, with whom he spends a lot of time. He clearly love [*sic*] them very much but struggles with the resources needed to adequately parent.
>
> [99] Mr. Anderson's work history is sporadic, again not surprising given his limited education. He is however described by his former employer, Mohammed Sabra, as a reliable and hard-working employee who doesn't realize his potential.
>
> [100] Rakeem Anderson has perpetrated no real violence in his adult life. According to the IRAC [*sic*] assessment, as a youth he threw a chair at a teacher

> and was charged with assault with a weapon. On another occasion he brought a knife to school out of fear of being harmed by older, more violent students. His break and enter charge occurred when he was 18 and according to the report, was "in keeping with the deprivation described in the report". Given what we know about Mr. Anderson's experience with the educational system, it is perhaps not surprising that he encountered issues at school leading to criminal charges. That does not excuse his behaviour but does place it in valuable context.
>
> [101] There has not been any further offending. Mr. Anderson has abided by the conditions of his Recognizance which has been in place since November 5, 2018 – over 15 months. Included in that order are conditions to live at a specific residence in Halifax, follow a daily curfew from 10 p.m. to 6 a.m. and be subject to curfew compliance checks by police. He is not to possess a firearm, crossbow, prohibited or restricted weapon, prohibited device, ammunition or explosive substance.
>
> [102] Mr. Anderson has not engaged in rehabilitative efforts to address education or employment deficits. One might conclude that Mr. Anderson is not interested in improving his life circumstances. But the issue is more complicated than that – as evidenced by the IRAC [*sic*] assessment and testimony of several African Nova Scotian professionals. Lifelong trauma has left Mr. Anderson with a sense of hopelessness and a lack of self worth. His mother put it well in the Pre-sentence Report, "Rakeem is giving up on himself because he believes he's going to jail".
>
> [103] Mr. Anderson needs Afrocentric therapy interventions and an African Nova Scotia male mentor/role model. He needs substantial literacy and vocational interventions that are offered to African Nova Scotians specifically.
>
> [104] 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. Perhaps it is time to look to community to help address those needs for offenders like Mr. Anderson, who I find does not pose a substantial risk to public safety.[27]

[71] It was the judge's view that a conditional sentence of imprisonment provided "the opportunity to blend principles of deterrence, denunciation with restorative options of accountability and reparation".[28] She concluded that a conditional sentence was appropriate in Mr. Anderson's case, a sentence she described as "a substantial jail term in the community under stringent conditions":

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[27] The judge misstated the test under s. 742.1(a) when deciding Mr. Anderson's service on a conditional sentence in the community would not "pose a substantial risk to public safety". Section 742.1(a) states the court has to be satisfied "that the service in the community would not endanger the safety of the community…" However nothing turns on this. She reached a conclusion in relation to the community safety aspect that has not been challenged.

[28] *Anderson* (2020), *supra* note 18 at para. 105

> [106] Mr. Anderson has the opportunity, with the assistance of his community, to be held accountable, to be rehabilitated and to give back. I believe that he is at a place in his life where he is ready to take full advantage of the opportunities that come with serving a substantial jail term in the community under stringent conditions. He has proven his ability to follow court ordered conditions for well over a year.

[72] The conditions imposed by the judge included the mandated statutory conditions and numerous additional conditions tailored to Mr. Anderson's circumstances. These conditions required Mr. Anderson to: reside at a certain address, support his children, attend Afrocentric therapy interventions to address trauma, attend literacy and education interventions with an Afrocentric focus and obtain a reading assessment, seek out mentorship with 902 Man Up, IMOVE or both, and perform 50 hours of community service work in the African Nova Scotian community. Mr. Anderson was prohibited from owning, possessing or carrying a weapon. He was placed on eight months of house arrest to be followed by a 9 p.m. to 6 a.m. curfew for eight months. At the completion of his conditional sentence, Mr. Anderson was ordered to serve two years of probation with conditions. The judge imposed the appropriate ancillary orders.

[73] Mr. Anderson was ordered to report back to court on a monthly basis with Correctional Services directed to provide the judge with written updates on his progress. She recommended that Mr. Anderson be supervised by an African Nova Scotian Conditional Sentence Supervisor and an African Nova Scotian probation officer.

The Crown's Approach to the Appeal

[74] The Crown has consistently approached this appeal as a request for guidance. Its proposed framework for that guidance has evolved. Its factum called for the application of a test of "exceptional circumstances" to structure sentencing for gun crimes perpetrated by African Nova Scotian offenders.

[75] The Crown's submissions in support of an "exceptional circumstances" test acknowledged "how the history of colonialism and its after-effects have profoundly disadvantaged Black Nova Scotians" and recognized the value and importance of IRCAs. The Crown's factum stated the following position:

> 3. Guns have been a persistent scourge on Canadian communities. They reek [*sic*] tragedy and loss amongst marginalized communities, including the African Nova Scotian communities.

> 4. The Appellant does not dispute how the history of colonialism and its after-effects have profoundly disadvantaged Black Nova Scotians. An illustration of that history through IRCA is critically important. But the tension here is that appellate courts have recently given increased effect to Parliament's intent on curbing gun crime – knowing its effect on marginalized communities. Indeed, because of its effect on the victims, families and communities as a whole, sentences are on the rise. As such, the overarching aim is to promote a safe, peaceful society does not acquiesce to a determinist, arm yourself "in case" world view.
>
> 5. In this case, the sentencing Judge's laudable desire to provide an opportunity for Mr. Anderson to restore and rehabilitate himself was premised on an assumption that jail will not deter him or others in his situation. That, with respect, was not an option for her. Incarceration should be the norm because denunciation and deterrence are particularly pressing.
>
> 6. In saying this, the Appellant is not suggesting there is no way forward. We say that conditional sentences can be ordered in exceptional circumstances. The test for "exceptional circumstances" – a common law safety valve – can balance the aims of Parliament and the unique circumstances of the case. Exceptional circumstances may have to be redefined for the ANS experience to strike this balance.

[76] Prior to the appeal hearing, Crown counsel advised the Court he would not be arguing for an "exceptional circumstances" test. He would provide "a roadmap…for proper rigour to the dangerousness component of the CSO [conditional sentence order] inquiry". It is to be noted the Crown had recognized in its factum that an "exceptional circumstances" test had potential to further disadvantage offenders already burdened by "intergenerational trauma and lack of self-worth".

[77] This concern about "exceptional circumstances" as a qualifier for a remedial sentence was also identified by the Intervenor, the African Nova Scotian Decade for People of African Descent Coalition ("ANSDPAD Coalition") who said in their factum: "African Nova Scotians do not need an additional legal hurdle as a prerequisite to community-based sentences".

