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Constance Backhouse
University of Western Ontario

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Articles

Constance Backhouse*

Racial Segregation in Canadian
Legal History: Viola Desmond's
Challenge, Nova Scotia, 1946

This article recounts the arrest and trial of Viola Desmond, who in 1946 violated a rule imposing racial segregation on Blacks. It goes on to describe Desmond's unsuccessful attempt to have that conviction overturned in the Supreme Court of Nova Scotia, the first known challenge brought by a Black woman in Canada against a racial segregation law. Through the use of interviews and analysis of archival material, the author situates this legal proceeding within the context both of the history of racism in Canada and of legal attempts to combat it.

In 1947

Viola Desmond was arrested
At the Roseland Theatre in New Glasgow,
Viola had gone that evening to see her
favourite show,
In New Glasgow a law forbids blacks from
sitting in the downstairs section,
It was reserved for whites only.
They wanted her to go upstairs
Because it was the balcony —
They called it "A Nigger's Heaven."

I CRY —

Feeling the depth of black pain

So writes the celebrated Black¹ Nova Scotian poet, David Woods, enshrining Viola Desmond in Black folk memory through his "Nova

* Faculty of Law, University of Western Ontario. This paper was presented as the Seventh Annual Gibson-Armstrong Lecture in Law and History at Osgoode Hall Law School in February, 1994. I am indebted to Allen B. Robertson, Ph.D., who assisted me in locating the Nova Scotia material for this research. Anna Feltracco, Alexandra Hartmann, Marianne Welch, Kristen Clark, Anne Eichenberg, and Jennifer Hall provided remarkably helpful research assistance. Pearleen Oliver and Jack Desmond very generously agreed to oral interviews and provided essential information. Funding from the Law Foundation of Ontario and the Social Sciences and Humanities Research Council of Canada is gratefully acknowledged.

1. I have capitalized "Black" through this article, following the practice of Black legal scholars such as Kimberle Williams Crenshaw, who notes in "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law" (1988) 101 Harv. L. Rev. 1331 at 1332 that the upper-case "B" reflects the view that "Blacks, like Asians, Latinos, and other 'minorities', constitute a specific cultural group and, as such, require denotation as a proper noun." Where the historical records use terms other than "Black", I have followed the original designations.

Scotia Reality Song”.² Viola Desmond’s courageous efforts to eliminate racial segregation are not as well known to Canadians in general. However, the legal response to Viola Desmond’s challenge provides one of the best examples of the historical role of law in sustaining racism in Canada.

I. *The Arrest at the Roseland Theatre*

The contentious racial incident began on Friday, 8 November 1946, when Viola Irene Desmond’s 1940 Dodge four-door sedan broke down in New Glasgow, Nova Scotia.³ The thirty-two year old, Halifax-born Black woman was en route to Sydney on a business trip. Forced to wait overnight for repairs, she decided to take in the 7:00 o’clock movie at the Roseland Theatre. Erected on the north-east corner of Forbes and Provost Streets, the Roseland Theatre had been constructed in 1913, after a fire razed earlier wooden buildings housing a hardware store and the Oddfellows Lodge. Outfitted with the latest modern equipment for sound pictures in 1929, the Roseland was New Glasgow’s pre-eminent movie house.⁴

Handing the cashier a dollar bill, Viola Desmond requested “one down please.” Peggy Melanson, the white ticket-seller on duty that evening, passed her a balcony ticket and seventy cents in change. Entirely unaware of what would ensue from her actions, Viola Desmond proceeded into the theatre and headed toward the main floor seating area. Then Prima Davis, the white ticket-taker inside the theatre, called out after her: “This is an upstairs ticket, you will have to go upstairs.” Thinking there must have been some mistake, Viola Desmond returned to the wicket and asked the cashier to exchange the ticket for a downstairs one. The ticket-seller refused, and when Viola Desmond asked why, Peggy Melanson replied: “I’m sorry but I’m not permitted to sell downstairs tickets to you people.”

2. D. Woods, *Native Song* (Nova Scotia: Pottersfield Press, 1990) at 37. The poem originally named the theatre as the “Graceland” theatre. The error will be corrected in the forthcoming second edition of the book. David Woods also hopes to produce a movie and a play featuring Viola Desmond’s arrest in New Glasgow: see Letter of D. Woods to C. Backhouse (October 1993), letter on file with the author.

3. Details surrounding the arrest are taken from “Affidavit of Viola Irene Desmond” 29 January 1947, *His Majesty the King v. Viola Irene Desmond*, Public Archives of Nova Scotia (hereafter P.A.N.S.), RG 39 “C” [Halifax], Vol. 937, Supreme Court of Nova Scotia #13347; “Negress Alleges She Was Ejected From Theatre” *The [Halifax] Chronicle* (30 November 1946) 2 [hereinafter “Negress Alleges”]; “Ban All Jim Crow Rules is Comment on N.S. Charge” *The Toronto Star* (30 November 1946) 3 [hereinafter “Ban All”].

4. The original Proprietor of the Roseland Theatre appears to have been Henry (Harry) MacNeil, who may have been the same Henry MacNeil who acted as theatre manager in the 1940s, or his father. For details regarding the Roseland Theatre, see J.M. Cameron, *About New Glasgow* (New Glasgow, Nova Scotia: Hector, 1962) at 174 and 178.

Peggy Melanson never mentioned the word "Black", or the other terms, "Negro" or "coloured", which were more commonly used in the 1940s. But Viola Desmond recognized instantly that she was being denied seating on the basis of her race. She made a spontaneous decision to challenge this racial segregation, walked back inside and took a seat in the partially filled downstairs portion of the theatre. As Prima Davis would later testify, "[When] she came back and passed into the theatre, I called to her. She never let on she heard me. She seated herself below."⁵

Prima Davis followed Viola Desmond to her main floor row. Confronting the Black woman, who was now sitting quietly in her seat, she insisted "I told you to go upstairs." When Viola Desmond refused to budge, Prima Davis left to report the matter to the manager, Henry MacNeil. The white man came down immediately and "demanded" that Viola Desmond remove herself to the balcony. She had already "been told to go upstairs," MacNeil pointed out, and a notice on the back of the ticket stipulated that the theatre had "the right to refuse admission to any objectionable person."

Viola Desmond replied that she had not been refused admission. The only problem was that her efforts to purchase a downstairs ticket had been unsuccessful. Politely but firmly, she requested the manager to obtain one for her. "I told him that I never sit upstairs because I can't see very well from that distance," she continued. "He became angry and said that he could have me thrown out of the theatre. As I was behaving very quietly, I didn't think he could." The agitated Henry MacNeil turned heel and marched off in pursuit of a police officer.

In short order, Henry MacNeil returned with a white policeman, who advised Viola Desmond that he "had orders" to throw her out of the theatre. "I told him that I was not doing anything and that I did not think he would do that," advised Viola Desmond. "He then took me by the shoulders and dragged me as far as the lobby. I had lost my purse and my shoe became disarranged in the scuffle." The police officer paused momentarily to allow Viola Desmond to adjust her shoe, while a by-

5. There were historical precedents for Viola Desmond's direct action approach. R.W. Winks, *The Blacks in Canada: A History* (New Haven: Yale University Press, 1971) at 283-84 notes that in November 1860, the white managers of the chief theatre in Victoria had issued instructions that Blacks were no longer to be admitted to the dress circle or to orchestra seats. Two hundred and sixty Blacks petitioned Governor James Douglas to overturn this policy. A group of Blacks attempted to take seats in the parquette and a riot erupted. In 1861, Blacks who took seats in the dress circle had flour thrown upon them.

In 1791, a Black man was refused admission to a public dance in Sydney, Cape Breton. While attempting to force his way in, he was murdered by a white man. The killer was acquitted at trial on the ground of self-defence. See *Ibid.* at 51; See also C.A. Thomson, *Blacks in Deep Snow: Black Pioneers in Canada* (Don Mills, Ontario: J.M. Dent & Sons, 1979) at 19.

stander retrieved her purse. Then the forcible ejection resumed. As Viola Desmond recounted:

The policeman grasped my shoulders and the manager grabbed my legs, injuring my knee and hip. They carried me bodily from the theatre out into the street. The policeman put me into a waiting taxi and I was driven to the police station. Within a few minutes the manager appeared and the Chief of Police [Elmo C. Langille]. They left together and returned in an hour with a warrant for my arrest.⁶

Held in the town lock-up overnight, Viola Desmond described the jail:

I was put in a cell which had a bunk and blankets. There were a number of men in the same block and they kept bringing in more during the night. The matron was very nice and she seemed to realize that I shouldn't have been there. I was jailed for twelve hours. . . .⁷

II. *The Trial*

The next morning, 9 November 1946, Viola Desmond was brought before New Glasgow Magistrate Roderick Geddes MacKay. Born and bred in nearby St. Mary's in Pictou County, Mackay had graduated in law from Dalhousie University in 1904. He had been appointed town solicitor for New Glasgow in 1930, where he managed his law practice while simultaneously holding down a part-time position as stipendiary magistrate.⁸ The sixty-nine year old, white magistrate was the sole legal official in court that day. Viola Desmond had no lawyer; she had not been told of her right to seek bail or to request an adjournment, nor of her right to counsel. Indeed, there was no Crown Attorney present either. Henry MacNeil, "the informant", was listed as the prosecutor.

Viola Desmond was arraigned on a charge of violating the provincial *Theatres, Cinematographs and Amusements Act*.⁹ First enacted in 1915, the statute contained no explicit provisions relating to racial segregation. A licensing statute to regulate the operations of theatres and movie houses, the act encompassed such matters as safety inspections and the censorship of public performances.¹⁰ It also stipulated that patrons were

6. "Negress Alleges", *supra* note 3. See also *Desmond*, *supra* note 3.

7. "Negress Alleges", *ibid*.

8. For biographical details, see "Former magistrate dies at 84" *The [Halifax] Chronicle-Herald* (29 September 1961) 2.

9. *The Theatres, Cinematographs and Amusement Act*, R.S.N.S. 1923, c. 162, [hereinafter *Theatres Act*].

