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NOVA SCOTIA  
PUBLIC PROSECUTION SERVICE

**DOCUMENT TITLE:**

***Fair Treatment of African Nova Scotians and People of African Descent in Criminal Prosecutions (FTANS)***

**NATURE OF DOCUMENT:**

**DPP DIRECTIVE**

**SUBSTANTIVE REVISIONS:**

**May 30, 2023**

**EFFECTIVE:**

**February 28, 2024**

**DISTRIBUTED:**

**February 28, 2024**

**NOTE:**

THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.

CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE “**WORDS & PHRASES**” SECTION OF THIS PART OF THE MANUAL.

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## DEFINITIONS

For the purposes of this policy, the following terms are used:

“African Nova Scotians” - The descendants of free and enslaved Black Planters, Black Loyalists, Black Refugees, Maroons, and other Black people who inhabited the fifty-two (52) original land-based Black communities within Mi’kma’ki known as Nova Scotia. African Nova Scotians (who also self-identify as Indigenous Black, Africadian, Afri-Scotian, First African Nova Scotian, or Scotian) **are a distinct people.**<sup>1</sup>

“Black” and “People or Persons of African descent” - Any person who self-identifies as such, whether as a descendant of the victims of the transatlantic slave trade or as a more recent migrant, and specifically includes African Nova Scotians, as a distinct people.

The Nova Scotia Public Prosecution Service recognizes the legacy of colonialism and centuries of slavery and segregation have led to the intergenerational legacy of structural and systemic racism and the present-day social problem of anti-Black racism for African Nova Scotians / People of African Descent especially those whose ancestry is connected to the fifty-two (52) original land-based communities in Nova Scotia.

We acknowledge that anti-Black racism faced by People of African Descent in Nova Scotia uniquely positions them in a very disadvantaged, and thus, vulnerable societal state. For all these reasons, the Black experience in Nova Scotia is separate and distinct from any other lived experience. Therefore, particular attention must be paid to African Nova Scotians when applying this policy. This is demonstrated in all aspects of the policy, including in the title. If a Crown Attorney has questions about this, they should speak with their Chief Crown Attorney.

## INTRODUCTION

As proclaimed by the United Nations General Assembly in 2015, the theme for the International Decade for People of African Descent was “People of African descent: recognition, justice and development.”

Crown Attorneys seek justice by applying laws fairly and equitably to all who encounter the criminal justice system. We acknowledge the problematic issue of overrepresentation of Black people within that system. This reality is a persistent barrier to achieving fundamental equity in society. In 2012, the United Nations called on Canada to take urgent measures to reduce the overrepresentation of Black and Indigenous people in the criminal justice system. We recognize that Crown Attorneys have an important role in attaining this by finding ways to ensure more equitable treatment of African Nova Scotians who are involved in criminal prosecutions.

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<sup>1</sup> Definition used by the Dalhousie University African Nova Scotian Advisory Council.

Overrepresentation of Black people in our criminal justice system is a symptom of the larger root issue of anti-Black racism. We recognize that the legal system has played a vital role in both the construction and maintenance of anti-Black racism in Nova Scotia, beginning with the legal endorsement of slavery. In 1713, within the garrison at Louisbourg over 90 percent of the enslaved people were Black.<sup>2</sup> Even when some enslaved African Nova Scotians obtained their legal freedom, they were nonetheless reduced to societal slavery no matter their legal status.<sup>3</sup> North America's first recorded race riot occurred in the port town of Shelburne, Nova Scotia on July 26, 1784.<sup>4</sup>

So entrenched was slavery in what later was to become Canada that the first bill designed to abolish it did not free a single slave. The bill only prohibited the "importation" of new enslaved people, while maintaining the status quo for the enslaved and their children up to the age of 25.<sup>5</sup> Although on August 1, 1834, slavery was officially abolished in most of the British Empire, including what later became Canada,<sup>6</sup> its effects endure in the form of contemporary anti-Black racism in Canada.

Following slavery, Nova Scotia immediately implemented anti-Black policies and practices through racial segregation enforced by customary law.<sup>7</sup> The law sanctioned anti-Black racism by authorizing racial segregation in nearly every aspect of daily life including in schools,<sup>8</sup> the military,<sup>9</sup> public transportation, churches, burial, hotels, restaurants, theatres,<sup>10</sup> athletic facilities, parks, swimming pools, beaches, dances, skating rinks, pubs/bars, and housing/land titles.<sup>11</sup>

Specific laws and practices forced African Nova Scotians to build their communities outside of white spaces, with limited access to essential services such as education, health care, food, and economic development. Most Nova Scotians will recall the example of Africville.<sup>12</sup> Sun-down laws prevented Black people from entering most towns during the

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<sup>2</sup> Kenneth Donovan, "Slaves and Their Owners in Ile Royale, 1713-1760" (1995) 25 *Acadiensis* 3-32, at 4-5.

