ANTI-BLACK RACISM IN CANADA'S CRIMINAL JUSTICE SYSTEM

BACKGROUND INFORMATION & RESOURCE GUIDE

LEGAL AID ONTARIO
AIDE JURIDIQUE ONTARIO

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INTRODUCTION

The bail stage is one of the most critical stages of the legal process. Not being released on bail can lead to the accused losing their employment, home, family, community, and educational opportunities. To avoid these impacts, those who remain in custody are more likely to plead guilty to offences they did not commit. Conversely, an accused who is able to secure bail can continue with their life until trial. They will thus be in a better position to mount a defence against the charges. They are also less likely to attract a custodial sentence at the sentencing stage. In short, the stakes are very high.

There are current and longstanding racial disparities in bail outcomes, particularly with respect to Indigenous and Black accused. For example:

- In 1995, the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System came to a "conclusion [that] is inescapable: some black accused who were imprisoned before trial would not have been jailed if they had been white, and some white accused who were freed before trial would have been detained had they been black".[1]
- A 2002 study of bail courts in Toronto found that "race remains a significant predictor of pre-trial detention", after controlling for relevant legal factors related to flight risk and danger to the public. The same study also found that black accused, after controlling for similar variables, tend to receive significantly more release conditions than non-blacks.[2]
- A 2017 study found that Black people awaiting trial in Ontario jails spend longer in custody than white people.[3]

In most cases, release on bail is determined by whether or not the accused has a criminal record, the seriousness of the allegations, and the proposed plan of release; however:

- Systemic and background factors such as anti-Black racism can act as a powerful counterweight to the statutory factors for detention on secondary and tertiary grounds;[4]
- Honouring the constitutional right to reasonable bail requires consideration of the socio-economic factors present in the life of any accused;[5] and
- It is beyond dispute that systemic racism is part of the cause for the overrepresentation of certain populations in the criminal justice system. Section 493.2 of the *Criminal Code* is clearly intended to be part of the remedy to this problem.[6] When justices, peace officers and judges are considering releases, s. 493.2 requires that they pay 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.

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[1] "Report of the Commission on Systemic Racism in the Ontario Criminal Justice System", Commission on Systemic Racism in the Ontario Criminal Justice System, (Toronto: Queen's Printer for Ontario), at p v, online: https://archive.org/details/reportracismont00comm.
[2] Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42 Brit J Crim, as explained in Akawsi Owusu-Bempa & Scot Wortley, "Race, Crime and Criminal Justice in Canada" in Sandra M. Bucerius & Michael H. Tonry eds The Oxford Handbook of Ethnicity, Crime and Immigration, (Oxford, UK: Oxford University Press, 2013) at 292.
[3] CBC News, "Black people awaiting trial in Ontario jails spend longer in custody than white people" https://www.cbc.ca/news/canada/toronto/race-ontario-jails-wait-trial-disparity-1.4364796
[4] *R v AA,* 2022 ONSC 4310 at paras 74-83 and 95-104
[5] *R v Chocolate*, 2015 NWTSC 28 at para 49
[6] *R v EB*, 2020 ONSC 4383 at para 27

For these reasons, it is important to use social context evidence, including relevant submissions about race and anti-Black racism, at the bail stage.[7]

The weight to be given to an accused's criminal record provides one example. In most cases when a criminal record is alleged by the Crown, there are limited submissions that the defence can make to the court to explain the record, especially if the accused does not testify. Evidence contained in expert reports can provide context for the record. Expert reports can provide information about:

- over–policing of Black and racialized communities;
- racial profiling;
- racial disparities in the use of police discretion;
- higher rates of stops and searches by police of Black and racialized individuals;
- higher likelihood of being charged and held for bail by police.

Such evidence can help shed light on the experiences that may have contributed to an accused's criminal record in the first place.

Similarly, evidence about the overrepresentation of Black people among low-income Ontarians can give context to any financial challenges that potential sureties may have for posting bail.
This document provides an overview of anti-Black racism in Canada, presents examples of instances in which courts have considered race and racism in criminal law, provides practical tips for how lawyers can practice cultural competence in order to be an "ally" and "accomplice" to Black clients, and lists some local resources that lawyers can use to provide additional supports for Black clients. Reviewing this document is an important step towards helping you seriously address the vicious cycle of arrests, detentions and criminal records that many Black clients in the criminal justice system face.

[7] *R v. LWB*, 2021 ONSC 6152 at paras 47-49

ANTI-BLACK RACISM IN CANADA

The experience of Black communities in Canada has been marked by racism and discrimination.

Anti-Black racism in Canada is rooted in Canada's history of colonialism, slavery, segregation and discriminatory social policies. The institution of slavery and of legalized segregation in Canada formed the basis for Black Canadians' initial relationship with the state. This legacy continues to have an impact on the lives of Black people in Canada, particularly in the criminal justice system.[8]

While the experience of Black Canadians is not monolithic, a broad consideration of the Black experience in Canada, past and present, can provide a helpful framework to understand how anti-Black racism manifests itself in society.

Excerpts from Owusu-Bempah, A., Sibblis, C., and Dr. James, C., Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario

EDUCATION

Concerns of Black students include a lack of racial diversity among teachers, an absence of Black history in curricula, tolerance of racist incidents in school, harsher discipline of Black students, and Black students being discouraged from attending university.

Anti-Black racism in education has contributed to the school-to-prison pipeline and poor educational outcomes for Black students.

- In the 2006–2011 Toronto District School Board (TDSB) cohort, Black students were more than twice as likely as white and other racialized students to have been suspended at least once during the academic year.
- Based on 2006-2011 data from TDSB, almost half of the Black student population is streamed into non-university tract programs.

CHILD WELFARE

Racism and poverty have been credited with fueling the disproportionate representation of Black Canadian children in Ontario's welfare system. It has been argued that assessments about parent-child relationships are based on white middle class norms about family and parenting that are culturally biased against Black families.

- Although Black Canadians comprise 8.5% of the population of Toronto, Black children represent 40.8% of children in care.
- Data from Ontario's child welfare agencies found that Black children are more likely to be investigated than white children.

