



# Action Committee on Modernizing Court Operations

## ADDRESSING BARRIERS FACED BY BLACK COURT USERS

### A Statement from the Action Committee

*Our Committee supports Canada's courts in their modernization efforts. It provides guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users.*

### 1. CONTEXT AND BACKGROUND

Considering the needs and perspectives of all court users is a key step towards achieving equitable access to justice. For Black people, this involves addressing the legacy of slavery, segregation, and marginalization that affects every aspect of their lives. Only then it is possible to understand both the unique needs of Black court users and approaches and strategies that could meet these needs. The companion to this publication, [Needs of Black Court Users](#), addresses the unique context of Black people in Canada's courts. This guidance builds on that contextual information by providing steps courts can take to improve access to justice and reduce trauma for this segment of the population.

While the guidance in these publications primarily concerns end users such as litigants, victims and witnesses, portions of it will also be relevant to the lived experience of those working in the courts such as judges, court staff and legal professionals, and Black community actors. This guidance builds on in the Action Committee's publications on Meeting the Diverse Needs of Court Users ([Orienting Principles](#) and [Operational Practices](#)). Readers are encouraged to review those related publications.

### 2. A TRAUMA-INFORMED APPROACH TO ADDRESSING BARRIERS FACED BY BLACK COURT USERS

Acknowledging and addressing the needs of different litigants can provide opportunities to reduce overrepresentation, facilitate meaningful access to justice, and increase confidence in the justice system. For Black court users, adopting a trauma-informed and trauma-responsive approach can help remove barriers by promoting cultural competency, creating a safe environment, building trust with the Black community – which leads to increased confidence in the justice system, and exploring and employing the use of alternatives to the adversarial process.

This approach is consistent with the Canadian Judicial Council's [Ethical Principles for Judges](#) which, among other things, call upon judges to be sensitive to social context, treat everyone fairly, avoid being influenced by attitudes based on stereotypes, myth or prejudice, avoid unnecessary isolation from the community as it does not promote wise or just judgements, and engage with and learn from communities with which they have little or no life experience.



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## 2.1 Cultural Competency

Education about the history of Black people in Canada is often limited to our role as a destination in the Underground Railroad for enslaved African people seeking freedom. Schools did not address either historical or ongoing discrimination and exclusion. As a result of this gap, decision-makers are often missing key pieces of information that can help them understand: 1) how their institutions have discriminated, and continue to discriminate, against people of African descent; and 2) how that discrimination impacts the lives of Black people across generations and regardless of country of origin or other intersecting identify factors, and contributes to outcomes that can increase their likelihood of contact with the justice system.

Although anti-Black racism has been acknowledged by Canadian courts for decades, persistent knowledge gaps can hinder the ability of justice system actors to both identify instances of racism and develop strategies to address them.

Cultural competency starts with understanding the social and historical context of Black people's experience. The Black community is very diverse and, although Black people are bound by a common experience of racism, there is no "universal Black culture" in Canada. As such, knowledge about local Black communities is necessary to develop culturally appropriate training and processes. Further, an intersectional approach to historical and social context learning supports a nuanced appreciation of the ways Black people's diverse identities have been and continue to be used to oppress them.

Racism doesn't just affect Black people's experiences in the criminal justice system. Judges in immigration, family law, child protection matters, and all other areas of law will be able to serve the community better if they understand how the historical and ongoing treatment of Black people is directly linked to their current legal issues.

- The legacy of anti-Black racism embedded in immigration law is directly relevant to the way Black first-generation residents of Canada experience court. Both during slavery and after emancipation, Black people were deemed unsuitable for settlement in Canada and were dissuaded from immigrating through both informal practices like permitting immigration agents and medical examiners to deny them entry and outright bans such as a [1911 Order-in-Council](#) that found them unsuitable for the "climate and requirements of Canada".
- Harmful stereotypes perpetuate bias and discrimination against Black women because of both their race and gender. This can lead to over-surveillance of their parenting and, ultimately, increase the likelihood of contact with child protection services. These same stereotypes can also increase their chance of becoming engaged with the criminal justice system through welfare fraud prosecutions.
- Stereotypes dating back to the Transatlantic Trade of enslaved African people that characterized Black women's sexualities as inherently deviant and animalistic were historically used to justify their exploitation. These stereotypes continue to increase the likelihood of Black women being stopped by the police for prostitution-related street checks and can affect their willingness or ability to seek justice as victims.



