"TAKE THE LONG WAY HOME"
R.D.S. v. *R.*
THE JOURNEY

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> While the law once promoted or permitted unequal treatment because of race, today it generally prohibits such discrimination. Equality is now guaranteed by our Constitution. Despite these important achievements, racism is still entrenched in Canadian society.[1]

Introduction

On 17 October 1993, R.D.S., a Black youth, was riding his bicycle home. Subsequent events would take this Black youth, a Black female judge, and the Black communities of Nova Scotia and Canada on a journey that would take four years. This journey, from the street of a predominantly Black neighbourhood in Halifax, would wind its way through Youth Court, two provincial Appellate Courts and ultimately to the Supreme Court of Canada.

R.D.S. was arrested and charged with assault on a police officer in the execution of his duty, assault with intent to prevent the lawful arrest of another, and resisting arrest. This occurred after R.D.S. stopped to ask his cousin, who was being arrested by a White police officer on the street, the circumstances of his arrest, and if he should call his cousin's mother.

Only two witnesses testified at the trial, R.D.S., the Black youth, and the White police officer, Constable Stienburg. R.D.S. testified that while he was still straddling his bicycle, he spoke only to his cousin and only asked him what had happened. He denied touching the police officer with his hands or his bicycle and he also denied telling the police officer to let his cousin go. R.D.S. testified that the police officer told him to "shut up" or he would be placed under arrest and that the police officer proceeded to put him in a choke hold and handcuff him. He also testified that both he and his cousin N.R. were put in choke holds by the officer. The police officer testified that he was assaulted by R.D.S. and that R.D.S. was obstructing the lawful arrest of another person. He gave no testimony with regard to the handcuffing of R.D.S. or the choke holds the two youths were subjected to.

R.D.S. was subsequently tried by way of summary conviction and acquitted of all charges by a Black Youth Court Judge who, faced with making a determination based

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[1]Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, Chapter 3, at 52. (Ontario: Queen's Printer, December, 1995).

on the credibility of the witnesses, accepted the testimony of the Black youth over that of the White police officer. This acquittal provoked a fire storm of controversy and litigation which uncovered the racial tensions between the Black community and the criminal justice system in Nova Scotia and in Canada.

The Crown appeal alleging an actual racial bias on the part of the only Black judge in Nova Scotia against the White police officer, and the subsequent overturning of the acquittal of the Black youth, R.D.S. by the Chief Justice of the Supreme Court of Nova Scotia created the "spark" that ignited the Black community. Black lawyers across the country challenged what was interpreted as an emerging legitimization of a discriminatory standard with respect to the test of reasonable apprehension of bias in judicial decision making. This standard was applied only to Black judges and, presumably, judges from other historically excluded groups.

This article focuses on the legal and social issues that shaped this journey and on the implications that the first case explicitly arguing the issue of race before the Supreme Court of Canada under s.15 of the *Canadian Charter of Rights and Freedoms*[2] has for the Black community in Canada and Nova Scotia in particular.

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[2] *Constitution Act*, 1982. There have been many cases dealing with Aboriginal issues argued before the Supreme Court of Canada which have contributed extensively to the Critical Race Theory genre. *R.* v. *O'Conner* (1996), 44 C.R. (4th) 1 (S.C.C.) and *Native Women's Assn. Of Canada* v. *Canada* [1994] 3 S.C.R. 627 are two such cases. In neither case however, was race the issue explicitly argued before the Court. *O'Conner* was a case on appeal from an order staying criminal proceedings against an accused (a Catholic bishop), who was charged with rape and indecent assault of four First Nations women in a residential school. The appeal was successful and a new trial was ordered. A further appeal to the S.C.C. was dismissed. *O'Conner* was essentially argued on the basis of gender discrimination. It is an important decision because for the first time constitutional rights were recognized for victims of sexual assault by the Supreme Court of Canada. The Supreme Court adopted a special balancing procedure respecting discovery of medical records in the possession of third parties. This case involved a number of intervener including the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network of Canada, the Women's Legal Education and Action Fund (LEAF), the Canadian Mental Health Association, and the Canadian Foundation for Children, Youth and the Law. For a further discussion of this case see: J. Cameron, ed., *The Charter's Impact On The Criminal Justice System* (Toronto: Carswell, 1996) and D. Stuart, *Charter In Canadian Criminal Law*, second edition (Toronto: Carswell, 1996). The *Native Women's Assn. Of Canada* v. *Canada* case involved issues of whether Aboriginal women's freedom of expression under ss. 2(b) and 28 of the Charter and s.15(1) Equality rights under the Charter had been infringed when the federal government provided funding to four national Aboriginal associations alleged to be male-dominated and invited them to participate in constitutional discussions but did not provide the same to the NWAC. This also was a case of gender discrimination as well as issues of expression and s. 35 guarantees of Aboriginal and treaty rights. The case did not explicitly address issues of race before the Supreme Court of Canada.

The Supreme Court of Canada did not find in favour of the NWAC. However, it reinforced the position that while the government may decide whether to extend the benefit of a particular means of expression, where it provides such a means, it must do so in a fashion that is consistent with the Constitution without discrimination.

Critical race theory and practice

The Critical Race Theory genre (CRT) originated with Black scholars and other scholars of colour who liked the idea put forward by proponents of the Critical Legal Studies movement (CLS) that deconstructing legal rules and principles would highlight "the true nature of the contingent power relationships they mask and conceal."[3]

Proponents of the CLS movement, among other things, challenge the concept of the "rule of law" and contend that the rule of law is a myth.[4] Altman argues that the CLS movement challenges this basic tenant of liberal legal philosophy by contending that the rule of law is simply not possible in a situation where individual freedom endorsed by the liberal view reigns. Altman argues the rule of law plays a central role in the theories of liberal thinkers because it is a necessary institutional mechanism for securing individual liberty as well as toleration, individuality, privacy, and private property.[5] Altman contends that a social situation where the kind of individual freedom endorsed by the liberal view reigns would be characterized by:

> ...a pluralism of fundamentally incompatible moral and political viewpoints – the establishment of the rule of law under the conditions of pluralism would require some mode of legal reasoning that could be sharply distinguished from moral and political deliberation and choice. There would be a sharp distinction between law on the one hand and morals and politics on the other. Without such a distinction, judges and other individuals who wield public power could impose their views of the moral or political good on others under the cover of the rule of law – this would destroy the rule of law and the liberal freedom it is meant to protect. Thus the liberal view requires that legal reasoning – (reasoning about what rights persons have under the law and why) be clearly distinguished from reasoning about political or ethical values – legal reasoning is not to be confused with deciding which party to a case has the best moral or political argument ...[6]

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[3] A.K. Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997) at 2. According to the announcement for the Critical Race Conference held at Yale Law School in October 1997, Critical Race Theory was officially introduced in 1987 when the Harvard Civil Rights - Civil Liberties Law Review published a symposium issue entitled "Minority Critiques of the Critical Legal Studies Movement" which included critical pieces by Richard Delgado, Mari Matsuda, and Patricia Williams. Also in 1987, C. Lawrence wrote the "Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," 39 Stan. L Rev. 317, (1987). There were also previous works by the founders of the Critical Race Theory movement, D. Bell who wrote the foreword for the Harvard Law Review "The Civil Rights Chronicles" in 1985, and K. Crenshaw who wrote "Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," (1998) 101 Harv. L. Rev. 1331. For further readings see: R. Delgado, ed., *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

[4] A. Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press,1990) at 10.

[5] *Ibid.*, at 12.

[6] Altman, *supra* note 4 at 13.

Altman also states that the position of the proponents of the CLS movement is that it is precisely this kind of legal reasoning that is impossible in a setting of moral and political pluralism. As a result, the distinction between law and politics collapses, and legal reasoning becomes tantamount to deciding which party has the best moral or political argument. Altman notes that one of the leading scholars in the CLS movement, Duncan Kennedy, makes this point more bluntly when he states:

> Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical or political discourse in general ... There is never a "correct legal solution" that is other than the correct ethical or political solution to that legal problem. [7]

Both American and Canadian Black scholars and other scholars of colour were attracted to the CLS movement because it challenged the objectivity of laws that oppressed people of colour. Scholars of colour applauded the CLS movement's skepticism that law can produce determinate results free from reference to value, politics, or historical conditions. However, these scholars believed that the CLS movement ignored the realities of people of colour because they "portrayed those who use legal doctrine, legal principles, and liberal theory for positive social ends as either co-opted fools, or cynical instrumentalists."[8] Further, the CLS movement's major weakness for people of colour is, according to Matsuda, its failure to recognize the ability of the minority experience of "dual consciousness" to accommodate "both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy."[9] This is problematic for scholars of colour because, as Matsuda puts it,

> The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of colour ... these people have used duality as a strength, and have developed strategies for resolving this dissonance through the process of appropriation and transformation ... the law, as critical scholars recognize, consists of language, ideals, signs, and structures that have material and moral consequences. Transforming this kind of system into one's own has a long tradition in the Black community.[10]

While scholars of colour were attracted to CLS because of its overriding message that legal concepts are "manipulable" and that law serves to legitimate existing

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[7] D. Kennedy, "Legal Education as Training for Hierarchy", in Kairys, *Politics of Law*, p. 47 referred to by A. Altman, "Critical Legal Studies: A Liberal Critique", *supra* note 4 at 14. For a bibliography and discussion of Canadian Critical Legal theorists see: R.F. Devlin, *Canadian Perspectives on Legal Theory*, (Toronto: Edmond Montgomery, 1991).

[8] M. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harvard Civil Rights-Civil Liberties L.R. 341.

[9] *Ibid.* at 333.

[10] *Ibid.* at 333.

"maldistributions" of wealth and power, they also criticized it for its inability to go beyond "trashing" into the next stage of "reconstruction".[11]

As a result of these and other criticisms, scholars of colour began their own movement known as Critical Race Theory which was designed to confront subtle forms of discrimination perpetuated by law and to challenge and expand rights analysis.[12] Canadian scholars of colour and Aboriginal scholars were also beginning to develop a body of Canadian critical race scholarship.[13] CRT would, instead of "trashing", offer solutions at its inception. CRT challenges the ability of conventional legal strategies to deliver justice and does so in the form of storytelling and narrative analysis so as to

> construct alternative social realities and protest against acquiescence to unfair arrangements designed for the benefits of others ... these stories help to expose the ordinariness of racism and validate that the experiences of people of color are important and critical bases for understanding an American [Canadian] legality that perpetuates

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[11]However, CRT is not without its detractors. Jeffery Rosen in a scathing 1996 article in The New Republic entitled "The Bloods and the Crits" (1996) Dec. 9 New Republic 2, denounced Critical Race Theory and condemned it for being the foundation of Johnnie Cochrane's successful defence of O.J. Simpson.

[12]Matsuda, *supra* note 8 at 2. See J. Rosen, *supra* note 11, who condemns CRT for "...Rejecting the achievements of the civil rights movement of the 1960's as epiphenomenal." He bemoans that critical race scholars argue that " the dismantling of the apparatus of formal segregation failed to purge American society of its endemic racism, or to improve the social status of African Americans in discernible or lasting ways." See however, A.L. Davis and B.L. Graham, *The Supreme Court, Race, and Civil Rights,* (California: Sage Publications, 1995), in which their 194-year examination of the role of the American Supreme Court in civil rights policy making indicates that politically disadvantaged groups such as Blacks have to relitigate over and over again in their struggle for equality. D. Bell, *Victims as heroes: A minority perspective on constitutional law,* (1987) in a paper delivered at the Smithsonian Institution's International Symposium, Constitutional Roots, Rights, and Responsibilities, p. 3, referred to by Davis and Graham, *ibid.*, at xxiii states:

> The commonly-held view of civil rights as a long, unbroken line of precedents resulting in slow but steady progress is reassuring ... too often, what is denominated progress has been cyclical phenomenon in which legal rights are gained, then lost, then gained ... Constitutional law has always been part of rather than an exception to this cyclical phenomenon.

Another key movement that has developed the Critical Race Theory genre is the history of the Boalt/Berkeley student activism beginning in 1964 which started with the Free Speech movement in the context of voting rights for Blacks through the 1980's and 1990's with the Boalt affirmative action admissions strikes, the anti-apartheid movement and the Coalition for diversified faculty and students. For a complete discussion of the key movements that performed the Theory see: K. Crenshaw, *et al.*, eds., *The Key Writings That Formed the Movement,* (New York: The New Press, 1996).

[13]See: E. Thornhill, *et al.*,"Racism...Talking Out", (1993) 6 CJWL 1. See also: Agnew, Vijay, *Resisting discrimination: Women from Asia, Africa, and the Caribbean and the Women's Movement in Canada,* (University of Toronto Press, 1996); N. Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases,* (1993) 6 CJWL, T. Wotherspoon and V. Stzeqick, *First Nations: Race, Class and Gender Relations,* (Scarborough: Nelson Canada, 1991); S. Razack, *Speaking for ourselves: Feminist Jurisprudence and Minority Women,* 4 CJWL 440. For a further bibliography of Aboriginal scholarship see: R.F. Devlin, *Canadian Perspectives on Legal Theory* (Toronto: Edmond Montgomery, 1991).

their disenfranchisement.[14]

Critical Race Theory methodology requires a deconstruction of legal rules and principles and challenges the so called "neutrality" and "objectivity"' of laws that oppress Black people and other people of colour. Deconstruction is designed to confront subtle forms of discrimination perpetuated by law. The question to be asked by the lawyer engaged in critical race litigation is does the doctrine, legal rule, principle or practice at issue in the particular case subordinate and discriminate against people of colour? Is race an issue? If the answer is yes, should it be litigated or should some other strategy be employed? In the context of the R.D.S. case, deconstruction took the form of challenging and deconstructing the doctrine of reasonable apprehension of bias, the reasonable person test, the myth of "neutrality" and "objectivity" in the context of judicial decision making, and the concepts of formal equality and ahistorical legal reasoning. The CRT approach of narrative or storytelling was also a part of the critical race litigation strategy employed in the R.D.S. case.

As noted earlier in this article, the methodology of Critical Race Theory employs, among other things, narrative or storytelling jurisprudence. Put to practical use, narrative or storytelling can function in a number of ways. It can function to allow lawyers to "tell the story" of their clients in a non-ahistorical way. In the context of the R.D.S. case, narrative or storytelling allowed the lawyers to debunk the myth of neutrality and objectivity by placing the encounter between the Black youth and the White police officer representing the state in its social and historical context of racial discrimination. Narrative allowed the lawyers representing R.D.S. to "tell the story" of the racial conflict between the police and the Black community of Nova Scotia and indeed in the whole of Canada existing at the time of the encounter.[15]

Narrative or storytelling can also function as a way of reading and interpreting judicial opinions in order to deconstruct the ideologies that may underlie them. A judge chooses to tell the reader one thing and not another. In Thomas Ross', *The Richmond*

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[14]Wing, *supra* note 3 at 3.

[15] J. Rosen, *supra* note 11 at 11, criticizes the narrative or storytelling strategy employed by Johnny Cochrane in the defence of O.J. Simpson. Cochrane, he says, through storytelling set out to "create a narrative that transformed O.J. from coddled celebrity into the civil rights martyr of a racist police force ... he put Mark Fuhrman's racial epithets on trail, suggesting, ... that, because reality is owed to language, hate speech can be compared to physical assault..." He categorizes narrative or storytelling methodology as "...nothing more than a proposal for broadening the narratives available to judges and juries, to help them get (quite literally) to the bottom of things ... Instead of being limited by a legal system that "disaggregates and atomizes" communal grievances into individual disputes, Critical Race theorists recommend that litigants think about group grievances rather than their own, and tell "the broad story of dashed hopes and centuries-long mistreatment that afflicts an entire people and from the historical and cultural background of your complaint."

Narratives[16], Ross theorizes about narratives and in discussing the *City of Richmond* v. *J.A. Croson Co.*, case he notes that the form of narrative judges choose reveals the 'essential form of their respective ideologies'. As an example, Ross says that one can discern a connection between narrative or storytelling and ideology in the U.S. Supreme Court's affirmative action opinions. He notes one can distinguish the narrative form most commonly used by those justices who seek to limit or stop affirmative action from the narrative form used by those who support it: "This distinction in narrative form reveals the ideology of the narrator and thus demonstrates the special connection between narrative and ideology."[17]

An important stage of critical race litigation and the most crucial step in transforming theory into practice is the reconstruction. What are the alternatives, if any, to the existing doctrine, legal rule, principle or practice? What harm or benefit to the Black client and/or the Black community might result from the adoption or non-adoption by the courts of this change? The foregoing methodologies for transforming Critical Race Theory into practice are illustrative but not exhaustive. Creative lawyers and Critical Race theorists will continue to explore new methodologies as the need arises.

Critical race litigation[18] requires Black lawyers and others to take a critical race position on any case involving a Black client and to either collectively work on precedent-setting cases involving race or to litigate race issues when we individually represent a Black client. Critical race litigation is the practical application of Critical

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[16] T. Ross, *The Richmond Narratives*, referred to by R. Delgado, ed., *Critical Race Theory: The Cutting Edge*, (Philadelphia: Temple University Press, 1995). Ross, in discussing the *City of Richmond* case reads the judicial opinions contained in that case as "narratives" as a way of "illuminating the idea of law as composed essentially of choices made for and against people..." The *Richmond* case according to Ross, spawned six opinions - six potential narratives. Each narrative he says was "rich" yet, the most powerful, complex, and important narratives are the concurring opinion by Justice Scalia and the dissenting opinion by Justice Marshall. Scalia's opinion he explains "as narrative is on the surface an impoverished and abstract story ... seeing judicial opinions as narratives and then linking that conception to ideology is, in one sense, a simple matter. In *Richmond*, Justice Marshall chooses to tell the reader the story of Richmond's resistance to school desegregation. Justice Scalia chooses not to speak of Richmond's school desegregation at all ... telling, or not telling, the reader that this is a city with a 'disgraceful history' of race relations is a rhetorical move connected to ideology."

[17] *Ibid.*, at 40.

[18] I coined this phrase to give a name to this kind of litigation strategy. Critical race litigation is, in my view, the practical application of Critical Race Theory and the natural next step in Critical Race discourse. In the United States as well as Canada, Critical Race theorists have been struggling with practical application and asking whether "CRT can translate radical theoretical critique into politically viable, concrete programmatic solutions without becoming overly domesticated and perhaps indistinguishable from traditional rights scholarship ... it is natural to wonder whether Critical Race Theory can make good on its twin commitments to critique and affirmative program ... to paraphrase, one wonders whether we can use the master's tools to dismantle the master's house...." Critical Race Conference, Yale Law School, 1997. See also: A.P. Harris, "Forward: The Jurisprudence of Reconstruction," in Symposium: "Critical Race Theory" (1994) 82 Cal. L.R. 741.

