NOVA SCOTIA
BARRISTERS' SOCIETY

Cultural Competence

STANDARD

A lawyer must be aware of and apply legal principles that may impact a client's case as a result of the client's Indigenous identity, racial or ethnic background, or immigration status. A lawyer must take reasonable steps to inquire about a client's Indigenous identity, racial or ethnic background, or immigration status for the purpose of determining if any such legal principles apply to the client's case. Counsel shall pay particular attention to clients with Mi'kmaw or African Nova Scotian ancestry.[1]

BACKGROUND

Along with the duty to be generally competent pursuant to the existing Lawyers' Competence standard[2], a lawyer has an additional duty to be culturally competent.

As the Supreme Court of Canada has recognized:

> "… judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:
>
> [Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on*

[1] The requirement to pay particular attention to clients with Mi'kmaw or African Nova Scotian ancestry is in accordance with the recommendations from the Royal Commission on the Donald Marshall, Jr., Prosecution, see *Royal Commission on the Donald Marshall Jr. Prosecution* (1989):

- Recommendation # 13: We recommend that the Dalhousie Law School, the Nova Scotia Barristers Society and the Judicial Councils support courses and programs dealing with legal issues facing visible minorities, and encourage sensitivity to minority concerns for law students, lawyers and judges.
- Recommendation # 27: We recommend that a program of ongoing liaison between the bar - prosecutors, private defence and legal aid - and Native people, both on and off reserve, be established through the Nova Scotia Barristers Society. The Society must also educate its members concerning the special needs of Native clients;

[2] See Lawyers' Competence Standard, online: https://www.lians.ca/standards/criminal-law-standards/2-lawyers-competence

> *the Donald Marshall, Jr., Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally."[3]

As racialized, Indigenous, and immigrant Canadians gain increasing space in society, lawyers need skills to competently represent their clients' interests in a context that is increasingly diverse and complex and in which racism is acknowledged to be present.[4]

The *NS Human Rights Act* recognizes that certain groups of individuals are prone to discrimination based on many factors, including cultural factors.

The Act states that discrimination takes place when a person makes a distinction, whether intentional or not, that has the effect of imposing burdens, obligations, or disadvantages on individuals, or a class of individuals, that are not imposed on others. This includes withholding or limiting access to opportunities, benefits, or advantages that are available to other individuals or classes of individuals.[5]

Further, the Act states that no person shall discriminate against an individual, or a class of individuals, for a number of reasons including, but not limited to: race; colour; ethnic, or national or aboriginal origin.[6]

The racialized groups enumerated by the *NS Human Rights Act* may be at risk of facing individual and systemic discrimination when they participate in the justice system. Lawyers must be mindful of this and work to protect racialized clients from individual and systemic discrimination that may be present in the justice system.

On September 29, 2020, the Premier of Nova Scotia, Stephen McNeil, acknowledged and apologized for systemic racism in the criminal justice system that has left Black and Indigenous Nova Scotians marginalized.

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[3] *R. v. R.D.S.* [1997] 3 SCR 484 at para. 47.

[4] Robert Wright, "Cultural Competence 101 for Lawyers: Meeting Professional and Ethical Standards", Presented for the Board and Staff of the Nova Scotia Barristers' Society, January 22, 2016 at slide 5. Online: See the NSBS equity portal: http://www.robertswright.ca/upload/385169/documents/71878C22DD54BD69.pdf

[5] Human Rights Act, RSNS 1989, c 214, s.4.

[6] Human Rights Act, RSNS 1989, c 214, s.5.

The province's justice system — from policing, to courts to corrections — "have failed many members of our Black community," he said. "A system that is supposed to keep you safe, but because of the colour of your skin, you fear it. Today, I say enough. I want you to know I hear you, I see you, I believe you, and I am sorry."

This standard is meant to assist counsel in acknowledging and addressing the existence of systemic racism and discrimination[7] against Indigenous Peoples, African Nova Scotians and Black Canadians, and other racialized groups in the criminal justice system in Nova Scotia. [8]

CULTURAL COMPTENCE

Cultural Competence generally refers to an ability to understand, communicate with and effectively interact with people across different cultures.

