Court File No.: C65766

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

– and –

KEVIN MORRIS

Respondent

– and –

CRIMINAL LAWYERS' ASSOCIATION

Intervenor

FACTUM OF THE CRIMINAL LAWYERS' ASSOCIATION

Emily Lam
Kastner Law
65 Queen Street West, Suite 1240
Toronto, Ontario
M5H 2M5

Tel.: 416-655-3044 x2
Fax: 416-655-3044
Email: elam@kastnerlaw.ca

Marianne Salih
Edward Royle & Partners
481 University Ave, Suite 510
Toronto, Ontario
M5G 2E9

Tel.: 416-309-1970
Fax: 416-340-1672
Email: Marianne.salih@roylelaw.com

Of Counsel for the Applicant, Criminal Lawyers' Association (Ontario)

PART I: STATEMENT OF THE CASE

1. A just punishment is one that is adequately informed by the nature and gravity of the offence and the individual circumstances of the offender. The imposition of a fit sentence, therefore, demands that a sentencing judge be entitled to consider the broadest range of relevant material. For this reason, the rules of evidence are substantially relaxed at sentencing, permitting the sentencing judge "wide latitude as to the sources and types of evidence upon which to base his [*sic*] sentence."

R v Levesque, **[2000] SCJ No 47 (SCC) at para 30**

2. Indisputably, for many Black offenders, the coalescence of historical and systemic background factors have played a role in bringing them before the courts. Indeed, the disproportionate representation of Black offenders in the criminal justice system has its source in these background factors. The judiciary, tasked with administering justice in our society, must have a meaningful way of addressing this injustice to the extent that it has contributed to the offender's moral culpability.

3. This appeal provides this Honourable Court with an opportunity to craft a framework for admitting evidence during sentencing of these unique historical and systemic factors affecting Black offenders. Several important questions are engaged by the prospect of this new framework: What is the evidentiary standard for admission of systemic and background factors? Can they be the subject of judicial notice? Should expert evidence

be required in order for judges to factor in the impact that systemic racism had in an offender's life?

PART II: THE CLA'S POSITIONS ON THE QUESTIONS IN ISSUE

4. The CLA's position on the questions at issue is as follows:

   a. The Canadian justice system is founded upon a flexible and culturally sensitive sentencing framework that provides ample basis for the court to take judicial notice of systemic and background factors experienced by African Canadians. These factors include: the history of colonialism, slavery, segregation, the disproportionate over-policing of Black communities, and the subsequent intergenerational trauma from the experience of widespread individual and systemic anti-Black racism, which has resulted in socio-economic disadvantages and higher rates of incarceration for Black Canadians. Allowing for judicial notice of these factors provides numerous practical benefits, such as avoiding the need for offenders and the courts to spend precious time and resources on proving facts that are beyond dispute.

   b. Once a sentencing judge has taken notice of these systemic and background factors, expert evidence should not be required to establish a connection between these factors and the particular circumstances of an offender. Rather, a sentencing judge should be able to rely on <u>any</u> credible and trustworthy evidence that reasonably supports an inference that the systemic and background factors have impacted their circumstances and are therefore relevant to crafting a fit sentence. Without diminishing the usefulness of

expert evidence or other specialized materials such as Impact of Race and Culture Assessments ("IRCAs") or social history reports when there is an ability to obtain one, this Court should be wary of requiring this type of evidence. Mandating that offenders provide expert evidence for this purpose creates an unrealistically high evidentiary standard, perpetuates systemic disadvantages already faced by Black offenders in the criminal justice system, and severely impedes defence counsel's ability to effectively represent indigent clients at sentencing.

c. A causal linkage between individual circumstances and systemic and background factors based upon expert evidence is not required. An offender should be able to rely upon any credible and trustworthy information, including self-reported information, to demonstrate that the systemic and background factors bear upon his/her unique circumstances and moral blameworthiness.

PART III: SUMMARY OF THE FACTS

5. The CLA intervenes pursuant to an Order of this Court dated June 18, 2019.

6. The CLA is a non-profit organization comprised of more than 1,300 criminal defence lawyers practicing in Ontario and elsewhere in Canada.

7. The CLA accepts the facts as set out in the Appellant's factum and takes no position on any facts to be disputed by the Respondent.

PART IV: LAW AND APPLICATION

A. JUDICIAL NOTICE IN SENTENCING BLACK OFFENDERS

8. Courts may take judicial notice of facts that are (1) so notorious or generally accepted as to be beyond reasonable dispute; or (2) capable of immediate substantiation through readily accessible and accurate sources. A party may rely upon facts that are the subject of judicial notice without the need to prove them by evidence.