Race Theory and the next vital step in race discourse. When Black lawyers litigate race issues, they are seeking to improve the legal, social and economic status of the Black community and to reach those Blacks who are most in need. In this sense, there is much Canadian Black lawyers can learn from African–American race based litigation strategy in the United States and from feminist litigation.

Black Canadians have not had access to a rights-based litigation organization such as the American National Association for the Advancement of Colored People (NAACP) which was established to attack a number of discriminatory and racist practices and policies such as the racial exclusion of African Americans from juries, segregation in public housing, discrimination in voting, and education in the United States.[19] Additionally, while Canada did have its own particular brand of Jim Crow laws,[20] at the same time it did not have the constitutional or statutory mechanisms in place in the United States which enabled Black Americans to litigate to seek civil rights and freedom from racial discrimination. Specifically, the foundations for American civil rights litigation were the Civil War Amendment to the U.S. Constitution: the Thirteenth Amendment, the Fourteenth and Fifteenth Amendment, and a myriad of general civil rights statutes such as the *Civil Rights Act of 1964*; the *Voting Rights Act of 1965*; and the *Fair Housing Act* of 1968.[21] In contrast, the federal government did not pass the *Canadian Bill of Rights*[22] with respect to matters under federal jurisdiction until 1960 and basic human rights were not constitutionalized to apply to all levels of government until 1982 with the passing of the *Canadian Charter of Rights and Freedoms.*[23] Notably, the equality section of the *Charter*, s.15(1), did not come into force until 1987. Although human rights legislation had been passed in all Canadian jurisdictions by 1977, except in Quebec, the enforcement of human rights legislation in the first instance is confided to specialized tribunals and there is no recourse to the civil courts for redress.[24] Human rights legislation is problematic because the vast majority of race-based human rights complaints never reach the Board of Inquiry stage within the human rights process, even when the racial minority complainant would like the case to proceed. As well, the fact that human rights have been designated the sole

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[19] R. Kennedy, "Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott", (1989) 98 Yale L.J. 999 at 1012.

[20] Jim Crow did exist in Canada. James Walker in his book *Race, Rights and the Law in the Supreme Court of Canada,* (Toronto: The Osgoode Society, 1997) at 125, notes that in virtually every one of these areas – churches, housing and jobs, restaurants, public transportation, sports and recreations, hospitals, orphanages, prisons and asylums and in funeral homes, morgues and cemeteries, African Canadians experienced exclusion and separation from mainstream institutions, amounting to "a Canadian version of 'Jim Crow.'"

[21] A.L. Davis & B.L. Graham, *supra* note 12.

[22] *Canadian Bill of Rights,* R.S.C. 1985.

[23] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982. See: *Racial Discrimination: Law and Practice,* (Toronto: Carswell, 1995) at 3-2 where it is emphasized that "The *Charter* has not been used extensively as a litigation tool to combat racism in Canadian society."

[24] *Racial Discrimination: Law and Practice, supra* note 23, at 3-32.

jurisdiction of human rights tribunals has meant that there is no recourse to the civil courts for redress.

Canada did however, have chapters of the NAACP, such as the Nova Scotia Association for the Advancement of Colored People which was founded in 1945. These organizations however, were ill equipped to conduct expensive and controversial race based litigation, although as Constance Backhouse noted, the NSAACP did raise funds for the Viola Desmond appeal in 1946.[25]

Viola Desmond was a Black woman who refused to move to the segregated section of a New Glasgow, Nova Scotia theatre. She was forcibly ejected from the theatre by police and charged with violating the provincial *Theatres Act*. In 1946, the Black Community did not have any Black lawyers to take the case. Backhouse observes that the Viola Desmond case "potentially offered an excellent vehicle with which to test the capacity of Canadian law to further racial equality."[26] However, the White lawyer who took the case did not litigate on the basis of racial segregation, but chose to argue the case on a "more conventional litigation strategy."[27] As Backhouse reported, the litigation strategy used by Bissett was based on intentional tort, which did not allow for a discussion of race discrimination.

To this day, race-based litigation in Canada is impeded by the paucity of Black lawyers to conduct the litigation and the unwillingness or inability of many White lawyers to make racial arguments before the Courts. This unwillingness or inability may stem from a number of factors such as conscious or unconscious racism, an inability to recognize the race implications of a particular case, a lack of knowledge about how to challenge and deconstruct legal rules and principles which foster and maintain discrimination, the total acceptance of the myth of "objectivity" of laws, or the fear that raising issues of race before the Courts will disadvantage a client's case because of the unacceptance or hostility of the Courts to these arguments.[28]

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[25] C. Backhouse, "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946", 17 Dalhousie L.J. 299 at 317. See also Walker, *supra* note 20 at 312 where he comments that in all the historical cases he reviewed involving race before the Supreme Court of Canada "...The distance from the original problem remained glaringly apparent. In court, 'race' dropped from view, but in the 'real world', as has been ascribed, *Christie* as precedent produced an increase in racial discrimination. The courts had not addressed Fred Christie's problem at all." In the *Christie* case a manager of a beer tavern in Montreal refused to serve a Black man, Fred Christie. The issue was decided on the basis of the legal doctrine of freedom of commerce.

[26] Backhouse, *supra* note 25, at 349.

[27] *Ibid.*, at 349.

[28] See Backhouse, *supra* note 25, at 349 for a discussion of the possible explanations for why Frederick William Bissett, the White lawyer for Viola Desmond, decided not to attack the racial segregation issue in that case. Backhouse also notes that "Had Viola Desmond wished to retain a Black lawyer to advise her on legal options, this would also have presented difficulties." See also, Walker, *supra* note 20.

This is not to suggest that Canada is a stranger to rights advocacy organizations. The women's movement has been very successful in organizing feminist litigation and intervening in Charter litigation. The Women's Legal Education and Action Fund (LEAF) was created for just this purpose, and modeled itself after the NAACP. Feminists were the "first to form an American-style litigation organization ... with the objective of using 'test cases' to pursue 'systemic litigation' strategies."[29] And as Allen and Morton point out, LEAF intervention in Charter cases has ensured that LEAF is the most visible of rights advocacy organizations. They also note that any book on the Charter includes an "obligatory" section or chapter on feminist litigation and that the presence of a feminist intervener such as LEAF automatically certifies a case as relevant to the feminist agenda.[30] It is the "most frequent interest group intervener appearing before the Supreme Court of Canada".[31]

While there was a recognition that cases like R.D.S. could afford the Black community the opportunity to petition for intervener status, this kind of intervention did not occur in Canada for a variety of reasons. First, as indicated, there were no rights based litigation organizations to either bring forward cases of this nature or to conduct this kind of litigation at first instance. Second, there were few cases of this nature going to the appellate Courts because of the shortage of Black lawyers to bring them forward and the reluctance of White lawyers to use race based strategy , as well as the reluctance or unreceptiveness of Canadian courts to arguments based on race.[32] Additionally, the cost involved in this kind of litigation was prohibitive, especially before the Supreme Court of Canada. This obvious void in the area of rights based litigation organizations eventually led to the development of the government funded African Canadian Legal Clinic with a mandate to address systemic racism and racial discrimination in Ontario and the rest of Canada through a test case litigation and intervention strategy.[33]

The African Canadian Legal Clinic was also formed in response to the recommendations contained in a report issued by the Federal, Ontario, Metropolitan

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[29] A. Allen and F.L.Morton, "Feminists and the Courts: Measuring Success in Interest Group Litigation", Paper prepared for the 1997 Annual Meeting of the Canadian Political Science Association, St. John's Nfld., 8-10 June 1997 at 10.

[30] *Ibid.* at 2.

[31] Allen and Morton, *supra* note 29, at 1.0.

[32] Backhouse, *supra* note 25 at 338. Backhouse, after a canvass of the historical jurisprudence notes many examples of "judicial support" for racial segregation such as: *Loew's Montreal Theatres Ltd.* v. *Reynolds* (1919), 30 Que. B.R. 459; *Franklin* v. *Evans* (1924), 55 O.L.R. 349; *Rogers* v. *Clarence Hotel* (1940), 55 B.C.R. 214, she also notes the 'erasure' of the issue of race in many of these cases. For an excellent historical account of Supreme Court of Canada decisions of this nature see Walker, *supra* note 20.

[33] Notice of Motion of the interveners: African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada *R.D.S.* v. *R.*, S.C.C. No. 25063. The ACLC mandate also extends to the monitoring of significant legislative, regulatory, administrative and judicial developments, and engaging in advocacy, law reform and legal education aimed at eliminating racism, and in particular, anti-Black racism.

Toronto and City of Toronto governments in response to the riots which occurred in Toronto following the Rodney King verdict in 1992, and the number of police shootings and cases of excessive use of force by police involving Black citizens across the country. There was also the Stephen Lewis report which called for an investigation into race relations in Ontario.[34]

Because of the historic and financial constraints on litigation by Black Canadians, there is no body of jurisprudence recognizing racial equality that can compare to the extensive jurisprudence developed in the United States after the *Brown* v. *Board of Education* decision.[35] In the past, critical race litigation has not occurred in Canada. In my view it is an important, if hitherto untapped, strategy for attaining significant legal and social gains for Black Canadians. The case of *R.D.S.* v. *R.*[36] is an example of critical race litigation.

The first step in critical race litigation is the ability of defence lawyers to recognize when the issue of race arises and the ability to do this depends on an awareness and acknowledgment of the existence of racism in Canadian society. The critical race position taken in the R.D.S. case was that the existence of racial discrimination and the context of the interaction between police officers and "non-white" groups in Canada is not a matter that requires evidence before the courts. Rather it is a matter of the common sense and experience of the judge which can be applied whenever the facts warrant. In this case, race was not a material fact that had to be proved. It was a matter of societal context and accordingly it did not require evidence nor the taking of judicial notice. The reasonable person whom the court invokes to determine whether or not a reasonable apprehension of bias arises must be aware of the fact that racial discrimination exists in Canada.[37]

Social Context: Police-Black Relations In Nova Scotia and Canada

There has been an ongoing and growing dissatisfaction with the state of relations between the police and racial minority communities in Canada and the United States. These relations have resulted in numerous claims of excessive use of force against the police in many jurisdictions in Canada. Many of the claims of excessive use of force by police involved the shooting of Black Canadians in Toronto and Montreal and

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[34]See the Stephen Lewis Report on Race Relations in Ontario, June 1992.

[35]347 U.S. 483 (1954).

[36]Chronology of the *R.D.S.* case: First instance: Youth Court Trial, *R.* v. *R.D.S.*, Y093-168, (December 2, 1994);Crown Appeal: R. v. R.D.S. S.C.N.S. SH#112402 (April 18, 1995) Nova Scotia Supreme Court (Glube C.J.S.C.'s decision); Defence Appeal: *R.* v. *R.D.S.*, 145 N.S.R. (2nd) 284; *R.D.S.* v. *R.*, in the Supreme Court of Canada, File No. 25063.

[37]Appellant's Factum, Supreme Court of Canada, Court File No. 25063 at 26.

included accusations that these shootings were racially motivated. Claims that police use excessive force and racial slurs against Blacks have also been made in Nova Scotia.

In a report to The Commission on Systemic Racism in the Ontario Criminal Justice System, in 1993, Professor H.J. Glasbeek noted that:

> Many believe that it is the criminal justice system as a whole which is racist, not just a few individual actors within it. *And there are data to support this argument* ... the Donald Marshall inquiry's revelations that it was not just a few police persons who acted in a truly deviant way; they had the help and support of a great number of senior officials in the prosecutorial and judicial offices of the province. And, a Manitoba report documented the discriminatory way in which Native peoples are treated by the criminal justice system. *Armed with this kind of authoritatively assembled evidence and supported by the evidence of the perceptions of minority groups who deal with the police on a day-to-day basis, the shootings of black persons by police officers takes on a particular significance.* It is in this context that they are characterized as manifestations of systemic racism within the police forces. [emphasis added][38]

What follows is a brief overview of cases involving the shooting of Black citizens by police and the state of Black/police relations in Canada and Nova Scotia at the time R.D.S. was arrested. It is crucial to understanding the "social context" argument made in the case.

On 14 May 1990, in Scarborough, Ontario, Marlon Neil, a 16 year old Black youth, was shot and seriously wounded by a White Metro-Toronto police officer after Neil refused to get out of the car he was driving. Neil was traveling at 54 kilometers per hour in a 40 kilometre per hour zone. Constable Rapson, on radar duty, spotted the car and chased it after the car sped away. The police officer eventually stopped the car and Mr. Neil locked the car and refused to get out. The police officer fired three shots at the car at a distance of six feet. The Black teenager was hit by two bullets which entered his back. One broke a rib and entered his esophagus and spine.

A witness indicated that the teenager held his hands out with the palms up shortly before the officer fired three shots into the car he was driving. The witness stated that the teenager appeared to be "frightened and confused" while the police officer appeared

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[38]H. J. Glasbeek, Professor of Law, Osgoode Hall Law School, York University: *A Report on Attorney-General's Files, Prosecutions and Coroners' Inquests Arising out of Police Shootings in Ontario* prepared for the Commission on Systemic Racism in the Ontario Criminal Justice System (Ontario: Queen's Printer, December, 1995) at 8. Professor Glasbeek was asked to look into the way in which the criminal justice system dealt with eight shootings of Black citizens following encounters with the police in Ontario. Examples of the police excessive use of force cases contained in this article are taken from the Glasbeek Report unless otherwise indicated.

to be "angry and losing his patience."[39] The White police officer claimed that he thought the teenager was armed.

The Black youth testified that he slowed down when he passed Constable Rapson's radar trap but that he sped up again when he saw something in the police officer's face. The White police officer was charged with attempted murder, criminal negligence causing bodily harm and aggravated assault. He did not take the stand during the trial. A sworn statement in which he said he thought he saw a black shiny object in the front seat of the car that he took to be a weapon, was allowed into evidence. The youth was, in fact, unarmed. The police officer also said in his sworn statement that the teenager told him to "back off or you're dead meat". Because the police officer did not take the stand during his defence this sworn statement was not subject to cross-examination. The defence called no other witnesses.[40] An all White jury returned a verdict of not guilty and cleared the police officer of all charges.

Metro Toronto Police Association president Arthur Lymer said the verdict sends out a message that a jury will support the police.[41] In this and other cases of police shootings of Blacks, before and after charges were laid dozens of Metro Toronto police officers, together with the president of their union, went on the defensive and often crowded into the court room in support of their comrades.

In one such case in Toronto, after a charge of manslaughter was laid against a White police officer, David Deviney, in the shooting death of a Black man, Lester Donaldson, police briefly worked to rule to protest the manslaughter charge. At a closed meeting of Metro Toronto's police force, seven thousand Metro Toronto police members met to "weigh strategy in seeking to have the charge against Constable Deviney withdrawn."[42] Toronto's Black community charged that the shooting had racial overtones. Twenty five hundred police officers demonstrated, claiming that the charge of manslaughter laid against the police officer was only a political response to the vocal Black community and demanded the resignation of then Attorney General Ian Scott. This police shooting of a Black person in Ontario and the subsequent acquittal of the White police officer (Deviney) by an all White jury followed on the heels of five

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[39] D. Downey, "Teen held hands out, witness testifies Officer seemed angry, trial told", The Globe and Mail, (October 19, 1991), A12.

[40]The Crown argued before the jury that Constable Brian Rapson's statement explaining why he shot Marlon Neil was "filled with deliberate falsehoods" as quoted by reporter H. Hampton, "Jury clears Metro constable", The Globe and Mail, (October 29, 1991) A12.

[41] D. Downey, "Jury clears Metro constable on all counts in teen shooting Black activist says power of police lobby evident", The Globe and Mail, (October, 31, 1991) A8.

[42] T. Appleby, "Police weigh strategy on manslaughter charges", The Globe and Mail, (January 14, 1989) A10. During this time Metro Toronto police were receiving may calls of support from the public and a group of people backing the police force was formed which called itself "The Citizens Opposed to Police Slander".

other incidents in Toronto of Black citizens being shot by White police officers in less than two years.[43]

One of these five incidents involved the case of a Metro Toronto police officer, Cameron Durham, who stopped a car in which Sophia Cook, a Black woman, was a passenger. Ms. Cook was shot by the police officer after he stopped the vehicle and the two male occupants fled the car. Constable Durham was charged with careless use of a firearm in the shooting of Ms. Cook. Both the driver and the other male passenger were Black. Sophia Cook had accepted a ride with the men while she was waiting for a bus (it was later determined that the car she was riding in was stolen). Sophia Cook was left partially paralysed as a result of this shooting. Again, the White police officer in this case was tried and acquitted by an all-White jury consisting of seven men and five women. The twelve jurors were all screened for potential racial prejudice during the selection process. However, this screening only resulted in the rejection of four *Black* members of the jury panel but not the rejection of any White jurors.

An earlier 1979 incident, the Albert Johnson case, involved a White Metro Toronto police officer shooting a Black civilian in his own home. In this case, two Metro Toronto police officers, Inglis and Cargnelli, responded to an anonymous telephone call telling them that there was a disturbance at the Johnson residence. Two or three police cars were dispatched. Inglis and Cargnelli drove to the lane at the back of the house. There was no disturbance. A neighbour told them that Albert Johnson had been "noisy" earlier but that Johnson had left. Johnson was expected to return because he promised to help this neighbour with a chore. When Albert Johnson returned on his bicycle, he asked the police officers what they wanted and if they had a warrant. When he was told they did not have a warrant, he raced to his back door and closed it on the police officers.

Constables Inglis and Cargnelli went to the front door where a third police officer was standing. The police officers decided that everything was all right and left, walking down the back lane of the residence. They claimed that at this point, Albert Johnson started shouting insults at them. However, these claims were contradicted by evidence from neighbours who said they heard no shouting. The police officers testified that they believed Albert Johnson might harm someone so they broke into the house through the back door. Even though family members present at the time testified that the police officers encountered no disturbance, the police officers told Albert that they were arresting him for causing a disturbance. He told them he had done nothing wrong and refused to go with them.

The police officers later testified that Albert threw a pot of peas cooking on the stove at them. However, other witnesses said that the pot fell over during the struggle.

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[43] T. Claridge, Court Reporter, "Toronto Policeman Cleared in Shooting - Woman Left Paralyzed But Jury Finds Injuries Not Result of Careless Use of Revolver", The Globe and Mail, (May 26, 1994), A14.

One of the police officers hit Albert over the head with a metal flashlight a couple of times. Albert managed to free himself and ran upstairs to his bedroom. The police officers stayed downstairs. Albert came to the top of the stairs holding his daughter. The police officers testified that they thought he was going to throw her down. Mrs. Johnson took the child. The police officers then testified that Albert threw a bottle of disinfectant at one of the officers. They then claimed he was coming down the stairs with what looked like an axe but which turned out to be a lawn-edger. They testified that Inglis shot at Johnson and missed and then shot a second time killing Johnson. A child witness for the prosecution said that Albert Johnson was coming down the stairs calmly, not menacingly, and was in a kneeling position when the police officer shot him. However, this child's testimony was excluded at trial because of claims of coaching by adults. Again in this case, the two White police officers were acquitted of manslaughter by an all White jury. This was the first manslaughter charge to be laid against Metro Toronto police officers for a shooting death of a Black civilian.