<sup>3</sup> Harvey Armani Whitfield, "Slavery in English Nova Scotia, 1750-1810" (2010) 13 *J.R.N.S. Hist. Soc.* 23-40 at 36.

<sup>4</sup> Robertson, J. (2021). Shelburne Race Riots. In *The Canadian Encyclopedia*. Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/the-shelburne-race-riots>

<sup>5</sup> Henry, N. (2022). 1793 Act to Limit Slavery in Upper Canada. In *The Canadian Encyclopedia*. Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/1793-act-to-limit-slavery-in-upper-canada>

<sup>6</sup> Henry, N. (2021). Slavery Abolition Act, 1833. In *The Canadian Encyclopedia*. Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/slavery-abolition-act-1833>

<sup>7</sup> Ricardo A. Sunga III, Ahmed Reid & Michal Balcerzak, "Report of the Working Group of Experts on People of African Descent on its mission to Canada" (2017) United Nations Human Rights Council Working Paper No 1713471. Retrieved from <https://digitallibrary.un.org/record/1304262> [2017 UN Working Group Report]

<sup>8</sup> An Act to continue and amend the Act for the Encouragement of Schools, S.N.S. (1836).

<sup>9</sup> An Act for regulating the Militia S.N.S. 1841.

<sup>10</sup> Constance Backhouse, "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946" (1994) 17:2 *Dal L.J.* 299.

<sup>11</sup> *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60, at para. 36.

See also Henry, N. (2021). Racial Segregation of Black People in Canada. In *The Canadian Encyclopedia*. Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/racial-segregation-of-black-people-in-canada>.

<sup>12</sup> Tattie, J. (2021). Africville. In *The Canadian Encyclopedia*. Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/africville>.

night, while segregated schools and private sectors created wealth and social gaps which ensured African Nova Scotians could never escape poverty.<sup>13</sup>

The legacy of that uncorrected history continues to translate into deeply entrenched social problems currently experienced by African Nova Scotians and Persons of African Descent (Black). Access to power, opportunities, and resources are limited for African Nova Scotians today as a direct result of deeply rooted anti-Black laws, policies, and practices. The last reported unemployment rate for African Nova Scotians is **16.2%** (9.8% for whites). African Nova Scotians face poverty rates of **32.1%**, which is twice that experienced by whites. The poverty rate for African Nova Scotian youth ages 18-24 is **50.2%**; with **39.6%** of children (up to age 17) living in poverty.<sup>14</sup>

A United Nations report in 2017 found that “...the socioeconomic conditions in the Black communities across the province remain deplorable.” It went on to state that “educational inequalities” between African Nova Scotians and other Nova Scotians remain unchanged since the school system was integrated more than thirty years ago.<sup>15</sup> African Nova Scotians face disproportionately high rates of suspension and other forms of discipline. Recent studies have found gross inequality in nearly every area studied, including carding by law enforcement,<sup>16</sup> child protection and consumer racial profiling.<sup>17</sup>

Nova Scotia is also home to People of African Descent/Black people who have recently migrated to Canada (and Nova Scotia) directly from African countries, Caribbean countries and from other countries within the African diaspora for social, economic, or familial reasons.<sup>18</sup> They, too, face manifestations of anti-Black racism, although they do not have the same historical connection to Nova Scotia or have experienced the systemic challenges realized by those African Nova Scotians who inhabited, and in some instances, still inhabit, the original land-based Black communities in Nova Scotia.

The Supreme Court of Canada recognized the unique racial dynamics that exist in Canada and Nova Scotia in its decision *R. v. S. (R.D.)*, [1997] 3 SCR 484, where, under the heading of “The Nature of the Community”, Justices L’Heureux-Dubé and McLachlin, speaking for the majority wrote:

The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nation-wide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*’s equality provisions. These are matters of which judicial notice may be

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<sup>13</sup> Michelle Williams, Coursepack: African Nova Scotian History/Orientation to Law (Faculty of Law, Dalhousie University, 2019).

<sup>14</sup> 2016 Census: <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/index-eng.cfm>

<sup>15</sup> 2017 UN Working Group Report, *supra*, at para. 56.

<sup>16</sup> Dr. Scot Wortley’s report: “Halifax, Nova Scotia: Street Checks Report”. (March 27, 2019)

<sup>17</sup> Nova Scotia Human Rights Commission report on retail racial profiling (May 29, 2013).

