



Court Recognize Systemic Racism

By Dr. Lorne Foster

In January of 1996, with the release of the 445-page *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, it was publicly disclosed that racial minorities are both over-represented and experience differential treatment in the criminal justice system.

The Commission acknowledged: “Over the past two decades, a lack of confidence in the Ontario criminal justice system has been articulated particularly strongly by members of the Black communities ... A sense of injustice has been intensified by the lack of any systemic response to repeated experiences of arbitrary and humiliating encounters with police. (And) there are strongly held perceptions that Black and other racial minority people are often unfairly charged, unjustly denied bail, unnecessarily prosecuted, wrongly convicted, harshly sentenced and mistreated in prison.”

Now, seven years after the inquiry report was quietly shelved by the province because its findings about systemic discrimination were too controversial it has finally gained a strong measure of credibility, and has provided a new framework and guide for sensitizing the legal system to racial particularities in the dispensation of justice.

The Ontario Court of Appeal has ruled that sentences for Black criminal offenders can be reduced or tailored to reflect the systemic racism that has historically plagued the Black community.

The ruling is being hailed by some legal professionals and community activists as a breakthrough for a minority which, like Aboriginals, has suffered historical inequalities and is over-represented in the justice system.

The 3-0 judgment came in a case involving Quinn Borde, a Black gunman from Toronto's inner-city Regent Park area. The 18-year-old admitted to firing a gun repeatedly into the air while being chased by a gang, and he pistol-whipped a rival later.

Mr. Justice Marc Rosenberg noted that Mr. Borde never knew his father and that his mother had serious mental problems. He was bounced between foster homes and often ran away. Mr. Borde abuses alcohol, has little education and faces limited job opportunities.

Mr. Borde's trial judge gave him a total of five years and two months in prison. He had already served 31 months in pretrial custody. On appeal, lawyer David Tanovitch, representing Mr. Borde, argued for a reduction on the basis of “systemic and background factors.”

The court concluded in its 3-0 ruling that while Mr. Borde's behaviour was too serious to entitle him to lenient sentencing based on his background, other cases will likely arise that do.

Judge Rosenberg, an expert on sentencing issues, said that since research clearly shows the existence of systemic racism against Blacks, “background and systemic factors

facing African Canadians — where they are shown to have played a part in the offence — might be taken into account in imposing sentence.”

“Systemic racism and the background factors faced by Black youths in Toronto are important matters and in another case I believe that they could affect the sentence,” he said, on behalf of Mr. Justice Dennis O’Connor and Madam Justice Karen Weiler.

The appeal panel agreed to reduce Mr. Borde’s sentence by a year, because the trial judge was so intent on deterring other criminals that he forgot to pay attention to Mr. Borde’s youth.

“The length of a first penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence,” said Judge Rosenberg. While the offences were serious and demand a penitentiary sentence, “these circumstances, however, had to be balanced against the appellant’s age and his chaotic background as part of a dysfunctional family being raised in poverty by a mother who unfortunately had few parenting skills and suffered from a mental illness.”

University of Toronto law professor Kent Roach said it is significant that the court utilized and quoted extensively from the results of the Ontario inquiry into systemic racism in the justice system.

“This ruling should encourage counsel and trial judges to make more use of the report,” Professor Roach said. “At the same time, the report needs to be updated to see whether the issues are the same. Intuition suggests that things have probably gotten worse.”

Notwithstanding a need for updated research, it is important to grasp the historical and sociological significance of the Borde case.

By acknowledging the structural determinants of ethno-racial equality in the dispensation of justice, the Ontario Court of Appeal has provided the opportunity to transcend what up to this point has been a rather vexatious dualism between blaming the victim and blaming society; and so, it has take the first step toward breaking the vicious and dysfunctional cycle – *the “cradle-to-the-cage” pathology*, if you will – that has plagued the Black community.

We now, at least, have a context to work with. So, from this day forward in Canadian history, let it be known that those concerned with the perpetration of crime as it relates to the Black community are no longer working in a social void, and those in the Black community who would perpetrate crime can no longer be voided of their individual responsibility.