At the trial of these police officers, as in all of the other cases, the victim's character became the main issue. In this case, Albert Johnson's many altercations with the police and the number of times the police were called to his house were treated as relevant evidence by the court. However, the Crown's theory in this case was that racism was irrelevant to the case. It was evident that the issue of racial motivation by the White police officers in the shooting death of Albert Johnson was not an issue the White Crown prosecutor was prepared to argue because of an inability or an unwillingness to acknowledge the existence of racism in Canadian society and in the provision of policing services. Since the Crown pursued a manslaughter charge rather than a second degree murder charge, the intent or racial motivation of the accused police officer was not in issue because proof of intent is not a requirement for a conviction for manslaughter. However, as Professor Glasbeek noted in his analysis with regard to the evidence of the victim's character and the failure by the Crown to develop the issue of racial motivation, " this accused-favouring evidence was admitted without regard to its [racial] context". [44] Had the Crown pursued the issue of race Glasbeek argues:

> ...evidence that Albert Johnson's strange and allegedly violent anti-police behaviour was, to the police officers' knowledge, in large measure due to police harassment would have become relevant ... contextualized evidence of this kind might have been admissible because it would have tended to prove a fact in issue, namely, that the confrontation was the result not just of one domestic disturbance involving a known person but due to a personal, perhaps racist, animus towards an unusual, unemployed black man who was somewhat mentally ill.[45]

Glasbeek also notes that the Crown could have offered evidence to show racist *animus* on the part of the police such as the fact that, on 12 May 1979, Albert Johnson

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[44]H.J. Glasbeek, *supra* note 38, at 118.

[45]*Ibid.*, at 118.

was arrested in his house after several squad cars chased him for driving through a red light on his bicycle. On this occasion, police broke his door and ripped his arm through the opening, causing him serious injury. His resistance during this event had, according to police, forced them to shackle him and take him to the hospital for his injuries. Glasbeek also notes that on June 11, after this event, it was Albert Johnson who was charged with assaulting a police officer.

Further evidence the Crown could have offered to show racial motivation by the police was that on 19 June 1979 Albert Johnson was charged with reading his Bible aloud in a park. He was later acquitted of this charge. Then on 12 July 1979, Albert Johnson was charged with having a dangerous weapon in his possession. This turned out to be a six inch stick he was using to exercise the arm the police had injured during his arrest on 12 May 1979. Also, a neighbour heard a police officer call Albert a "nigger" on a previous occasion and, when Albert Johnson was hospitalised as a result of his injuries sustained by police in the 12 May 1979 incident, he filed a racial harassment complaint with the Ontario Human Rights Commission.[46]

Racial tensions were again high across Canada and particularly in Ontario following the shooting death of Wade Lawson, a 17 year old Black teenager, in 1988. He was killed by two White Peel Regional Police officers, Constables Anthony Melarani and Darren Longpre, who fired six shots at him while he was sitting behind the wheel of a stolen car fastened in by his seat belt. Angry demonstrations over police racism occurred. Again the White police officers in the Wade Lawson case were acquitted by an all White jury. Following the acquittal, the spokesmen for the Black Action Defence Committee[47] stated that "The trial of these police officers was a farce. If we can't get justice from the Courts, maybe it is time that our committee began to think of ways of getting justice for ourselves."[48]

Questions of race were avoided not only during the Lawson trial discussed above but in other police shooting and excessive use of force cases . In spite of this, headlines in Canadian newspapers increasingly recognize that each new shooting by White police officers of a Black Canadian or other racial minority group member demonstrates the

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[46]Glasbeek, *supra* note 38, at 120. The Metropolitan Toronto Police department was aware of the filing of this human rights complaint at the time of Albert Johnson's death.

[47]This Committee was formed by Black Community Activists to address the issue of police shootings of Black persons in Ontario and elsewhere in Canada. Other community groups also formed around this issue, for example: The Coalition Against Racist Violence; Womens' Action Against Racist Police (WAARP), ; Canadian-Chinese National Council; Toronto Coalition Against Racism; The African Canadian Legal Clinic. For publications dealing with this issue see: *Target Magazine*, a publication of the Coalition Against Racist Police Violence; and *Currents, Readings In Race Relations*: *Race and the Canadian Justice System* published by the Urban Alliance on Race Relations a quarterly magazine supported by the Department of Canadian Heritage, the Municipality of Metropolitan Toronto, the City of Toronto, the Trillium Foundation and the United Way of Greater Toronto.

[48] L. Sarick, " Police officers acquitted in Lawson shooting", The Globe and Mail, (September 4, 1992) A1.

presence of a recurring problem. The phenomenon of police shootings and other forms of excessive use of force by police on Blacks and other racial minorities is not confined to Metropolitan Toronto. As one Globe and Mail editorial noted:

> Toronto is not the only Canadian city where relations between the police and visible minorities have ended in violence in recent years. In Halifax, relations between the police and the city's black community have been strained in the wake of allegations that the police have used excessive force against blacks. In Montreal, six men – three blacks and three hispanics – have been killed by police in the past five years ... Although white persons have been shot by police officers in the carrying out of their duties, even Arthur Lymer, president of the Metropolitan Toronto Police Association, says that "the number of blacks shot in such incidents is "out of proportion" to their share of the population.[49]

In the United States on 3 March 1991, Rodney King was beaten by police officers in Los Angeles during his arrest following a high speed chase. The beating was videotaped and was broadcast on local, national and international television. A California grand jury indicted four White police officers on assault charges for the beating. The state trial of King was moved on motion for a change of venue to Simi Valley, a White suburb of Los Angeles, where an all White jury acquitted the police officers of all charges except one on which a mistrial was declared. Race riots broke out in Los Angeles and in other cities in the United States.

On 9 May 1992 "reverberations from the King verdict blended with anger at yet another police shooting of a Black man and flared into an outburst of violence and vandalism in downtown Toronto."[50] During and after the Los Angeles riots some Canadians started to ask the question "Could it happen here?"

> Although police deny that race is a factor, police have been accused of using excessive force against blacks in a number of recent cases – including that of Marcelus Francois, the unarmed black man shot dead by a Montreal SWAT team that mistook him for someone else; and Wade Lawson, the Toronto youth fatally shot in the back of the head as he sat at the wheel of a stolen car. We have not seen major riots as a result – not yet – but blacks have made clear their anger ... As tension between police and the black community rises, other Canadians are becoming more fearful about crime ...The American pattern is clear. Crime rises. Police, feeling threatened, become edgy and aggressive. Black men are picked up – or worse – just for being black. The frightened middle-class looks the other way. Could it happen here? In some ways, it already is.[51]

Clayton Ruby, an Ontario criminal law lawyer, stated:

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[49]Editorial "Blacks and the police", The Globe and Mail, (April 4, 1992), A14.

[50]Editorial, "L.A.'s Northern Echoes", The Globe and Mail, (December 30,1992) D6.

[51] Editorial, *ibid.*, at D6.

> ...Young native Canadians are shot and killed by police in Winnipeg, Winnipeg's police are overwhelmingly white. Vancouver contains a large important Asian community. But Vancouver's police are overwhelmingly white. Black youths are shot and killed in Montreal. Montreal's police are overwhelmingly white. Black youths are shot and killed by Toronto's police in alarming numbers – eight in the past four years. Toronto's police are overwhelmingly white. Yet no police officer has been convicted of any offence in connection with these shootings ... Three days ago in Toronto, a white undercover police officer shot and killed a 19 year old black man armed with a knife ... Metro Police Chief William McCormack and Police Services Board chairwoman Susan Eng appeal for calm. Who are they kidding? Every black and native person in this country knows that the justice system will not deliver justice for them ... again and again there is the laying of inadequate charges, the wrong charge or no charges at all. Prosecutors and police like each other ... and so with police and prosecution and courts, the message comes: white folks get justice, black folks get excuses.[52]

Additionally, recent headlines suggest that the Toronto police exceed most police forces on the continent when it comes to police shootings of civilians.[53] For example, according to Nicole Nolan, the data shows that from 1991 to September 1996, Metro Toronto police were proportionally more likely to shoot suspects than their colleagues in many of America's most "crime-ridden cities". For example, Metro Toronto police had, in police shootings relative to homicides, a rate 53 per cent higher than Washington, D.C.'s and 88 per cent higher than that of the "notorious" Los Angeles police department.[54]

In 1996, the Black Action Defence Committee of Toronto, lobbied for a commission to examine why the victims of police shootings are frequently Black. In a study of Toronto on racial distribution of civilians shot by police versus racial distribution of the general population, the percentage of persons shot by police who were Black compared to the percentage of the general population was 24 percent, while Blacks make up only 7.45 percent of the general population.[55]

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[52] C. Ruby, "Clayton Ruby takes a look at the white face of policing and doesn't much like what he sees", The Globe and Mail, Fifth Column: Law and Society,(May 5, 1992) A18.

[53] N. Nolan, "Metro Cops More Likely to Shoot than LAPD": *Now Magazine*, (July 11-17, 1996) at 20. Statistical sources referred to by Nolan: W.A. Geller and M.S. Scott, "Deadly Force-What We Know (Washington D.C.: Police Executive Research Forum); 1991 Census, Statistics Canada; Cole-Gittens Commission. *Data refers to fatal shootings only.* See also *Target Magazine* (April 1997 issue) statistics for Metro Toronto police shootings for 1996 (first six months) three persons of colour shot, and the shooting death of Hugh George Dawson, a Black teenager, on 30 March, 1997, by Metro Toronto police officers Richard Shank and Rajeev Sukurman. This is the second shooting death of a Black youth involving officer Shank. He shot and killed Ian Coley, a 20 year old Black man, in 1993.

[54] Nolan, *ibid.*, at 20.

[55] Nolan, *supra* note 53, at 20.

In Canada, criticism of police investigations into police shootings of Black civilians, and other perceived police misconduct in relation to Black citizens and other persons of colour, prompted the appointment of various Task Forces, Royal Commissions, and the like, to study relations between police and racial minority communities.[56] Of particular relevance to the present article, the Royal Commission on the Donald Marshall, Jr. Prosecution in Nova Scotia in 1989 indicated that research, as well as experience, has emphasized very significant racial discrimination at the key point of policing and the Commission's own study strongly supports this finding.

In 1991, a disturbance in downtown Halifax which resulted when Black males were consistently refused admittance to the city's downtown bars again focused attention on racial tensions in Nova Scotia. This incident erupted into altercations between Blacks and Whites and subsequently led to allegations of the police using excessive force and uttering racial slurs against Blacks involved in the incident. This incident received national and international media attention. As a result of this riot, the Chief of Police in Halifax set up an ad hoc Incident Review Committee which consisted of both civilian and police members to "investigate the allegations of racial slurs and excessive use of force on the part of the police".[57]

Although the Committee was supposed to produce a joint report, the members were unable to agree on the findings. The civilian and police members wrote separate reports. The report by civilian members of the Committee found that "the internal investigation conducted by the Halifax Police Department into allegations of excesssive

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[56]The Royal Commission On The Donald Marshall Jr. Prosecution (Nova Scotia, 1989); Policing On The Blood Reserve (Alberta, 1990); The Aboriginal Justice Inquiry (Manitoba, 1991); Maloney Report to the Metropolitan Toronto Police (1975); The Royal Commission into Metropolitan Toronto Police Practices (by Hon. Justice Morand, 1976); Walter Pitman Report: "Now Is Not Too Late" (1977); The Report to the Civic Authorities of Metropolitan Toronto Council and its Citizens (by Cardinal Carter, 1979); Dr. Reva Gerstein's Report of the Task Force on the Racial and Ethnic Implications of Police Hiring, Training, Promotion and Career Development (1980); The Clare Lewis Report on Investigations into Relations Between Police Forces, Visible and Other Ethnic Minorities (Montreal, 1988); The Stephen Lewis Report, (Toronto); The Commission des droits de la personne, Investigation Committee on relations between police forces, visible and other ethnic minorities, (Quebec, 1988); Follow-up Committee to oversee actions in response to the recommendations made by the Investigation Committee (Quebec, 1995); The Yarosky Report (Montreal, 1992); The Corbo Report (Montreal, 1992); The Malouf Report (Montreal, 1994); The Thomassin Report (Montreal, 1993); The Reid Report, "Law Enforcement and Race Relations in Canada" (July, 1992); Cherif, M., and F. Niemi, " And Justice For All/A Report on the Relations Between Police and Visible Minoirities in Montreal, Montreal, Canada: Center de recherche-action sur les relations raciales, 1984; Carbo, C., Task Force on the Relations Between the MUC Police and the Black Community of Montreal, Canada: Available from Canadian Centre for Police-Race Relations, Ottawa, 1993; see also: "Canadian Centre for Police-Race Relations, Federal and Provincial Royal Commissions, Task Force and Inquiries into Police/Aboriginal and Police/Visible Minority Relations: A Compliation. Canadian Centre for Police-Race Relations, March, 1993; and The Report on Systemic Racism in Ontario Criminal Justice System, 1996.

[57]Report of the Incident Review Committee of the Halifax Police Department, December 17, 1991; see also The Report of the Nova Scotia Advisory Group on Race Relations, 1991 and The Response of the Federal Government to the Recommendations of the Nova Scotia Advisory Group on Race Relations: Taking Action, 1992 (both available from the author).

force and racial slurs uttered by police officers on 19 July 1991 was inappropriately handled."[58] The report by police members of the Committee stated that "the incident of 19 July 1991 was not precipitated by racial discrimination but was intended to be 'a settling of a score' by a Black community member."[59]

Subsequently, other controversies arose in Nova Scotia with respect to interactions between police and members of Black communities in the province. In 1994, two Black men in Halifax claimed police officers used excessive force after ordering them out of a taxi. Early in 1995, a police officer strip-searched three little Black girls in their school after a suspected theft of ten dollars. Lawyers for the children, Burnley Jones and Anne Derrick, suggested the incident was racially motivated.[60]

In 1996, six young Black men in Halifax received sentences of up to ten years for the aggravated assault on a White university student, Darren Watts. These charges stemmed from a fight which occurred outside a fraternity house. The White student received serious injuries as a result. Many in the Black community argued that race played a role in the "excessive" sentences received by the Black youth in comparison to sentences received by Whites convicted of the same or a more serious offence. A Black group called Brothers Reaching Out Society argued that the sentences were "the highest sentences ever given out in Nova Scotia's history for that type of unpremeditated incident."[61] Stephen Kimber, a White journalist, stated the issue thus:

> ... Did the young men convicted of beating Darren Watts get unusually harsh prison sentences simply because they are black? Put more generally: is the Nova Scotia justice system racist?

Kimber concludes that, in contrast to the 1990 case of a White male, Timothy James Connell, who was convicted in the racially motivated beating of Jeremy Paris, a Black student at the Stellarton campus of the Nova Scotia Community College, and received only a fine for the attack, the six Black youth in the Watts case received excessive sentences. Further, Kimber notes that unlike the highly publicized Watts case, it appears that the police spent little time or effort attempting to identify and charge others who might have been involved in the Paris beating. Kimber states that:

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[58]Report, *ibid.*, at 8; See also: K. Cox, "Halifax police under fire for probe of racial brawl Reports of officers beating black not fully investigated, group says", The Globe and Mail, (December 20, 1991) A8. Cox notes: "Halifax police didn't adequately investigate allegations that officers beat a black man and shoved him through a window and called another 'nigger' as they broke up a racial brawl in July, civilians on a panel reviewing the incident say."

[59]Incident Review Report, *supra* note 57, at 9.

[60] C. Saunders, "Speaking out can be hazardous", The Sunday Daily News, (May 7, 1995) A17. Saunders notes that the lawyers were criticized sharply by Halifax Police Chief Vince MacDonald, who "decried the suggestion, saying he considered it 'out of order' and 'unusual'".

[61]As quoted by S. Kimber "Young, black, and shafted", Halifax Daily News, (June 14, 1996) 18.

> The Paris case is far from the only obvious incident of what the Marshall commission once delicately referred to as "differential treatment of racial minorities" in the criminal justice system ... it wasn't that long ago, for example, that a Digby judge – after acquitting a white man of murdering a black – allowed that we know what happens when those black guys get to drinking.[62]

Kimber concludes by saying that:

> The treatment of those involved in the Watts case – four of the men convicted were first offenders – raises a serious question about whether anything has really changed since those findings and the report of the Marshall inquiry. And the issue is serious. "If the courts condone differential treatment of racial minorities", the inquiry judges pointed out, "the integrity of the entire system will suffer." It has. It does. And it will continue to do so until we finally begin to acknowledge and deal with reality.[63]

Subsequently, one of the six Black men, Damon Cole, convicted in the Watts case noted above, had his conviction overturned and a new trial ordered when the Nova Scotia Court of Appeal ruled that he might not have received a fair trial because of non-disclosure of witness statements in the Crown's possession.[64] These witnesses placed Damon Cole on the opposite side of the street at the time that the assault on Darren Watts occurred. The Court of Appeal held that the non-disclosure by the Crown resulted in an infringement of the principles of fundamental justice enshrined in s.7 of the *Canadian Charter of Rights and Freedoms* because the right of an accused to full and timely disclosure is incident to the right of an accused to make full answer and defence.[65] The other five Black accused also appealed their convictions and sentences to the Nova Scotia Court of Appeal. The Court of Appeal denied their appeals.[66] The issue at the appeal was the effect of the Crown's non-disclosure of four witness statements on the right of these five Black accused to a fair trial and the right to make full answer and defence. The majority in the Nova Scotia Court of Appeal adopted the following test to determine the prejudicial effect on the accused's right to a fair trial and to make full answer and defence:

> ...to show prejudice as a consequence of the non-disclosure, the appellant must satisfy the court that there is a reasonable probability that, had there been proper disclosure, the

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[62]Kimber, *supra* note 61, at 18.

[63]*Ibid.*, at 18.

[64]*R.* v. *Cole* (D) (1996) 152 N.S.R. (2nd) 321.

[65]*Cole*, *supra* note 64, at 321.

[66]*Spencer Dixon* v. *R.*, C.A.C. No.126136; *Guy Robart* v. *R.*, C.A.C. No.126420; *Stacy Skinner* v. *R.*, C.A.C. No.126474; *Herman McQuid* v. *R.*, C.A.C. No.126612; *Cyril J. Smith* v. *R.*, C.A.C. No. 126473. The Judges sitting on the Court of Appeal for this decision was different than in the Cole case. The decision of the Nova Scotia Court of Appeal in these cases is currently on appeal to the Supreme Court of Canada.