[78] The Crown's analytical roadmap, articulated in a written submission filed subsequent to its factum, and described at the appeal hearing, focused on the tensions that lie at the heart of this appeal: can remedial sentencing intended to reverse the trend of over-incarcerating African Nova Scotian offenders be reconciled with the principles of denunciation and deterrence that have been given

prominent roles in sentencing for gun crimes? In the Crown's submission, the answer can be "yes". It requires an exacting sentencing process to achieve "just sanctions when such important interests intersect" and will involve incorporating "an *Ipeelee*-like methodology into the *Proulx* assessment".

[79] The Crown says a conditional sentence can be "a meaningful alternative for less serious and non-dangerous offenders" in accordance with what *Proulx* contemplated. Incarceration for gun crimes "will continue to be reserved for serious and/or violent offenders". As the Crown's written submissions explain:

> The sentencing objectives that underlie the range of sentence for this kind of offence are the strong need for deterrence and denunciation of this inherently dangerous and prevalent conduct. In the circumstances of Mr. Anderson, could these objectives be met by a CSO? [By "met", the appellant means achieved, while balanced with other applicable sentencing objectives.]
>
> With the preconditions satisfied, serious thought must be given to a CSO. In the context of the ANS experience, the need to address overrepresentation of this historically disadvantaged people and the lessened moral culpability of Mr. Anderson may factor heavily. A robust review of ss. 718-718.2 can enable the Court to arrive at the CSO of two years less one day, as concluded by the trial judge.

[80] The Crown submits the imposition of a conditional sentence order was a reasonable outcome in Mr. Anderson's case. Properly crafted conditions achieved denunciation and deterrence. The requirements for community service work and reporting back to the court exacted "a measure of accountability" for Mr. Anderson. In the Crown's submission although it was arguable the periods for house arrest and curfew should have been longer, it did not ask this Court to make any adjustments to the CSO.

[81] In its factum, the Crown referenced the Supreme Court of Canada's recognition in *Ipeelee* that sentencing innovation alone will not solve the problem of overrepresentation. However, as the Crown indicated,

> **[62]** …That reality should not cause courts to shirk the important role and contribution that they will bring in ending social inequality. To do otherwise would render our commitment to a peaceful society an empty promise and risk further alienating already marginalized people.

[82] The overrepresentation in prison of Indigenous and Black people is a nettle that not only courts are having to grasp. It is also on Parliament's radar. Mr. Scott

advised the Court that in formulating the Crown's position the objects of recently-introduced Bill C-22 had been taken into account.

Bill C-22

[83] The main object of the amendments proposed by Bill C-22 is to address the systemic discrimination and disproportionate representation of Indigenous and Black offenders in federal prisons. The Federal Government has proposed to achieve this by:

- Removing many mandatory minimum sentences from the *Criminal Code*, including several firearms offences;
- Providing funding for IRCAs and possible funding for community programming, to support successful conditional sentence orders;
- Repealing a significant list of offences for which a conditional sentence order cannot be imposed.

[84] Bill C-22 is an explicit recognition by the Federal Government that systemic change is required to recalibrate the sentencing options for Indigenous and racialized offenders and reverse their disproportionate incarceration. It speaks to what the Supreme Court of Canada noted in *Gladue*: "Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament".[29] Its proposed reforms would enhance the discretionary powers of judges in sentencing Black offenders. The increased availability of conditional sentence orders would afford judges greater scope in imposing sentences that better serve the principle of proportionality, thereby better serving the community and the offender, with systemic factors and historical disadvantage taken into account. Funding for IRCAs will give judges increased access to information about offenders, their circumstances and communities, and support the crafting of fit and proper sentences.

The Themes Emphasized by the Respondent and the Intervenors

[85] Mr. Anderson's factum responded to the Crown's original position that "exceptional circumstances" were the key to unlock the conditional sentencing door for firearms offences. As the Crown abandoned this argument, there is little

[29] *Gladue*, *supra* note 2 at para. 57

need to address the issue. I will merely observe that Mr. Anderson argued the concept of "exceptional circumstances" is not well suited to sentencing an offender from a marginalized community. In Mr. Anderson's submission, an "exceptional circumstances" requirement would compound the inequalities that already burden such offenders and their communities. As I have noted, the Crown recognized this and also noted that "exceptional circumstances" do not form part of the framework developed in *Proulx* for conditional sentencing.

[86] In oral argument, Mr. Burrill said this appeal should simply be dismissed and Mr. Anderson's sentence endorsed. He did not see the particular need for guidance other than possibly in relation to applying the principles of denunciation and deterrence. His main points were:

- Individualization at sentencing is to be achieved within the context of proportionality, the fundamental principle of sentencing.

- Restorative justice principles do not only apply to sentencing Indigenous offenders.

- The judge properly applied and balanced the principles of sentencing, including the principles of denunciation and deterrence. The comments she made about their efficacy did not materially influence her decision.

- The judge appropriately took into account the recognition in law of systemic racism and marginalization of persons of African descent.

- The importance of IRCAs has been well-established. The IRCA in Mr. Anderson's case contextualized his offending and enabled the judge to identify the appropriate range to be applied in sentencing him. The range for firearms offences will be very broad depending on the circumstances.

- The principles of sentencing actually worked in this case to produce a sentence proportionate to the gravity of the offence and Mr. Anderson's moral culpability. The judge appropriately weighed and balanced restorative and denunciatory/deterrent principles.

[87] The ANSDPAD Coalition focused on three themes: the unique history of African Nova Scotians which justifies a remedial response in sentencing; the crucial importance of IRCAs and the value in ordering them in every case; and the need to apply the information contained in IRCAs broadly, beyond sentencing, and

substantively. In the submissions of the ANSDPAD Coalition, what African Nova Scotians need "and what justice requires, is a culturally sensitive and historically contextual application of the existing principles of sentencing".

[88] The ANSDPAD Coalition described the law as having been a source of oppression for African Nova Scotians and not a shield of protection. Having contributed to perpetuating anti-Black racism, the law should play a role in remediating it. This should be accomplished through the consistent application by sentencing judges of the evidence from IRCAs and their clear articulation of how it has been factored into their analysis. In the submission of the ANSDPAD Coalition, why the offending occurred is important to determining a sentence that respects the proportionality principle.

[89] The ANSDPAD Coalition set out what it is seeking:

- The historical context for African Nova Scotians should inform the sentencing analysis for any African Nova Scotian offenders. Nova Scotia's legal history of mistreatment of African Nova Scotians justifies and demands a legal response.