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## 2.2 Creating a Safe Environment

Whether as an offender, victim, family member, community member or legal professional, many Black people experience the Canadian justice system as unfair, hostile, and discriminatory. This perception is often rooted in a lifetime of over-policing, as this constant surveillance makes many Black people feel as if they are living in a prison. This sentiment can be exacerbated by the increased scrutiny they often face when visiting court.

Black legal professionals are not exempt from these challenges, often experiencing microaggressions or racial profiling from the judiciary, court staff, sheriffs, and opposing counsel. Black male lawyers must deal with being mistaken for an offender, regardless of how professionally dressed they are, whereas Black female lawyers get mistaken for legal assistants or administrative staff. These professionals are frequently questioned or have their input diminished in front of clients, undermining their ability to do their work effectively. This experience further undermines trust in the system for Black clients who may have also experienced racism throughout the court process.

Creating a safe and welcoming physical, emotional, psychological, and cultural environment can help alleviate the trauma Black people experience when engaging with the courts. Judges have an opportunity to play a leadership role by using their discretion to manage the courtroom. If a judge understands and acknowledges that the Black individual before them may have experienced racism throughout their interactions with the justice system, they can develop strategies to both reduce the trauma associated with matters within their control and encourage equitable treatment by actors who are responsible for other parts of the process. Furthermore, as highlighted in commentary 2.C.6 of the Canadian Judicial Council's *Ethical Principles*, which addresses civility and respect, judges are well-positioned to observe lawyers' conduct and advise members of the bar to remain alert to their duty to both advocate effectively for every client and to treat everyone with respect. Judges can ultimately take appropriate action if they become aware of a lawyer's misconduct or incompetence, whether the behaviour is affecting the lawyer's own client, another court user, or a fellow legal professional.

In addition, judges presiding over criminal jury trials should be mindful of how anti-Black racism can affect the jury selection process and take steps to address this by incorporating specific information about anti-Black racism as part of their "general anti-bias instructions" for the jury.

For court staff, ongoing training about social and historical context can support a richer understanding of how Canadian institutions have discriminated against Black people. In turn, this learning can lead to self-reflection about how each individual might be contributing to ongoing inequities in the system, provide tools to correct personal behaviours, and support the establishment of practices and processes to improve the court experience for everyone.

The *Criminal Code* allows for consideration of social context information about both the overall effect of anti-Black racism in Canada and the specific experiences of Black accused persons and Black victims at different steps of the criminal justice process:

- Peace officers, justices or judges presiding over judicial interim releases must give particular attention to the circumstances of accused persons belonging to a population



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that is overrepresented in the criminal justice system and is disadvantaged in obtaining release (s 493.2 (b)). Courts have recognized, and there is ample statistical evidence to show, that Black people meet these criteria.

- Judges must consider the increased vulnerability of female victims when imposing a sentence in intimate partner violence cases (s.718.201). In doing so, a judge should be mindful of how a woman's experiences with anti-Black racism may increase her vulnerability.

### 2.3 Community Outreach and Building Trust

Rebuilding trust in the face of the Black community's negative experiences with justice and adjacent institutions requires concrete steps at both the institutional and individual level. Community outreach can support this work by providing the opportunity for the court and local Black communities to see each other outside of the context of the justice system and for judges and court staff to gain a greater appreciation of the lived reality of these members of the community.

Engaging directly with the different Black communities they preside over provides an opportunity for judges to understand the lived experiences of the members of those communities. This increased understanding can help judges to become truly impartial and independent by reducing their reliance on stereotypes about Black people while, at the same time, increasing their perception of judicial independence by building bridges between the court and these communities.

Black community organizations, including those that provide support to address social determinants of justice, can serve as an entry point to facilitate this outreach. For more information on respectfully engaging with Black and other marginalized communities, please refer to the Action Committee's publication on [Gathering User Perspectives](#).