10. See *The Theatres and Cinematographs Act, 1915*, S.N.S. 1915, c. 9, as am. by S.N.S. 1916, c. 31; S.N.S. 1917, c. 76; S.N.S. 1918, c. 48; *The Theatres, Cinematographs and Amusements Act*, S.N.S. 1920, c. 44, as am. by S.N.S. 1923, c. 40, as am. by R.S.N.S. 1923, c. 162, as am. by S.N.S. 1926, c. 51; S.N.S. 1931, c. 46; S.N.S. 1934, c. 39; S.N.S. 1939, c. 34; S.N.S. 1942, c. 24; S.N.S. 1944, c. 24; S.N.S. 1948, c. 29.

to pay an amusement tax on any tickets purchased in provincial theatres. Persons who entered a theatre without paying such tax were subject to summary conviction and a fine of "not less than twenty nor more than two hundred dollars." The statute authorized police officers to arrest violators without warrant, and to use "reasonable diligence" in taking them before a stipendiary magistrate or justice of the peace "to be dealt with according to law."¹¹

The statute based the rate of the amusement tax upon the price of the ticket.¹² The Roseland Theatre's ticket prices were forty cents for downstairs seats, and thirty cents for upstairs seats. These prices included three cents tax on the downstairs tickets, and two cents on the upstairs. The ticket issued to Viola Desmond had cost thirty cents, of which two cents would be forwarded to the public coffers. Since she had insisted on sitting downstairs, she was one cent short on tax.

This was the argument put forth by Henry MacNeil, Peggy Melanson and Prima Davis, all of whom gave sworn evidence against Viola Desmond that morning. The trial was short. The three white witnesses briefly testified that the accused woman had purchased an upstairs ticket, paying two cents in tax, and then insisted on seating herself downstairs.¹³ After each witness concluded, Magistrate MacKay asked the prisoner if she wanted to ask any questions. "I did not gather until almost the end of the case that he meant questions to be asked of the witnesses," Viola Desmond would later explain. "It was never explained to me of whom I was to ask the questions."¹⁴ So there was no cross-examination of the prosecution witnesses whatsoever.

At the close of the Crown's case, Viola Desmond took the stand herself. The minutes of evidence from the trial record contain a succinct report of her testimony: "I am the accused. I offered to pay the difference in the price between the tickets. They would not accept it." Whereupon Magistrate MacKay immediately convicted the defendant, assessing the minimum fine of \$20, with costs of \$6 payable to the prosecuting

11. *Theatres Act*, *supra* note 9 at ss. 8(8), 9, 10, 14.

12. *Ibid.*, s. 8(1) reads: Every person attending any place of amusement and every person participating or indulging in any amusement or recreation whatsoever shall upon each such attendance or participation or indulgence where a fee is charged for the same, pay to His Majesty for the use of Nova Scotia a tax to be collected as in this Chapter provided and according to the following schedule: . . . Upon each attendance, participation or indulgence a tax of one cent for each ten cents or fraction thereof charged as such fee.

13. "Record", Rod G. MacKay, Stipendiary Magistrate for the Town of New Glasgow, County of Pictou, 9 November 1946, *R. (Inf. Henry MacNeil) v. Viola Desmond*, P.A.N.S.

14. *Desmond*, *supra* note 3.

informant, Henry MacNeil. The total amount of \$26 was due forthwith, in default of which the accused was ordered to spend one month in gaol.¹⁵

Viola Desmond was quite properly angry that she had been offered no opportunity to speak about the real issues underlying the taxation charges. "The Magistrate immediately convicted and sentenced me without asking me if I had any submissions to make to the Court on the evidence adduced and without informing me that I had the right to make such submissions," she later explained.¹⁶ Even a casual observer can see that many arguments might have been raised to preclude a conviction. It was far from clear that Viola Desmond had actually transgressed the statute. According to her testimony, she had tendered the difference in the ticket prices (including the extra cent in tax), but the manager and ticket-seller had refused to accept her money. It is difficult to find the legally required "actus reus" (criminal act) in Viola Desmond's behaviour here.¹⁷ Indeed, if anyone had violated the statute, it was the theatre owner, who was in dereliction of his statutory duty to collect the tendered taxes and forward them to the designated government board.¹⁸

Furthermore, the price differential between upstairs and downstairs seats was not prescribed by statute. It was simply a discretionary business policy devised by the management of the theatre. The manager could have decided to collapse the two admission prices and ask one single fee at whim. In this instance, Henry MacNeil had chosen to charge Viola Desmond a mere thirty cents for her ticket, and on this amount she had paid the full tax owing. She was not charged forty cents, so she did not owe the extra cent in tax. The court might have construed the rules regarding alternate seating arrangements as internal business regulations having nothing whatsoever to do with the revenue provisions in the legislation.

Even more problematic was the prosecution's questionable attempt to utilize provincial legislation to buttress community practices of racial discrimination. The propriety of calling upon a licensing and revenue statute to enforce racial segregation in public theatres was never addressed. Did the legislators who enacted the statute design the taxing

15. *Desmond*, *supra* note 13. The ultimate disposition of the costs is unclear from the record. One handwritten document signed by Magistrate MacKay indicates that the accused was to pay Henry MacNeil "the Informant herein, the sum of six dollars for his costs in this behalf." Another handwritten document signed by the magistrate indicates that the costs were broken down: \$2.50 to be paid to himself as magistrate, and \$3.50 to police chief Elmo C. Langille.

16. *Desmond*, *supra* note 3.

17. This point would be raised by *Saturday Night* (7 December 1946) 5. "[T]he action of the magistrate in fining the lady in question for defaulting the province, when she had most expressly tendered to the box office the proper price, including tax, of the seat in which she later insisted on sitting, is a travesty of justice."

18. *Theatres Act*, *supra* note 9, ss. 8(3), 8(10).

sections for this purpose? Were racially disparate ticket-selling practices contemplated when the statutory tax rates were set? Were the penalty sections intended to attach alike to theatre-goers deliberately evading admission charges and Blacks protesting racial segregation? As the press would later attest, Viola Desmond “was being tried for being a negress and not for any felony.”¹⁹

But observers of the trial would have been struck by the absence of any overt discussion of racial issues. The prosecution witnesses never explained that Viola Desmond had been denied the more expensive downstairs ticket on the basis of her race. No one admitted that the theatre patrons were assigned seats on the basis of race. In an interview with the *Toronto Star* several weeks later, Henry MacNeil would insist that neither he nor the Odeon Theatres management had ever issued instructions that main floor tickets were not to be sold to Blacks. It was simply a matter of seating preferences: “It is customary for [coloured persons] to sit together in the balcony,” MacNeil would assert.²⁰ At the trial, no one

19. “Negress Alleges”, *supra* note 3. Although the word “Negress” was capitalized in the newspaper heading, neither “negro” nor “negress” were capitalized in the text of the article. W.E.B. DuBois has noted that “Negro” was always capitalized until, in defence of slavery, the use of the lower case “n” became the custom, and that the capitalization of other ethnic and national origin designations made the failure to capitalize “Negro” an insult: see W.E.B. DuBois, *The Seventh Son*, vol. 2 (publication information, 1971) at 12–13, as cited in Crenshaw, *supra* note 1 at 1332.

“Coloured” seems to have been the term of choice at the time, as indicated by the name given to the N.S.A.A.C.P. in Nova Scotia, and the N.A.A.C.P. (founded in 1909) in the United States. See also Mary Church Terrell, Letter to the Editor, *The Washington Post* (14 May 1949) as reprinted by G. Lerner, *Black Women in White America* (New York: Vintage Books, 1973) at 547–50:

[S]top using the word “Negro”. The word is a misnomer from every point of view. It does not represent a country or anything else except one single, solitary color. And no one color can describe the various and varied complexions in our group. In complexion we range from deep black to the fairest white with all the colors of the rainbow thrown in for good measure. . . . We are the only human beings in the world with fifty seven variety of complexions who are classed together as a single racial unit. Therefore, we are really, truly colored people, and that is the only name in the English language which accurately describes us. . . .

There are at least two strong reasons why I object to designating our group as Negroes. If a man is a Negro, it follows as the night the day that a woman is a Negress. “Negress” is an ugly, repulsive word—virtually a term of degradation and reproach which colored women of this country cannot live down in a thousand years. . . .

In the second place, I object to . . . Negro because our meanest detractors and most cruel persecutors insist that we shall be called by that name, so that they can humiliate us by referring contemptuously to us as “niggers”, or “Negras” as Bilbo used to do.

20. “Ban All”, *supra* note 3. MacNeil continued: “We have a large colored patronage at our theatre and we don’t permit color discrimination to be a determining factor. It would be poor policy for us to set up a color bar. . . . There was no discrimination.”

even mentioned that Viola Desmond was Black, that her accusers and her judge were white. 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.²¹

III. *The Community Responds to the Conviction*

The day of her conviction, Viola Desmond paid the full fine, secured her release and returned to her home on 4 Prince William Street in Halifax. She was deeply affronted by her treatment at the hands of the New Glasgow officials. She was also "well known" throughout the Black community in Nova Scotia, and consequently in a good position to do something about it.²²

Viola Desmond, whose birth name was Viola Irene Davis, had been born in Halifax, on 6 July 1914. Her father, James Albert Davis, was from a prominent, middle-class Black family. Although it was extremely difficult for Blacks to obtain positions within the civil service, Viola's uncle (and godfather), John Davis, had secured a place within the Post Office Division in Halifax. Her paternal grandfather had worked as a letter carrier. Viola's father was employed initially as a stevedore, and then took up the profession of barbering.²³ Barbering was an occupation within which a number of Canadian Blacks managed to carve out a

21. This raises the important question of 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. On the tendency to delete references to race in evidence filed on racial discrimination matters, see Winks, *supra* note 5 at 424, discussing the hearing under *The Industrial Disputes Investigation Act, 1907*, S.C. 1907, c. 20, as am. by S.C. 1920, c. 29, into the racially-motivated discharges of thirty-six Black porters from the C.P.R. On a comparative note, see also the discussion of the appeal of Rosa Parks' conviction in the Montgomery bus boycott in Alabama in 1955, which never mentioned the Alabama bus segregation statute or racial segregation. "One reads the opinion in vain trying to understand the issue that her appeal raised," notes R.J. Glennon, "The Role of Law in the Civil Rights Movement: The Montgomery Bus Boycott, 1955-57" (1991) 9 *Law and History Review* 59 at 88.

22. For reference to Viola Desmond as "well known throughout the province" see "Takes Action" *The [New Glasgow] Clarion* 1:1 (December 1946) [hereinafter *Clarion* 1].

