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Making Sense of Aboriginal and Racialized Sentencing

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Cases Commented On: *R v Laboucane*, 2016 ABCA 176 (CanLII); *R v Kreko*, 2016 ONCA 367 (CanLII)

In *R v Laboucane*, 2016 ABCA 176 (CanLII), the Alberta Court of Appeal strongly criticizes the Ontario Court of Appeal's decision in *R v Kreko*, 2016 ONCA 367 (CanLII), where the Ontario Court of Appeal allegedly approached the sentencing of Aboriginal offenders too leniently, and "almost" interpreted the *Criminal Code* as providing for automatic sentence reductions in all cases with Aboriginal offenders (*Laboucane* at para 67).

The Alberta Court of Appeal's critique warrants a review not only of this alleged disagreement between appellate courts, but also of the lack of clarity in Aboriginal sentencing more broadly. In addition, following a summary of the principles underlying Aboriginal sentencing, we argue that many of those principles should be applied in the context of sentencing racialized communities in Canada, and in particular, in the context of Black offenders.

BACKGROUND: ABORIGINAL SENTENCING

Statutory Background: The Aboriginal Sentencing Provision

At its core, the disagreement between the Alberta Court of Appeal and Ontario Court of Appeal centres on the sentencing framework provided by the *Criminal Code*, RSC 1985, c C-46.

In a previous post, Joshua Sealy-Harrington and Joe McGrade summarized the *Criminal Code*'s general sentencing framework, including the fundamental principle that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, s 718.1; the Proportionality Provision). Here, we will briefly discuss the specific provision that relates to Aboriginal sentencing (the Aboriginal Sentencing Provision).
The Aboriginal Sentencing Provision reads, in relevant part:

> A court that imposes a sentence shall also take into consideration the following principles:
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> […]
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
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> (*Criminal Code*, s 718.2; emphasis added).

In other words, the Aboriginal Sentencing Provision instructs courts to pay "particular attention" to the unique circumstances of Aboriginal offenders, and whether those circumstances merit "sanctions other than imprisonment". The Supreme Court has considered the Aboriginal Sentencing Provision multiple times, a brief summary of which follows.

Jurisprudential Background: The *Gladue*-*Ipeelee* Test

Given that the core conflict between the Alberta Court of Appeal and Ontario Court of Appeal here centres on the proper analytical framework for applying the Aboriginal Sentencing Provision, we will concentrate solely on how that analytical framework has evolved (or, in our view, persisted) throughout its consideration by the Supreme Court.

The Supreme Court first considered the Aboriginal Sentencing Provision in *R v Gladue*, [1999] 1 SCR 688 (CanLII). The key principles flowing from *Gladue* in respect of the Aboriginal Sentencing Provision are the following:

1. Proportionality Provision Persists: The Aboriginal Sentencing Provision does not displace the Proportionality Provision (i.e. the requirement that all sentences be fit). Rather, the Aboriginal Sentencing Provision "alter[s] the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders". In other words, the Proportionality Provision requires courts to impose fit sentences on all offenders—including Aboriginal offenders—whereas the Aboriginal Sentencing Provision clarifies that fit sentences, in the context of Aboriginal offenders, can only be imposed if there is particular sensitivity to their unique circumstances (*Gladue*, at paras 75 and 93.5).

2. No Automatic Leniency: The Aboriginal Sentencing Provision does not guarantee that all Aboriginal offenders will receive more lenient sentences than non-Aboriginal offenders, i.e. it does not provide for an automatic reduction in sentence (*Gladue*, at paras 78-80, 88, and 93.9).

3. Possible Accommodation of Aboriginal Offenders: The Aboriginal Sentencing Provision may, in some circumstances, reduce the sentence of an Aboriginal offender as compared to a non-Aboriginal offender, even for the same offence (*Gladue*, at para 93.12).

4. Aboriginal Sentencing Provision Always Considered: The more violent and serious the offence, the more likely that the Aboriginal Sentencing Provision will not alter the sanction imposed on an Aboriginal offender. However, even with serious offences, the Aboriginal Sentencing Provision must always be considered and applied with Aboriginal offenders, whether or not its application ultimately alters the sanction imposed (*Gladue*, at paras 79 and 82).