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[8] Lewis, Stephen. The Report of the Advisor on Race Relations to the Premier of Ontario Bob Rae. June 9, 1992. Retrieved online: report_of_the_advisor_on_race_relations_to_the_premier_of_ontario_bob_rae.pdf (siu.on.ca); Lewis, Clare. The Report of the Race Relations and Policing Task Force (1989). Retrieved online: https://archive.org/details/mag_00066901; M. Gittens et al., Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995). Retrieved online: https://archive.org/details/reportracismont00comm/page/n3/mode/2up?view=theater; McMurtry, R Roy, QC, and Dr. Curling, Alvin. Review of the Roots of Youth Violence in Ontario Report. C. 2008. Retrieved online: https://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn30240-vol1-eng.pdf.

CRIMINAL LEGAL SYSTEM

The historical and contemporary treatment of Black people in the criminal justice system has its genesis in Canada's experience with colonialism and slavery. During this period, Black people were systematically dehumanized and depicted as animalistic, aggressive, violent, and dangerous. Unfortunately, these perceptions have not completely subsided over time. Anti-Black racism is a contributing factor to the ongoing over-representation of Black people in the criminal justice system.

- Despite a decline in the overall inmate population, the number of Black offenders in Canadian federal correctional institutions increased by 75% in the decade leading up to 2012.
- Black accused are more likely to be detained before trial than white accused.
- 50% of the Black student population in Toronto report having been stopped and questioned by the police on two or more occasions in the previous two years (compared with 23% of white students).
- Over 80% of Black Canadians in Toronto feel that police treat Black people worse than white people.
- Evidence suggests that Black youth engage in violence as a means of "self-help" due to the belief that the police cannot, or will not, provide them with adequate protection.

EMPLOYMENT AND POVERTY

Evidence suggests that Black job seekers are excluded from the labour market, in part, due to the discriminatory actions of employers.

- Members of visible minority groups earn on average 36% less than non-visible minorities.
- Whereas 6% of white Canadian women live below the poverty line, the figure is 25% for Black women in Canada.

CONSIDERATIONS OF RACE AND RACISM IN CRIMINAL LAW

OVERVEIW

Racialized stereotypes about offending and dangerousness are as pernicious as they are persistent.[9] The fact that these stereotypes inform how Black, Indigenous, and racialized defendants are treated in the criminal justice system is now beyond controversy.[10] Ontario courts no longer take a "colour blind" approach to criminal doctrine.

Indigenous, Black, and racialized defendants know that racism impacts every moment of their contact with the criminal justice system. The system now recognizes this experience and incorporates it into the application of established doctrine. At every stage of a criminal proceeding, systemic anti-Black racism is relevant to the application of established tests.

Various areas in which the racialized identity of the defendant has been considered in the application of established tests are discussed below.

CHALLENGE FOR CAUSE

After the landmark *Parks* decision in 1993,[11] the "challenge for cause" became a standard feature of jury trials where the defendant is racialized. The "standard *Parks* question" was phrased as follows: "Would your ability to fairly judge this case without bias, prejudice, or partiality be affected by the fact that the defendant is Black?" This process gave courts a tool, if a blunt one, to identify and inoculate against racial bias in the jury pool.

In the decades that followed, racial justice advocates critiqued the standard *Parks* question because it was too superficial.[12] The single, "yes/no" structure of the question failed to assess the subtle, subconscious, and structural nature of racial bias. The Supreme Court heeded this criticism following Parliament's abolition of peremptory challenges in 2019.[13] In the constitutional challenge to this legislation, defenders of the peremptory challenge contended that it was an essential tool for screening out jurors for racial bias and for securing a representative jury.[14] While a majority of the Supreme Court rejected this argument, the various judgments did suggest that it was time for a more robust challenge for cause question.[15]

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[9] *R v Le*, 2019 SCC 34 at para 90.
[10] At least since *Le*, the Supreme Court has embraced a race-conscious approach to criminal law. See for example *R v Chouhan*, 2021 SCC 26 at paras 158-160 and *R v LaFrance*, 2022 SCC 32 at paras 57-59.
[11] *R v Parks* (2003), 94 CCC (3d) 353 (Ont CA).
[12] Ruparelia, Rakhi "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after *Parks*" (2014), 92 Can B Rev 267.
[13] Bill C-75, *An Act to Amend the Criminal Code, the Youth Criminal Justice Act, and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019.
[14] *R v Chouhan*, 2021 SCC 26 at para 17.
[15] *Ibid* at paras 63 and 110; see also Justice Code's influential decision in *R v Stanley*, 2021 ONSC 6110 at paras 14-21.

Several trial-level decisions in Ontario have taken up this suggestion. In Stanley, based on expert evidence and on the Supreme Court's decision in *Chouhan*, Justice Code suggested the following update to the *Parks* formula:

1. As I instructed you this morning, in deciding whether or not the prosecution has proven the charge against an accused, a juror must judge the evidence of the witnesses without bias, prejudice, or partiality. Bias may be based on attitudes or stereotypes related to the personal characteristics of certain persons or groups. You may not even be aware that you have a particular bias. Might your ability to judge the evidence in this case be affected by the fact that the person charged is Black?
2. If you are chosen to be a member of the jury in this case, will you remain mindful of the possibility that you may have unconscious biases, and will you make efforts to identify any such biases, set them aside, and judge the case fairly and objectively?[16]

In Ontario, advocates now have access to a much more robust challenge for cause question than they did before *Chouhan* was decided. This development reflects the law's recognition of the widespread problem of racial bias and the need to account for it at the very outset of a criminal trial.[17]

JURY INSTRUCTIONS

In *Barton*, where the Indigenous victim was notoriously dehumanized throughout the trial, the Supreme Court held that juries should be given an anti-bias instruction to minimize prejudice against Indigenous women and girls in sexual assault cases.[18]

In *Chouhan*, the Supreme Court affirmed that this principle applies with equal force to racialized defendants.[19] After the abolition of jury challenges, "jury instructions have a critical role to play in ensuring that jurors approach their deliberations free from bias." [20]

In coming to this conclusion, the Supreme Court rejected a "colour blind" approach to combatting systemic racism. Instead, relying on critical race scholarship, the majority recognized that racial bias is largely unconscious.[21]Racialized stereotypes about dangerousness or offending could unintentionally and unconsciously infect a juror's reasoning process. The majority recognized that this poses a "significant danger" in jury trials.[22] This danger should be counteracted with a general anti-bias instruction and with specific instructions tailored to the identity of the defendant and the allegations against them.[23] Jurors must be told about the unconscious character of systemic bias, warned that they may be susceptible to stereotypical reasoning, and given guidance in identifying and rejecting it in delivering a true verdict.