<sup>18</sup> See generally Statistics Canada (2019), “Diversity of the Black population in Canada: An overview”. Retrieved from <https://www150.statcan.gc.ca/n1/pub/89-657-x/89-657-x2019002-eng.htm>

taken. In *Parks*, *supra*, at p. 342, Doherty J.A., did just this, stating:

*Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.*

The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against Black and Aboriginal people, and high-profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall Jr. Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that 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 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.*<sup>19</sup>

In 2021, the Nova Scotia Court of Appeal in *R. v. Anderson*, recognized the unique history and experience of African Nova Scotians:<sup>20</sup>

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

- *Enslavement and the legal status as property of White men.*
- *Re-enslavement of freed slaves by profiteers and slave marketers.*
- *Forced migration as the chattels of American loyalists after the Revolutionary War.*
- *Servitude to Loyalists households even for freed slaves.*
- *Lawful segregation following the formal abolition of slavery in the British colonies. Examples of legally sanctioned racial segregation existed for military service, schooling, and, as the 1946 case of Viola Desmond highlighted, even in cinemas.*
- *The denial of ownership of real property. Black settlers were given tickets of location or licenses of occupation rather than legal title to their land. Denied clear title, Black settlers could not sell or mortgage their property, or legally*

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<sup>19</sup> *R. v. S* (R.D.), [1997] 3 SCR 484, paras. 46-47.

<sup>20</sup> 2021 NSCA 62, paras. 97-100 [interior citations omitted].

*pass it down to their descendants on death.*

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

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

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

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

*“...While Nova Scotians were generally appalled at the conduct of the police and justice system in Mr. Marshall’s case, the Royal Commission’s findings came as little surprise to many within the African Nova Scotian minority. As a community, we had come to expect systemic discrimination and barriers to access to justice when dealing with the police and the courts. It was thus with appreciation, but skepticism, that many African Nova Scotians greeted the Commission recommendation: “that the Chief Justices and the Chief Judges of each court in the province exercise leadership to ensure fair treatment of minorities in the system.”*

Citing the recent documentation of illegal street checks of African Nova Scotian/Black people in the Halifax region [35], the ANSDPAD Coalition observed that,

*“...even in the 21<sup>st</sup> century, law, law enforcement, and the justice system in Nova Scotia, have continued to operate in ways that systematically discriminate against Nova Scotians of African descent.”*

On September 29, 2020, the Government of Nova Scotia apologized for the systemic racism that has marked the province’s system of justice, including policing and the courts, and acknowledged that these institutions have failed members of Black and Indigenous communities.<sup>21</sup>

As a direct result of slavery, African Nova Scotians who inhabited the original land-based Black communities in Nova Scotia have survived through centuries of legally sanctioned, horrendous violence and trauma. They were stripped of their original cultures, religions, languages, and traditions: *There has been a long history of resistance and resilience by African Nova Scotians, and they have developed a distinct culture, traditions and social and political practices.*<sup>22</sup>

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<sup>21</sup> News release: “Premier Delivers Apology, Sets Course for Fundamental Change in Public Safety” (September 29, 2020) - <https://novascotia.ca/news/release/?id=20200929002>.

<sup>22</sup> 2017 UN Working Group Report, *supra*, at para. 14.

## POLICY OBJECTIVES

This policy acknowledges the unique experiences of African Nova Scotians, who inhabited the original land-based Black communities in Nova Scotia. It is intended to provide guidance to Crown Attorneys in their various exercises of prosecutorial discretion in cases involving African Nova Scotians and other People of African Descent / Black so as to ensure fair treatment.

Specific objectives of this policy are multi-faceted, and include:

- To give effect to the primary purpose of the Public Prosecutions Act, which is to ensure fair and equitable treatment in the prosecution of offences.
- To help address overrepresentation of African Nova Scotians and other People of African Descent in correctional centres by factoring in cultural context at all stages of the criminal justice process.
- To ensure Crown Attorneys conduct culturally competent prosecutions involving African Nova Scotians and other People of African Descent accused, victims and witnesses.
- To provide Crown Attorneys with the resources needed to properly and consistently identify and address issues of racism and discrimination within individual cases and the criminal justice system as a whole.
- To support and promote the continued use and development of Impact of Race and Culture Assessments (IRCAs) within the criminal justice system, in a manner analogous to the *Gladue* framework within Nova Scotia but grounded in the distinct experiences of African Nova Scotians and other People of African Descent.

This policy is also part of a larger response by the Public Prosecution Service to the specific recommendations of the 1989 *Royal Commission on the Donald Marshall Jr. Prosecution*, directed at the Attorney General, that Crown Attorneys:<sup>23</sup>

- Gain exposure to materials explaining the nature of systemic discrimination toward Black and Native peoples in Nova Scotia in the criminal justice system; and
- Explore means by which Crown Attorneys can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotia criminal justice system.

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<sup>23</sup> Royal Commission on the Donald Marshall Jr. Prosecution, Recommendation #14(a) and #14(b), December 1989

[https://novascotia.ca/just/marshall\\_inquiry/\\_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution\\_findings.pdf](https://novascotia.ca/just/marshall_inquiry/_docs/Royal%20Commission%20on%20the%20Donald%20Marshall%20Jr%20Prosecution_findings.pdf)

See also: Conn, H. (2020). Marshall Inquiry. In *The Canadian Encyclopedia*.

Retrieved from <https://www.thecanadianencyclopedia.ca/en/article/marshall-inquiry>.