23. J. Fingard, "Race and Respectability in Victorian Halifax" (1992) 20:2 *Journal of Imperial and Commonwealth History* 169 at 180ff, notes that the Davises were well-established members of the Black elite in Halifax. On the rarity of Blacks achieving the status of civil service or post office employees, see Letter of B.A. Husbands, President of the Colored Men's Conservative Social and Athletic Club to Mayor of Halifax (17 May 1937) protesting that "there is no representative of the colored race in any of the local civic departments". P.A.N.S. RG35-102 (3B), vol. 7, #42. See also W.P. Oliver, "Cultural Progress of the Negro in Nova Scotia" (1949) 29:3 *Dalhousie Review* 297, as reprinted in G.E. Clarke, ed., *Fire on the Water: An Anthology of Black Nova Scotian Writing*, vol. 2 (Lawrencetown Beach, Nova Scotia: Pottersfield Press, 1992) at 133.

successful living in the 19th and early 20th centuries.²⁴ Hair-cutting and styling were rigorously segregated by race in many portions of the country, with white barbers and beauticians reluctant to accept Black customers.²⁵ Black barbers were quick to seize the business opportunities rejected by racist whites, and set up shop servicing both Black and white clientele.

Viola's mother, Gwendolin Irene (Johnson) Davis, was a white woman, the daughter of a white minister and his white wife, who had originally come to Halifax from New Haven, Connecticut. Viola's parents had married in 1908, creating a mixed-race family within a culture that had rarely welcomed inter-racial marriage. It was not the actual fact of racial mixing that provoked consternation, for there was undeniable evidence that inter-racial reproduction had occurred extensively throughout North American history. It was the formalized recognition of such unions which created such unease within a culture based on white supremacy.²⁶ Despite

24. D.G. Hill, *The Freedom-Seekers: Blacks in Early Canada* (Agincourt: Book Society of Canada, 1981) at 162–77, listing many successful barbershops operated by Blacks in Upper Canada in the 19th century. See in particular, reference (*ibid.* at 166–67) to the successful barber and hairdressing shop in St. Catharines, owned by a Black couple, Thomas P. Casey and his wife, Mary Ann Casey in 1847. D.W. Williams, *Blacks in Montreal 1628–1986: An Urban Demography* (Cowansville, Que.: Yvon Blais, 1989) at 19 and 33 lists barber shops as some of the few enterprises owned and operated by Blacks in Montreal from the 19th century through the first quarter of the 20th century.

25. For reference to the racial segregation of barbershops in Nova Scotia, see E. McCluskey, "Long-established Minority Still Excluded from Power" *The [Halifax] Chronicle-Herald* (16 March 1989) 41, where Daurene Lewis, the Black mayor of Annapolis Royal, notes that her father "never had his hair cut in a barber shop. The barber was a friend of his and he cut his hair—but not during business hours." See also W. Taylor, "Journey home" in "Afro-Nova Scotian Portraits" *The [Halifax] Chronicle-Herald* and *The [Halifax] Mail-Star* (19 February 1993) P16, discussing the experience of Sandra Anderson, a Black who was refused service on racial grounds by a white hairdresser in New Glasgow in the 1980s. Winks, *supra* note 5 at 325 notes that segregation for hair care was enforced in some areas of the country, but not in others: "In Saint John, Edmonton, and Victoria, Negroes could find no white barber to cut their hair; in Vancouver, Winnipeg, and Montreal, they could." Winks also notes (*ibid.* at 294) that "a Chatham barber won local fame when he declined to cut a Negro's hair because he had no black soap."

26. Gwendolin Irene Johnson's parents were Henry and Susan Johnson. For biographical details on Viola Desmond's parents, who married on 9 March 1908, see 735, 736, 844 P.A.N.S. Micro.: Churches: Halifax: Trinity Anglican: Baptisms #735, 736, 844; RG32 Marriages: Halifax County: 1908: #92 at p. 249 [hereinafter Parents]; Interview with Pearleen Oliver (July 1993) Halifax, Nova Scotia [hereinafter Pearleen Oliver].

F.J. Davis, *Who is Black? One Nation's Definition* (University Park, Pennsylvania: Pennsylvania State University Press, 1991) at 29: "[T]here are millions of white Americans who have at least small amounts of black genetic heritage. From 75 to well over 90 percent of all American blacks apparently have some white ancestry, and up to 25 percent have Indian background." This extensive racial intermixing was the product of both voluntary and coercive sexual mating, some marital, some extra-marital.

At the turn of the century, inter-racial marriages appear to have been on the decline: Fingard, *supra* note 23 at 179. See also R.I. McKenzie, "Race Prejudice and the Negro" (1940) 20 *Dalhousie Review* 201 that "intermarriage [of Blacks] with whites is not approved."

the community tensions that their marriage must have generated, James and Gwendolin Davis produced a large family of ten children, seven female and three male.²⁷ All of the Davis children would have been perceived as "Black", regardless of their mixed racial heritage. It was a fundamental premise of prevailing racial ideology that if individuals had even "one Black ancestor," they qualified for classification as "Black".²⁸

Viola Davis appears to have been a capable student, whose initial schooling was obtained within a racially mixed student body at Halifax High School. Upon her graduation from high school, Viola took up teaching for a brief period at both Preston and Hammonds Plains, racially-segregated schools for Black students.²⁹ But she had always been interested in hairdressing, and perhaps influenced by her father's success in barbering, soon decided to switch careers. Modern fashion trends for women, first heralded by the introduction of the "bobbed" haircut in the 1920s, had created an explosion of adventurous career opportunities for "beauticians", who earned their livelihood by advising women on hair care and cosmetics. Beauticians provided their much-sought-after services within the all-female world of the new "beauty parlours", which soon came to serve important functions as neighbourhood social centres. Beauty parlours offered steady and socially-respectable opportunities to many entrepreneurial women across Canada and the United States.³⁰

27. See Parents, *ibid.*; Pearleen Oliver. Viola's obituary lists the surviving siblings, Obituary, *The [Halifax] Chronicle-Herald* (10 February 1965) 26. There were five sisters and one brother in Montreal: Gordon Davis, Emily (Mrs. S.A. Clyde), Eugenie (Mrs. F.L. Parris), Helen (Mrs. B.W. Fline), Constance (Mrs. W. Scott), Olive (Mrs. A. Scott). There were two brothers and one sister in Halifax: John Davis, Alan Davis, Wanda (Mrs. W. Neal). See also Obituary, *The [Halifax] Mail-Star* (10 February 1965) 8.

28. Davis, *supra* note 26 at 5 notes that a person "with any known African black ancestry" was defined as Black. This racial definition emerged from the southern United States, reflecting the long experience with slavery, to become a classification "accepted by whites and blacks alike." Davis notes (*ibid.* at 16) that this rule, variously known as the "one-drop rule," the "one black ancestor rule," and the "traceable amount rule," has not been universally adopted by all countries. For example, the rule is more stringent than the Third Reich's designation of Jews, who were defined as persons with at least one grandparent who observed the Jewish religion: see Naomi Zack *Race and Mixed Race* (Philadelphia: Temple University Press, 1993) at 19. Canadians, however, appear to have accepted any known Black ancestry for racial classification of Blacks. For one example, see *Gordon v. Adamson* (1920), 18 O.W.N. 191 at 192 (H.C.), in which Middleton J. described the child of a "white" mother and a "negro" father as "coloured."

29. Interview with Jack Desmond (16 June 1993) Halifax, Nova Scotia [hereinafter Jack Desmond]. For details on the large number of Black women who chose teaching as a profession in Nova Scotia during this period, see S. Hamilton, "Our Mothers Grand and Great: Black Women of Nova Scotia" (1982) 4:2 *Canadian Woman Studies* 33.

30. See L.W. Banner, *American Beauty* (New York: Alfred A. Knopf, 1983) at 210–13 that the profession of hair-dressing dates from the 1870s, but that the 1920s was the "major era of the expansion of beauty parlors."

Despite severely limited employment opportunities in most fields, some Black women were able to create their own niche in this new market, as beauticians catering to a multi-racial clientele, with particular expertise in hair design for Black women.³¹ However, the first barrier that Viola Davis faced was in her training. All of the facilities available to train beauticians in Halifax restricted Black women from admission. Undeterred, Viola travelled to Montreal, where she was able to locate a school which would permit her to study hairdressing. Her high aspirations would eventually take her from Montreal to New York, where she enrolled in courses to learn more about wigs and other styling touches, ultimately graduating with a diploma in "Beauty Culture" from a "leading Beauty College in New York".³²

Shortly before she left for her first training in Montreal, in the mid-1930s, Viola met John G. (Jack) Desmond, a man ten years her senior. Their courtship would ultimately lead to marriage.³³ Jack Desmond was a descendent of Black Loyalists who had settled in Guysborough County in 1783.³⁴ He had been born into a family with eight children in Tracadie, Nova Scotia on 22 February 1905. Jack's family had lived for some years in New Glasgow, where his father, a hack driver for John Church's Livery

31. P. Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (New York: William Morrow, 1984) at 185–89. Giddings describes the specific services sought by Black women from hairdressers, and the spectacular career of Madame C.J. Walker, whose hair care products marketed to Black women made her the first Black female millionaire. J. Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family, From Slavery to the Present* (New York: Vintage Books, 1986) at 214–15 refers to beauty parlours as a "unique type of black enterprise":

Owned and staffed almost exclusively by women, they created jobs, offered highly valued services, and functioned as social centers in many neighborhoods. [...] Hair pressers and stylists prided themselves on their skills, 'fashioning beautifully arranged coiffures of smooth and pleasing waves.'

Where Black women went into business as entrepreneurs rather than waged labourers, Jones notes (*ibid.* at 181) that "the majority . . . were seamstresses and hairdressers who conducted modest businesses in their own homes.

32. See Jack Desmond, *supra* note 29. See also B. Pachai, *Beneath the Clouds of the Promised Land: The Survival of Nova Scotia's Blacks* (Halifax: Lancelot Press, 1991) at 152–53 and 297.

33. For biographical details on Jack Desmond see Jack Desmond, *ibid.*; Pachai, *ibid.*; Clarion 1, *supra* note 22; See also *Halifax-Dartmouth City Directories* (Halifax: Might Directories Atlantic, 1938–1946) [hereinafter *Directories*].

34. With the migration of between thirty and thirty-five thousand (white and Black) loyalists to Nova Scotia after the American Revolution, the number of Blacks in the region increased tenfold; the majority (about three thousand) were free Blacks: see D. Clairmont & F. Wien, "Blacks and Whites: the Nova Scotia Race Relations Experience" in D.F. Campbell, ed., *Banked Fires: The Ethnics of Nova Scotia* (Port Credit, Ontario: Scribbler's Press, 1978) at 147–48; Winks, *supra* note 5 at 141; J.W.St.G. Walker, *The Black Identity in Nova Scotia: Community and Institutions in Historical Perspective* (Halifax: Black Cultural Centre for Nova Scotia, 1985); J.W.St.G. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone 1783–1870* (Toronto: University of Toronto Press, 1992).