In the context of practicing law, cultural competence has been described in the following way:

"In order to practise law in a culturally competent manner, … we must (1) value an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice."[9]

With respect to the necessary skills required in order to practice in a culturally competent manner, it may be helpful to consider the following framework:

Cultural competence comprises five essential capacities. We must:

1. Understand our own cultural positions and how they differ from and are similar to others.

[7] "Systemic discrimination involves the concept that the application of uniform standards, common rules, and treatment of people who are not the same constitutes a form of discrimination. It means that in treating unlike people alike, adverse consequences, hardship, or injustice may result." Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta (Canada), "Justice on trial : report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta", March, 1991

[8] Rankin, Andrew "Premier apologizes for Nova Scotia's racist justice system, sets path for change" (2020), online: https://www.thechronicleherald.ca/news/local/premier-apologizes-for-nova-scotias-racist-justice-system-sets-path-for-change-503334/

[9] Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2006) 84:3 The Canadian Bar Review 564 at 564

2. Understand the social and cultural reality in which we live and work and in which our clients live and work.

3. Cultivate appropriate attitudes towards cultural differences.

4. Be able to generate and interpret a wide variety of verbal and non-verbal responses.

5. Understand structural oppression and demonstrate awareness and commitment to social justice. [10]

A competent lawyer is one that recognizes limitations in one's ability to handle a matter or some aspects of it and takes steps accordingly to ensure the client is appropriately served.[11]

It is generally recognized that cultural competence requires more than a single course or workshop.[12]

The examples and resources identified in this standard are meant to promote a continuum of knowledge to assist counsel in building cultural competence and meet their professional obligations.

Self-Identification

Before counsel can identify issues of race and culture that may be present in a file, counsel must be aware of how the client identifies.

In order to comply with this standard, counsel shall give clients an opportunity to voluntarily state whether they self-identify as part of a racialized group, and if yes, how they identify themselves.

[10] *Wright*, supra, note 2, at slide 10
[11] Nova Scotia Barristers' Society, *Code of Professional Conduct*, (Approved by Council September 23, 2011, Effective January 1, 2012 as amended January 20, 2012; July 20, 2012; February 22, 2013; September 19, 2014; January 23, 2015; May 22, 2015; February 26, 2016; April 22, 2016; May 27, 2016; May 26, 2017; July 20, 2018; January 24, 2020), online: https://nsbs.org/wp-content/uploads/2019/11/CodeofProfessionalConduct.pdf
[12] Federation of Law Societies, *Model Code of Professional Conduct*, (October 19, 2019), online: https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf

Indigenous Clients

Indigenous peoples have a special constitutional relationship with the Crown. This relationship is recognized and affirmed in section 35 of the *Constitution Act* and section 25 of the *Canadian Charter of Rights and Freedoms*.

Indigenous peoples are overrepresented in the Canadian criminal justice system.

Many inquiries, commissions, task forces and research studies have shown direct links between the historical and ongoing colonial laws, policies, processes and systems, and the overrepresentation of Indigenous peoples in the criminal justice system.

Crown Policy on Indigenous Peoples

The Nova Scotia Public Prosecution Service is mandated to follow policy titled, "Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia"[13]. Defence counsel must also be aware of this policy to ensure that individual Crown Attorneys are meeting their professional obligations. This policy touches on all aspects of criminal court proceedings including: decisions to prosecute; restorative justice options; arraignments; bail proceedings; trials, and sentencing hearings. The policy states that individual Crown Attorneys must:

> "…recognize and factor in the unique systemic or background factors that may have contributed to an Indigenous person's criminal conduct. As well, Crown Attorneys should also consider procedures and sanctions appropriate in the circumstances of the offender because of his or her particular Indigenous heritage or connection. The maintenance of social harmony, safety, and stability, within Indigenous communities, and as between these communities and non-Indigenous communities, should be a significant consideration of a Crown Attorney, in cases involving an Indigenous offender.
>
> …
>
> This policy is also intended to align, in part, with those standards adopted by the Federal Department of Justice in the *Aboriginal Justice Strategy*, but is particularized to the individual and unique circumstances of the Mi'kmaq of Nova Scotia, as well

[13] Nova Scotia Public Prosecution Service, *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia*, DPP Directive (October 2, 2018) online: https://novascotia.ca/pps/publications/ca_manual/AdministrativePolicies/Fair-Treatment-of-Indigenous-Peoples.pdf

> as those of other Indigenous heritage interacting with the justice system of Nova Scotia."