> result might have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome...[67]

Pursuant to this test, the court held that the accused received a fair trial and that there was no reasonable probability that had the non-disclosed evidence been made available to the accused at or prior to the trial, the result might have been different. The focus of the majority of the Nova Scotia Court of Appeal in determining whether there was prejudice was on the issue of the reliability of the result. Bateman J.A. (in dissent from the denial of the appeal of the five Black youths) argued that the majority did not adequately take into account the effect of the non-disclosure on the fairness of the trial. Bateman J.A argued that the standard of proof of prejudice which is required in cases involving ineffective counsel is an inappropriate one where, as here, responsibility lies with the government. Bateman J.A. points out that in ineffective counsel cases, no responsibility lies with the government because the government does not select the accused's lawyer, but in cases involving non-disclosure by the Crown:

> It is the government that has undertaken action impacting upon the trial process (here, the non-disclosure). While I would not go so far as to invoke a presumption of prejudice in favour of the appellant in such cases, where government action (or inaction) is the source of the complaint, a court must carefully scrutinize the fairness of the process.[68]

She also disagreed with the majority that the defence counsel in this case failed to exercise due diligence to a sufficient degree to override the prejudice resulting from the failure to disclose.

Notably, the issue of race was never raised in these appeals by the White lawyers either with regard to the disparate sentences handed down to these Black men or in reference to the failure to disclose by the Crown prosecutors. For example, it was not argued that the Crown's failure to disclose was motivated by race and consequently, due to this improper motivation, a stay of proceedings should be granted. Instead, the defence conceded that improper motivation was not at issue and that the Crown had 'inadvertently' failed to disclose. As a result, a new trial was sought and not a stay of proceedings based on improper motivation on the part of the Crown.

This is even more troubling in light of the fact that both race and non-disclosure were the main factors contributing to the wrongful conviction of Donald Marshall Jr., a Mi'Kmaq Nova Scotian wrongfully convicted of murder in the stabbing death of Sandy Seale, a Black Nova Scotian, in 1971. In the Marshall case, the Crown failed to disclose earlier inconsistent statements made to police by two of the teenage eyewitnesses who testified that they had witnessed Donald Marshall Jr. stabbing Sandy

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[67] *Dixon et al., ibid.* at 71.

[68] *Dixon et al., supra* note 66 at 73. Bateman, J.A. (dissenting).

Seale. In the Watts case, involving six Black youths, the Crown failed to disclose the existence of eyewitness statements at or prior to the trial which may have assisted the accused in raising a reasonable doubt in the case.

The finding by the Royal Commission on the Donald Marshall Jr. Prosecution that non-disclosure by the Crown, as well as race, contributed to the wrongful conviction of Donald Marshall Jr. resulted in the Commission making wide ranging recommendations with regard to prosecutions in Nova Scotia. Specifically, based on their findings concerning lack of disclosure, they recommended that the Attorney General urge the Federal Government to amend the Criminal Code to provide for full and timely disclosure of the evidence in possession of the Crown, including information that might mitigate or negate guilt. In the Marshall case, the Royal Commission found that the Crown prosecutors of the time generally disclosed the contents of statements of various witnesses to defence counsel *if they asked for such information*, however if they did not, the Crown would not make any disclosure. The Royal Commission recommended that "without request, the accused is entitled ... to receive any other material or information known to the Crown which tends to mitigate or negate the defendant's guilt ... notwithstanding that the Crown does not intend to introduce such material or information as evidence."[69] Also forming part of the Commission's recommendations was that judges not proceed with a case until they were satisfied that such disclosure had taken place.[70] In spite of these recommendations, seven years after the Marshall Inquiry, the Crown prosecutors in the Watts case failed to make full disclosure to the accused Black men. The Nova Scotia Court of Appeal upheld the Crown's argument that the defence had an obligation to seek out full disclosure and failure to do so amounted to a trial tactic on the part of the defence and not a failure to disclose on the part of the Crown.

It has been twenty five years since Donald Marshall Jr. was wrongfully convicted of murder in the province of Nova Scotia because he was a Mi'Kmaq. The Royal Commission on the wrongful conviction of Donald Marshall Jr. completed its task and tabled its report in 1989. The chairman of the Marshall Commission, Chief Justice Alexander Hickman, said at the beginning of the inquiry process in 1987 that:

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[69]Royal Commission on the Donald Marshall Jr. Prosecution: "Prosecuting Officers and the Administration of Justice in Nova Scotia, Vol. 1 Recommendation 39. See also a Directive of the Attorney General of Nova Scotia issued in 1994 pursuant to Section 6(a) of the Public Prosecutions Act which States that "There is a duty on the Crown to make full and timely disclosure to the defence of all relevant information known to the investigator and the Crown Attorney in Criminal Code prosecutions conducted by agents of the Attorney General. The obligation applies to both inculpatory and exculpatory information ... One measure of the relevance of information is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed. Accordingly, information is relevant if it can reasonably be used by the defence either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence." This directive was in effect at the time of the trial of the six Black men accused of the aggravated assault of Darren Watts.

[70]Royal Commission, *ibid.*, Vol. 6, and Recommendations 35-45.

> we intend to give consideration to the allegations that minorities of this province [Nova Scotia] are not treated equitably by the justice system. It is our ultimate aim to make recommendations which will ensure that the unfortunate events surrounding Mr. Marshall will not be repeated...[71]

The race and non-disclosure issues arising from the Watts case and the failure of the justice system in Nova Scotia including police, prosecutors and defence to heed the recommendations of the Marshall Inquiry arguably illustrate that not much has changed in Nova Scotia in the seven years since the release of the recommendations.

Black-Police relations in Nova Scotia also came under scrutiny in 1989 in the context of a racially motivated brawl at Cole Harbour High School in Dartmouth, Nova Scotia. Accusations of racial motivation followed after police laid charges against more Black students than Whites involved in the incident. Eventually two Blacks were convicted while all charges were dropped against Whites involved in the fighting. Again, in 1996, Cole Harbour High School was the scene of a brawl involving Black and White students. The Black community accused police, who pepper-sprayed a group of students, of racial motivation in singling out Black teens as targets of the pepper-spraying. Ultimately, five Black males were charged with obstructing a police officer. Calls for a public inquiry followed police spokesman Corporal Hubley's response that colour was not a factor in who the police pepper-sprayed. To date this incident is still unresolved.

This was the state of Black community and police relations in Nova Scotia and Canada on that day in October, 1993 when fifteen-year-old R.D.S. left his grandmother's house on his bicycle and encountered his cousin's arrest on his way home. Understood in this racialized social context, the arrest of this Black youth by a White police officer in a predominately Black neighbourhood and the subsequent allegation of racial bias against the only Black judge in the province who acquitted him takes on systemic qualities and becomes racially significant.

The Application Of Critical Race Theory: The Lower Courts in R.D.S.

The lawyer representing R.D.S. was Black activist/lawyer Burnley Jones who at the time was on staff at the Dalhousie Legal Aid Service.[72] The fact that R.D.S. was able

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[71]Royal Commission, *supra* note 69, Vol. 1, at xii.

[72]Burnley Jones is currently in private practice in the city of Halifax. Mr. Jones was in a particularly unique position to take on this case because of his experience as a Black activist who was the unsuspecting subject of R.C.M.P. surveillance for many years. In fact, special R.C.M.P. officers were actually assigned to spy on him during the 1960's and 70's. This information recently came to light as result of an application by Mr. Jones pursuant to the *Freedom of Information Act.* Also included in this documentation was R.C.M.P. information detailing the surveillance Black communities in Nova Scotia were under during that period and

to obtain a lawyer from his own community is quite remarkable given the fact that at the time of his arrest and trial, no Black lawyer was on staff at Nova Scotia Legal Aid and only one was in a staff lawyer position at Dalhousie Legal Aid. Additionally, at trial before Judge Sparks, something unique occurred.

In court that day was a Black female judge, a Black male lawyer, a Black court reporter, and the Black accused.[73] As one commentator noted, "It's the kind of scene the Marshall commissioners hoped for ...".[74] The trial was held before Corrine Sparks, Nova Scotia's only Black female Youth Court Judge, on 2 December 1994.

Historically, Blacks have been excluded from the profession of law in Nova Scotia. There has been an ongoing and continuing struggle by Nova Scotian Blacks to obtain a legal education despite segregation and oppression.[75] The Royal Commission on the Donald Marshall Jr. Prosecution recognized this exclusion when it made Recommendation 20 addressing the issue of legal careers for visible minorities. The Commission recommended that the government, the Nova Scotia Barristers' Society, and the Dalhousie Faculty of Law cooperate in the development of a program to identify, recruit, and support qualified visible minority students aspiring to legal careers. Prior to the Royal Commission on the Donald Marshall Jr. Prosecution, there were only seven Black lawyers in the entire province of Nova Scotia, most of whom were not practicing law primarily because of the colour barrier they faced in the profession.[76]

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racially stereotyped comments about them, including the comment that "...Black women were prolific child bearers ..."

[73]*R.* v. *R.D.S.*, *supra* note 36 at 18. As noted by Freeman J.A., in dissent at the Nova Scotia Court of Appeal at 18: "...Judge Sparks referred to the racial configuration of the court "which consisted of the accused, the defence counsel, the court reporter and the judge all being of African Canadian ancestry."

[74]Kimber, *supra* note 61, at 18.

[75]Throughout most of the twentieth century Blacks were legally segregated from the public school system in the province of Nova Scotia. From 1876 Black communities throughout the province formally organized to combat the inferior education and racial discrimination they encountered in the provincial school system. Legal segregation of Blacks in the education system was officially repealed, (at least on paper), in the late 1960's. In 1964 there were still four segregated school districts in the province and differential streaming on the basis of race continues in many Nova Scotia high school to the present day. See: Aylward, Adding Colour - A Critique of "An Essay on Institutional Responsibility: The Indigenous Blacks and Micmacs Programme at Dalhousie Law School", 8 CJWL 470.

[76]This pattern of exclusion in the legal profession persists today. For example there was a zero percent hire back rate for Black lawyers after articling with private law firms or government departments in the province in 1995. By 1997 only one Black lawyer had been hired back by a private law firm in the province and only a few had been hired by government departments and then only on short term contracts. See also the "Myths and Facts" brochure produced by the Indigenous Blacks and Mi'kmaq Programme at Dalhousie Law School which details some of the myths about Black lawyers commonly held by some members of the profession, including the myth of "inferiority" used in an attempt to justify the exclusion.

The first indigenous Black Nova Scotian to graduate from Dalhousie Law School was James Robinson Johnston in 1898.[77] The next indigenous Black Nova Scotian to graduate from Dalhousie Law School was not until 52 years later when George Davis graduated in 1952. The Black Community argued that this lack of Black legal representation in Nova Scotia has seriously undermined the community's ability to attack issues of racism in a legal framework and has retarded the advancement of rights doctrine in the context of race under the *Canadian Charter of Rights and Freedoms*. With the implementation of the Indigenous Blacks and Mi'Kmaq Programme at Dalhousie Law School in 1989[78] in response to the Royal Commissions' Recommendation 12, the number of Black lawyers in the province has increased but their participation in the profession is still not yet fully realized.

It is instructive that the lead counsel in the R.D.S. case, Burnley Jones, was one of the first Black graduates from the Indigenous Black and Mi'Kmaq programme at Dalhousie Law School. The fact that he is a lawyer is a direct result of the existence of this access programme. But for this affirmative action initiative at Dalhousie Law School, the R.D.S. case arguably would not have been heard by the Supreme Court of Canada.

As previously indicated, only Constable Stienburg and R.D.S. testified during the trial and Judge Sparks acquitted the young offender. Her decision was based on a finding of credibility.[79] Delivering an oral decision, Judge Sparks stated that:

> In my view, in accepting the evidence, and I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind and, therefore, based upon the evidentiary burden which is squarely placed upon the Crown, that they must prove all the elements of the offence beyond a reasonable doubt, I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th.[80]

Following this oral judgment, when the Crown attorney questioned the judge's finding of credibility in favour of the Black young offender by stating that "there's absolutely no reason to attack the credibility of the officer", Judge Sparks made the following comments in response:

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[77]The James Robinson Johnston Chair in Black Canadian Studies is named after this first member of Nova Scotia's Black Community to graduate in Law from Dalhousie Law School. It was, according to promotional material, "...established to bring Black culture, reality, perspectives, experiences and concerns into the Academy...".

[78]The Indigenous Blacks and Mi'Kmaq Programme at Dalhousie Law School is an affirmative action programme initiated by the school as a response to the issue of under-representation of Nova Scotian Blacks and Mi'Kmaq in the Law School itself and consequently in the legal profession in the province. I am the Director of this Programme.

[79]Glube, C.J.S.C.'s decision, *supra* note 36, at 8-9., see also: *R.* v. *R.D.S.*, YO93-168, (December 2, 1994) at 68.

[80]*R.* v *R.D.S.*, YO93-168, *supra* note 36 at 68.

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled the Court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non-white groups. That, to me, indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day.[81]

These remarks turned a routine acquittal of a young offender on summary conviction charges into a case where the credibility of a Black judge was attacked on the basis that she had a racial bias against the police. Burnley [Rocky] Jones, for R.D.S. stated in his opening statement to the Supreme Court of Canada "this case should have been about a young person, R.D.S. who was acquitted in 1994. However, I submit that through the appeal process the Crown has constructed a case about race."[82]

Constable Stienburg complained about these "disparaging" remarks[83] by Judge Sparks. The Chief of Police, Vince MacDonald threatened action against Judge Sparks in the form of a formal complaint to the Judicial Council[84] and the Crown immediately filed a Notice of Appeal of the acquittal of R.D.S., alleging actual racial bias on the part of the Youth Court judge.[85]

The Crown Appeal: The Finding of A Reasonable Apprehension of Bias

The Crown appeal of the acquittal of R.D.S. on the ground of an *actual* racial bias on the part of Judge Sparks against the police, was heard by the Honourable Chief Justice Constance Glube of the Supreme Court of Nova Scotia, sitting as a Summary Conviction Appeal judge, on 18 April, 1995.[86] Glube C.J.S.C. did not find an actual bias based on race but held that there was a reasonable apprehension of racial bias on the part of Judge Sparks based on the comments Judge Sparks made in response to the

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[81] *R.* v. *R.D.S.* YO93-168, *supra* note 36 at 68-69.

[82] Opening Statements by lawyer for the appellant, R.D.S. at the Supreme Court of Canada, March 10, 1997.

[83] Constable Stienburg complained to the police union and to the Chief of Police, Vince McDonald. Charles Saunders, "Speaking Out Can Be Hazardous", The Sunday Daily News, (May 7, 1995) 17.

[84] E. Hoare & B. Dorey, "Top Cop Considers Action Against Judge", The Mail Star (10 December 1994) as quoted by Devlin, R.F., "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R.* v. *R.D.S*"., (1995) 18 Dalhousie L.J. (1995). The threatened action never materialized.

[85] *R.* v. *R.D.S.* S.C.N.S. SH #112402 *supra* note 36.

[86] *Ibid.*, at 68-69.

Crown's assertion that "there's absolutely no reason to attack the credibility of the officer."

Glube C.J.S.C. applied the following test for reasonable apprehension of bias:

> The test of apprehension of bias is an objective one, that is, whether a reasonable right-minded person with knowledge of all the facts would conclude that the judge's impartiality *might* reasonably be questioned. [emphasis added]

Applying this low threshhold, she then reached the following conclusion:

> In my respectful opinion, in spite of the thorough review of the facts and the findings on credibility [on the part of Judge Sparks], the two paragraphs at the end of the decision lead to the conclusion that a reasonable apprehension of bias exists.[87]

Based on this finding, Glube C.J.S.C. ordered a new trial before a different judge. However, the existing jurisprudence showed two distinct approaches to the determination of whether a reasonable apprehension of bias exists, namely, the "mere suspicion" test which only requires that a "hint" of bias be found in order to satisfy the test, and the "real danger" test which requires a determination of a real likelihood of bias. In the view of the counsel for R.D.S., (ultimately submitted to the Nova Scotia Court of Appeal and the Supreme Court of Canada) the real danger test was the appropriate standard which should have been applied by Glube C.J.S.C. in this case.[88] Glube C.J.S.C. however, applied the lower "hint" of bias test and as a result her order of a new trial before a different judge, in the racial context of Nova Scotia, meant a new trial before a *White* judge.

The decision by Glube C.J.S.C. shocked and angered the Black Community across the country. In Nova Scotia, it was acutely felt for a number of reasons. First, Judge Sparks was not only the first Black judicial appointment in Canada but was, at the time, the only Black judge in Nova Scotia.[89] She was appointed to the Nova Scotia Provincial Court in 1987. At the time of the R.D.S. trial, she had been sitting as a judge for seven years. Understandably, the Black community celebrated Judge Sparks' personal achievement as well as the community achievement. They saw it as one hopeful sign that the racial divide that existed in the province might be bridged. Glube C.J.S.C.'s decision was seen as an attempt to topple a revered role model in the Black community and a warning to all Blacks to "keep their place" in the highly structured racial and social structures of the province. As one Black commentator noted,

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[87]*RDS* v. *R.*, Supreme Court of Canada, Appellant Factum at 10.

[88]See Appellants' Factum, *supra* note 87 at 20. See also the case comment by R.F. Devlin, *supra* note 84.

[89]The second Black Judge in the province, Judge Castor Williams, was appointed to the Provincial Court in 1995. Reporting on this development the Mail Star quoted then Premier John Savage as saying "...by bringing more Black and female judges to the bench, Nova Scotia is taking steps in the right direction...".

> these events imply a pattern that recurs whenever accusations – or even suggestions – of racism are made by blacks against the legal system. The pattern is, you speak out and you get slapped down – hard. It doesn't matter whether you're inside or outside the system. Who can be further inside the legal system than a judge ... the presence of blacks and Micmacs on the bench and bar was supposed to render the legal system more responsive to the needs and circumstances of their communities. Thus far, however, the system has been more defensive than responsive.[90]

The Black community was also cognizant of the fact that, three years after Judge Sparks' appointment to the bench, the Royal Commission on the Donald Marshall Jr. Prosecution recognized what the Black and Aboriginal communities had known all along – that racism played a part in Donald Marshall Jr.'s wrongful conviction and imprisonment. From the outset of their deliberations, the Royal Commission heard allegations that the criminal justice system in Nova Scotia dealt with people differently based on their race and social standing. In recognition of this fact, the Commission recommended "...that Governments *consider the needs of visible minorities* by appointing qualified visible minority judges and administrative board members whenever possible "[91] [emphasis added]

Second, in the decision rendered by Judge Sparks, the Black community saw what they had hoped for, and the Royal Commission on the Donald Marshall Jr. Prosecution saw what it had envisioned when it made Recommendation 12. A Black judge brought her life experiences to the adjudication process, and the social reality of racism was not only recognized by the judiciary but its impact on the particular case was openly considered as relevant to the decision making process.