After *Chouhan*, anti-bias instructions have become a routine – and perhaps mandatory – component of jury trials where the defendant is Black, Indigenous, or racialized.[24]

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[16] *R v Stanley, 2021 ONSC 6110 at para 20. See also R v Bhogal, 2021 ONSC 4925, R v Martin, 2021 ONSC 5333, and R v OR, 2021 ONSC 6331.*
[17] *R v Chouhan*, 2021 SCC 26 at para 47.
[18] *R v Barton*, 2019 SCC 33 at paras 195-204.
[19] *R v Chouhan*, 2021 SCC 26 at paras 48-59 and 158.
[20] *Ibid* at para 49.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] See EG *R v RO*, 2021 ONSC 6331 at paras 23-26; *R v Smith*, 2021 ONSC 6173 at paras 7-10; and *R v Bhogal*, 2021 ONSC 4925 at paras 8-10.

ADMISSIBILITY OF EVIDENCE

All evidence that is relevant and material is admissible, subject to the application of an exclusionary rule and provided that its probative value exceeds its prejudicial effect.

Systemic anti-Black racism is relevant to the law of evidence in at least three ways.

First, systemic racism is relevant in weighing the prejudicial effect of the evidence. Even relevant and material evidence must be excluded where its admission is not worth the cost.[25] Where the defendant is Black, Indigenous, or racialized, the "cost" includes the potential for triggering stereotypical reasoning in the trier of fact. To the extent that the admission of evidence may trigger or inflame stereotypical assumptions in the trier of fact, its prejudicial effect may eclipse its probative value.[26]

Second, systemic racism is relevant in weighing the probative value of the evidence. Evidence of bad character, as for example a defendant's criminal record, must be placed in context - "one that corrects for possible systemic biases, stereotypes, and assumptions."[27] When placed in this context, the strength of the inference may be diminished. For example, "[a]ccounting for any distortions caused by the possibility of stereotyping and systemic biases against Indigenous people may reveal that [a] criminal record is much less reflective of an Indigenous accused's subjective disregard for the truth or contempt for the law than would otherwise appear."[28] This, in turn, diminishes probative value and pulls towards exclusion.

Third, even where evidence is admissible, systemic racism can inform how it should be used. In Davis, the defendant fled after police approached his vehicle.[29] Officers recovered a loaded firearm from under the passenger seat. The Crown submitted that the defendant's flight was probative of his state of mind: he ran because the gun was his. Justice Christie held that though this evidence was admissible, "this does not mean that its use is unlimited."[30] Mr. Davis was a young Black man. Even though he did not testify, a reasonable alternative explanation for his flight was "that he was, as a young Black man, fearful of police."[31] Taking judicial notice of this fact, and noting the lack of other incriminating evidence, Justice Christie entered an acquittal.

ASSESSING CREDIBILITY

In *R v RDS*, Justice Corinne Sparks, in the course of acquitting a 15-year-old Black defendant of assaulting a peace officer, famously observed that "certainly police officers do overreact, particularly when they are dealing with non-white groups".[32] In making these comments, Justice Sparks was no doubt drawing on her experience as the first Black woman to become a judge in Canada. But when she rendered this judgment in 1995, these comments were seen as so controversial that the Crown appealed her ruling, alleging a reasonable apprehension of bias. On both summary conviction appeal and on appeal to the Nova Scotia Court of Appeal, these comments were taken to disclose an apprehension of bias sufficiently serious to overturn the

[25] *Mitchell v MNR*, 2001 SCC 33 at para 30.
[26] *R v Mills*, 2019 ONCA 940 at para 122; *R v King*, 2022 ONCA 665 at paras 193-196.
[27] *R v King*, 2022 ONCA 665 at para 179.
[28] *Ibid* at para 180.
[29] *R v Davis*, 2021 ONSC 8163.
[30] *Ibid* at para 40.
[31] *Ibid* at para 43.
[32] *R v RDS*, [1997] 3 SCR 484 at para 4.

acquittal and order a new trial.[33]

But at the Supreme Court of Canada, Justice Sparks was vindicated.[34] For the first time, social context was declared relevant to a trial judge's credibility assessment. While judges must always decide cases based on the facts, they are entitled to draw on their experience – including experiences of racism – in drawing common sense inferences about those facts.[35]

25 years later, the Court of Appeal for Ontario affirmed this principle in *Theriault*, the high-profile prosecution of the off-duty police officer who beat Dafonte Miller, a young Black man, so severely that he was rendered permanently blind in his left eye.[36] The trial judge instructed himself that he must assess Mr. Miller's credibility "in a fair context and with a sensitivity to the realities that racialized individuals face in society" and that he "must keep in mind that as a young Black man, Mr. Miller may well have had many reasons for denying any wrongdoing including a distrust of law enforcement."[37] The Court of Appeal held that this was an appropriate approach to the evidence: "[I]t is incumbent on trial judges to consider relevant social context, such as systemic racism, when making credibility assessments."[38]

CHARTER APPLICATIONS

RACIAL PROFILING[39]

In Canadian law, s. 9 of the *Charter* prohibits arbitrary detention or imprisonment. Its purpose is to protect individual liberty from unjustified state interference.[40] Police may place constraints on that liberty only to the extent that they are empowered to do so by law.[41] The law may authorize and prescribe limits on a detention. Provided that a detention is authorized by law and does not exceed the law's limitations, it is not arbitrary within the meaning of s. 9 of the *Charter*.[42]