### 2.4 Alternative Approaches

The legacy of slavery and ongoing segregation has resulted in the traumatizing reality that Black people are overrepresented in the Canadian criminal justice system and face significant barriers to accessing other areas of justice. One way to both increase access to justice and reduce the trauma associated with these experiences is to employ alternatives to the adversarial process such as alternative dispute resolution, diversion programs, and specialized court programs, when appropriate.

As outlined in the Action Committee's publication on the [Impact of the Pandemic on Access to Specialized Court Programs](#), specialized courts take a holistic approach, integrate access to specialized training and services from program partners, and prioritize latitude for judges to use problem-solving strategies to achieve more collaborative, effective and sustainable outcomes. These features can make them an effective tool to reduce the barriers Black people face when accessing justice.



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While these programs are designed to address many of the social determinants that disproportionately affect Black people, this segment of the population is still unfortunately underrepresented as participants in them. Common eligibility criteria may inadvertently result in this disproportionate exclusion of Black people:

- A common requirement for participation in specialized court programs is acknowledging responsibility for the act or omission that forms the basis of the offence. However, since over-charging means Black people are more likely to be charged for offences they did not commit, this requirement may be a barrier to their participation in these programs.
- Access to mental health courts often requires a formal diagnosis of a mental disorder or cognitive disability. There are a number of reasons why Black people may not be able to satisfy this requirement. To begin with, Black people who experience mental health issues, whether in the school system or in the community, are more likely to be the subject of police intervention and arrest than of care. And second, cultural stigma in the Black community can be a barrier to acknowledging mental illness and seeking help, including a diagnosis. This reluctance is compounded by the elevated risk of misdiagnosis arising from anti-Black racism in the health care system.
- Black people may be excluded from drug treatment court because they have been deemed a risk to public safety. This can happen when the assessment of this precondition for participation is based on the length of a person's criminal record: since over-policing naturally leads to over-charging, Black people are more likely to have a longer record. As such, when assessing whether a Black person should be excluded from drug treatment court because they pose a risk to public safety, it is important to examine the nature of the charges against them and consider the role that lifelong over-policing may have played. If the multiple offences are primarily non-violent or administration of justice charges, this examination might reveal the person is not in fact a public safety risk.
- Stereotypes about Black women being aggressive or overly sexualized may create unique challenges to accessing programs such as domestic or family violence courts. Assessing the criteria for participation in these programs from an intersectional lens may facilitate increased Black access.

### 3. TOOLS AND PROGRAMS TO SUPPORT BLACK COURT USERS

#### 3.1 Sentencing Tools

Section 718.2(e) of the *Criminal Code* requires that judges consider all reasonable and available sanctions other than imprisonment for all offenders. As part of this process, sentencing judges are responsible for developing an appropriate sentence for each individual offender, a process that can be supported for Black offenders by relevant contextual information about their cultural history and lived experience.



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### 3.1.1 Impact of Race and Culture Assessments

One way to ensure the court has access to relevant information about the personal experience and social context of Black people in Canada is through the use of written submissions prepared by independent professionals, commonly referred to as Impact of Race and Culture Assessments (IRCAs). IRCAs provide social and cultural context information about the experience of Black offenders. These reports help judges understand how factors such as systemic racism, poverty, and discrimination may have contributed to the accused's involvement with the criminal justice system. As with similar tools used for Indigenous offenders, they are meant to help address overrepresentation of Black people in the criminal justice system. Their use can also help enhance the credibility of the criminal justice system in the eyes of the community by increasing the likelihood that the sentence will be seen as just and appropriate.

While initially developed by the African Nova Scotian Justice Institute (ANSJI) for the African Nova Scotian community, courts in other jurisdictions have also started to accept IRCAs to support sentencing for Black offenders. Judges can request an IRCA or they can be commissioned by defense counsel on behalf of their clients.

As examined in the Indigenous context in the Action Committee's guidance on [Trauma-Informed Approaches to Gladue Processes](#), judges should be aware of the potential for the IRCA process, if not managed sensitively, to re-traumatize Black offenders. For example, the offender may feel they revealed painful personal information in vain if the judge does not refer to their IRCA during the sentencing process, or they may be re-traumatized by having the information contained in this report shared in open court.