With respect to the analytical framework, *Gladue* provides at least two distinct considerations for sentencing judges when adjudicating whether an offender's Aboriginal heritage may justify a more lenient sentence:

1. Contributory Mitigation: where an Aboriginal offender's heritage "may have played a part in" bringing them before the courts, i.e. where that heritage contributed to—but was not necessarily the cause of—the commission of the offence.

2. Suitability Mitigation: where an Aboriginal offender's heritage informs "[t]he types of sentencing procedures and sanctions which may be appropriate", i.e. where that heritage informs which sanctions are most suitable.

   (at para 93.6; the *Gladue* Test).

The Supreme Court next discussed the Aboriginal Sentencing Provision in *R v Ipeelee*, 2012 SCC 13 (CanLII). *Ipeelee* did not change the interpretation of the Aboriginal Sentencing Provision. Rather, it reaffirmed the principles established in *Gladue* and clarified how they operate (*Ipeelee*, at para 1).

With respect to affirming the principles established in *Gladue*, the Court restated in *Ipeelee* that:

1. The Proportionality Provision Still Persists: The Aboriginal Sentencing Provision does not displace the Proportionality Provision, but rather, furthers the objective of proportional sentencing in the context of Aboriginal offenders (*Ipeelee*, at paras 59, 68, 72-75 and 87).

2. Still No Automatic Leniency: The Aboriginal Sentencing Provision does not result in automatic leniency for Aboriginal offenders (*Ipeelee*, at para 75).

3. Still Possible Accommodation of Aboriginal Offenders: The Aboriginal Sentencing Provision may result in a more lenient sentence for an Aboriginal offender than for a non–Aboriginal offender who is ostensibly similarly situated (*Ipeelee*, at paras 78-79).

4. Aboriginal Sentencing Provision Still Always Considered: The Aboriginal Sentencing Provision must always be considered, even for serious offences (*Ipeelee*, at paras 84-87).

In addition to reaffirming that the Aboriginal Sentencing Provision does not displace the Proportionality Provision, the Court explained that the Aboriginal Sentencing Provision does not displace the parity principle. The parity principle requires that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (*Criminal Code*, s 718.2(b); the Parity Provision). The Court explained that this principle is not displaced by the Aboriginal Sentencing Provision because, when sentences imposed on Aboriginal offenders are more lenient, they will be "justified based on their unique circumstances … which are rationally related to the sentencing process" (*Ipeelee*, at paras 76-79).

Lastly, the Court in *Ipeelee* clarified that Aboriginal offenders need not "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." Rather, those background factors need only be "tied in some way to the particular offender and offence" such that they "bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized" (at paras 81-83). This final point is, in our view, simply a rephrasing of the *Gladue* Test. Put differently, *Ipeelee* rephrases the *Gladue* Test in the following terms:

> The Aboriginal Sentencing Provision will impact the sentence of an Aboriginal offender if their Aboriginal heritage either:
>
> 1. bears on their culpability for the offence (Contributory Mitigation); or

2. indicates which sentencing objectives can and should be actualized (Suitability Mitigation).

   (the *Gladue-Ipeelee* Test).

The *Gladue-Ipeelee* Test is central to the conflict between the Ontario Court of Appeal and Alberta Court of Appeal discussed in this post. Indeed, their core disagreement distills to how the *Gladue-Ipeelee* Test should be applied.

ALLEGED APPELLATE CONFLICT OVER *GLADUE-IPEELEE* TEST

In *Laboucane*, the Alberta Court of Appeal narrowly distinguishes its approach to the Aboriginal Sentencing Provision from that taken by the Ontario Court of Appeal in *Kreko* (see *Laboucane*, at paras 65–73). This alleged distinction relates to how the *Gladue-Ipeelee* Test should be applied. Accordingly, we will only consider how *Kreko* and *Laboucane* address the *Gladue-Ipeelee* Test, since they agree on all other core principles flowing from *Gladue* and *Ipeelee*, including the points that:

1. the Aboriginal Sentencing Provision does not displace the Proportionality Provision (*Kreko*, at para 27; *Laboucane*, at paras 2-3);

2. the Aboriginal Sentencing Provision does not result in automatic leniency for Aboriginal offenders (*Kreko*, at para 23; *Laboucane* at paras 2, 54 and 63.9);

3. the Aboriginal Sentencing Provision may result in a more lenient sentence for some Aboriginal offenders (*Kreko*, at para 19; *Laboucane* at para 62);

4. the Aboriginal Sentencing Provision must always be considered (*Kreko*, at para 27; *Laboucane*, at para 63.6); and

5. no causal link is required to trigger the Aboriginal Sentencing Provision (*Kreko* at para 21; *Laboucane*, at para 63.1).