- The sentencing analysis for African Nova Scotian offenders should take into account the evidence contained in IRCAs. Guidance from this Court will assist judges to understand that IRCA evidence will inform the sentencing analysis and outcome.

- IRCAs should be ordered any time they are requested.

- In order to address the over-representation of African Nova Scotians in the criminal justice system generally, there should be a broad and flexible application of IRCAs in contexts other than sentencing, such as, in the *Youth Criminal Justice Act*; the application of prosecutorial discretion; within restorative justice programming; and in the various forms of release from custody, including judicial interim release.

[90] The ANSDPAD Coalition agrees with the Crown that the systemic and background factors relevant to an African Nova Scotian offender be applied at all stages of the sentencing analysis: addressing whether a CSO is available and, if so, whether it is an appropriate disposition; assessing the safety of the community criterion; and informing the balancing of the sentencing principles. The ANSDPAD Coalition noted it is unlikely that caselaw being looked to in the

assessment of the range will have been informed by an analysis that included a recognition of the historic and systemic factors relevant to African Nova Scotian offenders.

[91] The Criminal Lawyers' Association ("CLA") joined with the Respondent and the ANSDPAD Coalition in emphasizing the importance of IRCAs as a tool for judges in the sentencing analysis. The CLA stressed four related themes: the value in having IRCAs inform the application of sentencing principles and determining the sentencing range; the relevance of factoring anti-Black racism into the calibration of denunciation and deterrence; the need for judges to consider anti-Black racism in crafting an individualized sentence; and the role of judicial notice so that every IRCA is not required to establish the historic underpinnings of anti-Black racism.

Impact of Race and Culture Assessments (IRCAs)

[92] As I noted at the start of these reasons, judges have recognized that, while the history of Indigenous people in Canada is distinct, as is their place in our legal and constitutional framework, African Canadians have experienced many of the same effects of discrimination and marginalization.

[93] Background and systemic factors are therefore similarly relevant to sentencing offenders of African descent. *Ipeelee* held there is "nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders".[30] In *R. v. Morris*[31], Justice Nakatsuru observed:

> [9] … The criminal law has recognized that there are cases where, in order to determine a fit and proportionate sentence, consideration must be given to an individual's systemic and social circumstances. These circumstances may extend beyond a person who is being sentenced to include factors such a systemic discrimination and historical injustice. This has been recognized by the criminal courts, particularly in the case of Indigenous offenders. While the distinct history of colonial violence endured by Indigenous peoples cannot simply be analogized to Black Canadians, I found that the ability to consider social context in a

[30] *Gladue*, *supra* note 2 at para. 69; *Ipeelee*, *supra* note 2 at para. 77
[31] 2018 ONSC 5186. The Crown appeal of *R. v. Morris* [*Morris*] was heard by the Ontario Court of Appeal on February 11, 2021. The Court's decision is under reserve.

> sentencing decision is extended to all under section 718.2(e) of the *Criminal Code*…

[94] African Nova Scotians have a distinct history reflected in how they arrived here and their experience over the past 400 years. This history is rooted in systemic and institutionalized racism and injustice.

> *An Abbreviated Survey – Acknowledging the History of Anti-Black Racism in Nova Scotia*

[95] Persons of African descent have lived in Nova Scotia for at least 400 years. In its factum and Book of Authorities, the ANSDPAD Coalition mapped out the historical context from which African Nova Scotians have emerged. It is a history of slavery, oppression, and direct and systemic racism, braced by laws and legal practices.

[96] African Nova Scotians are descendants of Jamaican Maroons, Black refugees and freed and enslaved Black Loyalists. As the ANSDPAD Coalition points out, African Nova Scotians are the only people in Nova Scotia whose history involves slavery, including slavery lawfully practiced in the province. Slavery perpetrated extreme violence and dislocation. In the Coalition's words:

> …It separated us from our original cultures, languages, traditions and peoples. It subjected us to horrific violence and trauma in a hostile and foreign environment. It is a testament to African Nova Scotian resilience, ingenuity and resourcefulness, that our people survived and thrived within this context of oppression. It is within this history that we developed our unique cultural, social, economic, political, spiritual and social traditions, practices, institutions and ways of relating to sustain us. It is through this context that *African Nova Scotians are a distinct people*. (emphasis in the original)

[97] An examination of the history and experience of African Nova Scotians reveals the nature and extent of their oppression:

- Enslavement and the legal status as property of White men.
- Re-enslavement of freed slaves by profiteers and slave marketers.
- Forced migration as the chattels of American loyalists after the Revolutionary War.
- Servitude to Loyalists households even for freed slaves.

- Lawful segregation following the formal abolition of slavery in the British colonies. Examples of legally sanctioned racial segregation existed for military service, schooling, and, as the 1946 case of Viola Desmond[32] highlighted, even in cinemas.

- The denial of ownership of real property. Black settlers were given tickets of location or licenses of occupation rather than legal title to their land. Denied clear title, Black settlers could not sell or mortgage their property, or legally pass it down to their descendants on death.[33]

- Exclusion under the 1864 *Juries Act* as a consequence of not holding a freehold estate.

[98] The ANSDPAD Coalition notes that in the 1960's Nova Scotia began the process of rescinding its segregationist laws and policies. These measures, the building blocks of subsequent law reform, while significant,

> …have not repaired the cumulative damage caused by centuries of legally sanctioned racism in this province. The social, cultural, political and economic impacts of slavery and segregation continue to reverberate within the African Nova Scotian community…

[99] The experience of racism and segregation inflicted deep transgenerational wounds. The ANSDPAD Coalition, referring to the Royal Commission of Inquiry into the Prosecution of Donald Marshall, Jr.[34], noted the mistrust that African Nova Scotians have felt toward the legal institutions in the province:

> …While Nova Scotians were generally appalled at the conduct of the police and justice system in Mr. Marshall's case, the Royal Commission's findings came as little surprise to many within the African Nova Scotian minority. As a community, we had come to expect systemic discrimination and barriers to access to justice when dealing with the police and the courts. It was thus with

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[32] Viola Desmond, an African-Nova Scotian businesswoman, was arrested, charged and convicted under a provincial licensing and revenue statute after seating herself in a Whites-only section of the Roseland Theatre in New Glasgow.
[33] *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60 at para. 36
[34] Racism was found by the Royal Commission to have been a factor in Mr. Marshall's wrongful conviction in 1971 for the murder of a Black youth, Sandy Seale. Mr. Seale's killer, Roy Ebsary, a White man, was not brought to justice until many years later. In the meantime, Mr. Marshall served 11 years in prison. He was acquitted in 1983 by the Supreme Court of Nova Scotia, Appeal Division. The Royal Commission report exonerated him in 1990. In the course of its mandate, the Commission undertook research in a number of criminal justice-related areas, including a study entitled: "Discrimination Against Blacks in Nova Scotia".