> ***R v Find*, [2001] 1 SCR 863, [2001] SCJ No 34 (SCC) at para 48.**
> ***Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, at para 56.**
> ***R v Williams,* [1998] 1 SCR 1128, [1998] SCJ No 49 (SCC), at para 54.**
> ***R v Spence,* 2005 SCC 71, at paras 1, 5.**

9. Both the Supreme Court of Canada ("SCC") and this Court have taken judicial notice of systemic anti-Black racism in the context of jury selection and interactions with the police. These decisions recognize that discriminatory beliefs may be consciously or unconsciously held, that reasonable persons are aware of the history of discrimination faced by disadvantaged groups in Canadian society, and that visible minorities are at particular risk from unjustified police interventions in their lives.

> ***R v Parks,* [1993] OJ No 2157, 15 OR (3d) 324 (CA) at para 54.**
> ***R v Williams,* [1998] 1 SCR 1128, [1998] SCJ No 49 at paras 21, 28, 30, 54.**
> ***R v Spence,* 2005 SCC 71, at paras 1, 5, 32, 33.**
> ***R v RDS,* [1997] 3 SCR 484, [1997] SCJ No 84 at paras 46-47.**
> ***R v Brown,* 64 OR (3d) 161, [2003] OJ No 1251 (CA) at paras 7-9, 38.**
> ***R v Grant,* 2009 SCC 32, at paras 43, 154.**
> ***R v Golden,* [2001] 3 SCR 679, [2001] SCJ No 81 at para 83.**
> ***R v Le*, 2019 SCC 34, at para. 97.**
> ***See generally R v Jackson,* 2018 ONSC 2527, at para 87.**

10. Judicial notice of racism and a history of discrimination against Indigenous offenders has, in the sentencing context, lead to a robust framework for mitigating a sentence based on systemic and background factors that played a role in bringing the Indigenous offender before the courts. In *Gladue* and *Ipeelee,* the SCC recognized that the historical disadvantages suffered by this minority group, including low income, high unemployment, lack of education and opportunities, substance abuse, and community fragmentation has resulted in disproportionate rates of crime and incarceration. In fashioning a fit sentence, a sentencing judge must take judicial notice of this relevant social context, and must consider any evidence regarding its impact on the Indigenous offender before the court, for example, through pre-sentence or *Gladue* reports. To the extent that these systemic and background factors shed light on the offender's moral blameworthiness, they bear on his/her culpability and may be mitigating.

***R v Gladue,* [1999] 1 SCR 688, [1999] SCJ 19 (SCC) at paras 66-84.**
***R v Ipeelee,* 2012 SCC 13, at paras 56-60, 73-75.**

11. In conducting this analysis for Indigenous offenders, the offender is not required to demonstrate a causal link between the background factors and the commission of the current offence. To require demonstration of a causal link would result in an overly onerous evidentiary burden and is unrealistic in light of the complex historical interconnections involved. Furthermore, a causal link incorrectly suggests that such factors excuse or justify the criminal conduct at issue. The correct approach instead recognizes that such factors may have created unique challenges for the offender, and may therefore provide context for his/her actions.

***R v Ipeelee,* 2012 SCC 13, at paras 81-83.**

***R v Okimaw,* 2016 ABCA 246, at paras 62, 68.**
***R v JLM,* 2017 BCCA 258, at paras 32, 37.**

12. The *Gladue* analysis appropriately reflects the broad discretion that sentencing judges generally enjoy. This discretion accords sentencing judges "wide latitude as to the sources and types of evidence upon which to base [their] decision." For example, judges may receive and rely upon any hearsay evidence that is credible and trustworthy. Judges may even rely on hearsay to resolve disputed facts. This wide latitude in sentencing enables judges to have the fullest information possible regarding an offender and his/her background in order to craft a sentence that is suited to the unique circumstances of the offender and the crime.

***R v Gardiner*, [1982] 2 SCR 368, [1982] SCJ No 71 (SCC) at para 109.**
***R v Levesque,* 2000 SCC 47, at para 30.**
***Criminal Code of Canada,* RSC, 1985, c C46, s. 723(5).**

13. Complementing the wide latitude afforded to sentencing judges in fashioning a fit sentence is the ability of judges to take "judicial notice of the social framework in which the law is to operate at sentencing." In this regard, the SCC has recognized a relaxed standard for taking judicial notice of social framework facts – which provide background context for deciding factual issues and which often involve broad policy considerations. A court may take judicial notice of a social framework fact if it "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used…*"

***R v Le*, 2019 SCC 34, at para. 71.**
***R v Jackson,* 2018 ONSC 2527, at paras 83-84.**

***R v Spence*, 2005 SCC 71 at para 65 [emphasis in original].**

14. The CLA submits that this flexible and culturally sensitive sentencing framework provides ample basis for this Court to affirm the principle articulated in *Jackson,* that judges may "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 to socio-economic ills and higher levels of incarceration." Amongst reasonable persons, these facts are beyond dispute.