Ontario Court of Appeal Approach in *Kreko*: More Lenient?

In *Kreko*, the Ontario Court of Appeal shortened a sentence because, in its view, the trial judge improperly required a causal connection for the Aboriginal Sentencing Provision to be triggered.

The trial judge in *Kreko* did expressly state that "a direct, causal link is not required" to trigger the Aboriginal Sentencing Provision (see *Kreko*, at para 15). However, the Ontario Court of Appeal held that the trial judge's reasoning, despite this statement, "effectively requir[ed] a causal link between the appellant's Aboriginal heritage and the offences" to trigger the Aboriginal Sentencing Provision (at para 20). Specifically, the Ontario Court of Appeal pointed to the following extracts from the trial judge's reasons for sentence and his report to the Court of Appeal as demonstrating the trial judge's requirement for a causal link (at para 20):

- "There was nothing tied to his Aboriginal genetic heritage, let alone considerations in *Gladue* and *Ipeelee*, that led the accused, Mr. Kreko, to the negative side of hip-hop, including its fascination with guns."

- "These things [possession of a gun, driving a Jaguar] relate to gang culture and do not relate to his Aboriginal background."

- "It appeared to me that his Aboriginal connection had been irrelevant to his offences, or how he got there."

- "I ultimately held that his Aboriginal heritage could not be linked in any meaningful way to these current offences, although his hip-hop affiliations could."

The Ontario Court of Appeal clarified that, to trigger the Aboriginal Sentencing Provision, a causal link between an offender's Aboriginal heritage and the offence is not required (at para 21). Rather, the offender's Aboriginal heritage need only be "tied to the particular offender and offence(s) in that [it] must bear on his or her culpability or indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing" (at para 23). In other words, the Ontario Court of Appeal, at least in principle, reaffirmed the *Gladue-Ipeelee* Test.

Alberta Court of Appeal Approach in *Laboucane*: More Strict?

In *Laboucane*, the Alberta Court of Appeal maintained a trial sentence because, in its view, the trial judge correctly determined that the offender's Aboriginal heritage "did not bear on his culpability for the offences or indicate which sentencing objectives can and should be actualized" (at para 76). Accordingly, the Alberta Court of Appeal, like the Ontario Court of Appeal, reaffirmed the *Gladue-Ipeelee* Test.

However, despite both judgments affirming the same test for Aboriginal sentencing, the Alberta Court of Appeal strongly criticized the Ontario Court of Appeal's judgment in *Kreko*. In essence, the Alberta Court of Appeal critiqued the Ontario Court of Appeal for diluting the *Gladue-Ipeelee* Test to a near automatic mitigating factor for all Aboriginal offenders. The Alberta Court of Appeal restates this basic critique in various ways, namely, that:

- *Kreko* "almost" expands the *Gladue-Ipeelee* Test to "a level of pure ethnicity" (*Laboucane* at para 67).

- *Kreko* "de-link[s]" the facts of a specific offender from the objectives of the Aboriginal Sentencing Provision (at para 67).

- *Kreko* "runs perilously close" to making the Aboriginal Sentencing Provision an "automatic mitigating factor" for all Aboriginal offenders rather than making it a mitigating factor only in those cases where Aboriginal heritage is related to determining a proportional sentence (at paras 68-69).

Interestingly, the Alberta Court of Appeal seems to agree with the Ontario Court of Appeal's holding in *Kreko*—i.e. reducing Mr. Kreko's sentence—because the facts in *Kreko* showed "a measurable connection" between the offender's Aboriginal heritage and his offence (*Laboucane*, at para 66). Accordingly, the Alberta Court of Appeal appears to only be critical of how the Ontario Court of Appeal described the relevant legal principles, not how it applied those legal principles in this instance.