> appreciation, but skepticism, that many African Nova Scotians greeted the Commission recommendation: "that the Chief Justices and the Chief Judges of each court in the province exercise leadership to ensure fair treatment of minorities in the system".

[100] Citing the recent documentation of illegal street checks of Black people in the Halifax region[35], the ANSDPAD Coalition observed that, "…even in the 21st century, law, law enforcement, and the justice system in Nova Scotia, have continued to operate in ways that systematically discriminate against Nova Scotians of African descent".

Constrained Choices: the Stranglehold of Racism

[101] Mr. Anderson's background and experiences provide a window into the lives of many African Nova Scotians who appear before the courts to be sentenced. Mr. Anderson's life has been characterized by poverty, housing instability, family breakdown, a lack of culturally relevant educational opportunities, limited employment prospects[36], lack of positive role models, disrupted community attachments, transgenerational trauma, loss of close friends to violence, and hopelessness. As Mr. Wright told the sentencing judge: "Young Black men are dramatically overrepresented on both ends of the gun".[37]

[102] The 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 offenders.

[103] The highly individualized sentencing process that seeks to determine a fit and proportionate sentence for an African Nova Scotian offender must take account of the social context of racism and historical injustice. This context can be made available to sentencing judges through the use of IRCAs.

The Evolution of IRCAs

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[35] Dr. Scot Wortley, "Halifax, Nova Scotia Street Checks Report" (2019); J. Michael MacDonald and Jennifer Taylor, "Independent Legal Opinion on Street Checks" (2019) to the Nova Scotia Human Rights Commission.
[36] In *Gabriel*, *supra* note 3, Justice Campbell recognized that "Geographic residence, civic address and last name appear to hinder black men, as well as others in low income communities, from securing employment opportunities" (para. 76).
[37] *Anderson* (2020), *supra* note 18 at para. 45

[104] The first known IRCA[38] was deployed in *R. v.* "*X*", the sentencing in the Youth Justice Court of Nova Scotia of a Black youth for attempted murder. It contributed to the dismissal of the Crown's application for "X" to be sentenced as an adult. The IRCA in "*X*" was authored by Robert Wright. It provided "a more textured, multi-dimensional framework for understanding "X", his background and his behaviours"[39].

[105] Subsequently, IRCAs have been considered in a number of sentencings in this province, such as: *R. v. Elliott*[40], *R. v. Desmond* [41], *Gabriel*[42], *R. v. Perry*[43], and *R. v. N.W.*[44] (a sentencing for first-degree murder under the *Youth Criminal Justice Act*). IRCAs also featured in Justice Nakatsuru's decisions in *R. v. Jackson*[45] and *R. v. Morris*[46].

[106] Sentencing places unique and exacting demands on judges. An IRCA offers insights not otherwise available about the social determinants that disproportionately impact African Nova Scotian/African Canadian individuals and communities. In *Desmond*, the sentencing judge lamented the lack of an IRCA to assist her:

> [28] It would have been helpful to have an IRCA prepared. It would have been of assistance for the parties and the Court to more thoroughly connect the issues of Anti-Black racism, over-incarceration of African Canadians, and historical and systemic injustices committed to the issues before this Court and the charge Mr. Desmond pleaded to.

[107] In *Gabriel*, the issue confronting the sentencing judge was the determination of parole ineligibility following a conviction for second-degree murder. Justice Campbell saw the value in IRCAs:

> [51] Some of the principles from *Gladue* are applicable to a racial and cultural group that has been the subject of such notorious centuries long systemic discrimination. It is important to know about the systemic and background factors that bring any person before the court for sentencing. That is particularly so when

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[38] The IRCA was referred to in "*X*" as a Cultural Impact Assessment ("CIA").
[39] *X*, *supra* note 3 at para. 198
[40] 2021 NSSC 78
[41] *Desmond*, *supra* note 3
[42] *R v. Perry*, 2018 NSSC 16
[43] 2018 NSSC 16
[44] 2018 NSPC 14
[45] 2018 ONSC 2527
[46] *Morris*, *supra* note 31

> they relate to members of a group that is disproportionately represented in the prison population, disproportionately economically disadvantaged, disproportionately disadvantaged in education, and disproportionately disadvantaged in health outcomes.

[108] He recognized how IRCAs can inform the task of sentencing and the person performing it:

> [57] Sentencing judges struggle to understand the context of the crime and person being sentenced. To do that judges rely on our own common sense and understanding of human nature. Sometimes that isn't enough. Our common sense and our understanding of human nature are products of our own background and experiences. An individual judge's common sense and understanding of human nature may offer little insight into the actions of a young African Nova Scotian male. The Cultural Impact Assessment serves as a reminder of the fallibility of some assumptions based on an entirely different life experience.

[109] To be a credible resource for the courts, IRCAs need to be prepared to a high professional and authoritative standard. The ANSDPAD Coalition notes that the IRCA ordered for the sentencing in *R. v. Boutilier*[47] was to be "completed by an individual or individuals with specialized knowledge, education and experience in the completion of such reports relating to systemic and background factors affecting the African-Nova Scotian Community".[48] The court order sought to have the IRCA examine factors such as poverty/low income, poor educational outcomes, community fragmentation, historical and contemporary impacts of racialized and intergenerational trauma, and overrepresentation of African Nova Scotians in the criminal justice system, where there remains little to no culturally relevant programming. In *Boutilier*, some portions of the IRCA, an opinion that the offender had a traumatic brain injury, were excluded from consideration as outside the expertise of the author.[49]

[110] I conclude this survey on IRCAs with some comments about judicial notice. In his submissions, Mr. Burrill suggested the calling of evidence, as was done at Mr. Anderson's sentencing hearing, should not have to be undertaken in every case. The judge, without objection from the Crown or defence, sought to hear from witnesses about the effects of systemic racism and disadvantage on Mr. Anderson. While this approach is at the judge's discretion or may be necessary if a

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[47] 2017 NSSC 308 [*Boutilier*]
[48] *Ibid* at para. 17
[49] *Ibid* at paras. 16, 19 - 20

qualifications *voir dire* is required[50], it should not be taken as creating a prerequisite for reliance on the contents of an IRCA. The sentencing judge is best positioned to determine how the sentencing should be conducted.