Stable, was a founding deacon of the New Glasgow Black Baptist Church. His mother, Annie, worked as a domestic servant. Jack himself was quite familiar with New Glasgow's Roseland Theatre. In fact, he had watched the Roseland Theatre being built while he worked as a child in the drugstore next door. He had moved to Halifax in 1928 and taken employment with a construction company, but the loss of his eye to a metal splinter in a work accident in October 1930 cost Jack Desmond his job.³⁵

Jack Desmond's chance came when his sister, Amelia, married a Black barber, Sydney Jones, in Halifax. Jack trained with his new brother-in-law and eventually joined him in the business. In 1932, he opened "Jack's Barber Shop" on Gottingen Street, a central thoroughfare in a racially mixed neighbourhood in the old north end of Halifax.³⁶ The business soon attracted a large, racially mixed clientele, drawn in part from the men who came in on the ships at the naval dockyard. The first Black barber to be formally registered in Nova Scotia in 1959, Jack Desmond's prominence would earn him the title of "The King of Gottingen Street".³⁷

The actual proposal of marriage came when Jack Desmond took the train up to Montreal, in pursuit of Viola, who had left for her initial training in hairdressing, to ask her to marry him. In 1936, when Viola was twenty-two, the couple were married before a Baptist minister in Montreal. Although Jack had been initially supportive of Viola's choice of career, her ambitious business plans soon began to cause him some distress. Jack apparently opposed his wife's decision to pursue her hairdressing study

35. See Jack Desmond, *supra* note 29; Pachai, *supra* note 32. Jack Desmond's father and mother, Norman Mansfield Desmond and Annie Williams, had both been born into farming families in Tracadie in Antigonish County.

36. Unlike the shorter-lived community of Africville, this area was a *quartier*, not a ghetto. Black settlement began on Gottingen Street, and was concentrated in the area bounded by Gerrish Street on the north, Cornwallis on the south, Maitland on the east and Gottingen on the west. Later westward expansion took in Creighton and Maynard Streets. Although commonly referred to as "the negro section" of mid-city Halifax, in 1962, Blacks represented only between a fourth and a fifth of the population of this area. The economic status of the Black residents of the mid-city, while considerably lower than that of white Haligonians, was higher than that of Black residents from the segregated Black community of Africville, located on the Bedford Basin. See *The Condition of the Negro of Halifax City, Nova Scotia* (Halifax: Institute of Public Affairs, 1962) at 7ff; Fingard, *supra* note 23 at 171; B. Cahill, "The 'Colored Barrister': The Short Life and Tragic Death of James Robinson Johnston, 1876-1915" (1992) 15 *Dalhousie L.J.* 326 at 341. For references to the importance of Gottingen Street to the Black community of Halifax, see Woods, *supra* note 2 at 44ff; Clarke, *supra* note 23 at 114 and 117.

37. "Jack's got all the Answers: King of Gottingen" *The [Halifax] Mail-Star* (31 May 1986) 13. Jack Desmond would work from his shop on Gottingen Street continuously until his retirement. When he closed his barber shop, he sold the site to Frank Sobey, who ultimately sold the store to Foodland groceries. Jack Desmond continued to work for both of the new owners, and to cut hair in peoples' homes for many years after.

in New York, believing that this additional training was unnecessary for a married woman.³⁸ However, when Viola returned to Halifax in 1937, he allowed his wife to set up Vi's Studio of Beauty Culture, side by side with his barbershop on Gottingen Street. Both spouses in Black families frequently held down jobs in the paid labour force, contrary to the pattern in white middle-class households.³⁹ But middle-class Black women who sought work outside the home often faced bitter tensions within their marriages. Their careers tended to clash with society's prevailing ideals of gender, which required that men be masters in their own homes, ruling over dependent women and children. Even women who remained childless, such as Viola Desmond, found themselves subject to pressure to retire from the paid workforce.⁴⁰

Viola Desmond held firm convictions that Black women ought to have greater access to employment opportunities outside their traditionally segregated sphere of domestic service. Consequently, she soon opened the Desmond School of Beauty Culture, which would draw Black female students from across Nova Scotia, New Brunswick and Quebec, graduating as many as fifteen beauticians a year. The hairdressing business itself, like her husband's, drew from a racially mixed clientele. Viola also continued to upgrade her own training, and in 1945 she was awarded a silver trophy for hair styling by the Orchid School of Beauty Culture in Montreal.⁴¹

38. Pearleen Oliver noted that Viola went against Jack's wishes in furthering her education in beauty culture, and that Jack saw this as competing with his barbering. According to Pearleen Oliver, this placed some strain on the marriage. Pearleen Oliver, *supra* note 26.

39. Jones, *supra* note 31 at 142–43 indicates that middle-class Black wives and daughters "often engaged in wage earning, both because the financial security of most black families remained precarious and because they sought to put to good use their talents and formal schooling." Speaking of Black households in the largest northern American cities, she adds (*ibid.* at 162): "Most apparent among black families was the high percentage of wives who worked outside the home—in 1920, five times more than women in any other racial or ethnic group." See also Giddings, *supra* note 31 at 232: "... by 1940, one Black woman in three over the age of fourteen was in the [U.S.] work force, compared to one in five for Whites."

40. For discussion of the tensions between gender ideology and the realities of Black employment experience, see J.O. Horton "Freedom's Yoke: Gender Conventions Among Antebellum Free Blacks" (1986) 12:1 *Feminist Studies* 51; S. Harley "For the Good of Family and Race: Gender, Work, and Domestic Roles in the Black Community, 1880–1930" (1990) 15:2 *Signs* 336.

41. For details regarding Viola Desmond's education as a beautician, see Clarion 1, *supra* note 22; Advertisements, *The [New Glasgow] Clarion* 2:4 (28 February 1947); Advertisements, *The [New Glasgow] Clarion* 2:5 (15 March 1947); "Beauty School Graduation" *The [Truro] Clarion* 2:9 (2 July 1947); Pachai, *supra* note 32 at 153; Jack Desmond, *supra* note 29; Directories, *supra* note 33; Elaine McCluskey, "Segregation Existed In Nova Scotia Well Into the 1950s" *The [Halifax] Chronicle-Herald* (16 March 1989) 41.

The evidence suggests that most legal challenges to racial segregation in Canada seem to have come from middle-class individuals.⁴² This appears not to be a coincidental factor, for class issues were intricately related to such matters. A certain level of economic security furnished a base which enabled such individuals to afford to consider taking legal action against discriminatory treatment. Furthermore, given contemporary class biases, middle-class status appears to have underscored the indignity of racist treatment. Viola Desmond's elite position within the province's Black community was well established. She and her husband Jack were often held up as examples of prosperous Black entrepreneurs, whose small business ventures had triumphed over the considerable economic barriers which stood in the way of Black business initiatives.⁴³ Yet regardless of her visible financial standing in the community, Viola Desmond remained barred from entry into the more expensive seating area of the New Glasgow theatre. For those who believed that economic striving would eventually "uplift" the Black race, the response of the managers of the Roseland Theatre crushed all hope of eventually achieving an egalitarian society.⁴⁴

The matter of gender is also important in understanding the significance of Viola Desmond's ejection from the Roseland Theatre. In making her decision to challenge racial segregation in the courts, Viola Desmond would become one of the first Black women in Canada to do so.⁴⁵ As the

42. Other Blacks who have contested racial segregation in Canadian courts include Norris Augustus Dobson, a Black chemist from Montreal, who was involved in the case of *Loew's Montreal Theatres Ltd. v. Reynolds* (1919), 30 Que. B.R. 459. W.V. Franklin, a Black watchmaker from Kitchener, and described by the court as "a thoroughly respectable man, of good address", was the plaintiff in *Franklin v. Evans* (1924), 55 O.L.R. 349, 26 O.W.N. 65 (H.C.). The plaintiff in *Rogers v. Clarence Hotel* (1940), 55 B.C.R. 214, [1940] 2 W.W.R. 545 (C.A.) was a Black man who ran a shoe-repair business in partnership with a white man in Vancouver, described by the court of being "of respectable appearance." Fred Christie, a resident of Verdun, Quebec, who had "a good position as a private chauffeur in Montreal", and was described as "a coloured gentleman" by the court, was the plaintiff in *Christie v. York Co.* (1937), 75 Que. C.S. 136.

43. For details regarding Viola Desmond's reputation in Nova Scotia, see Clarion 1, *supra* note 22. See also Oliver, *supra* note 23 at 298, where he notes that business ventures among Black Nova Scotians were "limited to barber shops, beauty parlours, taxi-business, trucking, shoe-making, a newspaper and one co-operative store." See also Pachai, *supra* note 32.

44. For a superb discussion of the complex racial dynamics associated with the promulgation of and resistance to white middle-class culture within the African-American community, see E.B. Higginbotham, *Righteous Discontent: The Women's Movement in the Black Baptist Church, 1800-1920* (Cambridge: Harvard University Press, 1993).

45. Although there were a number of cases brought by Black men earlier, and a few brought by Black couples, Viola Desmond appears to have been the first Black woman in Canada to take legal action against racially segregated seating practices independently in her own right. This claim is based upon an appraisal of reported cases only. There may have been others whose

controversy spread, Viola Desmond also came to symbolize the essence of middle-class Black femininity. She was a celebrated Halifax beautician, described as both “elegantly coiffed and fashionably dressed”, a “fine-featured woman with an eye for style.”⁴⁶ Depicted by her contemporaries as a “petite, quiet-living, demure” woman, who weighed less than one hundred pounds, Viola Desmond was a well-mannered, refined, demonstrably *feminine* woman, physically manhandled by rude and forcibly violent white men.⁴⁷ The spectacle would undoubtedly have provoked considerable outcry had the principal actors all been middle-class whites. Customary gender relations dictated that, at least in public, physically taller and stronger men should exercise caution and delicacy in their physical contact with women. Roughing up a lady violated the very core of the ideology of chivalry.