Racial profiling occurs when race or racialized stereotypes about offending or dangerousness are used, consciously or unconsciously, to any degree in suspect selection or treatment.[43] Any detention tainted by racialized thinking offends s. 9 of the *Charter*, regardless of whether police also possessed other, lawful authority.[44] To effect either a detention or an arrest, officers must have reasonable grounds to suspect or believe an individual has committed a criminal offence. The reasonableness assessment engages both the subjective and the objective: the officer must subjectively believe their grounds, and the grounds must be objectively reasonable. Doctrinally, racial profiling operates at the objective level. Relying on racial stereotypes to assess likelihood of involvement with criminal activity is not reasonable, and as a result constitutes arbitrary detention in Canadian law.[45]

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[33] *Ibid* at para 70.
[34] The real story, as always, is a little more complicated than this pithy summary. For a broader picture, see Devlin, Richard and Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role after *R v RDS*" (1999) 31:1 *OLR* 1, 1999 CanLIIDocs 15.
[35] *R v RDS*, [1997] 3 SCR 484 at paras 46-49.
[36] *R v Theriault*, 2021 ONCA 517.
[37] *Ibid* at para 141.
[38] *Ibid* at para 146.
[39] This section is largely drawn from Chris Rudnicki's paper, "Implicit Bias and Racial Profiling: Why *R v Dudhi*'s novel 'Attitudinal Component' Imposes an Unjustified Burden on Claimants" (2020) 68:4 *Crim LQ* 410.
[40] *R v Grant*, 2009 SCC 32 at para 20.
[41] *R v Mann*, 2004 SCC 52 at para 15.
[42] *R v Gonzales*, 2017 ONCA 543 at para 52.
[43] *R v Le*, 2019 SCC 34 at para 76.
[44] *Peart v Peel Police Services Board* (2006), 43 CR (6th) 175 (Ont CA) at para 91.
[45] *Brown v Durham Regional Police Force* (1998), 131 CCC (3d) 1 (Ont CA) at paras 34-39.

Racial profiling will rarely be proven by direct evidence, because officers will deny that racial prejudice had anything to do with their decision to detain the defendant. It will usually instead be proven by circumstantial evidence. [46] David Tanovich calls this the "correspondence test" for racial profiling, drawing on Justice Morden's comments in *R v Brown*.[47] At its core, racial profiling is "largely about implicit bias – the reliance on learned stereotypes about race and crime, often subconsciously, in the decision-making process."[48] Trial judges adjudicating these applications should therefore look to "indicators" of racial profiling established in the jurisprudence and social science research to assess whether or not the detention in their case corresponds to the phenomenon of racial profiling.[49] This can assist a trial judge to decide whether the detention was based, either consciously or subconsciously, on race or racial stereotypes.[50]

PSYCHOLOGICAL DETENTION

Even if a police officer's motives are untainted by racialized thinking, systemic racism is still relevant to the detainee's state of mind. Where a reasonable person in the shoes of the defendant would believe that they are not free to leave, they are "psychologically detained" within the meaning of section 9.[51]

The test for psychological detention consists of three factors: the circumstances giving rise to the encounter, the nature of the police conduct, and the particular characteristics of the defendant. The third factor requires trial judges to grapple with the historical relationship between a racialized defendant's community and the police. This history may give rise to a reasonable belief on the part of a racialized defendant that they were not free to go, even though they were not in fact detained at the time of the police interaction.[52]

In *Le*, a case where three Black men and one Asian man were detained in the absence of any evidence of criminal activity, the Supreme Court took judicial notice of reliable reports on systemic racism in Canadian policing released over the course of nearly 50 years.[53] For the majority, Justices Brown and Martin held that "[t]he documented history of the relations between police and racialized communities would have had an impact on the perceptions of a reasonable person in the shoes of the accused."[54] They found that Mr. Le was arbitrarily detained and excluded the evidence.

In *LaFrance*, the Supreme Court applied this logic to Indigenous defendants, holding that Indigenous persons in Canada are "disproportionately subjected to police encounters and overrepresented in the criminal justice system".[55] For the majority, Justice Brown held that "[t]his consideration will often weigh in favour of finding a detention", though it is not determinative.[56] He found that Mr. LaFrance had been detained and excluded the evidence.

In deciding whether a defendant was psychologically detained, trial judges must consider (1) the historical relationship between police and Black, Indigenous, and racialized persons in Canada, and (2) the resulting possibility that their interactions could reasonably be perceived by a person in

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[46] *R v Brown* (2003), 173 CCC (3d) 23 (Ont CA) at para 45.
[47] Tanovich, David "Applying the Racial Profiling Correspondence Test" (2017), 64 *Crim LQ* 35, citing *Brown*, *ibid*.
[48] *Ibid* at 359.
[49] *Ibid*.
[50] David Tanovich's paper was cited with approval by the Court of Appeal for Ontario in *R v Sitladeen*, 2021 ONCA 303 at paras 21-23 and 57-58.
[51] *R v Grant*, 2009 SCC 32 at para 30-31.
[52] *R v Le*, 2019 SCC 34 at para 82.
[53] *Ibid* at para 97.
[54] *Ibid* at para 97.
[55] *R v LaFrance*, 2022 SCC 32 at para 57.
[56] *Ibid* at para 58.

the defendant's shoes as depriving them of the choice to cooperate.[57] A trial judge who fails or refuses to consider these factors errs in law.[58]

SENTENCING

Perhaps the most dramatic shift in the criminal law's response to systemic anti-Black racism has come in the realm of sentencing. In *Hamilton*, the Court of Appeal for Ontario overturned conditional sentences imposed at trial because the trial judge improperly and on his own motion considered social science evidence concerning young Black women and the crime of importing controlled substances. [59] Though allowing that systemic racism could be relevant in some cases, the court held that it was not "particularly helpful or necessary to try to attribute the respondents' economic circumstances to systemic societal racial or gender bias." [60] Decided in 2004, this case had a decade-long chilling effect on arguments relating systemic anti-Black racism to the sentencing process.[61]