[111] Certain aspects of an IRCA, however, should not be subject to challenge. Like racial prejudice, acknowledged by the Supreme Court of Canada in *R. v. Spence* as "notorious and indisputable"[51], the existence of anti-Black racism can be admitted on the basis of judicial notice without the need for evidence[52]. Judges are entitled to take notice of racism in Nova Scotia and have done so.[53] There is no justification for requiring offenders to produce *viva voce* evidence of this pernicious historical reality.[54] That said, including in an IRCA the history of slavery and systemic racism in Nova Scotia and its effects on African Nova Scotian communities is indispensable. It 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.

How Should IRCAs Inform the Sentencing of African Nova Scotian Offenders?

[112] The Crown shared common ground in this appeal with the Respondent and the Intervenors that IRCAs can be a valuable resource for sentencing judges. The Crown's support for IRCAs generally and its application in Mr. Anderson's case is explicitly recognized in its factum:

> …African Nova Scotians are overrepresented in the criminal justice system. Their historical and continued marginalization is an undeniable, albeit brutally sad, fact.

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[50] In *X*, *supra* note 3, following a qualifications *voir dire*, the judge qualified Mr. Wright to give opinion evidence on social factors relating to the effect of those factors on "X" and rehabilitative recommendations for him. Mr. Wright was also permitted to express his opinion about the absence in the psychological and psychiatric assessments of any reference to race and culture (para. 163). In Mr. Anderson's sentencing, there was no challenge raised by the Crown to the qualifications of the IRCA witnesses and their ability to offer opinion evidence.

[51] 2005 SCC 71 at para. 5

[52] Justice Nakatsuru did so in *R. v. Jackson*, 2018 ONSC 2527 at para. 82: "I find that for African Canadians, the time has come where I as a sentencing judge must take judicial notice of such matters as the history of colonialism (in Canada and elsewhere), slavery, policies and practices of 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".

[53] *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 47 (L'Heureux-Dubé and McLachlin, JJ.)

[54] In *Ipeelee* para. 60, the Supreme Court of Canada held that the courts "must take judicial notice" of the historical injustices perpetrated against Indigenous people and the continuing impact of that history, including the "higher levels of incarceration".

> In this regard, the sentencing Judge was correct to rely heavily on the contents of the IRCA in considering a proportionate sentence for Mr. Anderson.

[113] At the appeal hearing, Mr. Scott emphasized the Crown's support for IRCAs, acknowledging them to be valuable conduits of information about the history of colonialism, anti-Black discrimination and its effects. He confirmed the Crown's wholesale approval with how the judge employed the IRCA in sentencing Mr. Anderson.

[114] Taking account of IRCA evidence ensures relevant systemic and background factors are integrated in the crafting of a fit sentence, one that is proportionate to the gravity of the offence and the moral culpability of the offender. In its factum, the ANSDPAD Coalition quoted from Professor Maria Dugas' article, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" where she discussed the role IRCAs are designed to play in sentencing:

> IRCAs operate from the assumption that a person's race and culture are important factors in crafting a fit sentence. They provide the court with necessary information about the effect of systemic anti-Black racism on people of African descent. They connect this information to the individual's lived experience, articulating how the experience of racism has informed the circumstances of the offender, the offence, and how it might inform the offender's experience of the carceral state.[55]

[115] Sentencing is an inherently individualized process.[56] It is a fundamental duty of a sentencing judge to pay close attention to the circumstances of all offenders in order to craft a sentence that is genuinely fit and proper. What is required in the sentencing of Indigenous offenders applies to offenders of African descent who are also entitled to "an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences…"[57]

[116] Sentencing judges play a significant role in how offenders are punished and rehabilitated through the criminal justice system. As in the case of Indigenous offenders, they decide whether an offender of African descent is incarcerated or receives a sentence that can play "a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime".[58]

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[55] (2020) 43 Dalhousie L.J. 103 at p. 106
[56] *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 92 [*M.(C.A.)*]
[57] *Ipeelee*, *supra* note 2 at para. 75
[58] *Gladue*, *supra* note 2 at para. 65

Notwithstanding that sentencing judges are far downstream from the forces that have contributed to bringing offenders before them, they are influential at a critical juncture: they determine if incarceration and separation from society is the course to be followed or if a remedial option can serve the objectives of sentencing and achieve a just outcome.

[117] The deference afforded sentencing judges by appeal courts is intended to respect the individualization of sentences "both in method and outcome". *Friesen* held that:

> [38] …Sentencing judges have considerable scope to apply the principles of sentencing in any manner that suits the features of a particular case. Different methods may even be required to account properly for relevant systemic and background factors (*Ipeelee*, at para. 59). Similarly, a particular combination of aggravating and mitigating factors may call for a sentence that lies…outside any range. (cites omitted)

[118] The "method" employed for sentencing African Nova Scotian offenders should carefully consider the systemic and background factors detailed in an IRCA. It may amount to an error of law for a sentencing judge to ignore or fail to inquire into these factors. A judge does not have to be satisfied a causal link has been established "between the systemic and background factors and commission of the offence…" These principles parallel the requirements in law established by the Supreme Court of Canada in relation to *Gladue* factors in the sentencing of Indigenous offenders.[59] As with Indigenous offenders, while an African Nova Scotian offender can decide not to request an IRCA, a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law.[60]

[119] As in Mr. Anderson's case, an IRCA can deliver the specific information relevant to the judge's obligation to determine an individualized sentence. However it is the content not the form that is critical. While the required information does not have to be presented in an IRCA, like *Gladue* reports for Indigenous offenders, IRCAs deliver the "indispensable" content[61] comprehensively and efficiently. IRCAs have become a familiar method for

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[59] *Gladue*, *supra* note 2 at para. 82; *Ipeelee*, *supra* note 2 at paras. 60, 82
[60] *R. v. Gilliland*, 2014 BCCA 399
[61] *Ipeelee*, *supra* note 2 at para. 60

placing systemic and individualized information about African Nova Scotian offenders before sentencing courts in Nova Scotia.

[120] IRCAs can support the use of rehabilitation in sentencing, "One of the main objectives of Canadian criminal law…" and "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world…".[62] IRCAs can provide a foundation on which to build alternatives to incarceration for Black offenders and reduce the over-reliance on imprisonment.

[121] As the ANSDPAD Coalition asked this Court to recognize, the social context information supplied by an IRCA can assist in:

- Contextualizing the gravity of the offence and the degree of responsibility of the offender.
- Revealing the existence of mitigating factors or explaining their absence.
- Addressing aggravating factors and offering a deeper explanation for them.
- Informing the principles of sentencing and the weight to be accorded to denunciation and deterrence.
- Identifying rehabilitative and restorative options for the offender and appropriate opportunities for reparations by the offender to the victim and the community.
- Strengthening the offender's engagement with their community.
- Informing the application of the parity principle. "Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e)".[63]
- Reducing reliance on incarceration.