## DIRECTIVES FOR INDIVIDUAL CASE MANAGEMENT

Note: This policy should be read in conjunction with the PPS Policy on *Fair Treatment of Indigenous Peoples in Criminal Prosecutions* where an accused/victim/witness is both Black and Indigenous.

### **I. Pre-Charge Advice to Police**

See PPS policy *Advising the Police* for guidance. If the advice involves race-based legal issues (e.g., allegations of racial profiling), Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney as well as experienced colleagues on the PPS Equity and Diversity Committee, who are available for consultation on such issues.

### **II. The Decision to Prosecute**

As with all cases, in making the decision to prosecute, Crown Attorneys must consider whether there is a realistic prospect of conviction and whether it is in the public interest to proceed. The presence of racism and discrimination within an individual case (implicit or explicit, whether intentional or unintentional) can impact both analyses.

Where a Crown Attorney is made aware that an accused is an African Nova Scotian or Person of African Descent, the Crown should:

- Review disclosure to identify any possible issues of racism and discrimination (implicit or explicit, whether intentional or unintentional) in the conduct of the State, at every stage of the file, including any investigation done by law enforcement or any involvement of agencies such as Department of Community Services, Correctional Services, or Probation. Examples: use of racial slurs or inappropriate language directed at the accused; reliance on stereotypes or generalizations about African Nova Scotians and Persons of African Descent or their neighbourhoods/communities in making decisions; and disproportionate reactions toward the conduct of the accused.
- If issues of racism and discrimination are suspected, consider whether the issues impact on prospect of conviction or the public interest. Example: racial profiling (even when it arises from unconscious bias) and carding (when based on stereotypes or generalizations about African Nova Scotians or Persons of African Descent or their communities) may constitute a violation of the Charter right not to be arbitrarily detained and could lead to remedies under s. 24(1) or s. 24(2) of the Charter.<sup>24</sup>

Considering the above, Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney and experienced colleagues before deciding to prosecute any case in which they are unsure of either the strength of the case or whether the public interest is best served by prosecution. The Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee are available for consultation on such issues as they arise in a case.

In addition, the Crown Attorney should consider the circumstances of an accused African Nova Scotian or Person of African Descent, including historical and present-day effects of

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<sup>24</sup> R. v. Dudhi, 2019 ONCA 665.

racism and discrimination, when:

- Making decisions that affect a referral to Restorative Justice (RJ); and
- Making decisions on Crown election (which can affect sentence).

### **III. Public Incitement of Hatred**

African Nova Scotians and Persons of African Descent also may be differentially victimized, in light of historical and contemporary experiences of racism and discrimination. Crown Attorneys should recognize and carefully consider this when analyzing whether or not it is in the public interest to prosecute such a case. Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney before deciding whether or not to prosecute any such case in which they are unsure of either the strength of the case or whether the public interest is best served by prosecution. The Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee are available for consultation on such issues as they arise in a case. (A PPS policy on Public Incitement of Hatred is being developed, which will provide guidance on handling these complex cases.)

### **IV. Restorative Justice**

Restorative Justice (RJ) referrals, whether pre-conviction or post-conviction, are an important means of reducing the number of African Nova Scotians and Persons of African Descent in custody and increasing the number of same resolving criminal matters outside the traditional court process. Crown Attorneys should consult the PPS *Restorative Justice* policy for further guidance.

### **V. Arraignment**

The Crown Attorney should inquire of Defence Counsel of each accused if their client wishes to self-identify as African Nova Scotian, Person of African Descent or Black. The Crown Attorney should make note of the accused's identity in the file. This information should be shared with the Court where it is relevant to the determination of applicable legal principles or availability of services, including those in relation to judicial interim release hearings and sentencing hearings.

### **VI. Bail**

When determining a position on bail involving an accused African Nova Scotian and Person of African Descent, the Crown Attorney must apply the general principles set out in the *Criminal Code* and in particular the following:

- the principle of restraint, pursuant to s. 493.1, which mandates primary consideration be given to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances; and
- the requirement to give particular attention to the circumstances of accused who

belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release, pursuant to s. 493.2.

- Consider whether “traditional” bail conditions disproportionately disadvantage African Nova Scotians and People of African Descent and seek culturally relevant alternatives. Example: “Non-association” conditions with persons having a criminal record may not be appropriate in light of over-policing in Black communities, which statistically leads to more People of African Descent having criminal records.