Then, throughout the late 2010s, trial judges began to push back on this analysis. Trial courts began relying on "Impact of Race and Culture Assessments" prepared by academics and social workers to explain how background and systemic factors brought the Black defendant before the court.[62] In 2021, the Court of Appeal for Ontario endorsed this practice in *Morris*, settling once and for all the debate about whether anti- Black racism is a relevant factor in sentencing.[63]

In *Morris*, the Court of Appeal, sitting as a five-member panel, opened its judgment with the following powerful language:

> It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis … Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased.[64]

Having set the stage, the court went on to affirm that sentencing judges must take judicial notice of anti- Black racism, consider it in assessing the moral culpability of Black defendants, and exercise restraint in order to help address the problem of Black over-incarceration in this country.[65] It is now beyond debate that systemic racism is an important factor in finding a fit sentence for Black defendants in Ontario.

Systemic racism is also relevant in assessing how punitive a custodial sentence is likely to be. In *Marfo*, citing the report prepared in *Morris*, Justice Ducharme observed the "very disturbing" fact that Black prisoners experience more restrictive, more dangerous, and longer conditions of confinement than non-Black prisoners.[66] Applying the parity principle, he found that "[i]f a sentence

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[57] *Ibid*. See also *R v Le*, 2019 SCC 34 at para 81.
[58] *R v Le*, 2019 SCC 34 at para 70.
[59] *R v Hamilton* (2004), 72 OR (3d) 1 (Ont CA).
[60] *Ibid* at para 137.
[61] See EG *R v Ferrigon*, 2007 CanLII 16828 (Ont SCJ), in which Justice Molloy held that there is "no direct correlation, in my view, between some people getting shot and young Black men carrying weapons ostensibly for self-defence" (para 56).
[62] Maria Dugas traces the development of these reports in "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 *Dalhousie LJ* 103.
[63] *R v Morris*, 2021 ONCA 680.
[64] *Ibid* at para 1.
[65] *Ibid* at paras 97, 123.
[66] *R v Marfo*, 2020 ONSC 5663 at para 52.

is more onerous for a Black man because of systemic anti-Black racism in the correctional system, then any sentence I impose must be shortened to recognize this fact."[67]

Justice Ducharme's judgment was cited with approval by the Supreme Court in *Hills*, a case about cruel and unusual punishment.[68] For the majority, Justices held that "[t]he principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate". [69] For this reason, "courts have reduced sentences to reflect the comparatively harsher experience of imprisonment for certain offenders, like … those whose experience of prison is harsher due to systemic racism".[70]

Based on the foregoing, systemic anti-Black racism is arguably relevant to at least four factors in sentencing in Ontario:

1. Taking judicial notice of disadvantage suffered by Black persons in Canada;
2. Assessing the degree of a Black defendant's moral culpability;
3. Exercising restraint as a remedy for Black over-incarceration; and
4. Accounting for the disproportionately harsh experience of Black imprisonment.

IMPACT OF RACE AND CULTURE ASSESSMENT (IRCA) REPORTS

Morris promotes the use of Impact of Race and Culture Assessment (IRCA) reports, also called enhanced pre-sentence reports, in matters where a Black person appears before the court for sentencing.

The IRCA report outlines the personal circumstances of the accused. It is an important tool that, *inter alia*:

- provides the court with social context information, such as how systemic racism has influenced the individual's life circumstances and the commission of the offence;
- helps the court assess proportionality, mitigating factors, and other sentencing principles; and
- helps the court recognize the reality of over-incarceration of Black persons and give due consideration to the principle of restraint.

EXPERT REPORT ON CRIME, CRIMINAL JUSTICE AND THE EXPERIENCE OF BLACK CANADIANS

The sentencing judge in *Morris* also relied on the *Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario* which provided data on anti-Black racism in various sectors of society and outlined the impact of anti-Black racism on the lives of members of Toronto's Black communities. The Report is included as an Appendix A to the Superior Court decision.[71]

The Court of Appeal in *Morris* noted the importance of the expert report, in the following terms: "The report bears reading and re-reading by those called upon to prosecute, defend and sentence Black offenders, particularly young Black offenders."[72]

In the absence of direct experience, it may be difficult to understand the deleterious impact of racism on the physical, mental and psychological health of the accused, and on their decisions and

[67] *Ibid*.
[68] *R v Hills*, 2023 SCC 2.
[69] *Ibid* at para 135.
[70] *Ibid*.
[71] *R v Morris*, 2018 ONSC 5186
[72] *R v Morris,* 2021 ONCA 680 at para 43.

actions. The information contained in the expert report provides important social context evidence that, along with the accused personal circumstances, can be used to support a variety of arguments at different stages of a criminal proceeding, including at the bail stage.

INEFFECTIVE ASSISTANCE OF COUNSEL

Competent counsel representing Black defendants require at least a rudimentary knowledge of systemic racism in order to effectively represent their clients. Usually, the competence of counsel is a matter left to the regulators, not the subject of concern in a criminal court. But on appeal, where counsel's incompetence results in a miscarriage of justice, a conviction may be set aside and a new trial ordered.

The test for ineffective assistance of counsel has two components: (a) that the representation provided by trial counsel was incompetent (the *performance* component); and (b) that the incompetent representation resulted in a miscarriage of justice (the *prejudice* component).[73] The performance component includes both *legal* competence and *cultural* competence. A new trial may be ordered because trial counsel failed to engage the legal system's protections against bias because they failed to grasp the reality of systemic racism in the criminal justice system.

In *Fraser*, trial counsel did not bring a challenge for cause in the jury trial of his client, a Black teacher alleged to have sexually assaulted a white student.[74] Mr. Fraser was found guilty by an all-white jury. Trial counsel explained on appeal that "I did not find challenges for cause particularly helpful and more of a waste of time than anything else".[75] Trial counsel admitted that he did not discuss the challenge for cause with Mr. Fraser before trial. The Nova Scotia Court of Appeal held that trial counsel's incompetence "effectively denied him his statutory right to challenge potential jurors for cause."[76] It allowed the appeal and ordered a new trial.