[122] The Crown's roadmap analysis aligns with the ANSDPAD Coalition's holistic application for IRCAs. It is an approach this Court endorses. IRCAs can enrich and guide the application of sentencing principles to Black offenders. The systemic factors described by the IRCA in Mr. Anderson's case and his

[62] *R. v. Lacasse*, 2015 SCC 64 at para. 4
[63] *Ipeelee*, *supra* at para. 79

experiences as an African Nova Scotian navigating racism and marginalization are not unique. IRCAs should be available to assist judges in any sentencing involving an offender of African descent. IRCAs can ensure judges, when engaged in "one of the most delicate stages of the criminal justice process in Canada"[64], are equipped to view the offender through a sharply focused lens.

[123] In explaining their sentences, judges should make more than passing reference to the background of an African Nova Scotian offender. It may not be enough to simply describe the offender's history in great detail. It should be possible on appeal for the court to determine, based on the record or the judge's reasons, that proper attention was given to the circumstances of the offender. Where this cannot be discerned, appellate intervention may be warranted.

[124] The role of IRCAs in the sentencing of African Nova Scotian offenders will serve to enhance the credibility of the criminal justice system in the eyes of a broad and diverse public by increasing the likelihood of the sentences imposed being seen as just and appropriate. Respect for the law and the maintenance of a just, peaceful and safe society is not achieved by putting disproportionate numbers of Black and Indigenous offenders behind bars having left unaddressed, in the context of sentencing, the deeply entrenched historical disadvantage and systemic racism that more than likely had a hand in bringing them before the courts.

[125] The historic discrimination and racism to which African Nova Scotians have been subjected is antithetical to societal values of equality and inclusion. The Supreme Court of Canada in *R. v Nasogaluak*, addressing, in the context of sentencing, the impact of a *Charter* breach, recognized the role of the *Charter* in the sentencing regime: "A sentence cannot be "fit" if it does not respect the fundamental values enshrined in the *Charter*".[65] This principle is to be applied purposively. The sentencing process as a whole must accord with *Charter* values, including the right to equality before and under the law. Differential treatment may be needed in order to serve the goals of substantive equality[66] otherwise how are historic inequalities confronted and addressed, ongoing systemic discrimination ameliorated, and continued disadvantage avoided?

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[64] *Lacasse, supra* note 62 at para. 1
[65] *R. v. Nasogaluak*, 2010 SCC 6 at para. 48 [*Nasogaluak*]
[66] *Wither v. Canada (Attorney General)*, 2011 SCC 12 at para. 39

The Conditional Sentence Regime

[126] The context for this appeal is the conditional sentence imposed on Mr. Anderson following an analysis by the judge which all parties have submitted was conducted appropriately. It is the use of IRCAs in the conditional sentencing regime to which I now turn.

Statutory Prerequisites

[127] Before a conditional sentence can be imposed, both a penitentiary sentence and probation must be eliminated as appropriate dispositions. This requires the judge to undertake "a preliminary determination of the appropriate range of available sentences".[67] The sentencing judge has to be satisfied the range for a fit and proportionate sentence includes incarceration of two years less a day.[68] This threshold intended by Parliament to "identify the type of offenders who could be entitled to a conditional sentence".[69] Judges are entitled to expect their determinations of who qualifies for a conditional sentence to be accorded significant deference on appeal absent an error in principle or the imposition of a clearly unfit sentence.[70]

[128] The determination of the range for an offence is governed by certain principles. While the fundamental purpose and principles of sentencing must be considered, "…there is no such thing as a uniform sentence for a particular crime".[71] Ranges,

> …are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.[72]

[129] As this Court held in *R. v. A.N.*, the range for an offence "moves sympathetically with the circumstances, and is proportionate to the *Code*'s

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[67] *Proulx*, *supra* note 4 at para. 58
[68] *Criminal Code*, s. 742.1
[69] *Proulx*, *supra* note 4 at para. 55
[70] *R. v. L.M.*, 2008 SCC 31 at para. 35
[71] *M.(C.A.)*, *supra* note 56 at para. 92
[72] *Nasogaluak*, *supra* note 65 at para. 44

sentencing principles that include fundamentally the offence's gravity and the offender's culpability….[73].

[130] Sentencing is tailored to the individual offender. The matrix of factors to be balanced in order to achieve a just and appropriate sentence is complex. *Lacasse* reminds judges where the focus must be directed:

> [58] There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case…

[131] In assessing the probation/penitentiary issue and determining the range, systemic and background factors that could reasonably and justifiably impact the sentence imposed must be considered. IRCAs are a vital source of evidence for resolving these issues. The judge sentencing Mr. Anderson did not have the benefit of sentences for s. 95(1) offences that had been crafted with IRCA evidence taken into account. Cases such as *Nur* were decided without such evidence.

[132] The question of whether the range can include a sentence of two years less a day should be refracted through the prism of the factors addressed by the IRCA. It is not a matter of determining if deviating from the range for the offence is warranted. Determining the range itself must be informed by the factors addressed in the IRCA and the statutory prerequisites for a conditional sentence. As the ANSDPAD Coalition submitted, IRCAs should be employed to individualize sentences, taking account of factors that have previously been absent from the analysis. Sentence ranges will have to be re-evaluated as they have been developed without the benefit of a fully contextualized analysis. As noted, a judge's determination of the applicable sentencing range needs to be accorded a high degree of deference.

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[73] 2011 NSCA 21 at para. 34

[133] The need to re-assess sentence ranges has been acknowledged by the Crown in post-hearing submissions:

> …the historical portrait of sentences that may comprise a range are *currently* without the benefit of IRCAs to inform those results. Therefore, to individualize the range, even for the preliminary step of excluding probation and federal custody, any consideration of this range *must* be cognizant of the more fulsome context by which a court with the benefit of an IRCA can arrive at a just and appropriate sentence.