Crown Attorneys must work to ensure that the objectives of the NS Public Prosecution Service policy are met. Defence counsel has a responsibility to hold individual Crown Attorney's accountable. These objectives include but are not limited to:

> To contribute to a decrease in the rates of victimization, crime and incarceration among Indigenous peoples in Nova Scotia by conducting culturally competent prosecutions involving Indigenous peoples.
>
> To sensitize and train Crown Attorneys to include Indigenous values such as those referenced in the *Gladue* decision throughout their range of contact with the criminal justice system in Nova Scotia.

Crown Attorneys and Defence Counsel should be aware that the NS Public Prosecution Service policy on ensuring the fair treatment of Indigenous peoples is an acknowledgement of the *Truth and Reconciliation Commission: A Call for Action*.[14]

If an individual Crown is failing to meet their obligations under this policy, and defence counsel fails to flag this, then defence counsel has also failed. The consequence could be a miscarriage of justice.

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[14] In June 2015, the Truth and Reconciliation Commission of Canada [TRC] released 94 "calls to action" regarding reconciliation between Canadian and Indigenous peoples.

The following TRC Calls to Action are of particular relevance to lawyers practicing in criminal law:

> 27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal– Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.
>
> 30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
>
> 38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

African Nova Scotian and Black Clients

Anti-Black racism in the criminal justice system is a concern for people of African descent [in] Nova Scotia—a province shaped by slavery and segregation.[15]

As described by Angela Simmonds in the NSBS Equity Lens Toolkit:

> "Our province's formal and informal social structures were designed to exclude Black Nova Scotians from the moment they arrived here over 400 years ago. The history of anti-black racism impacts all aspects of civic life for Black Nova Scotians. However, there are also specific ways this history of anti-black racism lives in the justice system, and lawyers are obligated to have a general awareness of this history to be effective advocates for their clients."

The overrepresentation of African Nova Scotians and Black Canadians in the criminal justice system is well documented and has manifested itself in numerous ways[16] including but not limited to: racial profiling, the illegal collection of personal data by police through the use of 'street checks'[17], excessive use of force by police, higher rates of incarceration, disproportionate negative treatment while in custody, lack of disaggregated race-based data collection, other multiple and intersecting forms of discrimination.

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[15] Michelle Y. Williams, "African Nova Scotian Restorative Justice: A Change Has Gotta Come" (2013), Dalhousie Law Journal, Volume 36, No. 2

[16] United Nations Human Rights Council, "Report of the Working Group of Experts on People of African Descent on its mission to Canada", August, 2017, 36th Session, Agenda item 9, online: https://fbec-cefn.ca/wp-content/uploads/2019/06/UN-Working-Group-Report_EN.pdf

[17] J. Michael MacDonald, "Independent Legal Opinion on Street Checks", 2019, online: https://humanrights.novascotia.ca/sites/default/files/editor-uploads/independent_legal_opinion_on_street_checks.pdf

…a street check involves two parts: an action (the police interact with, or observe, an individual) and record-keeping (the police collect and retain identifying information about the individual, in a database)

Also see

Dr. Scot Wortley, "Halifax, Nova Scotia: Street Checks Report" March, 2019, online: https://humanrights.novascotia.ca/sites/default/files/editor-uploads/halifax_street_checks_report_march_2019_0.pdf

CULTURAL COMPETENCE: SPECIFIC LEGAL ISSUES

For the purpose of this standard, it is imperative that counsel be aware of substantive legal issues relevant to specific cultural groups in the practice of criminal law.

Although not an exhaustive list, the following are examples of issues of race and culture that may arise when advocating on behalf of a racialized client:

Race Based Challenge for Cause in Jury Selection

A jury is required to be a representative cross-section of society, honestly and fairly chosen.[18]

The exclusion of Indigenous, Black and other racialized groups from juries is a longstanding, historical problem.[19]

Under s. 638(1)(b) of the *Criminal Code* a party may challenge a juror "for cause" alleging that the juror may not be indifferent. The test is whether there is a realistic potential that the jury pool may contain people who are not impartial in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused.[20]

One of the ways that a prospective juror may be indifferent is by harbouring racial bias against the accused. Courts have recognized that parties are entitled to challenge prospective jurors on racial prejudices that might affect their impartiality.[21]

Failure to advise a racialized client of their right to challenge prospective jurors for race-based bias, commonly referred to as a *Parks* challenge, can be grounds for a finding of ineffective counsel.