***R v Jackson,* 2018 ONSC 2527, at para 82.**

15. As in *Gladue,* judicial recognition of the background and systemic factors affecting African-Canadians would not justify a race-based discount at sentencing; rather, it would allow sentencing judges to take account of the context necessary to properly understand the individual circumstances of the offender and his/her culpability.

16. Allowing for judicial notice of the factors enunciated in *Jackson* also offers a number of practical advantages to the sentencing process: (1) it avoids the need for these offenders, who are often indigent or of limited resources, to obtain social context evidence to demonstrate what is already widely accepted; (2) it thereby avoids delay in sentencing proceedings; and (3) it allows offenders and the court to more appropriately devote their resources to fact-specific inquiries about the individual before the court.

***R v Jackson,* 2018 ONSC 2527, at para 90.**

17. Finally, allowing for such judicial notice presents no unfairness to the Crown. The social framework facts at issue are widely accepted and properly circumscribed. The sentencing process otherwise remains adversarial and requires proof by the offender of the specific impact upon him/her of the systemic and background factors at hand. If s/he can do so, it is incontrovertible that such information is relevant to the fundamental principles of proportionality and individual consideration in sentencing.

***R v Jackson,* 2018 ONSC 2527, at paras 91-92.**

B. THE EVIDENTIARY MATERIALS NECESSARY TO LINK SYSTEMIC AND BACKGROUND FACTORS TO THE OFFENDER'S CIRCUMSTANCES

18. In the wake of the sentencing judge's decision in this matter, various courts have taken often-conflicting approaches to the question of whether expert evidence such as IRCAs or any other evidence *beyond* factual evidence is required.

***R v Shallow*, 2019 ONSC 403 at paras 43, 48.**
***R v Brissett and Francis*, 2018 ONSC 4957 at paras 54-72.**
***R v Elvira*, 2018 ONSC 7008 at paras 21-26.**
***R v Williams*, 2018 ONSC 5409 at paras 46-47.**
***R v Desmond*, 2018 NSSC 338 at paras 23-24, 28-29.**

19. The CLA acknowledges and endorses the statement of Hill J. in *Williams* cited by the Appellant at paragraph 52 of its factum that "the record before the court ought to raise [the] issue from the general to the specific in the sense of <u>some evidence, direct or inferential, that racial disadvantage is linked to constraint of a particular offender's choices and to his life experience in bringing him before the court</u>" [emphasis added].

***R v Williams,* 2018 ONSC 5409, at para 45.**

20. The CLA does not submit that a sentencing judge may find that mitigation of sentence is appropriate for a Black offender *solely* on the basis of the court's judicial notice of the systemic and background factors identified above. Indeed, the CLA does not dispute that there must be some "offender-specific" evidence before the court as to how the systemic and background factors have affected a Black offender's life in a way that is relevant to moral culpability and the determination of a proportionate sentence.

21. Rather, the CLA's submissions focus upon what *kind* of evidence should be required to bridge the gap between the "general" and the "specific," or between the systemic and background factors and the offender's own circumstances and moral culpability.

22. The CLA submits that, once a sentencing judge has taken judicial notice of the systemic and background factors identified above, the court should not require expert evidence such as IRCAs or social history reports to be able to infer that these factors have affected an individual offender's circumstances.

23. Requiring offenders to provide expert opinion evidence, IRCAs, or similarly demanding forms of evidence in order for their experiences with anti-Black racism to be considered in sentencing sets the bar too high. It creates an impossible-to-meet evidentiary burden for many indigent offenders, including those receiving publicly-funded legal assistance, and perpetuates the systemic discrimination that Black offenders already face in the criminal justice system.

24. In light of the professional qualifications, expertise, time, and resources that report writers need to produce these materials, IRCAs, social history reports, and other expert reports will often be well beyond the financial means of many offenders, including offenders receiving publicly-funded legal assistance, and it would be fundamentally inequitable for sentencing judges to require types of evidence which only a well-resourced subset of Black offenders will be able to afford.

25. Further, a requirement that Black offenders must adduce expert evidence in all cases has the potential to cause significant delays in sentencing, a problem identified in *dicta* by the SCC in *Jordan* and by this Court in *Hamilton* – where Doherty J.A. noted that the sentencing delays arose from the offender's choice to tender significant expert evidence.