### 3.1.2 Report by a probation officer

These types of pre-sentence reports are another way to introduce social context information about the experiences of Black accused persons. As outlined in s. 721 of the *Criminal Code*, the court may ask a probation officer to prepare and file a report containing information about the accused, including their attitude and willingness to make amends, information regarding any prior sentence under the *Young Offenders Act* or the *Youth Criminal Justice Act*, and history of alternative measures.

While they can be a useful tool for introducing social context information, it is important to ensure these reports do not reinforce stereotypes about Black people. For example, the court should ensure any allusion to gang involvement is actually supported by evidence concerning the individual before the court, rather than arising from the report writer's assumptions about Black people.

## 3.2 Programs and Community Organizations

While there are limited targeted programs available to help Black people navigate the justice system, some community organizations have started to offer supports that aim to help these court users overcome the systemic barriers that undermine their ability to receive equitable treatment. Awareness of these programs among the judiciary and court staff can promote a more holistic and trauma-informed approach to Black people's experiences in court.



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### 3.2.1 *Restore, Reclaim & Rebuild Program – Durham Family and Cultural Centre*

The Durham Family and Cultural Centre's [Restore, Reclaim & Rebuild Program](#) (The Program) helps Black and racialized youth and young adults (aged 12-29), as well as their families, navigate the justice system. It also serves as a diversion program under the *Youth Criminal Justice Act*. Some participants are referred to the Program by the Crown prosecutor while others are referrals from the Boys and Girls Club. The Durham Children Aid Society also refers youth to the Program as part of their anti-Racism protocol.

The Program centres the needs of the youth and holistically supports them as their case progresses through the justice system. This includes providing financial assistance for necessities like food and transportation and facilitating access to a Black lawyer to support the youth and their families. The program also provides workshops for youth participants on emotional regulation and guilt, as well as workshops on communication for parents. Psychotherapy sessions are also available for both the youth and their caregivers.

### 3.2.2 *Justice Hoodistique*

[Justice Hoodistique](#) is a participatory restorative justice project developed and managed by Hoodstock, a social justice community organization. This project offers programs developed specifically for Black adults and youths located in the borough of Montreal North. The Program has since expanded to the entire island.

Using a holistic, multidisciplinary, and intersectional approach, the project's goals are to:

- 1) Reduce the overrepresentation of Black people in the criminal justice system
- 2) Increase access to justice for marginalized groups
- 3) Provide resources to support the accused person, victims, or their families
- 4) Support social reintegration for accused persons
- 5) Facilitate reconciliation between the accused person and those affected by their actions

The project is structured as a series of retreats, in which the participants are exposed to a range of activities adapted to their own cultural and individual circumstances. Activities may include workshops, information sessions, discussion groups, and opportunities to express themselves and share their personal experiences. Participants are given tools and strategies to help rebuild their self-esteem and rehabilitate their self-image with support from psychosocial support workers, a criminologist, and educators from the community. As part of building the participant's self-esteem, the Program includes Afrocentric workshops that highlight the history, culture, and contributions of Black people in Canada.

### 3.2.3 *African Nova Scotian Justice Institute – Justice Navigation Program*

The [African Nova Scotian Justice Institute](#) (ANSJI) is a non-profit advocacy organization established in 2022 that provides free legal services and guidance to African Nova Scotians and Black people of African descent living in Nova Scotia to address issues of systemic racism, discrimination, and inequities in the justice system.



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As part of their legal services, ANSJI provides a Justice Navigator Program to help African Nova Scotian and Black individuals, youth and their families navigate criminal, family and child protection, mental health, addiction, and social justice issues. Although available to all African Nova Scotians and Black individuals across the province, the program is currently focused on delivering services in Halifax and Truro.

With a focus on self-represented individuals, Navigators support clients in court, liaise with defense counsel, and engage with court employees to obtain information about court procedures and next steps or address barriers faced by clients. Navigators may also help clients access community support, address housing and education needs, or apply for pardons.