In its 2011 decision in *R v Fraser*[22]*,* the Nova Scotia Court of Appeal (NSCA) considered defence counsel's failure to instruct his African Nova Scotian client on the possibility of a race-based

[18] *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398
[19] Julianne Stevenson, CHALLENGING WHITENESS: The Role for Law Societies and Critical Race Theory in Addressing Unrepresentative Juries in Canada, 2018.
[20] *R. v. Find*, 2001 SCC 32 at para. 31
[21] *R v Parks* (1993), 15 OR (3d) 324 (CA), leave to appeal to SCC refused, [1993] SCCA No 481.
[22] *R. v. Fraser*, 2011 NSCA 70

challenge for cause. The client expressed concerns to his trial counsel about facing an all-White jury.

Justice Saunders held that trial counsel's "failure to provide advice to the appellant in response to his client's explicit and perfectly reasonable inquiries, effectively denied him his statutory right to challenge potential jurors for cause." Justice Saunders emphasized that this failing "in and of itself would justify a new trial." These comments from the NSCA in *R v Fraser* confirm that an understanding of and ability to advise one's client on race-based challenges for cause is a basic competency required by defence counsel.[23]

Canvassing *Gladue* Factors at Sentencing

In 1996, section 718.2(e)[24] of the Criminal Code was enacted. Its purpose was to address the overrepresentation of Indigenous peoples in Canadian prisons by requiring sentencing judges to consider sanctions other than imprisonment for all offenders, and specifically pay attention to the unique circumstances of Aboriginal offenders.

Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal peoples are unique. In sentencing an aboriginal offender, the judge must consider:

(1) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[25]

[23] Stevenson, supra, note 10, at page 10

[24] **Criminal Code (R.S.C., 1985, c. C-46),** 718.2:

A court that imposes a sentence shall also take into consideration the following principles:
…
(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[25] The Practitioner's Criminal Code, 2020 Ed. (Gold)

This section was authoritatively interpreted by the Supreme Court of Canada in *R. v. Gladue*[26] where the Court held that:

> In our view, s. 718.2(*e*) is more than simply a re-affirmation of existing sentencing principles. The remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.

The Supreme Court's decision in *Gladue* had important ramifications for justice system participants and stakeholders. To achieve the purpose and maintain the principles set out in *Gladue*, a number of programs were established, funded by the federal and provincial governments.[27]

Various critiques and concerns about the application of *Gladue* were subsequently raised. In 2012, the Supreme Court in *R v Ipeelee*[28] reaffirmed its commitment to the principles enunciated in *Gladue*, addressed a number of critiques, and clarified concerns.

Counsel must be familiar with section 718.2(e) of the *Code*, the principles affirmed in *Gladue* and *Ipeelee*, and their applicability for all Indigenous accused.

In Nova Scotia, the requirement from *Gladue* for courts to canvass the unique systemic or background factors that have played a part in an Indigenous accused coming before the court is facilitated through the preparation of *Gladue* reports.

The Mi'kmaw Legal Support Network provides training to the professionals who prepare *Gladue* reports in Nova Scotia.

Gladue factors that may be considered in a *Gladue* report include but are not limited to:

1. Substance abuse personally and in the immediate family
2. Physical abuse in personal relationships

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[26] *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 32
[27] Research and Statistics Division Department of Justice, Canada, "*Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*", 2017 see https://www.justice.gc.ca/eng/rp-pr/jr/gladue/gladue.pdf
[28] *R. v. Ipeelee*, [2012] 1 SCR 433

3. Violence in the family
4. Deterioration of Health
5. Systemic barriers to education and economic opportunities
6. Poverty
7. Mobility
8. Home and food security
9. Overt and covert Racism
10. Loss of identity, culture, and ancestral knowledge

In Nova Scotia, the legacy of residential schools[29] along with Indian day schools[30], and their devastating impact on Indigenous communities is also commonly referred to within a *Gladue* report.

Unless expressly waived by the client, defence counsel has a duty to ensure that a Gladue report is ordered for all Indigenous accused being sentenced, regardless of the nature of the offence.

<u>Canvassing Cultural Factors for People of African Descent at Sentencing</u>

An emerging approach in Nova Scotia in sentencing African Nova Scotians and Black Canadians is the use of Impact of Race and Culture Assessments (IRCAs) within the sentencing process.