Crown Attorneys must also apply the guiding principles from the Supreme Court of Canada in *Antic*<sup>25</sup> and *Zora*:<sup>26</sup>

- Save for exceptions, an unconditional release on an undertaking to attend trial is the default position when granting release.
- The ladder principle requires release at the earliest reasonable opportunity and on the least onerous grounds, in consideration of all the circumstances. When the Crown proposes an alternative form of release, it must show why it is necessary.
- Each rung of the ladder must be considered individually and must be rejected before moving to a more restrictive form of release.
- A surety should not be imposed unless all the less onerous forms of release have been considered and rejected as inappropriate.
- Cash bail should be relied on only in exceptional circumstances in which release on a recognizance with sureties is unavailable and/or reasonably recoverable assets cannot be pledged.
- When cash bail is sought, the amount must not be so high that it effectively amounts to a detention order. The amount must be no higher than necessary to satisfy the concern that would otherwise warrant detention and proportionate to the means of the accused and the circumstances of the case.
- Other terms of release may only be imposed to the extent that they are necessary to address concerns related to the statutory criteria for detention and to ensure that the accused can be released. They must not be imposed to change an accused person's behaviour or to punish an accused person.

### **Impact of Race and Culture Assessments (IRCA)**

Accused African Nova Scotians and Persons of African Descent are entitled to have their background and unique circumstances presented at a bail hearing through an Impact of Race and Culture Assessment (IRCA). Such information is relevant to the analysis under s. 493.2(b) of the *Criminal Code*.

The first IRCA was accepted and applied in the 2014 decision of *R. v. X*,<sup>27</sup> a sentencing hearing for a Black youth. The expert report was tailored to capture the unique experiences

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<sup>25</sup> *R. v. Antic*, 2017 SCC 27.

<sup>26</sup> *R. v. Zora*, 2020 SCC 14.

<sup>27</sup> (2014), 353 N.S.R.(2d) 130 (YC); 2014 NSPC 95.

of African Nova Scotians and Persons of African Descent and the impact of anti-Black racism on the person's development and eventual contact with the criminal justice system. At the time, the IRCA was treated as a pre-sentence report governed through sections 721(4), 723(3) and 723(4) of the *Criminal Code*.

Since *R. v. X.*, IRCAs have been tendered in several other cases in Nova Scotia and Ontario, at bail and sentencing hearings.<sup>28</sup> Although they do not hold the same constitutional implications as a *Gladue* report for Indigenous offenders;<sup>29</sup> some cases have applied the IRCA within the framework of the restraint principle in s. 718.2(e),<sup>30</sup> and others have used the content of the IRCA in the assessment of the moral culpability of the offender.<sup>31</sup>

IRCAs were developed to help address the overrepresentation of African Nova Scotians and Persons of African Descent within the criminal justice system. Although originally funded by Nova Scotia Legal Aid or the offenders themselves, the reports are now court-ordered and paid for by the Nova Scotia Department of Justice. The federal government also announced it would be adopting this pioneering Nova Scotia program.

The Nova Scotia Court of Appeal, in *Anderson*, upheld the use of IRCAs as “a valuable resource for sentencing judges,”<sup>32</sup> providing information about relevant systemic and background factors, to be incorporated into a fit sentence.

### **Approach to Bail for African Nova Scotians and Persons of African Descent**

Where an African Nova Scotian or Person of African Descent is brought to court in custody, the Crown Attorney should:

- If release on bail is opposed, Crown will inquire of defence counsel for an accused as to whether the accused wishes to have an IRCA prepared and considered at any bail hearing or alternatively, if the accused is self-represented, ask the Court to canvas the issue with the accused;
- If the accused wants an IRCA at the bail stage, not oppose the request, although it will increase the amount of time spent on remand.
- Accept (without the need to call evidence) and factor into the bail analysis, pursuant to s. 493.2 of the Code, matters such as: colonialism and centuries of slavery and segregation; the existence of systemic and direct racism, including racial profiling, experienced by African Nova Scotians; and the legacy of these experiences, such as lack of opportunities and over-representation of African Nova Scotians/Black people within correctional facilities.<sup>33</sup>

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<sup>28</sup> *R. v. Perry*, 2018 NSSC 16; *R. v. Morris*, 2021 ONCA 680; *R. v. Jackson*, 2018 ONSC 2527

<sup>29</sup> *R. v. Gabriel*, 2017 NSSC 90

<sup>30</sup> *R. v. Jackson*, 2018 ONSC 2527 at para 77

<sup>31</sup> *R. v. Anderson*, 2021 NSCA 62, para 146.

<sup>32</sup> *R. v. Anderson*, 2021 NSCA 62, at para. 112.

<sup>33</sup> *R. v. Anderson*, *supra*. See comments at para. 111 regarding judicial notice.