The extension of traditional gender assumptions to Black women provoked more pause. Racist practices condoned and nurtured throughout North America during times of slavery had combined to deny Black women both the substance and the trappings of femininity. Slave masters compelled their male and female slaves alike to labour alongside each other, irrespective of gender. Black women found their reproductive capacity commodified for material gain, and frequently experienced forcible rape at the hands of their white owners and overseers. Denied the most fundamental rights to their own bodies and sexuality, Black women were barred by racist whites from any benefits that the idealized cult of “motherhood” and “femininity” might have offered white women. The signs on the segregated washrooms of the deep south, “white ladies” and

cases were unreported, or whose cases do not reveal on the face of the documents that race was the issue: (see further discussion of this tendency in legal argument and reporting *infra*.)

Black women brought similar legal challenges in the United States. Sarah Remond successfully sued the owners of a Boston theatre for ejecting her in 1853. Elizabeth Jennings successfully sued the owners of a railroad in New York for ejecting her from a horse car in the 1850s. In 1865 Sojourner Truth pressed charges against the white conductor of a street car who assaulted her for attempting to ride. In 1866 Ellen Garrison Jackson litigated in Baltimore to stop racial segregation in the railway waiting room, and Mary Ellen Pleasant sued the San Francisco Trolley Company after she was prevented from riding on one of its cars. In 1873 Catherine Brown sued after she was denied accommodation in the “ladies’ car” while travelling between Alexandria, Virginia and Washington, D.C. In 1885, Ida Bell Wells sued a railroad in Memphis, Tennessee, after the conductor had forcibly ejected her from a first-class car. Charlotte Hawkins Brown brought suit in the 1920s whenever she was subjected to racial segregation on the train. See E.B. Higginbotham, “African-American Women’s History and the Metalanguage of Race” (1992) 17:2 *Signs* 251 at 262; Lerner, *supra* note 19 at 375–76; D. Sterling, ed., *We Are Your Sisters: Black Women in the Nineteenth Century* (New York: W.W. Norton, 1984) at 176ff; Giddings, *supra* note 31 at 262.

46. See e.g. Clarion 1, *supra* note 22; Pachai, *supra* note 32 at 152–55; McCluskey, *supra* note 41.

47. Pearleen Oliver, *supra* note 26.

"black women", neatly encapsulated the racialized gender assumptions. As Evelyn Brooks Higginbotham has described it, "no black woman, regardless of income, education, refinement, or character, enjoyed the status of lady."⁴⁸

Whites who ascribed to attitudes such as these were somewhat unsettled by women such as Viola Desmond. Throughout her frightening and humiliating ordeal, she had remained the embodiment of female respectability. Her challenge to the racially segregated seating policies had been carried out politely and decorously. Her dignified response in the face of the volatile theatre manager's threat to throw her out was that she "was behaving very quietly," and so "didn't think he could." Even the white matron from the New Glasgow lock-up had recognized the incongruity of exposing a refined woman to the rough and tumble assortment of men collected in the cell that night: "She seemed to realize that I shouldn't have been there," emphasized Viola Desmond. By all standards of the dominant culture, Viola Desmond was undeniably feminine in image and deportment. The question remained whether the ideology of chivalry would be extended to encompass a Black woman who had been insulted and physically mauled by white men.

The first to hear about the incident was Viola Desmond's husband, Jack, who was upset but not surprised. "[T]here were no coloreds allowed downstairs," he recalled later. "She didn't know that—I knew it because I grew up there." A deeply religious man, Jack Desmond's philosophical

48. Higginbotham, *supra* note 45 at 254ff. She adds: "Sojourner Truth's famous and haunting question, 'Ar'n't I a Woman?' laid bare the racialized configuration of gender under a system of class rule that compelled and expropriated women's physical labor & denied them legal right to their own bodies and sexuality, much less to the bodies to which they gave birth. While law and public opinion idealized motherhood and enforced the protection of white women's bodies, the opposite held true for black women's." See D. Brand, "Black Women and Work: The Impact of Racially Constructed Gender Roles on the Sexual Division of Labour" (1987) 26 *Fireweed* 87 at 90: "The construction of Black femininity has its foundation in Black women's relation to capitalist production and to reproduction. A particular category of femininity which is both neuter and over-sexed, both strong and incompetent, prepares Black women for work as domestic workers/mammies/baby sitters/care givers/service givers/prostitutes, as well as for work as labourers." Nitya Duclos has noted that our view of sexuality is both gender- and race-specific, with some feminist anthropologists arguing that there are many genders, not just two, (or that gender is culture-specific): see N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 *Canadian Journal of Women and the Law* 25 at 33–34. See also S. Morton, "Separate Spheres in a Separate World: African-Nova Scotian Women in late-19th-Century Halifax County" (1993) 22:2 *Acadiensis* 61 at 74–75, where she notes: "Black women were expected to be engaged in hard physical labour such as scrubbing, thereby confirming their unladylike reputation; yet, at the same time, those who restricted their labour to the private domestic sphere and expected their husbands to act as breadwinners could be perceived as lazy."

views were rooted in tolerance: "You've got to know how to handle it," he would counsel. "Take it to the Lord with a prayer."⁴⁹

Viola Desmond was considerably less willing to let temporal matters lie, as the interview she gave to the *Halifax Chronicle* shortly afterward indicates:

I can't understand why such measures should have been taken. I have travelled a great deal throughout Canada and parts of the United States and nothing like this ever happened to me before. I was born in Halifax and have lived here most of my life and I've found relations between negroes and whites very pleasant. I didn't realize a thing like this could happen in Nova Scotia—or in any other part of Canada.⁵⁰

The shock that underlies this statement clearly communicates the magnitude of the insult that Viola Desmond experienced in the Roseland arrest. She must have been no stranger to racial segregation. She had taught in segregated schools, been denied occupational training on the basis of race, and was keenly aware of segregated facilities in her own business. Segregated seating in a Nova Scotian theatre must have seemed the last straw. And how substantially worse were the actions of the theatre manager and various officials of the state, who responded to her measured resistance to racial segregation with armed force and criminal prosecution. To see the forces of law so unanimously and spontaneously arrayed against her quiet protest must have struck Viola Desmond as unspeakably outrageous. Couching her complaint in the most careful of terms, with polite reference to the "very pleasant" relations which normally ensued between the races, she challenged Canadians to respond to this unconscionable treatment, to side with her against the legal authorities who had promoted her conviction.

A considerable portion of the Black community in Halifax seems to have shared Viola Desmond's anger and concern over the incident. The Reverend William Pearly Oliver was one of the first to take up the case. Born in 1912 and raised in a predominantly white community in Wolfville, Nova Scotia, the Reverend Oliver had graduated from Acadia University with a B.A. in 1934, and a Master of Divinity in 1936. For the past decade he had been serving as the minister to an almost exclusively Black congregation at Cornwallis Street Baptist Church, to which Viola and Jack Desmond belonged. An influential member of the African United Baptist Association of Nova Scotia, the Rev. Oliver had achieved public acclaim as the only Black chaplain in the Canadian army during World

49. See Jack Desmond's comments in McCluskey, *supra* note 41; Pachai, *supra* note 32 at 154.

50. "Negress Alleges", *supra* note 3.

War II. A confirmed proponent of racial equality in education and employment, William Oliver was no stranger to humiliating practices of racial segregation himself. He had been refused service in restaurants, barred from social activities organized by whites, and challenged when he attempted to participate in white athletic events. William Oliver was on record as committed to opposing racial segregation in hotels, restaurants and other public facilities, insisting that businesses should "cater to the public on the basis of individual behavior, regardless of race." The Rev. Oliver and his twenty-nine year old wife, Pearleen Oliver, met with Viola Desmond that weekend.⁵¹

Pearleen Oliver would take a particularly active role in support of Viola Desmond. One of the most prominent Black women in Nova Scotia, Pearleen Oliver had been born into a family of ten children in Cook's Cove, Guysborough County in 1917. She had "put herself through high school by doing housework", and married the young Oliver right after graduation. In 1944, she had spearheaded a campaign of the Halifax Coloured Citizens Improvement League to force the Department of Education to remove racially objectionable material from its public school texts. The insulting depiction of "Black Sambo" in the Grade Eleven text should be superseded by the "authentic history of the colored people and stories of . . . their contribution to Canadian culture", she insisted.⁵² The leader of the Ladies Auxiliary of the African United Baptist Association, who campaigned extensively to eliminate racial barriers from the nursing profession, Pearleen Oliver took matters affecting Black women extremely seriously.⁵³ When the shaken and tearful

51. For biographical details on Reverend W.P. Oliver (who would later become the Chair of the Black United Front), see C. Thomson, *Born with a Call: A Biography of Dr. William Pearly Oliver, C.M.* (Cherrybrook, Nova Scotia: Black Cultural Centre, 1986); "Halifax Cleric Elected" *The [Halifax] Chronicle-Herald* (3 September 1960) 13; Clarke, *Fire on the Water* vol. 1 (Lawrencetown, Nova Scotia: Pottersfield Press, 1991) 171; Marjorie Major "The Negroes in Nova Scotia" P.A.N.S. Mgl, vol. 1767, # 42K; Oliver, *supra* note 23; W.P. Oliver "Urban and Rural Life Committee of The African United Baptist Association of Nova Scotia" P.A.N.S. Mgl, vol. 1767, # 42L; Winks, *supra* note 5 at 350–52; R.W. Winks, "Negroes in the Maritimes: An Introductory Survey" (1969) 48:4 *Dalhousie Review* 453 at 469; N. Lubka, "Ferment in Nova Scotia" (1969) 76:2 *Queen's Quarterly* 213.

Prior to her marriage to Jack Desmond, Viola had belonged to the racially-mixed congregation of the Trinity Anglican Church. She switched affiliations to her husband's church upon marriage.

52. Letter of Beresford Augustus Husbands, President of the Halifax Coloured Citizens Improvement League, to Mayor of Halifax (26 January 1944). Helen Campbell Bennerman's *Story of Little Black Sambo*, first published in 1899, became a Canadian classic, according to Robin Winks, "still selling well in its sixteenth printing in 1969." See Winks, *supra* note 5 at 295.