COMMENTARY

In our view, the Alberta Court of Appeal's critique is likely misplaced, and certainly difficult to understand. On our reading, the problem is not that the Ontario Court of Appeal and Alberta Court of Appeal applied different tests, but rather, that the *Gladue-Ipeelee* Test is vague, making it difficult for courts to ensure that they are correctly applying the Aboriginal Sentencing Provision.

With that in mind, we will first explore the disagreement between these Courts of Appeal. We will then discuss the possibility of expanding the underlying concepts of Aboriginal sentencing to other racialized offenders in Canada.

Appellate (Dis)Agreement Regarding *Gladue-Ipeelee* Test

As stated above, it is not clear that there is much if any divide between Alberta and Ontario on the *Gladue-Ipeelee* Test. Indeed, our best explanation for the ostensible divide between *Kreko* and *Laboucane* is the different facts those decisions addressed, rather than the legal principles those decisions affirmed.

First, it is difficult to identify any difference between Alberta and Ontario with respect to the *Gladue-Ipeelee* Test because the Alberta Court of Appeal's critique of *Kreko* is vague. The Alberta Court of Appeal claims that *Kreko* dilutes the *Gladue-Ipeelee* Test, but provides no pinpoint references to where the Ontario Court of Appeal's ruling actually provides for such dilution. Rather, the Alberta Court of Appeal simply describes how "the position adopted in *Kreko*" (at para 67), "the decision in *Kreko*" (at para 67), a "probing analysis" of the decision (at para 67), and "the approach taken in *Kreko*" (at para 68), dilute the *Gladue-Ipeelee* Test.

Second, a "probing analysis" of *Kreko* reveals, in our view, the same trigger for the Aboriginal Sentencing Provision as that described in *Laboucane* (and *Ipeelee*), namely, the *Gladue-Ipeelee* Test (see *Ipeelee*, at para 83; *Kreko*, at para 23; *Laboucane*, at paras 55–59).

We appreciate that, when scrutinizing judicial reasoning, it is critical to analyze not only how the court describes the law, but also whether or not the court's application of the law is faithful to that description (indeed, that is precisely how the Ontario Court of Appeal critiqued the trial judge in *Kreko*). For example, while the Ontario Court of Appeal undoubtedly affirmed the *Gladue-Ipeelee* Test (see *Kreko* at para 23), the Alberta Court of Appeal could be claiming that the Ontario Court of Appeal actually applied a diluted version of that test. But such a critique is difficult to understand in this case because the Alberta Court of Appeal appears to concede that the facts in *Kreko*—which involved a "measurable connection" between the offender's Aboriginal identity and his offence—merited an appellate reduction in sentence (*Laboucane*, at para 66). In other words, it is difficult to characterize the Alberta Court of Appeal's critique of *Kreko* as a critique of the Ontario Court of Appeal's application of the law when the Alberta Court of Appeal appears to agree with how the law was applied in *Kreko*.

In sum, the Alberta Court of Appeal's vague critique of *Kreko* leaves us guessing as to which passages it considers problematic.

Our best explanation is that the source of this vague critique is rooted not in any disagreement over the relevant legal principles, but rather (1) the distinct facts present in *Kreko* and *Laboucane*; and (2) the *Gladue-Ipeelee* Test itself being vague.

Distinguishable Facts in Kreko and Laboucane

The distinct facts in *Kreko*, which more appropriately justified leniency in light of that Aboriginal offender's identity, may partially explain the alleged divide between Alberta and Ontario. Indeed, the Alberta Court of Appeal itself appears to admit this, to our confusion (*Laboucane*, at para 66).

In *Kreko*, the Aboriginal offender pled guilty to possession without lawful excuse of a loaded prohibited firearm, robbery with a handgun, and intentional discharge of a firearm while being reckless as to the life or safety of another person, contrary to ss 95(2) and 343(d) of the *Criminal Code* (at para 2). The Trial Judge gave Mr. Kreko a 13-year sentence (*Kreko*, at para 1).