As explained by Professor Maria Dugas, these reports:

> …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 circumstance of the offender, the offence, and how it might inform the offender's experience of the carceral state.
>
> IRCAs are necessary in the light of the historical and ongoing systemic anti-Black racism present in Canada, and its effect on Black Canadians' lived experiences. The prevalence of anti-Black racism is directly connected to the history of slavery and subjugation of people of African descent in Canada. One way in which anti-Black racism continues to manifest in this country is through the overincarceration of

[29] See for example: https://www.canada.ca/en/parks-canada/news/2020/09/the-former-shubenacadie-indian-residential-school---shubenacadie-nova-scotia.html
[30] See for example: http://www.membertou.ca/wp-content/uploads/2019/10/Op-Ed-Indian-Day-Schools.pdf

> Black Canadians. The incarceration rate of Black Canadians is three times our representation rate in society. This is not simply because Black people commit more crimes.
>
> It is because of pervasive, systemic anti-Black racism that permeates our institutions and social structures. The association of black skin with criminality has deep roots. It can be traced back to "runaway slave ads," which portrayed self-liberated people of African descent as thieves and criminals. Slaveholders would place ads in the newspaper when enslaved people escaped and would use the court system to affirm their property interests in the enslaved person.
>
> The United Nations' Working Group of Experts on People of African Descent recognized the overincarceration of African Canadian people following their visit to Canada in 2016. The Working Group noted that they were "deeply concerned about the human rights situation of African Canadians" and "particularly concerned about the overrepresentation of African Canadians in the criminal justice system." Despite representing only 3.5% of the population Black Canadians represented 8.6% of the total incarcerated population in 2016–2017, and 8% of the total incarcerated population in 2018–2019. In 2017–2018, Black offenders represented 12% of the incarcerated "young adult" population (ages 18-21). [31]

Judges can and should take judicial notice of the legacy of slavery and the existence of systemic anti-Black racism however IRCAs are still very important in order to draw the connection between these systemic background factors and why the accused is before the court. This information can not only serve to provide greater context to the sentencing judge but in some cases can be a lens through which to view the moral culpability of an African Canadian accused and in that sense IRCAs can also serve a mitigating purpose.[32]

In *R. v. Anderson*[33], Chief Judge Williams described the importance of receiving cultural evidence at sentencing as follows:

[31] Maria Dugas, "*Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders*" (2020), Dalhousie Law Journal, Volume 43, No. 1
[32] *R. v.* Jackson, [2018] O.J. No. 2136 at para. 38 & R*. v. Morris*, [2018] O.J. No. 4631 at para. 75
[33] *R. v. Anderson*, 2020 NSPC 10

> 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…

Although there is not <u>yet</u> any right under the law to demand an IRCA on behalf of a client of African descent, defence counsel should be aware of this option and, in appropriate cases, canvass their clients as to whether an IRCA should be requested from the Court for the purpose of sentencing.

An appropriate case can include cases where an African Nova Scotian or Black client faces significant jeopardy such as the loss of liberty.

It has become the practice of Court Services in Nova Scotia to fund IRCAs upon an order being made by the Court.

Once an IRCA is ordered by the court, The African Nova Scotian Justice Institute Forensic Assessment and Treatment Unit takes responsibility for processing, assigning, and supervising IRCAs, requests for Clinical Letters related to impact of race and culture, and Cultural Trauma Letters (principally for Wellness Courts) for courts in Nova Scotia.[34]

<u>Cultural Factors at Bail</u>

Sentencing is not the only stage of proceedings where factors of race and culture should be considered by counsel.

When considering interim release, counsel should be aware that on December 18, 2019, s. 493.2 of the *Criminal Code* came into force and states:

> **Aboriginal accused or vulnerable populations**
>
> **493.2** In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
>
> **(a)** Aboriginal accused; and

[34] Wright, Robert, Letter to Claudia Mann, Director of Court Services, Regarding Harmonizing IRCA/CA Practices under one roof Responding to Request re: Cultural Trauma from Wellness Court, August 4, 2020

> **(b)** accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

This new section essentially codifies the principles of *Gladue* and *Ipeelee* at the bail stage and adds consideration for those from "vulnerable populations" with the intent of reducing incarceration of people traditionally marginalized by the criminal justice system.