53. For biographical details on Pearleen (Borden) Oliver, whose own attempts to enter the nursing profession were barred because of race, and who would give birth to five sons, see D. McCubbin, "The Women of Halifax" (June 1954) *Chatelaine* 16; Thomson, *supra* note 51;

Viola Desmond showed Pearleen Oliver the bruises she had received, the pastor's wife advised her to get immediate medical attention. The Black physician that Viola consulted on November 12th treated her for injuries to her knee and hip, and advised his patient to see a lawyer.⁵⁴

The Olivers strongly supported this idea, and urged Viola Desmond to retain a lawyer to appeal the conviction. Pearleen Oliver also sought public support for Viola's case from the Nova Scotia Association for the Advancement of Colored People (NSAACP). The NSAACP, dedicated to eradicating race discrimination in housing, education and employment, had been founded in 1945. The nine Black charter members, all residents of the same Gottingen area neighbourhood as the Desmonds, were: the Reverend William P. Oliver, Pearleen Oliver, Arnold P. Smith, Richard S. Symonds, William Carter, Bernice A. Williams, Carl W. Oliver, Walter Johnson, and Ernest Grosse. Pearleen Oliver found about half of the NSAACP members supportive of Viola Desmond's court challenge, while half expressed initial reluctance. Divisions of opinion about strategies for change seem to be inherent in all social reform movements, and the NSAACP was no exception. Fears of fostering racist backlash, concerns about using the law to confront racial segregation, and questions about whether equal admission to theatres was a pressing issue seem to have motivated the more cautious.⁵⁵ Pearleen Oliver made a convincing case for supporting a legal claim, however, and all of the members of the NSAACP ultimately backed the case. They pledged to call public meetings about Viola Desmond's treatment and to raise funds to defray any legal costs.⁵⁶ As Pearleen Oliver would explain to the

Clarke, *supra* note 51; F. Early, "Rethinking Canada: The Promise of Women's History" (1992) 21 *Resources for Feminist Research* 25. For reference to Pearleen Oliver's public speaking campaign in the 1940s to publicize cases of Black women refused admission to nursing schools, see A. Calliste, "Women of 'Exceptional Merit': Immigration of Caribbean Nurses to Canada" (1993) 6 *Canadian Journal of Women and the Law* 85 at 92. For reference to Pearleen Oliver's interest in discrimination against Black women, see Clarke, *supra* note 23 at 146, where he notes Pearleen Oliver's *One of His Heralds* (Halifax: Pearleen Oliver, n.d.) discusses the situation of Agnes Gertrude Waring (1884–1951), whose attempt to receive ordination to preach at the Second Baptist Church in New Glasgow was refused by the Maritime Baptist Convention because she was female.

54. Viola Desmond sought medical treatment from a physician from the West-Indies, who resided in the same building as her parents, and maintained an office on the corner of Gottingen and Gerrish streets. Being Black, this physician had no access to city hospitals, and had to perform all procedures in his office: Pearleen Oliver, *supra* note 26.

55. *Ibid.*

56. The mission of the NSAACP was set out in "The N.S.A.A.C.P." *The [New Glasgow] Clarion* 1:1 (December 1946) 1:

- a) To improve and further the interest of the Colored people of the Province.
- b) To provide an organization to encourage and promote a spirit of fraternity among its members.

Halifax *Chronicle*, the NSAACP intended to fight Viola Desmond's case to prevent "a spread of color-bar tactics" across the province.⁵⁷

Some dissent continued to linger within the Black community. One individual wrote to *The Clarion*, a bi-weekly Black newspaper founded in New Glasgow in July 1946:⁵⁸

About all we have to say about our Country is "Thank God" for it. With all its shortcomings it is still the best place on earth. I would like to start complaining about segregation in theatres and restaurants, but as I look around me and see the food stores filled to overflowing while countless millions are starving I just can't get het up over not eating in certain places. I am EATING and REGULARLY. Later on, maybe, but not now. Canada is still all right with me.⁵⁹

c) To co-operate with Governmental and private agencies for the promotion of the interest and the welfare of the Province or any community therein, wherein Colored People are resident, and particularly in reference to said Colored people.

d) To improve the educational opportunities of Colored youth and to raise the standard [of living] of the Colored people of the Province or any community therein.

Thomson, *supra* note 51 at 77 notes two predecessor organizations: the Halifax-based Colored Education Centre, founded in 1938 by F.B. Holder, a British Guiana-born Black physician, and the Halifax Colored Citizens Improvement League, founded by Beresford Augustus Husbands in 1932. For details regarding the NSAACP, see Pachai, *supra* note 32 at 241–43. See also *An Act to Incorporate The "Nova Scotia Association for the Advancement of Colored People"*, S.N.S. 1945, c. 97.

57. "Negress Alleges", *supra* note 3. This position was supported by Mrs. M.H. Spaulding, chair of the emergency committee for civil rights of the Civil Liberties League, whose views were quoted in "Ban All", *supra* note 3: "'Jim Crow practices, such as segregating Negroes or any other group in certain sections of theatres, or in keeping them out of hotels, have no place in Canada and should be forbidden by law. There is no place for second-class citizenship in this country,' said Mrs. Spaulding. She added there had been instances of the same sort of racial discrimination in other parts of Canada. The practice is that when Negroes try to buy a ticket at a theatre they are told the only seats available are in the balcony, she asserted. 'When Paul Robeson was in Toronto in 'Othello' at the Royal Alexandra he said he would not appear if there was any discrimination against colored people, and they were seated in all parts of the house.'"

58. For details on *The Clarion*, which proclaimed itself devoted to news and advocacy "in the interest of Colored Nova Scotians", see Winks, *supra* note 5 at 408–10; Pachai, *supra* note 32 at 241; C.M. Best, *That Lonesome Road* (New Glasgow, Nova Scotia: Clarion, 1977); Clarke, *supra* note 51. *The Clarion*, which ceased publication in 1956, was the second Black newspaper to be published in Nova Scotia. Wilfred A. DeCosta, Miriam A. DeCosta and C. Courtenay Ligoure published the first Black publication in Nova Scotia, *The Atlantic Advocate*, between April 1915 and 1917, from an office at 58 Gottingen Street. ["Devoted to the Interests of Colored People": *The Atlantic Advocate*, Nova Scotia's First Black Magazine", P.A.N.S. brochure, April 1992, copy on file with the author.] Wilfred A. DeCosta was also one of the founding trustees of the Nova Scotia Home for Colored Children; see *An Act to Incorporate The Nova Scotia Home for Colored Children*, S.N.S. 1915, c. 107.

For a listing of other Black newspapers published in Canada, see Winks, *supra* note 5 at 394–410.

59. *Clarion* 1, *supra* note 22.

The argument made here seems partially rooted in economic, or class-based concerns. The letter focuses on issues of basic sustenance, intimating indirectly that those who can afford to eat in restaurants or attend the theatre are not fully representative of the Black community. In contrast, Carrie M. Best, the forty-three year old Black editor of *The Clarion*,⁶⁰ believed that the question of racial segregation in public facilities was extremely important to the entire Black population. She wrote back defending those who would challenge such discrimination in no uncertain terms:

It is sometimes said that those who seek to serve are "looking for trouble." There are some who think it better to follow the line of least resistance, no matter how great the injury. Looking for trouble? How much better off the world would be if men of good will would look for trouble, find it, and while it is merely a cub, drag it out into the open, before it becomes the ferocious lion. Racial and Religious hatred is trouble of the gravest kind. It is a vicious, smouldering and insidious kind of trouble, born of fear and ignorance. It often lays dormant for years until some would be Hitler, Bilbo or Rankin emerges to fan the flame into an uncontrollable catastrophe.

It is heartening to know how many trouble shooters have come to the aid of *The Clarion* since the disgraceful Roseland incident. They are convinced, as are we, that it is infinitely wiser to look for trouble than to have trouble looking for them.⁶¹

Carrie Best would profile Viola Desmond's treatment on the front pages of *The Clarion*, denouncing it as a "disgraceful incident", and claiming that "New Glasgow stands for Jim-crowism,"⁶² at its basest, over

60. For biographical details on Dr. Carrie M. Best, born in New Glasgow in 1903, married to a Black porter for the Canadian National Railway, an editor and publisher of several Black newspapers, including the nationally circulated *The Negro Citizen* in 1949, see Best, *supra* note 58; Clarke, *supra* 51 at 171; Winks, *supra* note 5 at 405. Her son, Calbert Best, would later become national president of the Civil Service Association of Canada in Ottawa in 1960, and an Assistant Deputy Minister for Manpower and Immigration in 1970. *Ibid.* at 408.

61. Editorial, "Taking Inventory" *The [New Glasgow] Clarion* 2:4 (28 February 1947) 2.

62. The origins of the American phrase "Jim Crow" appear to go back to the 1730s, when Blacks were first derogatorily referred to as "crows." "Jim Crow" was initially used to describe some Black dances, and in 1828, Thomas D. Rice, soon to be known as "the father of American minstrelsy", popularized the term in a profoundly racist manner. A white man who performed in "Black face", Rice wrote a song titled "Jim Crow" in which he imitated and ridiculed "the erratic twitching, loose-jointed jig performed by a crippled and deformed black stableman named Jim Crow." His performance caused a theatrical sensation amongst white audiences in Louisville, inspiring far-ranging, lucrative tours throughout the United States and England, and spawning a host of Blackface imitators. (On the cultural meaning of Blackface minstrelsy, described as the "first self-consciously white entertainers", and the projection of white fears and fascination upon African-American music and dance, see D.R. Roediger, *The Wages of Whiteness* (London: Verso, 1991) at 116–19.) "Jim Crow" came to encompass a stereotypical characterization of Black males as "childlike, irresponsible, inefficient, lazy, ridiculous in speech, pleasure-seeking and happy." By 1835, "Jim Crow" and "Jim Crowism" had come to mean segregation of Blacks from whites, used in such phrases as "Jim Crow car" (1841, first

the entire globe.” She also gave prominent placement to a notice from Bernice A. Williams, NSAACP secretary, announcing a public meeting to solicit contributions for the Viola Desmond Court Fund. *The Clarion* urged everyone to attend and give donations: “The NSAACP is the Ladder to Advancement. Step on it! Join today!”⁶³

Carrie Best was a native of New Glasgow and well acquainted with the egregious forms of white racism practised there. And she was no stranger to the heroism of Black resisters. One of her most vivid childhood memories involved a race riot which had erupted in New Glasgow at the close of the First World War. An inter-racial altercation between two youths had inspired “bands of roving white men armed with clubs” to station themselves at different intersections in the town, barring Blacks from crossing. At dusk that evening, Carrie Best’s mother was delivered home from work by the chauffeur of the family who employed her. There she found that her husband, her younger son, and Carrie had made it home safely. Missing was Carrie’s older brother, who had not yet returned home from his job at the Norfolk House hotel. Carrie described what ensued in her autobiography, *That Lonesome Road*:

In all the years she lived and until she passed away at the age of eighty-one, my mother was never known to utter an unkind, blasphemous or obscene word, nor did I ever see her get angry. This evening was no exception. She told us to get our meal, stating that she was going into town to get my brother. It was a fifteen minute walk.