[134] This, the Crown says, will lead to a body of jurisprudence that has incorporated the factors addressed by IRCAs. In the meantime, "departure from a traditional range that is not itself informed by systemic and background factors will not necessarily constitute an error in principle or result in an unfit sentence".[74]

[135] Once a judge has determined that the appropriate range of sentence for the offender includes a term of imprisonment of two years less a day, they then must address whether the offender should be permitted to serve their sentence in the community. As I noted earlier, a conditional sentence can only be ordered if the judge:

> …is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.[75]

[136] The "endangerment of the community" factor consists of two components: (1) the risk of re-offence; and (2) the gravity of the damage should re-offending occur.[76] These elements were extensively reviewed in *Proulx* which held that incarceration would be warranted where there is a "real risk" of re-offending and, particularly in the case of violent offenders, where there is even a minimal risk of "very harmful future crime".[77]

The Risk of Re-Offending

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[74] Crown's post-hearing submissions, April 13, 2021
[75] *Criminal Code*, s. 742.1(a)
[76] *Proulx*, *supra* note 4 at para. 69
[77] *Ibid* at paras. 69 and 74

[137] As the judge recognized in this case, the risk of re-offending relates to the risk that the individual offender may pose to the community while serving a conditional sentence. *Proulx* found the risk can be mitigated by "the imposition of appropriate conditions" that support rehabilitation and institute a level of supervision to ensure compliance.[78] The utilization of appropriate conditions intended to manage risk is apparent in Mr. Anderson's sentence. And although the judge should have explicitly addressed the gravity of damage factor, which she does not appear to have done, the Crown expressly supports the suitability of Mr. Anderson's CSO and we have not been asked to find an error of law in the reasons for sentence.

[138] *Proulx* sets out a variety of factors relevant to the assessment of whether the offender poses a risk of re-offending. The decidedly individualized nature of sentencing is a critical aspect of the analysis. In the case of African Nova Scotian offenders, these factors should be evaluated in the context of the information contained in the IRCA. The 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. A criminal record may be the result of limited choices, the "normalized lack of achievement",[79] the corrosive effects of racism and prejudice, and the absence of positive role modeling. As the Crown pointed out in its roadmap, association with criminalized peers,

> …must be contextualized by a consideration of the ANS experience. It is simply a reality that some people in marginalized communities will have criminal records. That is the product of systemic racism and overrepresentation in the justice system. Absent any connection to criminal activity with any of these associates, it would unduly discriminate to factor this against the availability of a CSO.

[139] It was the Crown's submission that the judge properly did not "superficially conclude that, because Mr. Anderson may have associates with criminal records, he constitutes a danger to the community. It must be informed by the IRCA".

[140] Taking account of context will be necessary in relation to the other non-exhaustive factors identified in *Proulx* as possibly relevant: the nature of the offence; the relevant circumstances of the offence, including prior and subsequent

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[78] *Ibid* at para. 72

[79] Mr. Anderson's IRCA, quoted by the judge in para. 65 of her reasons.

incidents; the degree of the offender's participation; the relationship of the offender to the victim; and after-the-fact conduct. *Proulx* references in general terms what an IRCA can supply in rich and contextualized detail: the offender's "profile", including their "occupation, lifestyle, criminal record, family situation, mental state…".[80] As I noted earlier in these reasons, IRCAs supply a broad array of information to assist a sentencing judge's understanding of the racialized offender.

[141] As for the degree of harm if there is re-offending, *Proulx* held that "a small risk of very harmful future crime"[81] could be the basis for a judge deciding a conditional sentence is not appropriate. Again, risk may be attenuated by suitable conditions and culturally relevant supports in the community for the African Nova Scotian offender. 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.

The Fundamental Purpose and Principles of Sentencing

Proportionality

[142] A conditional sentence must adhere to the fundamental principle of proportionality stated in s. 718.1 of the *Criminal Code*. Both the gravity of the offence and the degree of the offender's responsibility for it must be addressed contextually.

[143] A sentence that is proportionate to the seriousness of the offence enhances public confidence in the administration of justice by ensuring justice is seen as fair and rational. While the "normative character of the offender's actions" and "the consequential harm" to victims and the community must be reflected in the sentence[82], the seriousness of the offence should not be assessed in a vacuum with no consideration given to the context in which it was committed and its surrounding circumstances.

[144] As I noted in paragraphs 58 and 59 of these reasons, the sentencing judge here appears to have dealt with the "gravity of the offence" issue in the context of addressing aggravating factors. The "potential for violence and physical harm"[83] did make this a very serious offence. The judge appropriately contextualized the

[80] *Proulx*, *supra* note 4 at para. 70
[81] *Ibid* at para. 74
[82] *Friesen*, *supra* note 8 at para. 76
[83] *Anderson* (2020), *supra* note 18 at para. 28

degree of seriousness on the basis of universally applicable considerations: Mr. Anderson's gun possession was not connected to criminal activity such as drug trafficking, he did not have other guns in his possession, he was not impaired, and his interaction with the police was polite, respectful and cooperative.

[145] Even where the offence is very serious, consideration must be given to the impact of systemic racism and its effects on the offender. The objective gravity of a crime is not the sole driver of the sentencing determination which must reflect a careful weighing of all sentencing objectives.

[146] The moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism, as was done in this case. The African Nova Scotian offender's background and social context may have a mitigating effect on moral blameworthiness. In *Ipeelee*, the Supreme Court of Canada recognized this principle in relation to Indigenous offenders.[84] It should be applied in sentencing African Nova Scotians. Sentencing judges should take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility. The judge here mined the rich vein of the IRCA evidence and closely and comprehensively examined it to better understand how to view Mr. Anderson's possession of the gun.

[147] The Supreme Court of Canada in *Ipeelee* recognized that factors routinely considered in sentencing must be re-evaluated by judges "to ensure that they are not contributing to ongoing systemic racial discrimination".[85] The Court, referenced a quote from Professor Timothy Quigley that can be equally applied to African Nova Scotian offenders:

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

[84] *Ipeelee*, *supra* note 2 at para. 73
[85] *Ipeelee*, *supra* note 2 at para. 67

> disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.[86]

[148] As *Ipeelee* states, the imposition of just sanctions, a purpose of sentencing, must not be grounded in discrimination. This applies to the sentencing of African Nova Scotian offenders.