Mr. Kreko was adopted into a non-Aboriginal family at a young age because his birth mother could not adequately care for him. His Aboriginal grandparents struggled with alcoholism and were unable to parent their children (Mr. Kreko's mother). This resulted in his mother being placed in various foster homes before becoming a Crown ward at age 11. She gave birth to Mr. Kreko while still a Crown ward at the age of 15 (at paras 4-6).

Mr. Kreko grew up not knowing he was adopted, and assumed his heritage was Finnish and French. However, when he learned of his Aboriginal heritage (around the age of 17), he experienced feelings of abandonment, resentment, and a sense that he was unwanted (at paras 8-9). In particular, Mr. Kreko struggled with his identity and adoption, and the "identity crisis" that followed the discovery of his Aboriginal identity and adoption "coincided with his involvement in the criminal justice system" (at para 14).

In *Laboucane*, the offender pled guilty to assault on a cabdriver, possession of a stolen taxicab, and refusing to provide a breath sample. Mr. Laboucane was further convicted of one count of break and enter and commit assault, one lesser offence of assault, and uttering threats. Mr. Laboucane was sentenced to two years' imprisonment (at paras 8-9).

At the time of these offences, Mr. Laboucane was 38 years old, with 36 prior criminal convictions including five assaults, one break and enter, and numerous breaches. These were Mr. Laboucane's sixth, seventh and eight convictions for violent offences (at para 34).

Mr. Laboucane's *Gladue* report found that he had a "good and normal" childhood, free from familial substance abuse and domestic violence. Mr. Laboucane himself considered his parents to be "good parents" and never experienced or witnessed domestic abuse. His father (the only Aboriginal parent) was not raised in the Métis culture. Similarly, his family did not participate in Aboriginal culture and none of his relatives attended residential schools. Mr. Laboucane visited paternal relatives at a Métis settlement, but his cultural involvement was limited. Mr. Laboucane struggled to stay employed due to his personal relationship issues and only experienced domestic violence in his own intimate relationships and his older half-sister's relationship (at paras 40-45).

In our view, these distinguishable facts explain why the courts in *Kreko* and *Laboucane* reached opposing conclusions, despite correctly applying the same legal test.

In *Kreko*, the Ontario Court of Appeal reduced an Aboriginal offender's sentence because aspects of his Aboriginal heritage—his dislocated identity that traced back to the discovery of his Aboriginal roots and the factors that led to his adoption—bore on his culpability. Indeed, the

Ontario Court of Appeal referenced statistics highlighting how adopted Aboriginal children are more likely to suffer from a sense of dislocation (at para 24).

In contrast, the Alberta Court of Appeal in *Laboucane* maintained an Aboriginal offender's sentence because his Aboriginal heritage did not appear to bear on his culpability or inform a suitable sanction. In particular, his upbringing was considered very 'normal' and he did not appear to experience the same intergenerational or systemic issues as Mr. *Kreko,* which could have affected Mr. Laboucane's culpability (at paras 74-80). Moreover, Mr. Laboucane was a repeat offender who did not take responsibility for his actions (at paras 34 and 46), whereas Mr. Kreko, by the time of the appeal, had found his birth mother, successfully completed a number of rehabilitative Aboriginal programs, and embraced his Aboriginal heritage (at para 12). Given these distinct facts, the Alberta Court of Appeal's critique of *Kreko* seems ill-founded, as the same test was applied in both cases, and led to different outcomes that appear responsive to the facts in both cases.

The Gladue-Ipeelee Test is Vague

A further cause of confusion between the Alberta and Ontario Courts of Appeal regarding Aboriginal sentencing is the vagueness of the *Gladue-Ipeelee* Test itself. The Supreme Court has consistently instructed what the *Gladue-Ipeelee* Test is not. But it has failed to provide adequate guidance regarding what the *Gladue-Ipeelee* Test is in a positive sense, i.e. by elaborating on Contributory Mitigation and Suitability Mitigation and providing instructive examples of each.