In *Blake*, trial counsel did not bring a challenge for cause in the jury trial of his client, a Black man alleged to have assaulted a white sex worker.[77] Mr. Blake was found guilty by a mostly white jury that did not contain any Black people. Trial counsel explained on appeal that it was his "standard practice" not to challenge jurors for cause because he did not want to "accuse them of racism".[78] He believed that the challenge for cause amounted to "play[ing] a race card" and was "offensive".[79] The Court of Appeal for Ontario corrected this misapprehension, explaining that the challenge for cause does not accuse jurors of racism, but instead asks them to reflect candidly on potential biases they may hold. The Court found that trial counsel "show[ed] a basic misunderstanding of criminal procedure in jury trials." [80]It allowed the appeal and ordered a new trial.

Though these cases are confined to the challenge for cause process, both make clear that where trial counsel fails to engage a beneficial procedural protection based on a culturally incompetent understanding of systemic racism, they risk causing a miscarriage of justice. Trial judges faced with this conduct arguably have a duty to intervene to ensure that a Black defendant's procedural rights are protected.[81]

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[73] *R v GDB*, 2000 SCC 22 at paras 26-29.
[74] *R v Fraser*, 2011 NSCA 70.
[75] *Ibid* at para 73.
[76] *Ibid* at para 76.
[77] *R v Blake*, 2023 ONCA 220.
[78] *Ibid* at para 45.
[79] *Ibid*.
[80] *Ibid* at para 46.
[81] This argument is advanced in Devlin, Richard and Layton, David, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis" (2014) 60 *Crim LQ* 360.

It should be clear from the foregoing that courts may take "judicial notice of the existence of overt and systemic anti-Black racism in Canadian society and the criminal justice system in particular." [82] The persistence and prevalence of anti-Black racism is so notorious as to be beyond the dispute of reasonable persons. Appellate courts have recognized it in the context of jury selection, [83] *Charter* applications in general, [84] racial profiling applications, [85] evaluating witness credibility, [86] and sentencing hearings. [87] Advocates should not hesitate to ask justices presiding over bail hearings to do the same. Indeed, many Superior Court judges already have.[88]

[82] *R v Morris*, 2021 ONCA 680 at para 41.
[83] *R v Parks* (2003), 94 CCC (3d) 353 (Ont CA); *R v Spence*, 2005 SCC 71.
[84] *R v Le*, 2019 SCC 32.
[85] *R v Dudhi*, 2019 ONCA 665.
[86] *R v Theriault*, 2021 ONCA 517.
[87] *R v Morris*, 2021 ONCA 680.
[88] See *R v LWB*, 2021 ONSC 6152, *R v NY*, 2021 ONSC 1398, and *R v Raheem-Cummings*, 2020 SKQB 342.

ALLYSHIP

Competent lawyering requires cultural competency – that is, the knowledge, skills, and attitudes necessary to relate to the social context of a client in order to appropriately protect their rights and advance their legitimate interests at all stages of proceedings.[89]

Taking advocacy beyond the courtroom requires allyship. Being an ally is about working towards ending oppression through supporting and advocating for marginalized people.

Being an ally isn't always easy or comfortable. It requires recognizing the power and privilege of being part of a dominant group. It requires actively practicing anti-racism. It requires educating oneself on racism, oppression, and structures of white supremacy. It requires amplifying marginalized voices. It requires listening and humility.

ALLYSHIP IN ACTION

Excerpt from Osler, J., Opportunities for White People in the Fight for Racial Justice

Allyship outside of the courtroom can look like:

PROTEST	Engage in or support movements organized by Black people and people of colour.
EDUCATE	Coordinate (and pay for) organizations that conduct anti-racism trainings to facilitate their workshops within your schools, communities, and workplace.
VOLUNTEER	Join or volunteer at an organization with an explicit aim of naming and disrupting racial injustice.
FUNDRAISE	Donate or raise funds for organizations with an explicit racial justice mission, led by directly impacted individuals.
SHARE	Diversify your social media. Follow Black, Brown, and Indigenous people committed to disrupting oppressive structures. Do your best to share and amplify their voices.
CONFRONT	Intervene when you observe any form of intimidation, harassment, violence, or micro-aggressions towards marginalized individuals.

[89] Devlin, Richard and Layton, David, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis" (2014) 60 Crim LQ 360

LAWYERS AND ALLYSHIP

Lawyers can practice allyship from their first interaction with a client. Ask yourself:

- How much space am I taking up in conversations?
- Have I created a safe space to allow my client to share?
- How do I improve access to our meetings?
- How is my identity taking up space – physically and verbally?
- What assumptions do I have about my client and where did they originate?
- What experience has this client had that I don't understand and how can I educate myself?[90]

THE DO' S AND DON' TS

Excerpt from Lamont, A., *Guide to Allyship*[91]

THE DO' S	THE DON' TS
Do be open to listening	**Do not** expect to be taught or shown. Take it upon yourself to use the tools around you to learn and answer questions
Do be aware of your own implicit biases	**Do not** compare how your struggle is "just as bad"
Do your own research to learn more	**Do not** behave as though you know best
Do the inner work to figure out a way to acknowledge how you participate in oppressive systems	**Do not** take credit for the labour of those who are marginalized and did the work before you stepped into the picture
Do the outer work to figure out how to change the oppressive systems	**Do not** assume that every member of a marginalized community feels oppressed or has the same lived experience
Do use your privilege to amplify suppressed voices	
Do learn how to listen and accept criticism with grace, even if it's uncomfortable	
Do the work every day to learn how to be a better ally	

[90] Anti-Oppression Network, "Allyship" <https://theantioppressionnetwork.com/allyship/>
[91] <https://guidetoallyship.com/>