- In making determinations regarding bail, treat the analysis as analogous to the approach taken for Indigenous accused.<sup>34</sup> Crown Attorneys should use any reasonably available sources of information (within the time constraints of the bail process) to apply the following checklist of non-exhaustive biographical factors, to consider what, if any, impact those factors may have on the African Nova Scotians and Persons of African Descent accused's ability to secure a release plan:
  - Has the person been affected by substance abuse in the community?
  - Has the person been affected by poverty?
  - Has the person or their family faced overt or systemic racism?
  - Has the person been affected by family breakdown?
  - Has the person been affected by unemployment, low income, and a lack of employment opportunity?
  - Has the person been affected by dislocation from their community, involvement with the child welfare system, or by loneliness and community fragmentation?<sup>35</sup>
  
- When considering a release plan versus detention, consider the following additional questions:
  - Whether any sureties offered, in the context of the African Nova Scotian community or culture, can control the accused's behaviour?
  - In light of over-policing in African Nova Scotian communities, whether a proposed surety is otherwise suitable, notwithstanding the presence of a criminal record?
  - Whether a residential surety is actually required or if other suitable arrangements can be made to control the accused's behavior?
  - What is a fair, appropriate, and meaningful pledge for a surety, in light of historical socio-economic issues that plague African Nova Scotian communities as a result of systemic racism and discrimination?
  - Are there any customs or cultural practices within said community that could provide assurances of attendance in court and protection of the public?
  - Would detention have a disproportionately negative impact on the accused as a member of the African Nova Scotian community and whether that impact could be alleviated by strict bail conditions?<sup>36</sup>
  - Consider whether "traditional" bail conditions disproportionately disadvantage African Nova Scotians and Persons of African Descent and seek culturally relevant alternatives.

Assessment of the factors listed above, where present, compel a Crown to carefully consider all bail options that can safely release accused African Nova Scotians and Persons of African Descent into the community. Crowns should also consider any difficulties it is believed the accused may have in getting to court due to distance and inability to fund travel and make note of such issues in the file. If the accused African Nova Scotian and Person of African Descent does not attend a future court appearance, a Crown

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<sup>34</sup> R. v. Perry, 2018 NSSC 16 at para. 22.

<sup>35</sup> M.E. Turpel-LaFond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue", (2000), 43 C.L.Q. 34 at 40. And see Gillian Balfour, "Sentencing Aboriginal Women to Prison", in JM Kilty, ed, *Within the Confines: Women and the Law in Canada* (Toronto: Women's Press, 2014) at 100.

<sup>36</sup> R. v. Perry, *supra*

can weigh this circumstance in any subsequent bail proceeding.

Where the accused is both African Nova Scotian/Person of African Descent and Indigenous, the Crown Attorney should consult the PPS policy regarding *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia* for determining a position on bail given the different case considerations, statutory and constitutional law imperatives, and guidance unique to Indigenous accused.

## VII. Trial

Crown Attorneys should be mindful that most African Nova Scotians who come in contact with the criminal justice system - as victims, witnesses or as accused - will have personally experienced direct and systemic discrimination at the hands of the State or know someone who has. This can have an impact on an African Nova Scotian's ability to put their trust in the criminal justice system, especially in Crown Attorneys and police.

In trials involving an African Nova Scotian and Person of African Descent victim, witness or accused, the Crown Attorney should:

- Be mindful of cultural, religious, and linguistic differences, including differences in demeanour;
- Be mindful of implicit and unconscious racial bias toward African Nova Scotians and Persons of African Descent particularly when questioning a witness or an accused, or presenting any other type of evidence, so as to prevent manifestation of stereotypes. Examples: "angry Black woman", "aggressive Black man", "Black men as thugs/gangsters/drug dealers" etc.;<sup>37</sup> and
- Take a trauma-informed approach to victim/witness trial preparation.

In trials involving race-based legal issues (such as racial profiling or provocation involving use of racial slurs), Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney and experienced colleagues. The Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee are available for consultation on such issues as they arise in a case. Examples: What facts can the court take judicial notice of?<sup>38</sup> Is expert evidence required to assist the judge or jury in understanding complex or nuanced race-based legal issues or is testimony from lay members of the Black community sufficient?

### Challenge for Cause/*Parks* Challenge

In jury trials, where the accused and/or victim is African Nova Scotian/Person of African Descent, either party can seek to challenge the jury for cause for racial biases during jury selection pursuant to Criminal Code section 638(1)(b). This is also known as a *Parks* challenge.<sup>39</sup>

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<sup>37</sup> R. v. Mills, 2019 ONCA 940, at paras 121-122: When considering admissibility of rap lyrics written by the accused, the Court held that in weighing their probative value versus prejudicial effect, one must consider the risk in allowing their admission because they can "trigger and inflame stereotypical assumptions that triers of fact bring with them to court about race and crime."

<sup>38</sup> R. v. Spence, [2005] 3 S.C.R. 458, at para 5.

<sup>39</sup> R. v. Parks, [1993] 3383 ONCA, 84 CCC (3d) 353.

Challenge for racial bias requires that the applicant establish there is widespread bias in the community and that some prospective jurors may not be capable of setting aside their bias; however, the recognized prejudice against visible minorities, including the Black community, is widespread enough that a challenge for cause will be established in most cases.<sup>40</sup> As such, Crown Attorneys should support an African Nova Scotian and Person of African Descent accused's request for a *Parks* challenge and consider seeking a *Parks* challenge when the victim is African Nova Scotian/Person of African Descent.