> ***R v Hamilton*, [2004] OJ No. 3252, 72 OR (3d) 1 (CA), at para 161.**
> ***R v Jordan*, 2016 SCC 27, at para 49, n 2.**

26. Indeed, the Appellant in this case attacks the fitness of the sentence on the basis that the trial judge credited the Respondent with pre-trial custody time that was accrued when the Respondent "delayed his own sentencing hearing" for the purpose of obtaining expert and social history reports. The Appellant argues that "the award of enhanced credit (approximately six months) for additional time that the respondent spent in pre-sentence custody as a result of his adjournment requests contributed to a demonstrably unfit sentence." Yet, at the same time, the Appellant insists that expert evidence is required to receive mitigation on sentence due to systemic and background factors. Acceptance of the Appellant's submissions guarantees significant delays in sentencing proceedings,

which not only affects the offender and those affected by the offence, but the appellate process as well.

27. To be clear, if an offender is able to obtain an IRCA, social history report, or other expert or opinion evidence, he or she should be encouraged to do so, as courts have noted the value of these in providing the sentencing judge with an understanding of the offender's life experience in light of the historical and systemic impacts of anti-Black racism.

> ***R v Desmond*, 2018 NSSC 338 at para 28.**
> ***R v Williams*, 2018 ONSC 5409 at paras 46-47.**

28. In the absence of such reports, however, the CLA submits that, once an offender has adduced at least some credible and trustworthy evidence detailing how the systemic and background factors have impacted his/her circumstances, a sentencing judge should be entitled to draw reasonable inferences regarding the offender's moral culpability and any due mitigation of sentence.

29. Credible and trustworthy evidence can come from a variety of sources that are far more readily accessible to indigent offenders than expert reports, IRCAs, or similar opinion evidence: for example, *viva voce* testimony, letters, or documentary evidence provided by family members, friends, neighbours, community members, spiritual leaders, classmates, teachers, doctors, therapists, social workers, and other professionals *testifying in their capacity as laypersons* about their interactions with the offender.

30. Relevant information may also come from the offender's own testimony at trial or sentencing. The fact that an accused person has an interest in the outcome of the proceeding does not, in itself, render his/her evidence of little or no evidentiary value. Relevant information may also come from a pre-sentence report, police testimony regarding neighbourhood dynamics, or a sentencing judge's "personal understanding and experience of the society in which the judge lives and works."

See, for example, *R c Lacasse*, 2015 SCC 64
***R v Amara,* 2010 ONSC 251 at paras 72-77**
***R v S(RD)*, [1997] 3 SCR 484 at para. 44**

31. The relaxed evidentiary rules at sentencing already provide the framework necessary to sustain the admission of the aforementioned forms of evidence. Pursuant to s.723(2), the sentencing court is required to hear the parties on "any facts relevant to the sentence to be imposed." Further, the admissibility of hearsay evidence is specifically provided for in s.723(5) of the *Criminal Code.* A court is entitled to rely on such hearsay evidence, even when it is disputed.

***R v Nguyen,* 2012 ONCA 534 at para 1**
***R v Amara,* 2010 ONSC 251, at para 70**

32. At the same time, the evidentiary rules at sentencing protect the Crown's ability to test the evidence, as well as the Court's ability to demand higher quality evidence where necessary. Where the Crown disputes a fact, for example, the court may require that evidence be adduced as to the existence of the fact: s.724(3)(a). The defence would then have the burden of proving that fact on a balance of probabilities: s.724(3)(b) and (d).

The Crown would be entitled to cross-examine any witness called by the defence: s.724(3)(c).

33. If the evidence before the court demonstrates that the offender's life experience includes a constellation of factors consistent with the systemic and historical manifestations of anti-Black racism of which the court has already taken judicial notice (such as living in low-income areas, facing limited educational opportunities, experience in the child welfare and child protection systems, mistreatment and profiling by police, employment and housing discrimination, witnessing violence, a lack of culturally-appropriate social programs, and intergenerational trauma), then the court can draw reasonable inferences as to how those factors have constrained life choices.

34. The approach advocated here advances the fundamental goal of sentencing: the determination of a just and appropriate sentence. The jurisprudence has long recognized that this determination involves a highly individualized exercise, in which the court must consider the specific circumstances of the offender and of the offence. This is a "delicate balance" that cannot be accomplished without granting the court broad discretion to receive and consider information about the background, character, and culpability of the offender. The arrival of a fit sentence not only achieves justice for the offender, but also safeguards the repute of the administration of justice. For these reasons, courts have been reluctant to constrain a sentencing judge's ability to receive and weigh all relevant personal factors, and to exercise reasonable discretion – a fact borne out by a wealth of jurisprudence nullifying mandatory minimum sentences.