At the corner of East River Road and Marsh Street the crowd was waiting and as my mother drew near they hurled insults at her and threateningly ordered her to turn back. She continued to walk toward the hotel about a block away when one of the young men recognized her and asked her where she was going. “I am going to the Norfolk House for my son,” she answered calmly. (My mother was six feet tall and as straight as a ramrod.)

used as a nickname for a “Black only” car on the Boston Railroad), “Jim Crow law” (1890s), and “Jim Crow school” (1903). C.V. Woodward *The Strange Career of Jim Crow*, 3d ed. (New York: Oxford University Press, 1974) at 7 indicates that “Jim Crow” was used as a designation for “racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries.” See S.B. Flexner, *I Hear America Talking* (London: Van Nostrand Reinhold, 1976); *The National Cyclopaedia of American Biography*, vol. 11 (New York: James T. White, 1909) at 207–08; Davis, *supra* note 26 at 51; W.T. Leonard, *Masquerade in Black* (Metuchen, New Jersey: Scarecrow Press, 1986).

63. *Clarion* 1, *supra* note 22; Editorial, “A New Year’s Message” *The [New Glasgow] Clarion* 2:1 (1 January 1947). The latter article would note that “one of New Glasgow’s leading business men” (race unspecified) had donated ten dollars to the case, leading the editor to applaud him for his “courage and generosity”. Pearleen Oliver recalls that money came in from all over the province, in amounts both large and small, with more white donors than Black: Pearleen Oliver, *supra* note 26.

The young man ordered the crowd back and my mother continued on her way to the hotel. At that time there was a livery stable at the rear entrance to the hotel and it was there my mother found my frightened brother and brought him safely home.⁶⁴

This was but one incident in an increasingly widespread pattern of white racism, which exploded with particular virulence across Canada during and immediately following World War I. White mobs terrorized the Blacks living near New Glasgow, physically destroying their property. White soldiers also attacked the Black settlement in Truro, Nova Scotia, stoning houses and shouting obscenities. Blacks in Ontario and Saskatchewan withstood increasingly concerted intimidation from the hateful Ku Klux Klan.⁶⁵ But race discrimination had a much longer history in Canada.

IV. *The History of Black Segregation in Canada*

Although records indicate that the first Black man arrived as early as 1606, substantial numbers did not immigrate to Canada until after the American Revolution in 1782. At that time several thousand free Black Loyalists took up land grants from the Crown. Many of the white Loyalists also brought their Black slaves with them. During the War of 1812, several thousand additional Blacks sought refuge with the British, ultimately settling in Nova Scotia between 1813 and 1815. In the 1840s and '50s, the province of Canada West received an estimated forty thousand American Blacks, who were fleeing the *Fugitive Slave Act* via the Underground Railroad. Smaller groups of Blacks migrated to the Canadian West, settling on Vancouver Island in 1859, and in Saskatchewan and Alberta in the 1890s, and between 1910 and 1914. Additional numbers continued to come from the United States and the West Indies from the 1920s onward.⁶⁶

64. Best, *supra* note 58 as reprinted in Clarke, *supra* note 51 at 123. The Norfolk House, where Carrie's brother worked, had a history of refusing to support the practices of racial discrimination so common in the area. *The [Halifax] Eastern Chronicle* (28 May 1885) noted that Mr. H. Murray refused to close his Norfolk hotel to the Fisk Jubilee Singers, a Black choir group. Members of the choir had earlier been refused admission to hotels in Pictou and Halifax.

65. Winks, *supra* note 5 at 319–25; "Negroes in the Maritimes", *supra* note 51 at 466–67; Thomson, *supra* note 51 at 467. Truro, which would earn itself the designation of "the Alabama of Canada" and "Little Mississippi", also maintained a "Whites Only" waiting room in the railroad station: see Lubka, *supra* note 51 at 215; Winks, *supra* note 5 at 420.

66. Williams, *supra* note 24 at 7 indicates that Matthew da Costa, a Black man, accompanied Samuel de Champlain on his third voyage to Canada in 1606. A group of exiled Jamaican Maroons migrated to Nova Scotia in 1796, but left for Sierra Leone 4 years later. See R.W. Winks, "Negro School Segregation in Ontario and Nova Scotia" (1969) 50:2 *Canadian Historical Review* 164 [hereinafter "Segregation"]; Walker, *supra* note 34; J.W.St.G. Walker, *Racial Discrimination in Canada: The Black Experience* (Ottawa: Canadian Historical Association, 1985) [hereinafter "Experience"]; M. Power & N. Butler, *Slavery and Freedom*

Racist whites spearheaded campaigns within several provinces to restrict the further entry of Black immigrants.⁶⁷ The federal government responded in 1910 with *The Immigration Act*⁶⁸. This allowed the federal cabinet to issue orders prohibiting the entry of “immigrants belonging to any race deemed unsuited to the climate or requirements of Canada.”⁶⁹ As

in *Niagara* (Niagara-on-the-Lake, Ontario: Niagara Historical Society, 1993); “Negroes in the Maritimes”, *supra* note 51; J. Hornby, *Black Islanders: Prince Edward Island’s Historical Black Community* (Charlottetown: Institute of Island Studies, 1991); Hamilton, *supra* note 29. 67. In Nova Scotia, efforts were made to bar the entry of liberated slaves from the Caribbean in 1834, with the passage of *An Act to prevent the Clandestine Landing of Liberated Slaves, and other Persons therein mentioned, from Vessels arriving in this Province*, S.N.S. 1834, c. 68. The preamble stated, “Whereas, from the recent Emancipation of the Slaves in the West-Indies, Bermuda and the Bahama Islands, it is apprehended that many of the sick, infirm, idle and dissolute of them, may be transported to this Province . . . and that thereby burthensome expense may be occasioned by the Inhabitants of this Province, and Contagious Diseases be introduced among them.” The statute fined the master of the ship fifteen pounds per slave or liberated slave. A constable was stationed in the harbour to forestall any vessel from discharging slaves or liberated slaves. The act was stipulated to be in force for one year, and “from thence to the end of the next Session of the General Assembly.” Winks, *supra* note 5 at 129 states that Nova Scotia attempted to renew this act in 1836, but the Imperial Government disallowed it. See also Oliver, *supra* note 23 at 129–35. No legislative records have yet been located to verify this.

In 1911 various groups from Alberta petitioned the federal government to exclude Black immigrants. The Edmonton Board of Trade, the Orange Lodge, and the Edmonton chapter of the Imperial Order of the Daughters of the Empire were all involved. Dr. Ella Synge, spokeswoman for the latter group, drew upon pernicious racist myths to explain her motivation as that of white women’s fear of sexual assault by Black men. She claimed that “surely the result of Lord Gladstone’s foolishness in South Africa is apparent enough already, in the enormous increase in outrages on white women that has occurred.” She warned that “the finger of fate is pointing to lynch law which will be the ultimate result, as sure as we allow such people to settle among us.” See *The [Edmonton] Capital* (27 March 1911); H.M. Troper, “The Creek-Negroes of Oklahoma and Canadian Immigration, 1909–11” (1972) 53:3 *Canadian Historical Review* 272; Thomson, *supra* note 5; H.M. Troper, *Only Farmers Need Apply* (Toronto: Griffen House, 1972); R.B. Shepard, “Plain Racism: The Reaction Against Oklahoma Black Immigration to the Canadian Prairies: in O. McKague, ed., *Racism in Canada* (Saskatoon: Fifth House, 1992) 15. On the pervasiveness of racist claims regarding Black male sexuality, see A.Y. Davis, “Rape, Racism and the Myth of the Black Rapist” in *Women, Race and Class* (New York: Random House, 1981); Jones, *supra* note 31; A.M. Duster, ed., *Crusade for Justice: The Autobiography of Ida B. Wells* (Chicago: University of Chicago Press, 1970).

68. S.C. 1910, c. 27.

69. *Ibid.* at s. 38 provided: The Governor in Council may, by proclamation or order whenever he deems it necessary or expedient

(c) prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry in Canada, of immigrants *belonging to any race deemed unsuited to the climate or requirements of Canada*, or of immigrants of any specified class, occupation or character.

Section 37 also provided: Regulations made by the Governor in Council under this Act may provide as a condition to permission to land in Canada that immigrants and tourists shall possess in their own right money to a prescribed minimum amount, which amount may vary according to the race, occupation or destination of such immigrant or tourist. . . . [emphasis

early as 1864, physicians had been predicting that the harsh Canadian winter would “efface” the Black population, and this theme was enthusiastically adopted by senior officials from the Department of the Interior at the turn of the century.⁷⁰ An order in council was drafted in 1911 to prohibit the landing in Canada of “any immigrant belonging to the Negro race”, but it was never declared. Concerned about the potential diplomatic problems this overtly exclusionary policy might create between Canada and the United States, the authorities opted to utilize unwritten, informal rules to accomplish the same end by more indirect means.⁷¹ Similar legislation was enacted in Newfoundland in 1926.⁷²

added]. *The Immigration Act*, S.C. 1921, c. 32 amending S.C. 1910, c. 27 was introduced to exclude from its scope Canadian citizens, diplomatic officials, and the military.

The legislation was expanded by *The Immigration Act*, S.C. 1919, c. 25, s. 13, repealing S.C. 1910, c. 27, s. 38(c), enacting in its stead the following:

(c) prohibit or limit in number for a stated period or permanently the landing in Canada, or the landing at any specified port or ports of entry in Canada, of immigrants belonging to any nationality or race or of immigrants of any specified class or occupation, by reason of any economic, industrial or other condition temporarily existing in Canada or because such immigrants are deemed unsuitable having regard to the *climatic*, industrial, social, educational, labour or other conditions or requirements of Canada or because such immigrants are deemed unsuitable owing to their *peculiar customs, habits, modes of life and methods of holding property, and because of their probable inability to become readily assimilated* or to assume the duties and responsibilities of Canadian citizenship within a reasonable time after their entry. [emphasis added]

See also *Immigration Act*, R.S.C. 1927, c. 93, ss. 37–38.