Third, the Black community astutely recognized that this decision, if allowed to go unchallenged, could have wide ranging consequences beyond the particular case. Prior to the decision in *R.* v. *R.D.S.*, no Canadian case existed in which a finding of bias on the part of a judge had been founded on race.[92] This decision potentially subjected judges of colour, women judges, judges with disabilities, and gay and lesbian judges to unfounded allegations and challenges for bias not before countenanced with respect to White male judges. It also meant that in Nova Scotia , Black defendants potentially would always appear before White judges in future cases because this case stood for the wider proposition that Black judges could not be unbiased when adjudicating a case involving a Black accused and a White police officer (a return to the pre-Marshall status quo). A ruling that a Black female judge had a reasonable apprehension of bias based

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[90] Saunders, *supra* note 60 at 17.

[91] Royal Commission, *supra* note 56, Recommendation 12.

[92] See *R.D.S.* v. *R.*, Supreme Court of Canada, Factum of the Appellant, *supra* note 87 at 29 (available from the author); see also: Devlin, *supra* note 84 at 422.

on race, created the opportunity for judge shopping on the part of Crown attorneys (and defence lawyers in certain circumstances) based on the race of the judge.

Why did the Crown in the R.D.S. case pursue an appeal so vigorously on the basis of an actual racial bias or a reasonable apprehension of a racial bias on the part of this Black judge?[93] Why did the Chief Justice of the Supreme Court of Nova Scotia, sitting as a Summary Conviction Appeal Judge so readily accept the bias argument? One possible explanation is that the lessons of the Donald Marshall Jr. prosecution have not been easily learned and most of the major recommendations made by the Royal Commission have not been adequately implemented although, arguably, some progress has been made.[94] The Royal Commission on the Donald Marshall Jr. Prosecution found that apart from the obvious failure of the police

> ...Marshall's wrongful conviction resulted as well from the failure of others [in the criminal justice system] including both the Crown prosecutor and Marshall's own defence counsel to discharge their professional obligations...[95]

As a result of these findings the Commission not only made numerous recommendations directed at the policing and prosecutorial services in Nova Scotia but the Commission also recommended that:

> ...the Chief Justices and the Chief Judges of each court in the province exercise leadership to ensure fair treatment of minorities in the system.[96]

Fair treatment, the Black community would argue, includes not only the fair treatment of Black accused who appear before the Courts and the presence of Black judges but also the fair treatment of Black judges.

The Defence Appeal: The Nova Scotia Court of Appeal

When Glube C.J.S.C.'s decision was rendered, the immediate reaction in the Black community was outrage and an outpouring of support for an appeal . The lawyer for

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[93]Devlin, *supra* note 84.

[94]See: The Afro-Canadian Caucus Response to the Federal and Provincial Governments on Implementation of the Recommendations of the Marshall Royal Commission, 1992 (available from the author). There has also been proactive judicial reaction to the failure of the legislature to implement the disclosure recommendations made by the Royal Commission on the Donald Marshall Jr. Prosecution and the former Law Reform Commission of Canada, see: *R.* v. *Stinchcombe*, (1991), 68 C.C.C. (3rd) 1 (S.C.C.) and for a discussion of the Stinchcombe decision and the issue of the failure of the legislature to implement the Marshall recommendations regarding disclosure see: K. Roach, "Institutional Choice, Co-operation, and Struggle in The Age of The Charter" in J. Cameron, *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 357.

[95]Royal Commission, *supra* note 56, Digest of Findings and Recommendations, at 12.

[96]*Ibid.*, at 12.

R.D.S. was determined to file an appeal but much depended on whether Dalhousie Legal Aid would support such an appeal since the young offender could not, on his own, afford this costly legal process. Dalhousie Legal Aid Service threw its support behind filing an appeal to the Nova Scotia Court of Appeal. The Notice of Appeal of Glube C.J.S.C.'s decision was filed on 18 May 1995. From that point on, Black lawyers, academics, and the Black community knew that this case was of significant import, not just with respect to the interests of the Black youth , but also to the interests of the Black community across Canada.

As previously noted, in the United States, civil rights litigation[97] has occurred since the 1960's. The resulting decisions have enhanced the civil rights of African Americans through favourable substantive and procedural outcomes on some race-related issues.[98] In Canada, Black lawyers are beginning to take a Critical Race position on issues for the benefit of the Black accused. R.D.S. is the first Critical Race Litigation case explicitly arguing a race issue before the Supreme Court of Canada in the context of s.15 of the Charter and therefore has the potential to be precedent-setting.

There are a growing number of Black lawyers and others in Canada who are beginning to recognize that it is crucial to collectively and individually work in the area of race based litigation and to identify and overcome oppressions in order to enhance the interests of Blacks through substantive outcomes. Burnley Jones took a Critical Race position on the case at the individual representational level for this particular Black accused.

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[97]R. Kennedy, *supra* note 19 at 1013. This kind of race based litigation in the United States was a form of resistance aimed at challenging the institution of segregation. It is generally referred to as Civil Rights litigation or simply Rights litigation. However, see Davis and Graham, *supra* note 12 at 16 for an in-depth discussion on the limits of civil rights litigation and Derrick Bell, *supra* note 12 at 62 one of the founders of the Critical Race Theory movement who states

> ...Blacks need to examine what it was about their reliance on racial remedies that may have prevented them from recognizing that these legal rights could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form. This examination requires the redefinition of racial equality goals ... Reform of our civil rights thinking is as badly needed as was our thinking about jurisprudence prior to the advent of the legal realists. Indeed, racial realism is to race relations what legal realism is to jurisprudential thought. Traditional civil rights law is also highly structured and founded on the belief that the Constitution was intended ... to guarantee equal rights to blacks ... This belief in eventual racial justice, and the litigation and legislation based on that belief, was always dependent on the ability of its advocates to adhere to equality ideology while rejecting discriminatory experience ... Civil rights advocates must replace it [racial equality ideology] with an approach that recognizes the real role of racism in our society and seeks to deflect and frustrate its many manifestations.

[98]For an analysis of some of these important civil rights cases see Kennedy, *ibid.*, at 1013.

At the Nova Scotia Court of Appeal stage of the litigation in the R.D.S. case, professors at Dalhousie Law School,[99] including myself, offered our services to Burnley Jones in the preparation of the case on appeal as well as in the subsequent preparation of the case to the Supreme Court of Canada. This meant there were now two Black Nova Scotian lawyers, Burnley Jones and myself, involved in the appellant's case. It was starting to take on the form of a Black collective, albeit at this point a small one, working on a precedent setting case. At this stage of the litigation, Black lawyers were taking the lead in formulating the issues from a Critical Race perspective. Race was clearly an issue at the Nova Scotia Court of Appeal.

Three grounds of appeal were set out in the appellants Court of Appeal factum. These were that the learned Supreme Court Justice erred in law 1) in overturning the acquittal of the appellant, R.D.S., where the acquittal was based on findings of credibility by the Youth Court Judge; (2) in finding a reasonable apprehension of bias on the part of the Youth Court judge; and (3) in adopting a formal equality approach to the determination of a reasonable apprehension of bias rather than, as mandated by ss.15, 11(d) and 7 of the Charter, a substantive equality approach.[100]

The argument of the R.D.S. team before the Nova Scotia Court of Appeal required the court to take a substantive equality approach to s.15 of the Charter and not a formal equality approach as Glube C.J.S.C. did in her finding of a reasonable apprehension of bias. Burnley Jones noted that

> ...a formal equality approach means that the court should be colour blind and all persons should be treated equally regardless of age, gender, colour ... this formal equality approach means that the court should abstain and abstain completely from any reference to race as if to acknowledge that if race is mentioned it would taint the judicial proceedings...[101]

Formal equality mandates the same treatment for all and ignores the special needs of disadvantaged people.[102] Racism exists in Canadian society and a recognition of that fact can help jurists remedy the effects of discrimination. To assume that everyone in society regardless of race is always treated the same by police flies in the face of what common sense and experience tells us about the existence of racism in Canada and

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[99]The two White professors are Diane Pothier and Richard Devlin. Professor Pothier also acted as co-counsel and presented a portion of the oral argument before the Supreme Court of Canada. Professor Pothier is also an activist for the rights of persons with disabilities.

[100] *R.* v. *R.D.S.*, 145 N.S.R. (2nd) 284, Nova Scotia Court of Appeal, Appellant Factum , Ground of Appeal #3.

[101] *Ibid.*, Nova Scotia Court of Appeal transcript at 13.

[102] G. Brodsky and S. Day, *Canadian Charter Equality Rights For Women: One Step Forward or Two Steps Back*? Canadian Advisory Council on the Status of Women, 1989 at 190.

documented reports of the differential treatment of racial minorities at the hands of the police.

The majority of the Court of Appeal summarily dismissed this ground of appeal based on s.15 of the Charter as not being a proper issue because it was not raised before the summary conviction appeal court judge. This is an odd conclusion given the fact that the decision appealed from was that of the summary conviction appeal court judge and the Charter issue arose as a result of the Crown's allegation of errors in that decision. Oddly, the majority goes on (after making the determination that the Charter was not an issue) to say that "In any event, the Chief Justice did not ... apply an inappropriate equality approach in her consideration of apprehension of bias."[103] No analysis however, is undertaken by the Nova Scotia Court of Appeal in reaching this determination.

In spite of the fact that the issue of race was squarely before the court, the reported decision of the majority in the Nova Scotia Court of Appeal is devoid of any mention of race. Based on a reading of the majority decision, the reader would not know that Judge Sparks is Black. In fact, from the questions posed to the appellant's lawyer, it is arguable that at least one member of the Court saw no issue of race at all. This is apparent from the following exchange:

> Mr. Jones: "I think my Lord because this issue, was framed as being based on racial bias that it has gone to proportions far beyond the reality of the case and we are into arguing things that basically have nothing to do with my client..."
>
> Judge:"Chief Justice Glube didn't say that the Youth Court Judge had a racial bias did she?
>
> Mr. Jones: No, but she found that there was an apprehension of bias based on the comments..."
>
> Judge: "Those are two very different things are they not?"
>
> Mr. Jones: "Well, the foundation of Chief Justice Glube's decision that there was an apprehension of bias is based on race."
>
> Judge: Well you know that this is a Summary Conviction Appeal and you are limited to questions of law, where did Chief Justice Glube make her error of law in either formulating the test for reasonable apprehension of bias or applying it?"[104]

It was only in the dissenting opinion of Freeman J.A. in the R.D.S. case that the issue of race was acknowledged. Freeman J.A. says that Judge Sparks in her oral

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[103]*R.* v. *R.D.S.*, *supra* note 100 at 157.

[104]Court of Appeal Factum, *supra* note 100, at 11.

decision only articulated what everyone present ought to have known, that the case was racially charged, and that questions with racial overtones cannot be ignored if justice is to be done.[105] This erasure of the issue of race from the R.D.S. decision is similar to the erasure of racial issues by White lawyers in the excessive use of force by police and the Watts cases cited above. In the excessive use of force by police cases, neither the White Crown prosecutors nor the White defence lawyers argued the issue of racial *animus* on the part of the White police officers and White Crown prosecutors failed to lay appropriate charges in some of them. In the Watts case, the White Crown prosecutors failed to provide adequate disclosure to the six Black men accused of aggravated assault and the White defence lawyers "conceded" that there was no issue of improper motivation on the part of the Crown despite the history of the wrongful conviction of Donald Marshall Jr. and the legacy of racism in the criminal justice system in Nova Scotia that was uncovered by the Royal Commisssion.

The erasure of the issue of race from the majority Nova Scotia Court of Appeal decision in R.D.S. is also eerily reminiscent of the 1946 Nova Scotia case of Viola Desmond. She was charged with violating the provincial *Theatres, Cinematographs and Amusements Act* following her forceful ejection from a *de facto* racially segregated theatre in New Glasgow after she refused to sit in the balcony section reserved for Blacks only. The ticket price for seats in the balcony section included a lower provincial tax than that of tickets purchased for the floor section of the theatre. When Ms. Desmond took a seat in the floor section she did not have a ticket for that higher priced section. She tried to purchase the proper ticket but was refused and informed that "Negroes" could only purchase tickets in the balcony section. At her trial the issue of racial segregation was eradicated by legal argument surrounding the failure of Ms. Desmond to pay a one cent provincial tax under the act. Constance Backhouse in her Article "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge", Nova Scotia, 1946 stated the following:

> ...observers of the trial would have been struck by the absence of any overt discussion of racial issues on its face, the proceeding appears to be simply a prosecution for failure to pay provincial tax ... in fact, if Viola Desmond had not taken any further action in this matter, the surviving trial records would leave no clue to the real significance of the case.[111]

Professor Backhouse queried "...how many other trials lie buried, lost to historical scrutiny, because the real issues relating to racial divisions were (consciously?) unspoken or camouflaged with unrelated legal matters?"[112]

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[105] *R.* v. *R.D.S.*, *supra* note 100 at 161.

[111] Backhouse, *supra* note 25 at 305.

[112] Backhouse, *supra* note 25, at 305-6.

Race Based Cases Pre-R.D.S.

The case of *R.* v. *Parks,*[113] is also a Critical Race case which was heard by the Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada was denied). In *Parks*, a Black accused was charged with the murder of a White victim sought to challenge jurors for cause by asking potential jurors whether their ability to judge evidence without bias would be affected by the fact that the accused was Black and the victim was White. While there have been pre-*Charter* cases in which Black accused were denied the right to question the perspective jurors on their anti-Black attitudes,[114] the *Parks* case was the first to confront the courts with the issue of race in the context of jury selection under s.7 and 11(d) of the Charter.

The Ontario Court of Appeal in *Parks* held that the accused Black man should be allowed to challenge the jurors for racial prejudice because of the overwhelming evidence of anti-Black racism in Metropolitan Toronto and Canada.[115] Doherty J.A. (in the absence of evidence presented by counsel) relied on his own research into the existence of racism in Canadian society.[116] He found "...an ever-growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society, many deal[ing] with racism in general, others with racism directed at black persons."[117] Doherty J.A. noted that there was relatively little Canadian data relating to the impact of racial bias on jury verdicts but found that "despite the lack of empirical data, Canadian commentators have no doubt that racist attitudes do impact on jury verdicts where the accused is a member of a racial minority."[118] The Ontario Court of Appeal upheld the right of an accused to a fair trial with an impartial jury and noted that the trial judge must be satisfied that questions asked of potential jurors be relevant to assess the jurors' partiality.[119] Doherty J.A. held that partiality was both attitudinal and behavioural but biases of themselves are not sufficient to establish partiality. It is purely the impact on the juror's ability to be impartial which was to be the determining factor.[120]

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[113]*R.* v. *Parks,* (1993) 84 C.C.C. (3rd) 353.

[114]*R.* v. *Crosby,* (1979), 49 C.C.C. (2nd) 255 (Ont. H.C.J.) 255. For a discussion of this and other pre-Charter cases see: M. Henry and F. Henry, "A Challenge to Discriminatory Justice: The Parks Decision in Perspective", (1996) 38 Crim. L.Q. at 333.

[115]*Parks, supra* note 113 at 367. Informatively, the Court in Parks noted that in Nova Scotia, anti-Black racism has been described by both Blacks and non-Blacks as "pervasive."

[116]Henry and Henry, *supra* note 114, at 339.

[117]*R.* v. *Parks, supra* note 113, at 366.

[118]*Ibid.*, at 378.

[119]*Ibid.*, at 363 see also Henry and Henry, *supra* note 114 at 339.

[120]*Ibid.*, at 364.

The Ontario Court of Appeal decision in the *Parks* case was appealed to the Supreme Court of Canada. One of the grounds of appeal was that the Ontario Court of Appeal erred in law "when it collected the evidence on the need to challenge without giving the Applicant an opportunity to respond to that evidence or adduce further evidence."[121]

The Supreme Court of Canada denied leave to appeal in the *Parks* case thereby foreclosing the opportunity to address the issue of race . Specifically, the issue of whether the existence of racism and in particular anti-Black racism was the proper subject for taking judicial notice at a national level. This is a significant issue for Critical Race Litigation since arguments have increasingly been made that evidence of the existence of racism is still required because "...*Parks* did not provide any documentation or expert witness testimony." [122]

The *Parks* case stands for the proposition that a defendant's right to challenge for cause based on racial partiality is essential to the accused's constitutional right to a fair trial by an impartial jury enshrined in ss. 7 and 11 of the Charter. While the *Parks* decision can be criticized from a Critical Race Theory perspective for its emphasis on the race-neutral quality of the question posed to the jurors, for the purposes of this article, the discussion of the *Parks* case is limited to its usefulness as an example of the emergence of Critical Race Litigation in Canada.

The law in British Columbia is different than the law in Ontario. The British Columbian courts are very reluctant to accept the principles set out in *Parks* and insist that the decision is limited to Ontario. In the cases of *R.* v. *McPartlin*[123] and *R.* v. *Williams*[124] the idea of challenge for cause on the basis of racial bias on the part of potential jurors was rejected even though societal prejudice was not denied outright by the courts.

In the *McPartlin* case, a 1994 case involving a charge of sexual assault where the accused was a Black man and the victim a White woman, a distinction was drawn between partiality and bias. A juror may only be challenged for partiality and not for bias. Hence, even if a juror is shown to be biased against racial minorities, the court held that this is not indicative of the juror's inability to be impartial. The existence of widespread bias and prejudice against racial minorities, does not in itself establish partiality of prospective jurors against a particular racial minority defendant to

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[121] Henry and Henry, *supra* note 114, at 345.

[122] Henry and Henry, *supra* note 114, at 347.

[123][1994] B.C.J. No. 3101 B.C.S.C.

[124](1996) 106 C.C.C. (3rd) 215 (B.C.C.A.); (1994) 90 C.C.C. (3rd) 194 (B.C.S.C.).

displace the presumption that jurors can be relied on to do their duty and decide the case without regard to their personal biases and prejudices.[125]

This decision differs from the decision of the Ontario Court of Appeal in *Parks* in that while the Ontario Court of Appeal did not ignore the presumption that jurors would decide the case on the merits, it nonetheless held that the presumption that jurors can be relied upon to do their duty and decide the case without regard to their personal biases and prejudices "must be balanced against the threat of a verdict tainted by racial bias."[126]

A similar analysis was articulated by the British Columbia Court of Appeal in the *Williams* case which also considered the *Parks* decision. In *Williams*, an Aboriginal man was accused of the robbery of a White victim. Notably, the Crown in the *Williams* case did not challenge the existence of racism, however, the court still did not accept that there was partiality which could prevent the jurors from making a rational decision.

