Race as a significant variable in the legal system

The history of Nova Scotia is steeped in a racialized narrative. Colonialism, treatment of Aboriginal persons, participation in slavery, segregation, exclusion of racialized persons from all the relevant instruments of civil society until a minute ago in the timeline of our province – these are the reasons race is always an issue in any social interaction. To ignore the complex ways in which persons of European descent have been in an intergenerational familial and social location of privilege is to forget the lessons of the most frequent Nova Scotia greeting until very recently: "who are your people?" or "who are your parents" or "where are you from?"

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The importance of recognizing this history as a relevant and important issue in any matter before the courts is being increasingly recognized. This has been seen quite vividly in the Supreme Court of Canada's discussion of the reasonable person in the often quoted *R.v.S. case (R.v.S. (R.D.), [1997] 3 S.C.R. 484 – 1997 – 09 – 26)*: "The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality."

This test seems to imply that all persons before the courts in all settings should have a working knowledge of this racialized narrative. And not only that, but that each person should be an advocate in promoting greater equality and justice within their communities. If this is so, it would stand to reason that a critical role of every person in any adjudication process would be to actively work to identify elements of racial injustice that may be at play in the cases before them. If this is the standard expected, most would agree that we are not currently meeting it.

Acknowledging the "social context of lawyering" (Voyvodic, n.d.) requires that lawyers and judges alike have certain skills and capacities to discuss such matters. More than just a moral imperative, these competencies – often called cultural competencies – are being increasingly read as required professional practice of law in Canada as suggested or even required by the Supreme Court.

It is evident we are not meeting this expectation. For the facts, go to the Marshall Inquiry. For the current practice involving the African Nova Scotian population (the subject of this article), start from there, and then proceed to examine the necessity of learning what legal education has not taught today's lawyers, legal experts, professional contributors to expert knowledge, and the judiciary. In the provision of legal services in a situation where the victim or perpetrator are racialized – whether in criminal court, family court, child welfare matters, custody and access conflict – the legal professionals must begin to examine what isn't known, and what very specific questions need asking about the competence required to consider the best interests of the client.

In addition to simply acknowledging that the racialized narrative is a factor to be considered in all courts, the Marshall inquiry pointed out that Aboriginal and African Canadians have unique historical experiences within the criminal justice system. Beyond general principles then, there is a particular onus on courts to acknowledge the systemic and historical manner in which these populations have been poorly served. This is particularly seen within the criminal courts. The overrepresentation of Aboriginal and African Canadians in the provincial and federal correctional systems, the reality of racial profiling by frontline policing professionals, and even the treatment and the experience of Aboriginal and African Canadians within the corrections systems, all point to a unique and tragic consequence of systemic racism. While this should be no surprise to any justice professional, our practice seems to suggest that even if we are aware of these dynamics, we are powerless or incompetent to adequately address them. The Office of the Correctional Investigator of Canada was so disturbed by the treatment and overrepresentation of African Canadians in the federal correctional system that it made a case study of African Canadians a central theme in its most recent annual report.

To argue that race is always an issue, is definitely not to suggest that race is by any means the only issue or always even the single most important consideration in examining the complexity of any one case. It is simply to say that the "invisible"(ironic when we often use the term "visible minority") or ignored must be made visible and brought to the front line of issues under consideration. And that furthermore, the lack of knowledge of the legal professional(s) and the medical or mental health professionals informing the case with their reports or testimony, or their own emotions, guilt, "subtle", aversive or overt racist attitudes, cannot continue to guide the legal process underway. We must acknowledge that ignorance with regard to race constitutes inadequate and unethical conduct in the provision of all aspects of the legal system affecting persons of African Nova Scotian descent. All the persons influencing the conduct or the outcome of legal proceedings must be expected to have some baseline, or minimum capacity, to contextualize race, and the relevant historical and current socio-cultural variables affecting the outcome of the legal proceedings.

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What might be the most relevant starting points for suggesting this baseline or minimum standard, below which exists cultural incompetence or an unethical level of ignorance in legal practice?

We suggest the following, to name just a few:

- acknowledging the issue of race as a variable in the case;
- basic information on the racialized history of Nova Scotia;
- familiarity with aspects of racism, as both an active agent of oppression, and as experienced both sociologically and psychologically by the African Nova Scotian person, including those of mixed race parentage;
- familiarity with the dimensions of racial privilege carried by European or white persons in Nova Scotia;
- familiarity with the diversity of the psychological experience of racism by immigrants of African descent and indigenous persons of African descent, as well as the diversity of the racial experience dependent upon the individual's location in the province; and
- acknowledgement of, and competence in, understanding the fluidity of the conduct, and experience of racism over generations and historical timelines; that is, racism is located in both place and over time, and contextualization requires understanding these intersections.

Building capacity within the Canadian legal system to properly address the racialized narrative of African Canadians who come before the courts is a challenging project. One mechanism that might be used perhaps as a stopgap measure or as a systemic instructional mechanism is to bring discussion of the racialized narrative into such matters. This might be in the form of formal reports whether by social science professionals or skilled health professionals or testimony from community elders, activists and advocates. This would provide courts with the opportunity to conduct race and culture analysis of matters before it. There is precedent for such a thing. In 1999 the Supreme Court of Canada effectively recommended that such informed analysis be available to the criminal courts to assist the court in fulfilling its section 718.2 (e) obligation to Aboriginal peoples.

That such discussion would be of use in family matters is obvious. The respect and consideration of children's "cultural, racial and linguistic heritage" is enshrined in the preamble to Nova Scotia's *Children and Family Services Act.* Though this act arguably increased the professional and clinical expectations on child welfare professionals in their assessments and interventions of risk to children, anecdotally there is significant evidence it did not increase the cultural competence of child welfare practice or practitioners. As well it did not appear to increase the cultural competence of legal practitioners who are involved in child welfare litigation, or the policy and practice leaders who developed manuals and training in the child welfare sector, or the class of expert professionals who regularly are called upon to assess and comment on the needs of families and children who are the subject of child welfare involvement.

Similarly the *Nova Scotia Family Maintenance Act* (FMA) requires that when "determining the best interests of the child, the court shall consider all relevant circumstances, including (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage". In this setting as well, Nova Scotian courts, legal practitioners, and persons regularly called upon to provide clinical information to assist the court in assessing children's best interest have regularly ignored the racial and cultural identities and the racialized narrative of the African Canadian children and families that are the subject of FMA matters.

The arguments presented here are not intended to be so daunting and all-consuming as to suggest the task is too big. We merely argue the necessity to state the problem and current ethical concerns, in order to know where to start the process of educating for building capacity and increasing the knowledge necessary for baseline, minimally competent legal intervention. In future articles, we propose to outline with more specificity, the urgent questions that need to be asked in preparing cases before criminal and family court, and what the base lines of minimal cultural knowledge look like to suggest that a person of African descent may be served in a far improved manner in the day-to-day conduct of the legal profession in Nova Scotia.

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