TAKING IT FURTHER: FROM ACTOR TO ALLY TO ACCOMPLICE

Excerpt from Osler, J., Opportunities for White People in the Fight for Racial Justice[92]

ACTOR	The actions of an actor do not disrupt the status quo and have only a nominal effect in shifting an overall outcome. The actions of an actor do not explicitly name or challenge the pillars of white supremacy which is necessary for meaningful progress towards racial justice. Such systems are challenged when actors shift or couple their actions with those from allies and/or accomplices.
ALLY	The actions of an ally have greater likelihood to challenge institutionalized racism and white supremacy. An ally is a disrupter and educator in spaces dominated by whiteness. An ally might find themselves in a setting in which something inappropriate is being talked about. Instead of allowing that space to incubate whiteness, the ally wisely disrupts the conversation, and takes the opportunity to educate those present.
ACCOMPLICE	The actions of an accomplice are meant to directly challenge institutionalized racism, colonization, and white supremacy by blocking or impeding racist people, policies, and structures. Realizing that our freedoms and liberations are bound together, retreat or withdrawal in the face of oppressive structures is not an option. Accomplices' actions are informed by, directed and often coordinated with leaders who are Black, Brown, Indigenous peoples, and/or people of colour. Accomplices actively listen with respect, and understand that oppressed people are not monolithic in their tactics and beliefs. Accomplices aren't motivated by personal guilt or shame. Accomplices build trust through consent and being accountable - this means not acting in isolation where there is no accountability.

[92] <https://www.whiteaccomplices.org/>

ADDITIONAL RESOURCES

BOOKS

- *Policing Black Lives: State Violence in Canada from Slavery to the Present* by Robyn Maynard
- *The Alchemy of Race and Rights* by Patricia J. Williams
- *So You Want to Talk About Race* by Ijeoma Olou
- *Until We Are Free: Reflections on Black Lives Matter in Canada,* edited by Rodney Diverlus, Sandy Hudson, and Syrus Marcus Ware
- *The Skin We're In* by Desmond Cole
- *How to Be Antiracist* by Ibram Kendi
- *Revolutionary* by Burnley "Rocky" Jones
- *The New Jim Crow* by Michelle Alexander
- *Critical Race Theory: A Primer* by Khiara Bridges
- *Critical Race Theory: The Key Writings that Formed the Movement*, edited by Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas

ARTICLES

- Joshua Sealy-Harrington, "'Silly Anecdotes': From White Baselines to White Juries in R. v. Chouhan" (2023) 108 Supreme Court Law Review (2d) 109
- Rakhi Ruparelia, "Erring on the Side of Ignorance: Challenges for Cause Twenty Years after Parks" (2014) 92 Canadian Bar Review 267
- Maria C. Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103
- Danardo S. Jones, "Anchoring Lifeline Criminal Jurisprudence: Making the Leap from Theory to Critical Race-Inspired Jurisprudence" (2023) 46:1 Dal LJ
- Richard Devlin and David Layton, "Culturally Incompetent Counsel and the Trial Level Judge: A Legal and Ethical Analysis" (2014) 60 Criminal Law Quarterly 360-385

MEDIA

- "Policing Black and Indigenous Lives in Canada: A Digital Teach-In" by ElJones, Pam Palmater, Reakash Walters, and Meenakshi Mannoe
- "Pullback Podcast: Critical Race Theory" with Joshua Sealy-Harrington
- *13th* Netflix Documentary directed by Ava DuVernay

WEBSITES

Black Mental Health Canada (BMHC)	https://blackmentalhealth.ca
CMHA National: Mental Health Within Black Communities In Canada	https://cmha.ca/news/mental-health-within-black-communities-in-canada-profiles-of-advocates-and-bonus-resources/
Black Health Alliance	https://blackhealthalliance.ca/resources/community/
Black Therapist List	https://www.blacktherapistlist.com/

COMMUNITY ORGANIZATIONS

The list below includes descriptions of community programs across Ontario. The descriptions have been taken and adapted from the program websites. This is by no means an exhaustive list of programming and resources that may be available throughout the province of Ontario.

BRAMPTON

NAME	DESCRIPTION
Roots Community Services https://rootscs.org/	Roots Community Services Inc. provides culturally-relevant programs and services to inspire and empower individuals, primarily from the Black, African and Caribbean communities, to make positive changes in their lives and within their communities.
Black Community Action Network (BCAN) Peel https://www.bcanpeel.com/	BCAN is presently leading an initiative in partnership with E-Fry Peel- Halton (E-Fry-Peel), St. Leonard Place (SLP), Community Justice Initiative (CJI), Correctional Services of Canada (CSC) and other community partners to develop a reintegration resource wrap-around initiative for Black women and men who are returning to the community after being incarcerated within the criminal justice system.
Brampton Multicultural Centre https://bmccentre.org/	Programs offered include crisis counselling. BMC offers various programs that are explicitly geared towards youth. The group ranges from 12 to 29 years of age and includes programs that support the vulnerable community such as at-risk youth.

NEWMARKET

NAME	DESCRIPTION
Newmarket African Caribbean Canadian Association (NACCA) https://www.naccacommunity.ca/	NACCA is a registered charity providing strong leadership for a diverse resident Black community, especially Black youth. NACCA serves the Newmarket and surrounding areas.
John Howard Society EMPower Program https://johnhoward.on.ca/jhs-program/empower-program/	EMPower, a pre-employment program which aims to promote employment and social participation among marginalized communities, has been developed for individuals 18 years and older who identify as Black, Indigenous or Newcomers and who may be justice-involved or at risk of justice involvement. EMPower provides clients with 12 weeks of pre-employment training, followed by a 12- week job placement opportunity.