As we summarized above, ever since *Gladue*, the Supreme Court, and other appellate courts, have been clear about two extremes, neither of which reflect the proper approach to Aboriginal sentencing:

1. Aboriginal heritage only reducing a sentence when it is causally linked to the offence, which is too strict (*Gladue*, at para 93.6; *Ipeelee*, at paras 81–83; *Kreko* at para 21; *Laboucane*, at para 63.1); and

2. Aboriginal heritage automatically reducing every sentence, which is too lenient (*Gladue*, at paras 78-80, 88, and 93.9; *Ipeelee*, at para 75; *Kreko*, at para 19; *Laboucane* at para 54).

In this way, courts have been clear in <u>negatively</u> defining Aboriginal sentencing. But a clear <u>positive</u> definition for Aboriginal sentencing remains elusive. At best, the Supreme Court has positively defined Aboriginal sentencing as requiring that an offender's Aboriginal heritage be "tied in some way to the particular offender and offence" such that it "bear[s] on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized" (*Ipeelee*, paras 81–83). But what does it mean for an offender's Aboriginal heritage to be "tied in some way" to an offender or their offence? And what does it mean for an offender's Aboriginal heritage to "bear" on their culpability? These general terms, without instructive examples, make it difficult for courts to know the threshold at which leniency is warranted in the context of Aboriginal sentencing. Indeed, we suspect that the Alberta Court of Appeal's alternate and broad language ("a measurable connection"; see *Laboucane* at para 66) is yet another indicator of these courts not really understanding the type of connection required to warrant leniency in Aboriginal sentencing.

For example, in *Kreko*, the trial judge acknowledged that the law does not require a causal link (which would be too strict), but still described, in various alternative phrasings, that no leniency was warranted because Mr. Kreko's Aboriginal heritage did not tie to or bear on his culpability (*Kreko*, at para 20). Those phrasings included that "there was nothing tied to his Aboriginal genetic heritage", that his offences "do not relate to his Aboriginal background", that his "Aboriginal connection had been irrelevant to his offences", and that "his Aboriginal heritage could not be linked in any meaningful way to these current offences" (at para 20; emphasis added). In other words, even the trial judge in *Kreko*, like the Alberta Court of Appeal and Ontario Court of Appeal, applied the *Gladue-Ipeelee* Test (albeit conservatively). With three courts all at least describing the same legal test (see *Kreko*, at paras 15 and 21–24; *Laboucane*, at paras 50–63), the only logical source of confusion is the vagueness of the test itself. In particular, the test lacks clarity regarding what it means for an Aboriginal offender's heritage to tie to or bear on their culpability or to inform the sentencing objectives that should be emphasized in a given case.

Implications for Sentencing Racialized Offenders

In our view, aspects of the sentencing principles discussed above could (and should) be applied in the context of other racialized communities. We say this because many, though not all, of the principles underlying cultural sensitivity with Aboriginal sentencing apply in other contexts. We will discuss the context of Black offenders here.

To be clear, the Aboriginal Sentencing Provision only requires courts to give "particular attention" to Aboriginal offenders. But that does not remove the court's duty to impose proportional sentences on other racialized offenders. And the unique experiences of other communities—including Black offenders—may inform that proportionality.

Recent commentary argues that systemic and intergenerational factors should be considered for other racialized groups, including Black offenders. This argument has gained momentum in Nova Scotia, where Blacks have a deep history of dislocation and oppression that dates back to the 1770s, when an influx of African-American loyalists and former slaves fled the United States and settled in Canada. In fact, there is an ongoing case in Nova Scotia in which a judge has accepted a cultural assessment similar to a Gladue Report for a Black offender.

In a similar case in Ontario, instead of sentencing a young Black man to the 6-12 month jail term sought by the Crown for drug dealing, Justice Edward Morgan instead issued a conditional sentence (see *R v Reid*, 2016 ONSC 954 at para 31). In issuing that sentence, Justice Morgan considered both the Black offender's personal circumstances and societal forces, including anti-Black racism and the over-incarceration of Black citizens (at paras 21-27). In particular, Justice Morgan cited a finding by the Office of the Correctional Investigator, which found that the number of federally incarcerated Black inmates has increased by 80 per cent over the last decade (at para 22).