### Crown Consent to Change Mode of Trial

Defence Counsel may seek Crown consent, pursuant s. 473 of the *Criminal Code*, to elect to have a judge alone trial for a s. 469 *Criminal Code* offence, because of race-based legal issues in the file. When this occurs, Crowns should carefully consider whether the race-based legal issues can be meaningfully addressed by a *Parks* challenge, as noted in the previous section of this policy, and work with Defence Counsel to craft challenge for cause questions which may meaningfully address potential bias. Consideration of a change of venue may also offer an option to address geographically based and/or community-based bias. There may be cases in which it is appropriate for the Crown to exercise its discretion under s. 473 to consent to a trial by judge alone, due to the unique complexity of the race-based legal issues or the degree of known bias in a particular community. Crowns should consult with their Chief Crown about this. The Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee are available for consultation.

## VIII. Sentencing

The Criminal Code does not explicitly require consideration of the unique circumstances of accused African Nova Scotians and Persons of African Descent at the sentencing stage, unlike cases involving Indigenous accused. However, caselaw has established a framework within which judges can apply the restraint principles codified in 718.2(e) of the Criminal Code to African Nova Scotians/Persons of African Descent and consider background and systemic factors in the assessment of moral culpability.

At the sentencing of an African Nova Scotian/Person of African Descent offender:

- The Crown Attorney should ask the Court to canvas with the offender, whether or not they are represented by counsel, if an IRCA is required. Or, alternatively, the Crown Attorney should obtain any recently prepared IRCAs from other files involving the accused.
- If the accused is both African Nova Scotian and Indigenous, they are entitled to both an IRCA and a Gladue Report. Absent exceptional circumstances, the Crown Attorney should not recommend the preparation of both if the accused only wants to have one of the two completed. The Crown Attorney should also consult the PPS *Policy on Fair Treatment of Indigenous Peoples in Criminal Prosecutions* given the different case

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<sup>40</sup> R. v. Parks, *supra*.

considerations, statutory and constitutional law imperatives. and guidance unique to Indigenous accused persons.

- If an IRCA is requested, the Crown Attorney should not ask the offender to waive his or her rights under s. 11(b) of the *Charter*. Like the preparation of Pre-Sentence Reports and *Gladue* Reports, delay attributable to the preparation of the IRCA is not attributable to the offender. An African Nova Scotian and Person of African Descent offender should not have to choose between their right to a trial within a reasonable time and a culturally competent sentencing hearing. In cases where the delay is attributable to the offender, such as when the offender fails to attend appointments with the author of the IRCA, the Crown can request that the Information be endorsed to reflect this.
- If the Crown Attorney has concerns with any of the content of the IRCA, attempts should be made to resolve the issues with defence counsel. If this is not possible, Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney. The Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee are available for consultation.
- The Crown Attorney should ask the Court to take judicial notice of the systemic and background factors affecting African Nova Scotians and Persons of African Descent in Canadian society.<sup>41</sup>
- The law does not require proof of a causal link between systemic factors and the offending behaviour which brings the African Nova Scotian and Person of African Descent before the Court; therefore, the Crown Attorney must not insist on proof of such a link. There does have to be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence.<sup>42</sup>
- The Crown Attorney should consider secure custody as a sentence of last resort for African Nova Scotian/Person of African Descent offenders, canvassing in every instance the suitability of sentencing alternatives, with sentencing principles 718.2(d) & (e) being considered in every case where secure custody is a possible outcome.
- The Crown Attorney should use any reasonable sources of information to apply the following checklist of non-exhaustive biographical factors in situating the moral responsibility of an African Nova Scotian/Person of African Descent offender when formulating a recommendation for a sentencing hearing:
  - Has the person been affected by substance abuse in the community?
  - Has the person been affected by poverty?
  - Has the person faced overt racism in addition to systemic racism?

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<sup>41</sup> R. v. Perry, *supra*; R. v. S. (R.D.), *supra* at para 46 and 47.

<sup>42</sup> R. v. Morris, 2021 ONCA 680, paras. 96-97.



- Has the person been affected by family breakdown?
- Has the person been affected by unemployment, low income, and a lack of employment opportunity?
- Has the person been affected by dislocation from an African Nova Scotian community, involvement with the child welfare system, or by loneliness and community fragmentation?

The Crown Attorney should also consider circumstances of an African Nova Scotian and Person of African Descent accused when making decisions that impact sentencing options including, but not limited to, Notice to Seek Increased Penalty.<sup>43</sup>

In cases involving hate crimes involving racial issues, for example, cases in which the race of a victim is an aggravating factor, Crown Attorneys are strongly encouraged to consult with their Chief Crown Attorney, Director/Executive Lead of Equity, Diversity, Inclusion and Strategic Relations and experienced colleagues on the PPS Equity and Diversity Committee.