The existence of racism in Canadian society is not an accepted fact in Canadian jurisprudence as it is in American jurisprudence. Any reference to racism is frowned on by Canadian courts and its existence and influence on prospective jurors is considered to be non-existent. As Roach noted:

> *Parks* also differs from *Williams* in its perceptions about how racial bias among jurors might affect their decision-making. The Ontario Court of Appeal in *Parks* recognized the sub-conscious and institutional nature of anti-black racism where as the court in Williams seemed only concerned about the likelihood of conscious and intentional racism against an Aboriginal accused ... an implicit model of intentional racism also may explain why Esson C.J.S.C. stressed that there was no "racial element" in the robbery that Williams was charged with ...[127]

The result of *McPartlin* and *Williams* is that a juror cannot be challenged on grounds of racial bias in British Columbia. To date, there has been no case in Canada where a challenge for cause based on racial partiality has been raised or where the existence of societal racism has been accepted as a matter of the judges background knowledge of social reality, common sense and experience. This fact was of particular significance for the *R.D.S.* case since the issue of the existence of racism in Canadian society was at the heart of the issues before the Supreme Court of Canada. The Critical Race case of *R.* v. *Williams*[128] is currently before the Supreme Court of Canada.

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[125] *R.* v. *McPartlin, supra* note 123, at 199.

[126] K. Roach, "Challenges for Cause and Racial Discrimination", (1995) 37 Crim. L.Q. 410..

[127] Roach, *supra* note 126 at 420-21.

[128] *R.* v. *Williams, supra* note 124.

The Supreme Court Of Canada In R.D.S[129]: The Black Presence

Burnley Jones, who began by conducting critical race litigation at the individual level of representation of R.D.S. was now about to embark on an ever broadening "collective" strategy of critical race litigation. As one critical race theorist noted "Law should be emancipatory and liberatory for everyone. And although for Black people, Law in Canada has so often operated against us and so seldom worked for us, Law remains too valuable a tool for us ever to abandon."[130]

After the decision of the Nova Scotia Court of Appeal was rendered in the R.D.S. case, a critical decision had to be made. Because this was a summary conviction of a young offender, there was no automatic right of appeal to the Supreme Court of Canada. Leave to appeal had to be sought pursuant to s. 40 of the *Supreme Court Act.*[131] A number of questions immediately arose. Would the young offender want to appeal to the high court? Would Dalhousie Legal Aid support an appeal to the Supreme Court of Canada? Where would the funding come from to launch such an appeal? Would there be interveners in the litigation and, if so, which ones? Would the Supreme Court entertain a leave application where the issue was one of race? As Esmeralda Thornhill noted, there had been, to date, a "... systematic and steadfast refusal of the Supreme Court of Canada to take a stance on Racism and settle definitively this question of public interest."[132]

R.D.S. and his mother wanted to pursue an appeal to the Supreme Court of Canada. Thus, the first hurdle was crossed. This is the most crucial issue in any critical race litigation strategy. Without the consent and full participation of the client, raising issues of race in litigation can be difficult if not impossible. Issues of ethics and the best advocacy for the Black client may collide with the interest of the larger Black community in addressing legal issues of racism. Furthermore, ethical considerations arise for the lawyer in making the decision to pursue a critical race strategy in spite of the reluctance or resistance of the client. If the client does not wish to pursue the racial aspect of the case, does the advocate acting in the best interests of her/his client

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[129] *RDS* v. *R.*, [1997] 3 SCR 484.

[130] E.M.A. Thornhill, "Focus on Racism: Legal Perspectives From a Black Experience", Currents, January, 1994 4.

[131] R.S.C., 1985, C. S-26, s. 40.

[132] Thornhill, *supra* note 130 at 5. Professor Thornhill also points out examples of this resistance in footnote 11 where she cites the following: "In January 1988, the Supreme Court of Canada refused the Commission des droits de la personne's request to appeal a Quebec Court of Appeal decision concerning racial discrimination." Commission des droits de la personne du Quebec c. La Communaute urbaine de Montreal *et.al.* (1983) 4 C.H.R.R., D-1302 (C.A.). In addition, the Charter Challenges Programme before its abolition in 1992, was forced to acknowledge that our legal system still has not succeeded in confronting or dealing effectively with racism and racial discrimination as a societal problem of public interest: National meeting on racial and ethnic discrimination , Ottawa, 28 September 1989...." Note: The Court Challenges Programme has since been reinstated.

continue to pursue a critical race litigation strategy ? What are the conflicting interests of the individual Black client and the larger Black community and society as a whole and how are these to be balanced?

Appealing to the Supreme Court of Canada took a great deal of courage on the part of this young offender. He was under the cloud of a pending new trial and a Supreme Court of Canada challenge could take a year or more, during which time the new trial would be in suspension, hanging over him like the sword of Damocles. He was the unwitting subject of a case about race and he was about to become well known, at least by his initials. He was also perhaps in essence a Canadian Rosa Parks.[133]

With the consent of the client secured, the next question was whether Dalhousie Legal Aid would be willing to pursue the Supreme Court of Canada challenge. This hurdle was crossed when Dalhousie Legal Aid announced its willingness to pursue the appeal. The major issue of funding for the litigation was addressed by the success of an application to the Court Challenges Programme for assistance. [134]

The formal Notice and Application for Leave to Appeal to the Supreme Court of Canada was filed by the appellant, R.D.S., on 20 December 1995 on the basis of the following grounds of Appeal:

> I) Did the Court of Appeal for Nova Scotia err in law in holding that the Chief Justice of the Supreme Court of Nova Scotia, sitting as a summary conviction appeal court judge, made no error in law with respect to the test for, or the application of the test for, or the finding of, reasonable apprehension of bias on the part of the trial judge?
>
> 2) Did the Court of Appeal for Nova Scotia err in law in dismissing the ss.7, 11(d) and 15 *Charter* requirements inherent in deciding the legal parameters of a reasonable apprehension of bias?[135]

The Supreme Court of Canada would only grant leave under s.40 if it was of the opinion that the issue involved in the case was of sufficient public importance.[136] It was therefore necessary to convince the Supreme Court that the right of racial minority judges and indeed all judges to recognize and address issues of race was a matter of public importance.

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[133]Rosa Parks refused to follow a bus driver's order to give up her seat on a Montgomery, Alabama segregated bus. This action and her subsequent arrest began what was to become the Montgomery boycott and the beginning of the civil rights movement. For an in-depth discussion of the civil rights movement, Martin Luther King and the N.A.A.C.P. litigation strategy see: Randall Kennedy, "Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott", (1989) 98 Yale L.J.

[134]The Court Challenges Program is a government-funded program that has as its mandate the sponsoring of Charter challenges to the Supreme Court of Canada and provincial Appellate Courts.

[135]As set out in the Appellant's Factum, S.C.C., *supra* note 87, at 8.

[136]R.S.C., *supra* note 131, s.40.

The main reason that the appointment of Blacks and women to the judiciary was seen as an important goal was to ensure that the judiciary would reflect the experiences of a broader spectrum of society. As Madam Justice Bertha Wilson noted with respect to the appointment of women:

> women view the world and what goes on it from a different perspective from men; and ... women judges, by bringing that perspective to bear on the cases they hear, can play a major role in introducing judicial neutrality and impartiality into the system.[137]

Madam Justice Wilson also noted with approval Professor Griffith's suggestion that " judicial attitudes [in Canada] towards political and social issues reflect the lack of a proper understanding of the view of labour unions, minorities, and the underprivileged."[138]

Currently in Canada, there are five Black judges at the Superior Court level and approximately twelve in Provincial Courts across the country. If these judges are to achieve the goal of bringing their "different perspective" to bear on legal issues, it is essential that they not be silenced or overruled by White judges on the basis of allegations of bias when they try to apply their knowledge and experience in addressing issues of race. This was the underlying issue that the appellants hoped the Supreme Court would recognize by granting leave to appeal in R.D.S. Black Canadians have called for a greater diversity on the bench because they hoped this diversity would "enrich the law by bringing sensitivity to the lived realities of communities of colour ... the experiences of excluded ethnic communities, and therefore our issues, are simply beyond the experience of most White judges".[139]

There was, however, no precedent for judicial sensitivity of this kind with respect to issues of race at the Supreme Court level. Chief Justice Isaacs noted in his presentation to the Dalhousie Black Law Students Association:

> ... to my knowledge, since section 15 of the Charter came into force in 1985, no Charter claim for Racial Equality has reached the Supreme Court of Canada. This anomaly suggests either that Governmental bodies in Canada never engage in actions which have racially discriminatory effects, or that people of colour are apathetic about their rights (although I do not believe that to be so), or that they are effectively barred from asserting them. Meanwhile, in the seminal case, *Andrews* v. *Law Society of British Columbia*, the Rights claimant was a White South African with British citizenship...[140]

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[137]Madam Justice Bertha Wilson, "Will Women Judges Really Make a Difference?", (1990) 28 Osgoode Hall L.J. 507.

[138]Professor Griffith, "The Politics of the Judiciary" as quoted by Madam Justice Wilson, *ibid.*, at 508.

[139]Mr. Justice Isaacs, Chief Justice of the Federal Court of Canada in an address to the Dalhousie Black Law Students' Association, Dalhousie Law School, February, 1997.

[140]*Ibid.*

Not surprisingly, Black lawyers involved in the R.D.S. case were somewhat skeptical about the Supreme Court's receptiveness to race issues since the Supreme Court of Canada denied leave to appeal in the Ontario case of *R.* v. *Parks*[141] referred to earlier.

Leave to appeal to the Supreme Court of Canada from the decision of the Nova Scotia Court of Appeal in the R.D.S. case was granted on 6 May 1996. The fact that *R.D.S.* and *Williams* have reached the Supreme Court of Canada indicates that, unlike some lower courts, the Supreme Court now recognizes that issues of race require explicit attention.

Black lawyers involved in the R.D.S. case and the Black community across Canada were cautiously optimistic that the Supreme Court of Canada was ready to make a definitive statement on the existence of racism in Canadian society. This would bring Canadian jurisprudence in line with the American jurisprudence on this issue and lead to the full recognition of racism in this country. Further, a recognition of the existence of racism in Canadian society would be in accordance with the Canadian jurisprudence which now accepts without question the existence of gender discrimination in Canadian society. The controversy of whether one must prove racism through the introduction of evidence or whether it can be accepted as part of the judge's general background knowledge hopefully will be finally settled. This recognition could provide the impetus to more effective Critical Race Litigation strategy and lead to meaningful improvements for people of colour in Canadian society in the same way that the recognition of gender discrimination by the Courts has helped women and the feminist agenda.[142]

While Black lawyers involved with R.D.S. were skeptical about the Supreme Court's willingness to fully confront the issues of race raised by the case, they were determined to squarely place the issue in arguments at the Supreme Court of Canada, in spite of the view of some White colleagues who were not on the litigation team that any argument based on race would not be appropriate and might predispose the Court to be unfavourable to the appellant's case.

As noted above, the theories of deconstruction, narrative or storytelling in legal discourse and reconstruction were employed in the R.D.S. strategy. Specifically, the litigation team's strategy was to offer the argument that the allegation of a reasonable apprehension of bias arose in this case because Judge Sparks was a Black female judge who, in adjudicating a trial of a Black accused, explicitly recognized that the case had racial overtones.[143] And as Freeman J.A., in dissent in the Nova Scotia Court of Appeal

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[141] *Parks, supra* note 114. Leave to appeal to the Supreme Court of Canada denied [1994] 1 S.C.R. x.

[142] See: Allen and Morton, *supra* note 29 for an in-depth discussion and analysis of the success of LEAF intervention at the Supreme Court of Canada.

[143] *R.D.S.* v. *R.*, Appellant Factum , in the Supreme Court of Canada, *supra* note 87, at 14.

observed, "Questions with racial overtones ... are more likely than any other to subject the Judge to controversy and accusations of bias...".[144]

The appellants' position was also that the "reasonable person", whom a court invokes to determine whether or not a reasonable apprehension of bias arises, must be aware of the fact that racial discrimination exists in Canada. Further, the litigation strategy was to use the Charter, specifically s.15 to challenge the formal notion of equality, that is, that judges must be colour blind. The appellant argued that:

> To be capable of detecting racism, one must be conscious of colour, race, and racial interactions because s. 15 was not restricted to a formal notion of equality, it was not satisfied by the notion of equality as sameness. Judicial analysis which ignores the possible racial dynamics of a situation will perpetuate racism while a substantive notion of equality recognizes that it may be necessary to take account of race in order ultimately to discount the invidious effect of race. To be sensitive to the possible racial dynamics of a given situation, as Judge Sparks was, is not indicative of bias but rather evidence of an understanding of the real meaning of equality. Given that racism is a reality in Canadian society, racism will be perpetuated if, as the majority of the Court of Appeal's analysis demands, judges studiously ignore the dynamics of race.[145]

The appellant's litigation team consisted of two Black lawyers (one of whom, Burnley Jones, was the lead counsel on the case and the other (myself) a member of the faculty of law at Dalhousie Law School) and four White team members.

As soon as the decision granting leave to appeal to the Supreme Court of Canada was handed down, the litigation team commenced preparations. At the same time we were preparing the factum, we were also planning a strategy around the issue of interveners. We all recognized that the issues raised by the appeal were of national importance and we wanted to encourage rights advocacy groups to participate, particularly Black organizations as well as coalitions consisting of other groups interested in the outcome. This meant that some of the Black lawyers' time had to be spent informing community organizations about the case. This proved not to be too onerous a task since it seemed that every Black organization around the country knew of, and was interested in the R.D.S. appeal.

A number of interveners filed motions for intervener status. One of the first to file was a coalition of two interest groups consisting of the Women's Legal Education and Action Fund (LEAF) and the National Organization of Immigrant and Visible Minority Women of Canada (NOIVMWC).

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[144] *Ibid.*, at 14

[145] *R.D.S.* v. *R.*, Appellant Factum , *supra* note 87, at 35-36.

The R.D.S. case had a significant import for the feminist agenda because a finding of a reasonable apprehension of racial bias today could very well be a finding of a reasonable apprehension of a gender bias tomorrow. A test for a finding of a reasonable apprehension of bias as low as that suggested by Glube C.J.S.C., that is, a "mere suspicion" test,[146] and accepted by the majority in Nova Scotia Court of Appeal, could have wide ranging implications for women judges as well as racial minority judges. The appellants submitted to the Supreme Court of Canada that the "real danger" test for the determination of a reasonable apprehension of bias was the appropriate standard to be applied in this case because if the threshold test is too low "...parties might seek to invoke a test with a low threshold to disqualify judges based on race or gender."[147]

The other member of the coalition of which LEAF was a part was the .NOIVMVC. This is a national, non-profit organization which was established in 1986 to promote "equality for immigrant and visible minority women in Canada ... through its research projects, legislative briefs, position papers and consultations, NOIVMWC addresses the implications for immigrant and visible minority women of Canada of various issues, including racism, poverty, social security reform, employment equity and violence."[148] NOIVMWC itself is a coalition of member organizations which include the women's committees of the Canadian Hispanic Congress, the Chinese Canadian National Council and the Canadian Council of Filipino Associations.

The interveners, LEAF and NOIVMWC submitted that the case raised important equality issues of national significance for all Canadians, and that their expertise and experience would assist the Supreme Court of Canada in analyzing the issues in the case. These Interveners' focus was on an equality analysis of gender and race, and the intersection of the two.[149]

Other interveners also applied to intervene in the R.D.S. appeal. The African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada filed a joint motion. The African Canadian Legal Clinic(ACLC), as noted above, is a non-profit organization funded by the Ontario Legal Aid Plan. The mandate of the ACLC is to address systemic racism and racial discrimination in Ontario (and Canada) through test case litigation and intervention strategy. The Afro-Canadian Caucus of Nova Scotia (ACC) was established in 1987 to provide "advocacy and leadership on socio-economic, cultural and political matters

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[146] See: The Appellants' Factum, Supreme Court of Canada, *supra* note 87, at 14, for a further discussion of these tests see also: R.F. Devlin, *supra* note 84.

[147] *Ibid.*, at 19.

[148] LEAF/NOIVMWC Notice of Motion for an order granting leave to intervene in the R.D.S. appeal p.4

[149] *Ibid.*, at 6.

in Nova Scotia, as they impact upon African-Canadians,"[150] and the Congress of Black Women of Canada is a voluntary non-profit organization formed in Toronto in 1973. The Congress of Black Women acts as an advocate for the equality rights of African Canadian women and their families throughout Canada and has a chapter in Nova Scotia.

The grounds put forward by the ACLC, the ACC of Nova Scotia and the Congress of Black Women of Canada in support of their application for Intervener status, were that the applicants represented the African Canadian communities throughout Canada and traditionally advocate on their behalf in areas of legal, political and social concerns. The R.D.S. case involved issues of judicial bias, race and police issues which were of great concern to the African Canadian communities in Nova Scotia, Ontario and throughout Canada. Additionally, the applicants had demonstrated expertise with issues relating to African Canadians and the police and argued that they would be directly affected by the decision of the Supreme Court of Canada because "any such decision will influence the way in which the Canadian courts address issues of race within the criminal justice system."[151]

There was an additional group that sought intervener status but, unfortunately, were unable to meet the deadline for filing a factum in support of their application for intervener status to the Supreme Court of Canada. The Parent Student Association of Preston [Nova Scotia] was formed in 1989 in response to the racial disturbances at Cole Harbour District High School to address the racism that Black youth had experienced in schools and with the police authorities, especially in the communities of Preston and Halifax-Dartmouth.[152] The PSAP argued that notwithstanding the "well established historic position of Black people in Nova Scotia, and owing to the systemic and endemic racism and discrimination that have pertained in the province over the years, Blacks have suffered injustice at the hands of the justice system, including the Police..."[153]

As Allen and Morton point out, for over a decade, the Supreme Court of Canada has progressively loosened restrictions on standing, to the point where the Canadian practice is now more lenient than the American one.[154] The Allen and Morton study also indicates that interest group intervention is successful in a number of areas. For example they conclude that:

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[150]Notice of Motion by the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada , p.12-13.

[151]Notice of Motion, *supra* note 150, at 3.

[152]Notice of Motion on behalf of the Parent Student Association of Preston, at 2.

[153]Notice of Motion, *supra* note 152, at 5.

[154]Allen and Morton, *supra* note 29, at 10.

> ...in three *policy* fields – pornography, immigration, and abortion/foetal rights – feminists have not lost a single case. In the field of abortion and fetal rights, the Court struck down the remaining Criminal Code restrictions on abortion (Morgentaler, 1988); threw out two "right to life" claims on behalf of the unborn (Borowsi and Daigle); acquitted midwives who botched a home-birth of any criminal guilt (Sullivan); prevented social workers from intervening to protect an unborn child from a glue-sniffing mother (Winnipeg Child Services); and struck down Nova Scotia's attempt to restrict abortions to licensed hospitals (Morgentaler, 1993)[155] [emphasis added].