These cases demonstrate that judges are becoming increasingly willing to consider systemic factors when sentencing members of racialized communities. In our view, this is a welcome development. We appreciate the Supreme Court's remark in *Ipeelee* that "no one's history in this country compares to Aboriginal people's" (at para 77). But the pursuit of a proportional

sentencing process that is sensitive to cultural differences and every offender's individual culpability should not be blind to other forms of systemic inequality.

The principles underlying sentencing make it clear that the background of racialized offenders should be considered in the sentencing process. For example, it would be difficult to claim that systemic discrimination and intergenerational struggle (experienced in varying ways by different communities) informs proportional sentencing of Aboriginal offenders, but not Black offenders. Even though these communities are very different, certain similarities between those communities (like overrepresentation in the criminal justice system and prejudicial treatment by law enforcement) could surely inform proportional sentencing for Black offenders.

Further, any claim that only Aboriginal offenders should benefit from such considerations because of the phrasing of the Aboriginal Sentencing Provision should be dismissed. First, the Aboriginal Sentencing Provision calls for "particular attention" in the context of sentencing Aboriginal offenders—it does not mandate a complete absence of attention in the context of Black offenders, especially when those circumstances are "rationally related to the sentencing process" (*Ipeelee*, at paras 76-79). Second, the Aboriginal Sentencing Provision expressly provides that background circumstances mitigating against incarceration should be considered "for all offenders"—which obviously includes Black offenders. Lastly, the Proportionality Provision requires that any sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Accordingly, if, for example, a Black offender's background circumstances inform that proportionality, it would be an error not to weigh those circumstances in determining a fit sentence on the basis that such weighing, despite its contribution to proportionality, somehow violated a provision calling for "particular attention" in the context of Aboriginal offenders.

CONCLUSION

Sentencing is a notoriously complex area of criminal law. And this complex area requires clearer appellate guidance in the context of sentencing Aboriginal and racialized offenders.

The *Gladue-Ipeelee* Test is well-established, and courts appear to be consistently alluding to its general principles and key terms. However, those principles and terms lack the specificity needed to predictably guide the process of Aboriginal sentencing. In particular, greater positive definition of when Contributory Mitigation and Suitability Mitigation may be triggered will bring much needed clarity to this area of the law. Requiring that Aboriginal heritage tie "in some way" to proportionality is simply too vague.

Recently, the Alberta Court of Appeal released another decision addressing the framework for Aboriginal Sentencing (see *R v Okimaw*, 2016 ABCA 246 (CanLII)). *Okimaw* also affirms the *Gladue-Ipeelee* Test for Aboriginal sentencing (at para 58). However, in our view, the confusion surrounding Aboriginal sentencing persists despite this recent decision. In *Okimaw*, the Court concedes that the background factors at issue—including the legacy of residential schools, domestic violence, substance abuse, physical and mental health, low income, and unemployment (see paras 26-45)—had "an obvious and profoundly adverse and harmful impact" on the offender (at para 67). In consequence, this relatively 'clear case' does not confront the ambiguity caused by the general language consistently used by the Supreme Court in the context of Aboriginal

sentencing. Indeed, the Court of Appeal relies on how these many background factors "bear" on the offender's culpability and appropriate sentencing procedures (at paras 64, 75, and 87)—the same general language we critique above. A later, tougher case may be required before the Court is compelled to provide greater clarity to Aboriginal sentencing.

Additionally, courts should continue to explore the boundaries of how systemic factors inform the proportional sentencing of racialized offenders. Sentencing is a multi-faceted process, and reserving systemic considerations to one community in Canada (albeit an incredibly significant and unique one, particularly in the context of criminal justice) disregards the requirement that every sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Sentencing is, and must remain, an individual process. But the diversity of individuals whose backgrounds may inform proportional sentencing should not be arbitrarily limited because those groups lack a specific remedial provision in the *Criminal Code*. To the contrary, the Supreme Court's own pronouncements that proportional sentencing demands an exploration of each individual offender's culpability requires that courts pay attention to racialized offenders and how their background, history, and relationship with the criminal justice system may inform the proportionality of their sentence. Some will confuse such considerations with playing "the race card". But, in actuality, such considerations will simply ensure that all offenders come before the criminal justice system with an even deck.