OSHAWA

NAME	DESCRIPTION
Women's Multicultural Resource & Counselling Centre https://wmrcc.org/	The Women's Multicultural Resource and Counselling Centre of Durham Region is a Registered Charitable Organization, dedicated to providing specialized counselling and support to women of all ages and their families, from diverse backgrounds, to eradicate violence, to re-build their lives, and to enable them to become contributing and valued members of society.
Durham Family and Cultural Centre https://durhamfcc.org/	DFCC is a Durham-based non-profit organization that provides a space for members of the Black community and other racialized and diverse groups to engage in programming that empowers their lives. Their mission is achieved through culturally focused programs, including: Counselling, parenting, education, mentorship, child and youth development programs, workshops, community events and cultural celebrations, and assistance in navigating the legal system.
Durham Community Collective https://durhamfcc.org/	The Durham Community Collective aspires to develop a Black community hub founded on disrupting and dismantling the harmful impacts of anti-Black racism, highlighting Black accomplishments and creating spaces for the growth, development and the overall well-being of Black communities in Durham Region. The collective includes organizations that are actively working to address disparities and disproportionalities, highlight Black excellence, amplify Black voices and strengthen the well-being of Black communities across Durham Region. The collective has representation from across sectors, including children's services, mental health, education, and professional services networks.
Carea Community Health Centre https://www.careachc.ca/Contact-Us/Our-Locations	Carea Community Health Centre is a registered, charitable organization providing a wide range of free services and programs to community members across Durham Region. Its interprofessional group of staff includes physicians, specialists, healthcare staff, mental health professionals, program and support staff.
Durham Community Action Group dcagdurham@gmail.com	DCAG advocates for Black children, youth and parents to achieve better outcomes, and assists the community to

	better understand and navigate key sectors.
Congress of Black Women of Canada (Oshawa/Whitby Chapter) **https://oshawa-whitby.cbwc-ontario.org/contact/**	Addresses the need for a wider range of social support systems and resources for Black women in Oshawa and Whitby.

TORONTO

NAME	DISCRIPTION
Central Toronto Youth Services (CTYS) **https://ctys.org/**	The R.I.T.E.S. Program is a culturally specific, identity development initiative that supports the empowerment of Black and African Canadian children, youth and their families. The program and its various services employ an integrated, full spectrum model of support and care so that participants have access to a range of clinical mental health programs, supports and resources.
Acorn To Oak Youth Services **https://acorn2oak.ca/**	**Acorn2Oak Youth Services** have been positively impacting lives and communities in the Greater Toronto Area for over twenty years through its wide range of programs, geared towards providing solutions and support for individuals and families. Hundreds of youth, young adults and families have been helped and transformed regardless of their race, culture and religious beliefs. Services include intervention, mediation, counselling, education, mentorship, sports, recreation, providing food weekly to families in need, COVID- 19 services to frontline workers, seniors, and at-risk families.
Tropicana Community Services **https://tropicanacommunity.org/our-services/wellness-mental-health/**	Tropicana offers culturally aware and supportive programs to those in need, including but not limited to counselling, settlement services, childcare, education, personal development, and employment services, with a predominant focus on the Caribbean, Black and African communities of Toronto.
Caribbean African Canadian Social Services **https://cafcan.org/**	CAFCAN is a registered charitable organization whose primary focus is on building and strengthening the service framework for African Canadian children, youth and families through culturally safe individual and group counselling supports, case management services, employment services, youth mentorship, and youth outreach programs.

Substance Abuse Program for African Canadian and Caribbean Youth (SAPACCY) https://www.camh.ca/en/your-care/programs-and-services/substance-use-program- for-african-canadian-caribbean-youth	SAPACCY provides services to African and Caribbean Canadian youth and their families who are dealing with problem substance use and mental health concerns. The SAPACCY team works from a cultural competence lens to help Black youth work through mental health and addiction concerns. Programs offer mental health and addictions counselling and support in accessing resources to assist youth and their families/caregivers in reducing harm, moving toward recovery, and making the best choices for themselves and their family.
Across Boundaries https://acrossboundaries.ca/	Across Boundaries works with racialized individuals with serious mental illness who require support to live and work in the community. Case managers promote independence and quality of life for these individuals by responding to their multiple and changing needs. They provide on-going support as needed by the client in order for them to stabilize, achieve their goals, and improve quality of life. Case managers also work to coordinate the services the client requires from across the mental health system, as well as other service systems (i.e., criminal justice, developmental, and addiction services).
DR Roz's Healing Place https://www.drrozshealingplace.com/	Dr. Roz's Healing Place is a centre for empowerment and healing that works towards the eradication of violence against women and their children locally, nationally and globally. Its vision is to identify all forms of violence with special focus on systemic anti-Black racism. Dr. Roz's Healing Place recognizes that violence against women is a health issue. Through the delivery of innovative programs and services, Dr. Roz's Healing Place helps empower women to make positive life changes through the cultivation of a holistic lifestyle. Dr. Roz's Healing Place provides emergency crisis and care to all those who identify as women, children and youth emerging from abusive relationships.
Harriet Tubman Community Organization https://www.drrozshealingplace.com/	As a non-profit agency, Harriet Tubman Community Organization is dedicated to building meaningful and developmental relationships with young people between the ages of ages of 8 – 25 years old

	experiencing racialization. Harriet Tubman partners with diverse institutions, organizations, community groups and individual allies to establish a 'railroad' network of resource to keep Black (African) young people and others who relate engaged in positive activities. Harriet Tubman provides strength-based, youth centered and culturally relevant programs that foster identity development, life skills and education model.
Midaynta Community & Youth **https://midaynta.com/project- turn-around/**	Project Turn-Around is holistic, culturally appropriate and responsive community-based prevention and intervention program serving youth ages 12-20 and their families in the Northwest areas of Toronto. The project provides quality prevention and intervention services to at-risk youth and high-risk youth to develop a positive, goal-oriented lifestyle. The Youth Justice program is culturally relevant program that serves Black youth ages 12-20 who live in the Neighborhood Improvement Areas (NIAs). The program provides support to youth to complete Extra Judicial Measures, get charges dropped and restore harm done to the community. The Youth for Change program provides support for Black youths, aged 15-29, in and around Northwest Toronto, who are struggling with substance use and mental health concerns. This program offers youth with substance use and mental health issues access to counselling and support resources to assist them and their families in overcoming barriers, moving toward recovery, and making the best choices for themselves and their family.

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