The application of *Gladue* factors and cultural factors for African Nova Scotians at the bail stage has previously been adopted by some courts in Nova Scotia.[35]

If a client waives their right to a *Gladue* report or similarly does not wish to have an IRCA ordered at the bail stage, counsel should consider whether it is appropriate to lead cultural evidence for Indigenous , African Nova Scotian, or Black clients at the bail hearing in order provide context for the Court, not withstanding the ability of judges to take judicial notice of systemic racism and its applicability to interim release.

<u>Racial Profiling</u>

It is not uncommon for counsel to hear from an African Nova Scotian or Black client that they were pulled over by police for 'driving while black'. Rather than dismissing this notion, **counsel should be aware of the existence of racial profiling and turn their mind to its applicability when dealing with racialized clients.**

"The concept of racial profiling is primarily concerned with the motivation of the police. It occurs when race or racial stereotypes about offending or dangerousness are used. Consciously or unconsciously, **to any degree** in suspect selection or subject treatment".[36]

In Nova Scotia, racial profiling was brought to the forefront in the Kirk Johnson human rights case.[37]

A Nova Scotia Board of Inquiry found that the Halifax Regional Police discriminated against Kirk Johnson on the basis of race when a police officer stopped Mr. Johnson while he was driving, fined him and towed away his car.

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[35] For example In the unreported decision of *R. v. Perry* (March 5, 2017) Nova Scotia CRH 450525 (Supreme Court of Nova Scotia) at p. 24, Justice Muise stated that he could take judicial notice of "the over-representation about aboriginal persons and African Nova Scotians in custody both on remand and serving sentences."
[36] R v Le, 2019 SCC 34 at para. 76
[37] *Johnson v Halifax* (Regional Municipality) Police Service, [2003] NSHRBID No 2

In the 2019 Ontario Court of Appeal decision *R. v. Dudhi*[38], Justice Paciocco confirmed the appropriate analysis to be applied when considering whether racial profiling has occurred:

> [62] In my view, it is self-evident that a decision need not be motivated solely or even mainly on race or racial stereotypes to nevertheless be "based on" race or racial stereotypes. If illegitimate thinking about race or racial stereotypes factors into suspect selection or subject treatment, any pretence that the decision was reasonable is defeated. The decision will be contaminated by improper thinking and cannot satisfy the legal standards in place for suspect selection or subject treatment.
>
> [63] Put simply, passages such as para. 11 of *R. v. Brown*, and para. 33 in *Bombardier*, are entirely consistent with the proposition accepted in *Le* and *Peart*. Where race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling.
>
> …
>
> [66] In sum, there are two components to racial profiling. The first is the attitudinal component, which is the acceptance by a person in authority that race or racial stereotypes are relevant in identifying the propensity to offend or to be dangerous. The second is the causation component, which requires that this race-based thinking consciously or unconsciously motivate or influence, to any degree, decisions by persons in authority in suspect selection or subject treatment.

Race & Arbitrary Detention

If racial profiling can be established, any resulting detention could be deemed to have taken place arbitrarily, in violation of s. 9 of the *Charter* and counsel should be prepared to argue this appropriately.[39]

In *R. v. Le*[40], Justices Brown and Martin, writing for the majority, relied on social science evidence to underscore the importance of racial context when considering s. 9 of the *Charter*:

[38] *R v Dudhi*, [2019] OJ No 4333
[39] See Charter standard
[40] *Le*, *supra* note 29 starting at paragraph 74

> [74] It is important, at the outset, to understand both the place and purpose of race as a consideration in the detention analysis and how it differs from the concept of racial profiling.
>
> [75] At the detention stage of the analysis, the question is how a reasonable person of a similar racial background would perceive the interaction with the police. The focus is on how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused as to whether they were free to leave or compelled to remain. The s. 9 detention analysis is thus contextual in nature and involves a wide ranging inquiry. It takes into consideration the larger, historic and social context of race relations between the police and the various racial groups and individuals in our society. The reasonable person in Mr. Le's shoes is presumed to be aware of this broader racial context.

In finding serious *Charter*-infringing police misconduct, the Court accepted that racialized people may experience interactions with the police differently given the historic over-policing of racialized communities. The majority also challenged the assumption that more frequent interactions with the police would make it less likely that a person felt detained. In fact, the opposite may be true. Racialized people are subjected to more frequent and unpleasant interactions with the police, leading to heightened suspicion and a reasonable apprehension that one is being detained.[41]

Cross Racial Identification

"The inherent frailties of identification evidence have been recognized in a myriad of ways for a long time in the existing jurisprudence."[42]

Intersecting with the existing frailties of identification evidence is the additional layer of cross-racial identification.