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<sup>43</sup> Per an earlier Anderson case, R. v. Anderson, 2014 SCC 41, Crown Attorneys are not constitutionally required to consider the Aboriginal status of an accused when deciding whether to seek a mandatory minimum sentence, which presumably would also apply to African Descended / Black accused persons. However, pursuant to this policy, Nova Scotia Crown Attorneys should consider the identity of the accused as an African Descended / Black person in the exercise of prosecutorial discretion at every stage of the proceedings.

**APPENDIX A: AFRICAN NOVA SCOTIAN / BLACK COMMUNITY SERVICE PROVIDERS** *(Note: This is a small sample of ANS/Black community service providers)*

**1. African Nova Scotian Justice Institute (ANSJI)**

The ANSJI is led by the African Nova Scotian Decade for People of African Descent Coalition. It is currently providing and/or developing programming related to: Impact of Race and Culture Assessments & treatment services; a data collection and policing accountability unit; a court support program; a community justice legal defence program; a bail alternative, incarceration support and reintegration program for historical African Descended people; an alternative justice and victim services program; public legal education and youth development program; and human rights and policing accountability programming.

**Phone:** (902) 492-5619    **Email:** [info@ansji.ca](mailto:info@ansji.ca)

**2. 902 Man Up**

902 ManUp is a non-profit volunteer organization founded in 2016 in response to the increase in community violence particularly involving Black males. The organization is primarily dedicated to the advancement of all Black Communities within Nova Scotia and has a particular focus on the empowerment of young Black males. The expanded mandate of 902MU includes all individuals or groups at risk of marginalization and social and academic exclusion.

**Website:** <https://902manup.ca/>

**3. Nova Scotia Brotherhood Initiative**

Nova Scotia Brotherhood Initiative is a free program for Black men to access health care in the community to improve overall health and wellbeing. A team of health care professionals provide culturally appropriate primary medical care plus health and wellness services for men of African descent across Halifax Regional Municipality.

**Phone:** 902-434-0824    **Email:** [nsbrotherhood@nshealth.ca](mailto:nsbrotherhood@nshealth.ca)

**4. iMOVE**

iMOVE is a nonprofit organization pioneered by Executive Director Sobaz Benjamin. It uses the arts for healing and self-expression, to enhance participants' (including youth at risk) ability to make a living, and to develop their leadership skills. They have, at times, provided court support.

**Website:**    <https://www.inmyownvoice.ca/>

**5. African Nova Scotian Policy and Advocacy Collective (ANSPAC)**

This is a community-based policy and advocacy initiative that seeks to enrich policy and advocacy for Nova Scotians of African descent employing an approach that uniquely considers the intersections and diversity of the lived experiences of historic African Nova Scotians, Persons of African ancestry born in Nova Scotia and Persons of African descent who have recently settled in Nova Scotia.

**Phone:** 902-237-5644    **Email:** [anspacoffice@gmail.com](mailto:anspacoffice@gmail.com)

**APPENDIX B: PPS CONSULTATION REQUEST FORM**

PPS employees seeking to consult on equity, diversity, inclusion and accessibility issues and opportunities, please fill out and submit this form by email: [PPSEDIA@novascotia.ca](mailto:PPSEDIA@novascotia.ca) .

Employees should attempt to complete all sections of the form to assist in understanding the request; however incomplete forms will still be considered.

Standard turnaround time for consultations to be reviewed and returned with feedback is about 4 weeks.



<b>Date of Submission:</b>	
<b>Submitted by:</b>	
<b>Chief Crown Attorney or Support Staff &amp; Office:</b>	
<b>Accused Name &amp; File Number (if applicable):</b>	
<b>Brief Statement of Facts/Situation:</b>  <i>If consultation is sought for a file, provide synopsis of facts (and attach any relevant supporting material). If not file related, briefly describe matter that requires consultation.</i>	
<b>Key Issues for Consultation:</b>  <i>Describe the key issues, concerns, or knowledge gaps that you would anticipate being addressed by the consultation.</i>	

<p><b>Previous Consultation and Review:</b></p> <p><i>Describe any past involvement by Crown Attorneys, Chief Crown Attorneys, or other PPS staff in this matter.</i></p>	
<p><b>Case Law/Legislation/ Policy Review:</b></p> <p><i>Identify any case law, legislation, policies and/or other resources already reviewed and how it may apply to this matter.</i></p>	
<p><b>Are there any timing issues or deadlines that affect when review and feedback are required?</b></p>	

## Review & Advice

<b>Reviewed by:</b>	
<b>Format of Advice (check all that apply):</b>	<input type="checkbox"/> Written feedback <input type="checkbox"/> Verbal feedback <input type="checkbox"/> Case conference
<b>Date Advice Given:</b>	
<b>Advice Provided (attach any supporting documents):</b>  <i>Summary of any advice &amp; feedback provided</i>	
<b>Outcome of the Case/Situation:</b>  <i>Follow-up with individual(s) who submitted request for consultation. Provide a summary of any action taken as a result of advice and provide overall outcome of the matter (i.e. impact on case resolution or trial decisions, press release issued, change in policy, directives from Management, etc.).</i>	