***R v Amara,* 2010 ONSC 251 at para 19**
***R v Lacasse,* 2015 SCC at paras 1-3, 89, quoting *R v M(CA),* [1996] 1 SCR 500 (SCC) at para 91**

35. In this case, as in all cases, sentencing judges should be entrusted to ensure the relevance and quality of information to be relied upon, determine its appropriate weight, and exercise reasonable discretion in arriving at a fit sentence.

PART V: ORDER REQUESTED

36. The CLA takes no position on the ultimate disposition of this appeal

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of July, 2019.

Emily Lam (LSO No.: 55867P)
Kastner Law
65 Queen Street West, Suite 1240
Toronto, Ontario M5H 2M5

Marianne Salih (LSO No.: 68561R)
Edward Royle & Partners
481 University Ave, Suite 510
Toronto, Ontario M5G 2E9

Of Counsel for the Applicant, Criminal Lawyers' Association (Ontario)

SCHEDULE A

AUTHORITIES CITED

CASE LAW

Childs v Desormeaux (2003), 67 OR (3d) 385 (CA)

Newfoundland (Treasury Board) v NAPE., 2004 SCC 66,

Ottawa Carleton Police Services Board v Ontario Civilian Commission on Police Services, [2001] OJ No 4075 (SCJ)

Oakwell Engineering Ltd v Enernorth Industries Inc, [2006] OJ No 1942 (CA

Pexiero v Haberman (1994), 20 OR (3d) 666 (Gen Div)

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 29

R v Amara, 2010 ONSC 251

R v Borde, 63 OR (3d) 417, [2003] OJ No 354 (CA)

R v Brissett and Francis, 2018 ONSC 4957

R v Brown, 64 OR (3d) 161, [2003] OJ No 1251 (CA)

R v CTV, 2013 ONSC 5779

R v Desmond, 2018 NSSC 338

R v Elvira, 2018 ONSC 7008

R v Find, [2001] 1 SCR 863, [2001] SCJ No 34 (SCC)

R v Gardiner, [1982] 2 SCR 368, [1982] SCJ No 71

R v Gladue, [1999] 1 SCR 688, [1999] SCJ 19 (SCC)

R v Golden, [2001] 3 SCR 679, [2001] SCJ No 81 (SCC)

R v Grant, 2009 SCC 32

R v Hamilton, [2004] OJ No. 3252, 72 OR (3d) 1 (CA)

R v Ipeelee, 2012 SCC 13

R v Jackson, 2018 ONSC 2527

R v JLM, 2017 BCCA 258

R v Jordan, 2016 SCC 27

R v Kresko, 2012 ONSC 2624

R c Lacasse, 2015 SCC 64

R v Le, 2019 SCC 54

R v Levesque, [2000] SCJ No 47 (SCC)

R v MC, 2018 ONCA 634

R v Nguyen, 2012 ONCA 534

R v Okimaw, 2016 ABCA 246

R v Parks, [1993] OJ No 2157, 15 OR (3d) 324 (CA)

R v RDS, [1997] 3 SCR 484, [1997] SCJ No 84 (SCC)

R v Shallow, 2019 ONSC 403

R v Toronto Humane Society, 2010 CarswellOnt 10981

R v Spence, 2005 SCC 71

R v Van-Kerrebroeck, 67 MVR (5th) 54 (Ont Ct Jus)

R v Williams, [1998] 1 SCR 1128, [1998] SCJ No 49 (SCC)

R. v Williams, 2018 ONSC 5409,

Scaduto v Cucu, 2017 ONCA 22

SCHEDULE B

LEGISLATIVE PROVISIONS CITED

Criminal Code of Canada, RSC, 1985, c C-46

723 (2) The court shall hear any relevant evidence presented by the prosecutor or the offender.

724 (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

723 (5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

(a) has personal knowledge of the matter;

(b) is reasonably available; and

(c) is a compellable witness.

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE CRIMINAL LAWYERS' ASSOCIATION

Emily Lam (LSO No.: 55867P)
Kastner Law
65 Queen Street West, Suite 1240
Toronto, Ontario
M5H 2M5

Tel.: 416-655-3044 x2
Fax: 416-655-3044
E-mail: elam@kastnerlaw.ca

Of Counsel for the Applicant, Criminal Lawyers' Association (Ontario)