"Cross-racial identification evidence has been identified by the courts as fraught with particular difficulty for some time."[43]

[41] Steph Brown, "Setting the Scene: R. v. Le and the Importance of Context in s. 9 Analysis", theCourt.ca (Oct. 29, 2019), online: http://www.thecourt.ca/setting-the-scene-r-v-le-and-the-importance-of-context-in-s-9-analysis/
[42] *R. v. MacLellan*, [2017] N.S.J. No. 461 at para. 26
[43] *Ibid* at para. 37

The phenomenon of cross-racial identification or the 'other-race' effect has been described in the following fashion[44]:

> In essence, this means that members of one race have increased difficulties in identifying distinguishing characteristics present in members of different races. It can be said that, "when persons are identified as belonging to groups other than our own, we attribute more similarity among them than we attribute to persons perceived as belonging to our own group." Thus, this impairment is not always a choice, meaning that the person identifying the accused is often not necessarily subjectively "racist." Instead, more often than not, this is a matter of psychological exposure and personal history.

There are numerous factors that should be considered in an analysis of cross-racial identification evidence[45] but generally if cross-racial identification arises, the trier of fact must be alive to the possibility that this might cause the witness some difficulty or constitute a reason to regard their evidence with greater caution.

Counsel should be aware of the potential frailties in cross-racial identification evidence and be prepared to argue this as the issue arises.

Immigration

Counsel must take reasonable step to determine a client's immigration status upon being retained by the client.

Immigration consequences have been deemed to be a legally relevant consequence flowing from a guilty plea[46] and as such, may have a bearing on the ultimate outcome for the client.[47]

Additional Resources

For further information and to find resources for skill development in cultural competency, counsel are encouraged to explore the Nova Scotia Barristers' Society Equity and Access Resources page at:

[44] Alison Aho, "Identification and Recognition Evidence: Determining Admissibility With Respect to Race" (2016)
[45] *MacLellan*, supra note 36 starting at para. 37
[46] *R. v. Wong*, [2018] 1 SCR 696
[47] **See Guilty Pleas standard**

https://nsbs.org/legal-profession/your-practice/practice-support-resources/equity-access-resources/

Note on Language

As the nomenclature surrounding distinct groups evolves it is important to understand for the purpose of this Standard some of the terms used are defined as follows:

The ***Mi'kmaw*** are a First Nations peoples and the founding culture of Mi'gma'gi, what we now recognize as Nova Scotia.

Indigenous peoples is a collective name for the original peoples of North America and their descendants. Often, 'Aboriginal peoples' is also used.

African Nova Scotians who also self-identify as Indigenous Black, Africanadian, Afri-Scotian, First African Nova Scotian or Scotian, are descendants of free and enslaved Black Loyalists, Black Refugees, Maroons and other Black people who were settled across 52 indigenous land-based Black communities in Nova Scotia. African Nova Scotians are a distinct people.

African Canadian refers to all people of African descent living in Canada.

People of African Descent is an all-encompassing term for the diverse groups of African descendants including African immigrants, people of Caribbean heritage, African Canadians, and African Nova Scotians.

Black is a term which recognizes the unified descent as African peoples while acknowledging a common experience of oppression. This term is interchangeable with People of African Descent.

Racialized is understood as the external categorization of non-white.

NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Criminal Standards Committee

Date: December 23, 2020

Subject: Professional Standards – Criminal – Standard # - Cultural Competence

For: **Approval ☐** **Introduction X** **Information ☐**

DATE January 22, 2021	Council	Introduction
	Council	Approval

Recommendation/Motion:

This is the introduction to Council of a new standard – # - Cultural Competence – by the Professional Standards (Criminal) Committee. The Committee reached out to REC (there is cross membership) for informal feedback, and there was no substantive feedback offered. Following introduction to Council, the standard will be circulated to the membership for review and consultation. The Committee will review any comments received and then present the final form, amended if necessary, to Council for approval.

Executive Summary:

In 2019 Council directed the Committee to draft a Cultural Competence Standard. The new standard is designed to assist counsel in acknowledging and addressing the existence of systemic racism and discrimination against Indigenous Peoples, African Nova Scotians and Black Canadians, and other racialized groups in the criminal justice system in Nova Scotia.

Exhibit:

New Standard #: Cultural Competence with rationale.