Allen and Morton also note that the *Andrews*[156] case is recognized as a triumph for the "feminist-preferred version of equality rights analysis, a technique that reduces the goal of section 15 to protecting "historically disadvantaged minorities...".[157] although, as noted earlier, the use of s.15 in this way has not benefited Blacks to date.

Most of the intervener organizations were Black. LEAF/NOIVMWC retained Black lawyers Yola Grant and Carol Allen to argue their position before the Supreme Court. The ,ACLC, the ACC of Nova Scotia and the Congress of Black Women of Canada retained Black lawyer, April Burey. This level of Black participation in the litigation was unprecedented. The Supreme Court of Canada granted all eligible interveners standing.

For the first time in the history of this country, the Black community had rights-based organizations who not only intervened in the case, but had Black lawyers to

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[155]Allen and Morton, *supra* note 29, at 10. Allen and Morton note that "with one exception, previous analyses of interest group litigation have ignored the relation of litigation to the Policy Status Quo. This oversight leads to inaccurate assessments of interest group litigation ... one of the potential benefits of litigation is to consolidate interest serving government policies once achieved so they cannot be eroded by subsequent political action." This describes how the series of "defensive wins" that followed the 1988 *Morgentaler* decision has strengthened the "pro-choice" position on abortion consistent with *Morgentaler,* the judges' rejected any legal recognition of the unborn child in *Daigle* (1988), which in turn made it easier for the midwives in *Sullivan and Lemay* (1991) to be acquitted of the homicide charges against them. *Sullivan* then became an additional precedent for the Manitoba Court of Appeal's ruling that the Winnipeg Childcare Services agency could not intervene to protect an unborn child ... while typically not as valuable as a policy gain, these legal gains can be significant and should be recognized as a component of success (or defeat) in interest group litigation.

[156][1989] 1 S.C.R. 143.

[157]Allen and Morton, *supra* note 29, at 5.3. See also: *Racial Discrimination: Law and Practice*, *supra* note 23, at 3-5. in which it is noted that the decision in *Andrews* is important for at least three reasons: 1). The Supreme Court rejected the 'similarly situated test' and adopted a broad approach to equality; 2). The Court reinforced its recognition of adverse impact discrimination set forth in *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.*[1985] 2 S.C.R 536 and reiterated that intent is not a prerequisite for discrimination; and 3). The Court determined that in order to constitute discrimination, a distinction made by an impugned law must discriminate on one of the grounds listed in s. 15 or on "analogous grounds, ie., groups which experience disadvantage relative to other Canadians. "The Court suggested that the purpose of s.15 is to correct historic social and political inequality, rather than to achieve 'identical treatment' of all individuals and groups, and the Court adopted a characterization of s.15 as 'a compendious expression of a positive right to equality in both the substance and administration of the law."

argue their positions. For the first time in Canadian history, four Black lawyers from across Canada argued before the Supreme Court of Canada either as appellant's counsel or as intervener counsel. Other Black lawyers who did not actually argue the case worked on the various litigation teams preparing factums, and offering advice or encouragement to their Black colleagues on what could be a precedent-setting case involving race and the *Charter*. The respondent's team also had a Black articling student assisting to prepare their case.

Equally important, Black lawyers were in charge of the litigation strategy. This is desirable and to some degree crucial for the employment of Critical Race methodologies such as narrative or storytelling. It appeared that a shift in the power paradigm had occurred. The Black community did not have to totally depend on White lawyers to carry the case forward. Although many White lawyers worked on the R.D.S. appeal, for the first time, the Black community and Black lawyers were in control of the litigation agenda. A shift in the power paradigm is essential if the gulf between the rhetoric of equality between the races and the reality of equality is to be bridged.

For true equality between the races to occur, those who have the power to make decisions in society, whether in law schools, law firms, or other societal structures, must include significant numbers of racial minorities, First Nations, and other historically excluded groups. Achievement of this goal requires a willingness on the part of dominant group members to practice what they preach by transforming the power structure within Canadian society and legal institutions and giving up or sharing power in decision making with racial minorities.[158] This occurred with respect to most aspects of the R.D.S. litigation since White members of the Appellant's team showed considerable deference to the expertise of the Black team members in preparation of the factum and development and implementation of the critical race litigation strategy.

However, on one significant issue such deference was notably absent. This related to the litigation team's media strategy with respect to the case before the Supreme Court of Canada. Media strategy was not discussed between the team members. In spite of this, one White male member of the appellant's team, without consulting lead counsel or other team members, gave press interviews the day before the case was to be heard.

This was problematic for two reasons. First, in any high profile case media strategy should be determined by lead counsel in consultation with the team. The use of media prior to or during litigation gives rise to issues of professional ethics and strategic issues with respect to whether or not it is beneficial or detrimental to your client and litigation strategy to give press interviews. Second, and most importantly, because the coverage resulted from a White male member of the team giving interviews

[158]For an in-depth discussion of this concept see Aylward, *supra* note 75, at 470.

to the press, a very important aspect of the case, that the race-based litigation was conducted by lead counsel who was Black and that the Appellant's team and Interveners included other Black lawyers, was completely lost, and received no media coverage in the resulting stories. This obscured a very significant historical fact. This omission perpetuated the power imbalance in society and reinforced the old stereotype that the Black community is incapable of bringing important legal issues forward without the paternal assistance of White males. Moreover, the fact that the media coverage focused on the comments of a dominant group member, gave or reinforced the impression that a case involving race claims could only be legitimate if supported by a member of the dominant group.

The appellant's litigation team was excited about the successful intervener applications but one of the factums filed by the Interveners caused the Appellant's team some concern. The LEAF/NOIVMWC coalition based part of their legal argument on the doctrine of judicial notice:

> ...The Interveners urge this Honourable Court to require judges to take judicial notice of the social context in which a case arises in order to give effect to the constitutional guarantee of equality enshrined in s.15 of the Charter.[159]

The Appellant's factum had made a strategic decision not to argue judicial notice as a ground in the appeal. Judicial notice has been defined as:

> The acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy may be noticed by the court without proof of them by any party.[160]

The potential problem with this line of argument for the Appellant was that the doctrine of judicial notice requires that the fact be so notorious as not to be the subject of dispute or that it be capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy. The Respondent of course argued, both in its factum and orally before the Supreme Court of Canada, that the issue of the existence of racial discrimination was a disputable fact and, therefore, any judge who wished to take judicial notice of the existence of racism would have to inform the parties that she/he was taking judicial notice of its existence and then allow the parties to introduce evidence for or against the existence of racism in Canadian society.

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[159]Factum of the Interveners, Women's Legal Education and Action Fund and National Organization of Immigrant and Visible Minority Women of Canada, at 6.

[160]John Sopinka *et al.*, "Rules Dispensing With Or Facilitating Proof" in *The Law Of Evidence in Canada* (Toronto: Butterworths, 1992) at 976 as quoted by LEAF in its' factum to the Supreme Court of Canada in *R.* v. *R.D.S.* Court No. 25063 at 10.

Further, the Respondent argued that if race had been the issue at trial, the Crown should have been afforded the opportunity to rebut the studies supporting the existence of racial discrimination, such as the Marshall report, by providing a literature review and *viva voce* evidence from a sociologist, psychologist, or research methodologist to properly interpret the studies, to examine the methodology of those studies, and to evaluate the reliability of the studies.[161] It should be understood however, that the LEAF/NOIVMWC argument was that the existence of racism in Canadian society was *not* a disputable fact, a position with which the Appellants agreed.

The Appellant's concern was that emphasis on judicial notice in the LEAF/NOIVMWC factum would distract the Supreme Court from the proposition that recognition of racism in Canada was a matter of common sense on the part of both judges and the reasonable person, and might encourage the Supreme Court to adopt an evidence-based approach to the issue of racism.

The concern was discussed with the intervener and the intervener's oral argument placed more emphasis on the social context argument that was also proffered in its factum. LEAF/NOIVMWC argued that the Supreme Court should adopt the approach which Judge Sparks relied on. Specifically, Judge Sparkes relied on social context to assess the impact on the Crown's case of the contradicted testimony before her. Failure to draw appropriate inferences from the conflicting testimony of R.D.S. and the police officer would have resulted in a de-contextualized decision-making exercise. This would have deprived R.D.S. of the equal benefit and protection afforded him by s.15 of the Charter. The joint interveners argued that:

> Absent social context to assess credibility of witnesses, the testimony of R.D.S. might seem preposterous and unworthy of credit ... the equality guarantees enshrined in s.15 require that this Court direct triers of fact to articulate in their decisions all non-legal assumptions upon which they base their judgments: whether they rely upon experiential knowledge, common experience or community awareness, or knowledge derived from extrinsic sources, in addition to the evidence presented in the case. This articulation would facilitate review by superior courts, guard against reliance on myths and prejudicial beliefs, and ensure that the inclusion in reasons for judgment of valid generalizations based upon well known social facts and observations is not construed as bias.[162]

This reinforced the Appellant's argument before the Supreme Court that the case was not about judicial notice because a judge has a right and a duty to be aware of what is happening in society. A judge has to be alert to the possibilities of racism in an interracial confrontation. The reasonable, aware, and informed person in today's society should be aware of the existence of racism and the possibility it may influence

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[161]Respondent's Factum, Supreme Court of Canada, Court File No. 25063 at 47.

[162]LEAF/NOIVMWC's S.C.C. Factum, *supra* note 159, at 13.

interactions between Black and White people in Canadian society. Judge Sparks was merely taking account of this general social context. It would be unrealistic and overly burdensome for society to have trials lasting a month in order to allow experts to testify on every side on the indisputable issue of the existence of racial discrimination in Canadian society. Judge Sparks merely said out loud what everyone could see. Madame Justice L'Heureux-Dubé highlighted this point in her question to the respondent during oral argument: "If the issue is not put on the table but stays here [in the head] is that better for society? Is it better to put it on the table and discuss it or is it better that it be silenced and no one know what is in the head of the judge who judges?"[163]

The oral hearing before the Supreme Court of Canada in the case took place on Monday, 10 March 1997. When the litigation teams arrived at the Supreme Court of Canada they were met by an overwhelming number of Black community members who had been lined up since early morning waiting for the doors to open. They came from all across the country, including Nova Scotia, Ontario, Quebec, British Columbia and Alberta. It may have been the first time in the history of the Court that citizens in such numbers showed up for a hearing and it was an unprecedented audience of predominately Black spectators. Included in the audience were also law students from across the country who had been mooting the case in their schools for months prior to the appeal. All nine justices of the Supreme Court sat together to hear this appeal. A bus load of law students had booked a tour of the Supreme Court for that day and normally they would have been seated first. This meant that many Black community members might not be able to sit in the main court room. These law students, understanding the importance of this case to the Black community, graciously told the court attendants to sit them last. The community members thanked them profusely. The main court room was full, as well as two anterooms in the Supreme Court building where spectators could listen to arguments in the Court room on television monitors.

The Crown argued in its brief regarding the intervener applications (and at the Supreme Court hearing) that the case should be resolved on common law principles with no reference to the *Charter* and requested that the Court limit any arguments that the Interveners make to non-Charter issues. This request was not granted.

The primary issue as stated by the Respondent was one of judicial notice (which they had not argued at the Nova Scotia Court of Appeal level) and that the essence of the case was that:

> ...a judge of the youth court made comments which inferred that the actions of the police officer were racially motivated. The officer against whom the conclusions were drawn

[163]Videotape of *R.D.S.* v. *The Queen* #25063 1997-03-10 (available from the author).

> was not given the opportunity to respond and no literature or report was cited by the court for its generalizations...[164]

While the Respondent conceded that "racism exists in Canada"[165] and stated that "we are not here to say that racism does not exist - we all know that"[166] its position was that the test for judicial notice is that the fact must be so notorious that it is uncontestable, then the proper procedure is "does anyone contest it and if so the judge cannot take judicial notice of it."[167] Interestingly enough, the Crown in its oral argument to the Supreme Court of Canada did not seem to want to argue the reasonable apprehension of bias issue before the court. Indeed, the Respondent argued that this case was of some significance and suggested to the Court that a more:

> Neutral position emotionally, but with a solid legal base, without pointing the finger at either the judge or the police officer ... is that judicial notice was taken of contestable issues and no opportunity was given to respond, then we need not move to the reasonable apprehension of bias issue ... this is the least controversial approach, however, if the Court doesn't choose to adapt that argument then the Crown will still support the reasonable apprehension of bias argument but we don't need to pursue it.[168]

The Respondent also argued that the issue was one of fairness and was a stand alone argument separate from the reasonable apprehension of bias argument.[169] The basis for this argument was that because there was no opportunity given by the Youth Court judge to introduce evidence to rebut a finding of racial motivation on the part of the police officer, her acquittal of the accused was unfair to the police officer and a stereotyping of police. The Respondent suggested this unfairness could have an impact on the officer's career.[170]

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[164]Respondent's Factum, *supra* note 161, at 7.

[165]Oral argument by the Respondent, videotape of *R.D.S.* v. *R.*, *supra* note 163, 10 March 1997.

[166]*Ibid.*,

[167]Respondents Oral Argument, S.C.C. *supra* note 163.

[168]*Ibid.*,

[169]See Respondent's Factum *R.D.S.* v. *R.*, File No.25063 at 12., see also the Respondent's videotaped oral argument in the Supreme Court of Canada, *supra* note 162, 10 March 1997. The Courts ultimate determination on this argument was that it could not be sustained. See para. 110 of Cory J.'s opinion in which he says "...The Crown suggested that this maxim ([it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done) provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for 'appearance of justice' than for 'appearance of bias'. This submission cannot be sustained ... [t]he requirement that justice should be seen to done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias."

[170]The Majority of the Supreme Court of Canada per Cory J's opinion at para. 144 ultimately determined that the Crown's attempt to put forward an argument that the trial was rendered unfair for failure to comply with 'natural justice' in that the real problem arising from Judge Sparks' remarks was the inability of the Crown

The Black community members in the audience were clearly quite involved in the proceedings. They were in attendance because of the importance of the case to the Black community, but in spite of this, and their respect for the "solemnity" of the proceedings, some exchanges between the lawyers and members of the Bench raised some whispered "amens" and caused some laughter. On the issue of introducing evidence in every case to test both the methodology of the studies (such as the Marshall Report) and the validity of the test results regarding the existence of racism in Canadian society and Black/Police interactions, the community was appreciative of the insightfulness (and the irony) of Justice L'Heureaux-Dubé's questioning of the reasonableness of this approach. L'Heureaux-Dubé J. asked the respondent why, in circumstances where evidence was required for any consideration of equity issues such as gender or race, would judges put themselves in the position of requiring evidence? This was realistic since such a requirement would lengthen trials and require evidence from all sides when these Communities do not have the money to do that?[171] The Crown's response to this question was that, as far as the Crown was concerned, it did not matter how long the trial might be lengthened, if it took a week or a month it was of no consequence because the reputation of the police was at stake. He also had no concern for the cost of such a lengthy proceeding.

Justice LaForest also observed that the case before Judge Sparks was one of a White police officer in a predominately "non-White" neighbourhood and that understood in this context one would have thought that up to a point the issue of race was on the table. He had difficulty understanding why the judge in this case would not consider the racial context. Justice LaForest also suggested to the Respondent that the problem he had was that Judge Sparks said out loud that there was a racial context to the case. The Respondent's attempt to erase issues of race from the proceedings is, as previously noted, not unique. According to Frances Henry and Carol Tabor:

> White Canadians tend to dismiss easily the accumulated body of evidence documenting racial prejudice and differential treatment, including victim's testimonies and experiences ... patterns of policing and the individual attitudes and behaviour of police officers are marked by overt prejudice and differential treatment towards people of colour, particularly Blacks. The courts and justice system fail to deliver fair and equal treatment to Racial Minorities... [172]

Despite the Respondent's efforts to persuade the Supreme Court to disregard the race and Charter arguments by the Appellant and the interveners, the Black lawyers

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and Constable Stienburg to respond to the remarks could not be accepted. "Neither Constable Stienburg nor the Crown was on trial."

[171]R.D.S. videotape, *supra* note 163.

[172]F. Henry and C. Tabor, "The Ideology of Racism - 'Democratic Racism', Canadian Ethnic Studies, XVI, No. 2, 1994 at 2.

for the Appellant and the interveners were cautiously optimistic that the Supreme Court of Canada was ready to affirm the existence of racism in Canadian society.

Further, the Black community and other communities of colour as well as women and other historically excluded groups in Canadian society, hoped that reasonable apprehension of bias based on race would no longer be the tool of those who prefer to maintain the status quo by silencing judges who seek to render justice by refusing to be "colour blind" in adjudicating cases where racism is a social reality.

The Supreme Court Of Canada Decision

In the dissenting opinion written by Major J. (and concurred in by Lamer C.J. and Sopinka J.) in the R.D.S. case, Major J. says that "...whether racism exists in our society is not the issue...".[173] He asserts that this appeal "should not be decided on questions of racism but instead on how courts should decide cases."[174] Major J. concludes that the trial judge in this case might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. The issue in this case according to Major J. is "...Whether there was evidence before the court upon which to base a finding that *this* particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial."[175]

In Major J.'s narrative there is once again an attempt to "erase" the issue of race by resorting to legal rhetoric. The dissenting opinion chooses not to "tell the story" of the existence of racism in Canadian society. In this respect, the dissent is not unlike the old historical cases about which James Walker writes "...The distance from the original problem remained glaringly apparent. In court, 'race' dropped from view...".[176]

With a 6-3 majority, the Supreme Court of Canada allowed the appeal in the R.D.S. case and set aside the judgements of the Court of Appeal and Glube C.J.S.C. restoring the decision of Judge Sparks. The majority consisted of La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

Did the decision rendered by the majority in the R.D.S. case further the critical race agenda? For the individual Black client in this case the outcome was a resounding success. He no longer faces the prospect of a new trial and there was a recognition by at least four members of the Supreme Court of Canada that there was evidence in this

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[173]*Supra*, note 129. Major J.'s dissenting opinion, para 6.

[174]Major J., *supra* 129, at para. 3.

[175]*Ibid.*, at para.6.

[176]Walker, *supra* note 20, at 349.

case capable of supporting a finding of racially motivated overreaction by the White police officer. L'Heureux-Dubé (McLachlin, Gonthier, and La Forest JJ. concurring) stated at paragraph 55 of her opinion:

> At no time did Judge Sparks rule that the probable overreaction by Constable Stienburg was motivated by racism. Rather, she tied her finding of probable overreaction to the evidence that Constable Stienburg had threatened to arrest the appellant R.D.S. for speaking to his cousin. *At the same time, there was evidence capable of supporting a finding of racially motivated overreaction.* At an earlier point in the proceedings, she had accepted the evidence that the other youth arrested that day, was handcuffed and thus secured when R.D.S. approached. *This constitutes evidence which could lead one to question why it was necessary for both boys to be placed in choke holds by Constable Stienburg, purportedly to secure them. In the face of such evidence, we respectfully disagree with the views of our colleagues Cory and Major JJ. that there was no evidence on which Judge Sparks could have found "racially motivated" overreaction by the police officer.* [emphasis added].[177]

Thus the goal of critical race litigation of taking the theoretical approach of Critical Race Theory and turning it into practice was fulfilled in the R.D.S. case.