Denunciation and Deterrence

[149] Denunciation in sentencing seeks to express condemnation of transgressive conduct. It is "communicative and educative" and "reflects the fact that Canadian criminal law is a "'system of values'". It condemns the offender's encroachment on society's shared values.[87]

[150] Before us, the Crown expressed concern with the sentencing judge's comments about denunciation and deterrence in relation to gun offences. For example, as I set out earlier in these reasons, the judge said: "Sadly, sentences that solely or primarily emphasize deterrence and denunciation have not made our communities safer places to [*sic*] in which to live. Punishment does not change behaviour when the actions are rooted in marginalization, discrimination and poverty".[88]

[151] The judge's comments do not make her an outlier. In the preceding paragraph of her reasons she had quoted the statement from the Supreme Court of Canada in *Gladue*: "…although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals".[89] *Gladue* is not the only instance when the Court explicitly acknowledged that locking offenders up has not achieved the goals intended by traditional sentencing principles. In *Proulx*: "The empirical evidence suggests that the deterrent effect of incarceration is uncertain".[90] In *Nur*: "Doubts concerning the effectiveness of incarceration as a deterrent have been longstanding".[91]

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[86] *Ibid* at para. 67 quoting T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in R. Gosse, J.Y. Henderson and R. Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (1994), 269, 1t pp. 275-76)
[87] *Friesen*, *supra* note 8 at para. 105
[88] *Anderson* (2020), *supra* note 18 at para. 88
[89] *Gladue*, *supra* note 2 at para. 57
[90] *Proulx*, *supra* note 4 at para. 107
[91] *Nur* (SCC), *supra* note 15 at para. 113

[152] *Proulx* drove the point home in the context of discussing conditional sentencing as the means by which Parliament has mandated the "expanded use…of restorative principles in sentencing as a result of **the general failure of incarceration to rehabilitate offenders and reintegrate them into society**".[92] (emphasis added)

[153] While scepticism is justified, judges are nonetheless required to factor denunciation and deterrence into their sentencing calculus. Where the appropriateness of a conditional sentence is being considered, it will be necessary for the judge to determine if denunciation and deterrence can be served by punitive conditions that restrict the offender's liberty.[93] And general deterrence as a sentencing principle must be applied with caution so that it does not obstruct the fashioning of a proportionate sentence. A grossly disproportionate sentence crafted to send a deterrent message to would-be offenders will attract appellate intervention.[94]

[154] Judges are accorded significant, although not unfettered, discretion in weighing the principles of sentencing in determining a fit sentence that accords with the overarching principle of proportionality.[95] In this calculus, a properly crafted conditional sentence with appropriate conditions can achieve the objectives of denunciation and deterrence.[96] A conditional sentence may even be:

> … as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.[97]

[155] Even a remedial sentence such as a suspended sentence carries a deterrent element; there can be significant consequences should the offender fail to abide by the court-imposed conditions or re-offend.[98] The consequences of breaching a conditional sentence are potent – the "real threat of incarceration".[99]

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[92] *Proulx*, *supra* note 4 at para. 20
[93] *Ibid* at paras. 36 and para. 127
[94] *Nur* (SCC), *supra* note 15 at para. 45
[95] *Friesen*, *supra* note 8 at para. 104
[96] *Proulx*, *supra* note 4 at para. 67
[97] *Ibid* at para. 41
[98] s. 733.1 of the *Criminal Code*: "An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of (a) an indictable offence and is liable to imprisonment for a term of not more than four years; or (b) an offence punishable on summary conviction".
[99] *Proulx*, *supra* note 4 at para. 21

[156] Societal values must not be lost in the analysis. Denunciation may need to be emphasized to such an extent that "incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct".[100] There are also statutory provisions that require judges to prioritize denunciation and deterrence.[101] The Crown's roadmap references *Proulx* which held:

> [114] Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.

[157] *Proulx* noted that while aggravating circumstances will heighten the need for denunciation and deterrence, "…it would be a mistake to rule out the possibility of a conditional sentence *ab initio* simply because aggravating factors are present…each case must be considered individually".[102]

[158] If a penitentiary sentence is imposed, s. 743.2 of the *Criminal Code* mandates that reports relating to the offender – and this must now include IRCAs if one is submitted at the sentencing hearing – be attached to the warrant of committal.[103]

[159] The use of denunciation and deterrence to justify incarceration should be closely interrogated. As the ANSDPAD Coalition argues, the use of denunciation and deterrence to protect societal values should be informed by a recognition of society's role in undermining the offender's prospects as a pro-social and law-abiding citizen.

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[100] *Ibid* at para. 106

[101] s. 718.01 of the *Criminal Code* states: "When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct". Referring to this provision, *Friesen* held that "…while s. 718.01 requires deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence in accordance with the overall principle of proportionality".

[102] *Proulx*, *supra* note 4 at para. 115

[103] "A court that sentences or commits a person to penitentiary shall forward to the Correctional Service of Canada its reasons and recommendation relating to the sentence or committal, any relevant reports that were submitted to the court, and any other information relevant to administering the sentence or committal".

[160] Accordingly, denunciation and deterrence – general deterrence in Mr. Anderson's case – must be assessed contextually in sentencing African Nova Scotian offenders. They cannot be regarded as static principles to be applied rigidly in what is a highly individualized process. Judges should look to IRCAs to assist them in determining whether the objectives of denunciation and deterrence can be satisfied as effectively in the community under a conditional sentence order as in a jail. In making this determination, the judge will consider the nature of the conditions that could be imposed, the duration of the conditional sentence, "and the circumstances of the offender and the community in which the conditional sentence is to be served".[104] All "relevant evidence" should be taken into account in the assessment.[105]

The Principle of Restraint

[161] Sections 718.2(d) and (e) of the *Criminal Code* codify the principle of restraint, directing that less restrictive sanctions than custody should be assessed for their appropriateness and reasonable alternatives to incarceration must be considered for all offenders. Restraint as a principle of sentencing must be considered as part of a sentencing matrix that includes denunciation and deterrence. Reversing the trend of over-incarceration of Black offenders will require robust and consistent application of the restraint principle.

[162] *Proulx* held that conditional sentences can reflect traditional punitive sentencing goals while also furthering restorative objectives:

> [100] … a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and €, which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[104] *Proulx*, *supra* note 4 at para. 114
[105] *Ibid* at para. 127

[163] *Proulx* has established that it is an error in principle not to seriously consider imposing a conditional sentence where the statutory prerequisites have been met.[106] As in Mr. Anderson's conditional sentence, conditions can underpin and fortify a restrained, restorative approach and allow for a sanction that is responsive to the disproportionate incarceration of African Nova Scotians.

Conclusion

[164] The Crown originally appealed Mr. Anderson's conditional sentence on the grounds the judge underemphasized denunciation and deterrence and imposed a sentence that was demonstrably unfit. Its Notice of Appeal filed on March 12, 2020, sought an order to increase the sentence to one of actual incarceration. The Crown's position has evolved substantially since then. The sentencing of African Nova Scotian offenders must similarly evolve. This is to be accomplished by judges taking into account evidence of systemic and background factors and the offender's lived experience, ideally developed through an IRCA, at every step in the sentencing process, and in the ultimate crafting of a just sanction. Mr. Anderson's sentencing shows that change is possible, for the offender, and as significantly, for our system of criminal justice.

Disposition

[165] I would therefore grant leave to appeal but dismiss the appeal.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Fichaud, J.A.

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[106] *Ibid* at para. 90

Farrar, J.A.

Beaton, J.A.