Did the decision in the R.D.S. case reflect the further objective of critical race litigation by challenging and deconstructing legal rules and principles which foster and maintain discrimination? Did it challenge the myth of "objectivity" of laws? Did it benefit the Black community? In determining the answers to these questions it is important to note that three different sets of detailed opinions/narratives[178] were rendered by the Court.

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[177] *Supra*, note 129. L'Heureux-Dubé opinion at paragraph [55]. Note that McLachlin, La Forest and Gonthier JJ. concur in this analysis while Cory and Iacobucci JJ. do not. It goes without saying that the dissenting Justices, Lamer C.J.S.C. and Major and Sopinka JJ. also do not support this position and specifically state at para. [6] that: "Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that *this* particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

[178] See Thomas Ross, *The Richmond Narratives*, contained in Richard Delgado, ed., *Critical Race Theory: The Cutting Edge*, Temple University Press, (1995) *supra* note 20 in which Ross theorizes about narratives and in discussing the *City of Richmond* v. *J.A. Croson Co., 68 Tex. L. Rev. 381 (1989)* case he reads judicial opinions as 'narratives' as a way of " illuminating the idea of law as composed essentially of choices made for and against people, and imposed through violence ... The *Richmond* case spawned six opinions – six potential narratives. Each narrative is rich. Yet, the most powerful, complex, and important narratives are the concurring opinion by Justice Scalia and the dissenting opinion by Justice Marshall. Scalia's opinion as narrative is on the surface an impoverished and abstract story ... Seeing judicial opinions as narratives and then linking that conception to ideology is, in one sense, a simple matter. A judge chooses to tell the reader one thing and not another. For example, in *Richmond*, Justice Marshall chooses to tell the reader the story of Richmond's resistance to school desegregation. Justice Scalia chooses not to speak of Richmond's school desegregation at all .. .Telling, or not telling, the reader that this is a city with a "disgraceful history" of race relations is a rhetorical move connected to ideology."

There are however, four areas on which all six members of the majority concur:

- The disposition of the case
- Judging in a multicultural society
- The importance of perspective and social context in judicial decision-making
- The presumption of judicial integrity

Deconstruction: The Reasonable Person/ The Test For Bias

Critical race theorists and feminists have challenged the so called "neutral" standard of the reasonable person used in law to determine the existence of a reasonable apprehension of bias and in other contexts as well. The "reasonable person" traditionally was implicitly and invisibly constructed as a White, heterosexual, able-bodied male who belonged to the dominant group by judges from the dominant group who perceived the experiences of that group as "neutral" and "normal".[179] The critical race position put forward by the appellant in the R.D.S. case was that the "reasonable person" must be aware of the fact that racial discrimination exists in Canada. In short the argument was that racism exists in Canadian society, therefore, a reasonable person in touch with broad Canadian social reality would know of racism. A recognition of that fact can help jurists recognize and remedy the effects of discrimination.

Cory J. and all members of the majority accepted these arguments and accordingly expanded the concept of the reasonable and informed person to mean one who is also aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.[180] Most importantly for the critical race agenda, all members of the majority held what should have been obvious to all Canadian judges, but as the R.D.S. case demonstrates was not, namely that:

> Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial. [181]

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[179]For a discussion of the "ordinary person" in the context of the defence of provocation see Grant, Chunn &Boyle, *"The Law of Homicide"*, Carswell (1994). See also *R.* v. *Lavallee*, 76 C.R. (3rd) 329, [1990] 1 C.C.R. 852, 55 C.C.C. (3rd) 97.

[180]*Supra*, note 129. Cory J.'s opinion para. 111.

[181]*Ibid.*, at para. 115. See also L'Heureux-Dubé J.'s opinion *supra* note 129, at para. 28 as well as Gonthier J's opinion, *supra* note 129 at para. 26.

With respect to the submission of the appellant and interveners, that judges should be able to refer to social context in making their judgments and to power imbalances between the sexes or between races, as well as to other aspects of social reality, Cory J. held that each case must be assessed in light of its facts and circumstances to determine whether reference to social context is appropriate, and whether a reasonable apprehension of bias arises from particular statements.[182]

The Appellant also submitted that the test for bias or a reasonable apprehension of bias requires a demonstration of a "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This position, Cory J. (supported by all members of the majority) says is supported by the English and Canadian case law.[183] Therefore the majority adopted the test for bias set out by de Grandpre J. in *Committee for Justice and Liberty* v. *National Energy Board*,[184] which as Cory J. noted is a two-fold objective test "...the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. [185] Cory J. and the other majority opinion (L'Heureux Dubé J.) further held that the threshold for a finding of real or perceived bias is high:

> Courts have rightly recognized that there is a presumption that judges will carry out their oath of office ... this is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high ... however, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias ... the presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.[186]

And L'Heureux-Dubé states:

> Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all the parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.[187]

From a critical race perspective, the majority decisions expand the concept of the reasonable person to include an awareness of the social context of a case, such as

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[182]Cory J., *supra* note 129, at para. 121.

[183]Cory J., *supra* note 129, at para. 112.

[184][1978] 1 S.C.R. 369, at 394.

[185]Cory J., *supra* note 129, at para. 111.

[186]*Ibid.*, at para. 117. See also L'Heureux-Dubé J.'s opinion *supra* note 129, at para. 31.

[187]*Ibid.*, at para. 49.

societal awareness and knowledge of the prevalence of racism or gender bias in a particular community. The finding with respect to judges' ability to refer to social context in their decision-making and whether this raises a reasonable apprehension of bias will depend on the individual case, and the requirement of a high standard for a finding of a reasonable apprehension of bias as well as the articulation that this high standard applies to all judges regardless of the race, gender or other characteristics of the judge does further the agenda of critical race theorists and practitioners. It is a move away from the historical denial of the existence of racism in Canadian society and a recognition that the doctrine of "neutrality" and "objectivity" in judicial decision-making is a myth. It is also a further recognition that the "reasonable person" in Canadian society is not unaware of the social reality of racism.

However, as I stated earlier, in determining whether the decision in the R.D.S. case furthers the critical race agenda it is also important to note that three detailed decisions were rendered in the case. There are two sets of opinions within the majority which must be considered as well as the dissenting opinion of Lamer C.J., and Major and Sopinka JJ. already discussed.

Narrative, Social Context, and the Application of the Test for Bias

L'Heureux-Dubé, McLachlin, La Forest and Gonthier JJ., chose in their opinion to explicitly state that the reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the Charter's equality provisions. They recognized that the reasonable person was not only a member of the wider Canadian community, but a member of the local community, in this case the Nova Scotian and Halifax communities. Such a person they say must be taken to:

> ...possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues...

They say that these matters are the proper subject of judicial notice:

> Those fundamental principles include the principles of equality set out in s.15 of the *Charter* and endorsed in quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter's* equality provisions. These are matters of which judicial notice may be taken.[187]

[187]L'Heureux-Dubé J. *supra* note 129 at para.46.

This assertion is important to the critical race agenda. L'Heureux-Dubé J. (and those concurring in her opinion) is saying that the existence of racism in Canadian society as well as the local community are uncontestable facts and are therefore the proper subject for the taking of judicial notice. Interestingly, Cory J. avoided the issue of judicial notice by making a rather curious reference to the fact that an intervener and not the appellant raised the issue and therefore it was not proper for the Court to consider the argument. This is curious since it completely ignores the fact that the respondent in the case argued that the case was in fact about judicial notice.[188]

L'Heureux-Dubé J. and those concurring in her opinion choose to "tell the story" of the wide-spread and systemic discrimination existing in Nova Scotia as well as the known racial tensions between police and Black and Aboriginal people in that province. Further, they choose to "tell the story" of the existence of racism in Canadian society as a whole. It is because of this acknowledgement of contextualized and historical background that Dubé J. and the other justices concurring with her find that Judge Sparks' comments did not give rise to a reasonable apprehension of bias and were not "close to the line" or any of the other descriptions used by Cory J. in his opinion. In applying the test for a finding of a reasonable apprehension of bias L'Heureux-Dubé J. held that Judge Sparks' oral reasons showed that she approached the case with an open mind and that in "alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her."[189]

L'Heureux-Dubé J. (McLachlin, La Forest and Gonthier JJ. concurring) explicitly distinguished "neutrality" from the concept of judicial impartiality. They explicitly recognized the "fallacy" of judicial neutrality. Objectivity is an impossibility because judges, like all other humans, operate from their own perspective. This is in keeping with the position postulated by critical race theorists and others that "objectivity" and "neutrality" of laws and judicial decision making are myths. Critical Race Theory requires a recognition that reason and logic are not the only determinants of judicial results. Judicial decisions may be influenced by a myriad of factors such as public pressures, social movements, and the judges' own as well as society's prejudices and opinions.[190] L'Heureux-Dubé J. ascribes to the reasonable person certain attributes

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[188]See Respondents Factum, Supreme Court of Canada, Court File No. 25063 at 47.

[189]L'Heureux-Dubé J.'s opinion, *supra* note 129 at para. 59.

[190]See: P. Harris, *Black Rage Confronts The Law,* New York University Press, (1997). See also: A. Hutchinson, "The Politics of Law," contained in Watson, *et.al., Civil Litigation, Cases and Materials,* (4th ed.) (Edmond Montgomery, 1991) at 241, in which Hutchinson notes that "insofar as we continue to turn to courts on issues of social justice, it is vital that more attention is paid to the ideological make-up of judges and that we explode the myths of judicial objectivity and neutrality ... the 'good judge' is someone who knows that there are no easy and objective answers ... [h]e or she attempts to listen to and empathise with the plight of litigants, retains a willingness to rethink their own views in light of that experience, and makes decisions that they are prepared to take personal responsibility for."

namely, that in addition to the reasonable and right-minded person being informed of the circumstances of the case, he or she would also be knowledgeable about the local community in which the case arose as well as the nature of judging. The reasonable person would also be knowledgeable of Canadian *Charter* values and supportive of the principles of equality set out in s.15:

> An understanding of the context or background essential to judging may be gained from testimony from expert witness in order to put the case in context ... from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential pre-condition.
>
> A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality. [191]

The reasonable person L'Heureux-Dubé, McLachlin, La Forest and Gonthier JJ. envision expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the realities of each case. However, judges must be aware of the context in which the alleged crime occurred. They assert this contextual inquiry has become an accepted step towards judicial impartiality L'Heureux Dubé, McLachlin, Gonthier and La Forest JJ. recognize that neutrality and true objectivity are impossible standards and they disagree with Cory and Iacobucci JJ. that references to social context are not appropriate in making determinations of credibility as long as the judge strives for impartiality and decides the issues with an open-mind.[192] L'Heureux-Dubé, McLachlin, Gonthier and La Forest JJ. also would not limit reference to social context to situations where expert evidence has been introduced or academic studies have been placed before the court, but say that an understanding of the context or background essential to judging may also be gained from the judge's personal understanding and experience of the society in which the judge lives and works and that:

> ...judges' own insights into human nature will properly play a role in making findings of credibility or factual determinations."[193]

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of litigants, retains a willingness to rethink their own views in light of that experience, and makes decisions that they are prepared to take personal responsibility for."

[191]L'Heureux-Dubé J.'s opinion *supra* note 129, at para. 44 and 45.

[192]L'Heureux-Dubé J.'s opinion, *supra* note 129, para. 40 in which she states "...Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them..."

[193]*Ibid.*, at para. 40.

> ...only after being equally open to, and considering the views of all parties before them."[194]

What appears to be the essential difference between the two majority judgments is that Cory and Iacobucci JJ. would seem to prefer to limit *explicit* judicial consideration of social context to situations requiring expert evidence, and would prefer that judges refrain from making *explicit* reference to it in cases of assessment of credibility. Cory J. puts it this way:

> In *Parks* and *Lavallee,* for instance, the expert evidence of social context was used to develop principles of general application in certain kinds of cases. These principles are legal in nature, and are structured to ensure that the role of the trier of fact in a particular case is not abrogated or usurped. It is clear therefore that references to social context based upon expert evidence are sometimes permissible and helpful, and that they do not automatically give rise to suspicions of judicial bias. *However, there is a very significant difference between cases such as Lavallee and Parks in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.* [emphasis added].

While Cory J. agrees that judges should be able to refer to social context in making judgments and that an issue of a reasonable apprehension of bias which may arise as a result must be dealt with on a case by case basis, he appears to limit the concept of social context to situations where expert evidence was adduced. However, he draws some distinction between those circumstances and the use of reference to social context to assist in the determination of credibility.

While at first glance Cory and Iacobucci JJ. appear to take a more narrow approach to the issue of social context in judicial decision-making than their colleagues L'Heureux-Dubé, La Forest, Gonthier and McLachlin JJ., it is also apparent on a closer reading of Cory J.'s opinion that he is *not* saying that reference to social context should never be made to assist in the determination of credibility. In paragraph 130 of his opinion he says that:

> When making findings of credibility it is obviously *preferable* for a judge to *avoid* making any comment that *might* suggest that a determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in their judicial fact finding ... yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations. [emphasis added].

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[194] *Ibid.*, at para. 40.

Cory J. does however, concede that in some circumstances it may be acceptable for a judge to acknowledge racism in society, for example, the motive for overreaction:

> In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race...[195]

It is apparently under this exception and taking into consideration that "cogent evidence" was required for a finding of a reasonable apprehension of bias that Cory J. allowed the appeal. He says that although Judge Sparks' remarks are "unfortunate"[196] and "unnecessary"[197] and "close to the line"[198] when viewed in isolation, it was important to remember that it is necessary in cases where a reasonable apprehension of bias is alleged to read all the comments in context of the whole proceeding. Having done this, Cory J. concluded that a reasonable, informed person, aware of all the circumstances, would not have concluded that Judge Sparks' comments gave rise to a reasonable apprehension of bias.[199]

From a critical race perspective it is unfortunate that it appears that Cory and Iacobucci JJ. would prefer the existing status quo, that is that judges simply not divulge the full reasons behind their judgments.[200] Surely Cory J.'s approach is not consistent with s.15 of the Charter which requires judges to articulate all non-legal assumptions on which they base their decisions. This articulation would facilitate judicial review and guard against reliance on myths and prejudicial beliefs. It would also ensure, as the appellant and the interveners LEAF/NOIVMWC contended, that "...the inclusion

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[195]Cory J. *supra* note 129, at para. 132.

[196]*Ibid.*, at para.158.

[197]*Ibid.*, at para. 158.

[198]*Ibid.*, at para. 152.

[199]*Ibid.*, at para. 158.

[200]At least one commentator notes that the main difference between the position taken by Cory J. and Iacobucci, J. and L'Heureux-Dubé, McLachlin, Gonthier and La Forest JJ. appears to be that "the former two judges would approve of the limited and perhaps even tacit use of the social context of racism in making the credibility judgement in question, while the latter four would encourage open acknowledgement of the social context of racism in making such determinations." See: B.P. Archibald, "The Lessons of the Sphinx: Avoiding Apprehensions of Judicial Bias in a Multi-racial, Multi-cultural Society", (1998) 10 C.R. (5th) 56 at 62.

in reasons of judgment of valid generalizations based upon well known social facts and observations is not construed as bias."[201]

Cory J.'s position that it is preferable that judges remain "silent" about their reference to social context in their decision-making unfortunately does not further the critical race agenda. It does not guard against reliance on myths and prejudicial beliefs infecting the decision-making process. If one does not have to articulate the basis for ones' decisions then one is not accountable. From a critical race perspective, Cory J.'s position is the antipode of judicial accountability. There are those perhaps who might prefer the status quo as this commentators statements seem to indicate:

> ... R.D.S. itself has certainly advanced the debate and heightened awareness of these critical issues. Nevertheless, it may be prudent in other circumstances for judges to use "common sense", "social context" or "judicial notice" in silence, knowing that even unreasonable apprehensions of bias can cause needless controversy which may bring the administration of justice into disrepute.[202]

This seems to ignore the test for apprehension of bias supported by the majority, including Cory J. in the R.D.S. case. Critical Race Theory and critical race litigation rejects the "silence" about racism and in particular anti-Black racism that spawned the R.D.S. case.

It is also unfortunate that in the process of determining the issues of social context and determinations of credibility, Cory J. seems to reintroduce the concept of judicial neutrality.

Cory J. appears to endorse the principle of impartiality in paragraph 93 of his opinion where he states that "For very good reason it has long been determined that the courts should be held to the highest standards of impartiality...". However, he does goes on to state in paragraph 118 that:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve *neutrality* and fairness in carrying out their duties. *This must be a cardinal rule of judicial conduct.* [emphasis added].

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[201]Factum of the Interveners, Women's Legal Education and Action Fund and National Organization of Immigrant and Visible Minority Women of Canada, *supra* note 159, at 13.

[202]Archibald, *supra* note 200 at 66.

Although he once again reinforces the idea that judges are not required to discount their life experiences he nonetheless reiterates the requirement for *neutrality.*

In contrast as noted above, L'Heureux-Dubé J. (and the three justices who concur), encourage "contextualized" judging. The reasonable person L'Heureux-Dubé J. envisions expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the realities of each case, but judges must be aware of the context in which the alleged crime occurred. This contextual inquiry has become an accepted step towards judicial impartiality she asserts.

Conclusion

While "race" and racism are significant factors in the psyche of Canadian society, these issues have not become a part of the litigation psyche of this country as they have in the United States. Canadian Black lawyers and others are gradually beginning to seriously consider the role of race in litigation and to develop effective critical race litigation strategies to address issues of race. This in turn will increasingly place these issues before Canadian courts where, it is hoped, as with gender-based litigation , a body of useful precedents can be developed. In Canada we are also beginning to develop a body of Critical Race Theory and to move beyond the theory to practical application which involves the use of critical race litigation on behalf of the Black client and the Black community as a whole.

In spite of the differences of opinion expressed by the Supreme Court justices in the R.D.S. case with respect to the issue of the reference to social context in the judicial decision-making process; the R.D.S. case can be seen as making a substantial contribution to the expansion of the reasonable person standard as well as furthering the judicial debate on "contextualized" judging in Canada. It of course remains to be seen how the decision will affect future pronouncements on race issues before the Courts. One thing is certain. *R.D.S.* v. *R.* will be a useful precedent in the critical race litigator's arsenal.