70. See for example, the comments of Chatham physician, Dr. T. Mack, quoted in S.G. Howe, *The Refugees from Slavery in Canada West: A Report to the Freedman's Inquiry Commission* (Boston: 1864) at 19: “The disease [Blacks] suffer most from is pulmonary—more than general tubercular; and where there is not real tubercular affection of the lungs there are bronchitis and pulmonary affections. I have the idea . . . that this climate will completely efface them.” See also the comments of L. Pereira, Department of the Interior, Ottawa, to Reverend W.A. Lamb-Campbell, Galveston, Texas, 20 Sept. 1906, as quoted in Troper, *supra* note 67 at 127: “[It has been] observed that after some years of experience in Canada [Negroes] do not readily take to our climate on account of the rather severe winter”.

71. Prime Minister Laurier was also apparently concerned about a backlash among the Black liberal voters in Nova Scotia and southwest Ontario. Under the informal exclusionary program, the Department of the Interior made it very clear, both to immigration agents and to prospective Black settlers, that the standard medical and character examinations made at the border would result in the rejection of Black immigrants. See Troper, *ibid.* at 140–41.

72. *The Immigration Act*, 1926, S.N. 1926, c. 29, provided:

s.11 Regulations made by the Governor-in-Council under this Act may provide as a condition to permission to land in this Colony that Immigrants shall possess in their own right money to a prescribed minimum amount which amount may vary according to the race, occupation or destination of such immigrant. . . .

s.12 The Governor-in-Council may, by Proclamation or order whenever he deems it necessary, or expedient . . .

(b) prohibit for a stated period, or permanently the landing in this Colony, or the landing at any specified port of entry in this Colony, of immigrants

From the middle of the 19th century, Blacks and whites in two provinces could be relegated to separate schools by law.⁷³ Ontario had amended its *School Act* in 1849 to permit municipal councils "to authorize the establishing of any number of schools for the education of the children of colored people that they may judge expedient." The preamble to the statute was quite specific. The legislation was necessary, it admitted, because "the prejudices and ignorance" of certain Ontario residents had "prevented" certain Black children from attending the common schools in their district.⁷⁴ The statute was amended in 1850, to clarify that the initiative to set up a separate school for "coloured people" was to come from the Black community itself. Local public school trustees were to establish such schools upon the application of twelve or more Black families in the area.⁷⁵ The number would be reduced, in 1886, to five families.⁷⁶ Although drafted in permissive language, white officials

belonging to any race deemed unsuited to the climate or requirements of this Colony, or of immigrants of any specified class, occupation or character.

[emphasis added]

73. Although the legislation was restricted to Ontario and Nova Scotia, several other provinces relied upon local social pressure to deprive Blacks of schooling or to force them into opening their own schools. See Winks, *supra* note 5 at 365, regarding New Brunswick and Prince Edward Island.

74. *An Act For the Better Establishment and Maintenance of Public Schools in Upper Canada, and For Repealing the Present School Act*, S.C. 1849, c. 83, ss. 69–71.

75. *An Act For the Better Establishment and Maintenance of Common Schools in Upper Canada*, S.C. 1850, c. 48, s. 19 read: "And be it enacted, That it shall be the duty of the Municipal Council of any Township, and of the Board of School Trustees of any City, Town or incorporated Village, on the application in writing of twelve or more resident heads of families, to authorize the establishment of one or more separate schools for Protestants, Roman Catholics, or coloured people, and, in such case, it shall prescribe the limits of the divisions or sections for such schools. . . ."

76. *The Separate Schools Act, 1886*, S.O. 1886, c. 46, provided as follows:

s.3(1) . . . upon the application in writing of five or more heads of families resident in any township, city, town or incorporated village, being coloured people, the council of such township or the board of school trustees of any such city, town or incorporated village, shall authorize the establishment therein of one or more Separate Schools for coloured people, and in every such case, such council or board, as the case may be, shall prescribe the limits of the section or sections of such schools.

s.3(2). No person shall be a supporter of any Separate School for coloured people unless he resides within three miles in a direct line of the site of the school house for such Separate School.

s.6. None but coloured people shall vote at the election of trustees of any Separate School established for coloured people. . . .

s.9. In all cities, towns, incorporated villages and township public school sections in which separate schools exist, each . . . coloured person . . . sending children to any such school, or supporting the same by subscribing thereto annually an amount equal to the sum at which such person, if such separate school did not exist, must have been rated in order to obtain the annual legislative public school grant, shall be exempt from the payment of all rates imposed

frequently used coercive tactics to force Blacks into applying for segregated schools.⁷⁷ Once separate schools were set up, the courts refused Black children admission to any other schools, despite evidence that this forced many to travel long distances to attend schools they would not have chosen otherwise.⁷⁸ Separate schools for Blacks continued until

for the support of public schools of such city, town, incorporated village and school section respectively, and of all rates imposed for the purpose of obtaining such public school grant.

s.10. The exemption from the payment of school rates, as herein provided, shall not extend beyond the period during which such persons send children to or subscribe as aforesaid for the support of such separate school; nor shall such exemption extend to school rates or taxes imposed or to be imposed to pay for school-houses, the erection of which was undertaken or entered into before the establishment of such separate school.

s.11. Such separate schools shall not share in any school money raised by local municipal assessment for public school purposes.

s.12. Each such separate school shall share in such legislative public school grants according to the yearly average number of pupils attending such separate school, as compared with the average number of pupils attending the public schools in each such city, town, incorporated village or township; the mean attendance of pupils for winter and summer being taken.

s.16. The trustees of each such separate school shall, on or before the thirtieth day of June, and the thirty-first day of December of each year, transmit to the county inspector a correct return of the names of all . . . coloured persons . . . who have sent children to, or subscribed as aforesaid for the support of, such separate school during the then last preceding six months, and the names of the children sent, and the amounts subscribed by them respectively, together with the average attendance of pupils in such separate school during such period.

s.18. The trustees of each such separate school shall be a body corporate . . . and shall have such power to impose, levy and collect school rates or subscriptions, upon and from persons sending children to, or subscribing towards the support of the separate school as are provided in section 54 of this Act.

77. Winks, *supra* note 5 at 365–76; “Segregation”, *supra* note 66 at 174–76.

78. *Washington v. Charlotteville School Board* (1854), 11 U.C.Q.B. 569 (Ont.) held that school authorities could not exclude Black children unless alternate facilities for “colored pupils” had been established, but *Hill v. Camden & Zone School Board* (1854), 11 U.C.Q.B. 573 (Ont.) ruled that Black children could be forced to attend separate schools located miles away from their homes and outside of their school sections.

An amendment was passed in 1869, which provided “that no person shall be deemed a supporter of any separate school for coloured people, unless he resides within three miles in a direct line of the site of the school house for such separate school; and any coloured child residing farther than three miles in a direct line from the said school house, shall be allowed to attend the common school of the section within the limits of which the said child shall reside”: see *An Act to Amend the Act respecting Common Schools in Upper Canada*, S.O. 1868–69, c. 44, s. 9. These provisions were continued by *The Separate Schools Act*, R.S.O. 1877, c. 206, ss. 2–5. See also R.S.O. 1897, c. 294.

After the amendment, several cases acknowledged that race should not be the sole ground for exclusion from common schools, but then accepted the testimony of school authorities regarding overcrowding and “insufficient accommodation”, using this to defeat the claims of Black parents to register their children in non-segregated schools: see *Hutchison v. St. Catharines (City of) Board of Education* (1871), 31 U.C.Q.B. 274 (Ont.); *Dunn v. Windsor (City of) Board of Education* (1884), 6 O.R. 125 (H.C.). For two examples of cases where the efforts of education officials to bar Black children from common public schools were challenged successfully, see *Simmons v. Chatham (Township of)* (1861), 21 U.C.Q.B. 75

1891 in Chatham, 1893 in Sandwich, 1907 in Harrow, 1917 in Amherstburg, and 1965 in North Colchester and Essex Counties.⁷⁹ The Ontario statute authorizing racially segregated education would not be repealed until 1964.⁸⁰ As historian Robin Winks has noted:

The Negro schools lacked competent teachers, and attendance was highly irregular and unenforced. Most schools met for only three months in the year or closed entirely. Most had no library of any kind. In some districts, school taxes were collected from Negro residents to support the [white] common school from which their children were barred. . . . The education received . . . could hardly have been regarded as equal. . . .⁸¹

Similar legislation had existed since 1865 in Nova Scotia, where education authorities had been authorized to establish "separate apartments or buildings" for pupils of "different colors."⁸² A campaign for racial integration in the schools, organized by leaders of the Black community in 1884, prompted an amendment to the law, stipulating that Black pupils could not be excluded from instruction in the areas in which they lived.⁸³ But the original provisions for segregation within the public school system remained intact until 1950.⁸⁴ In 1940 school officials in

(Ont.), quashing for uncertainty a by-law which purported to substantially enlarge the geographic catchment area of a separate school, and *Stewart v. Sandwich East School Board* (1864), 23 U.C.Q.B. 634 (Ont.), which accepted evidence that the separate school operated only intermittently as a reason to overrule the common school's refusal to register a Black female student. See also Winks, *supra* note 5; "Segregation", *supra* note 66 at 175–82.

79. Winks, *ibid.*; "Segregation", *ibid.* at 182 and 190.

80. The specific provisions relating to "coloured people" were continued in *The Separate Schools Act*, R.S.O. 1887, c. 227, as am. by R.S.O. 1897, c. 294; R.S.O. 1914, c. 270; R.S.O. 1927, c. 328; R.S.O. 1937, c. 362; R.S.O. 1950, c. 356; R.S.O. 1960, c. 368, as rep. by S.O. 1964, c. 108, s. 1.

81. "Segregation", *supra* note 66 at 177.

82. *An Act for the Better Encouragement of Education*, S.N.S. 1865, c. 29, s. 6(15) authorized school boards "to receive the recommendation of any inspector for separate apartments or buildings in any section, for the different sexes or different colors, and make such decisions thereon as they deem proper." Section 37 (*ibid.*) added: "If in any section the Council of Public Instruction shall permit separate departments under the same or separate roofs, for pupils of different sexes or different colors, the Trustees of the section shall, in this as in other cases, regulate attendance on the separate departments, according to the attainments of the pupils." See also *Of Education. Of Public Instruction*, R.S.N.S. 1873, c. 32, s. 3(10), which restated this law. See also Winks, *supra* note 5 at 376–80; "Segregation", *supra* note 66 at 183.

83. *Of Education. Of Public Instruction*, R.S.N.S. 1884, c. 29, s. 3(10) authorized the Council of Public Instruction "to receive the recommendation of any inspector for separate apartments or buildings in any section for the different sexes or different colors, and make such decisions thereon as they shall deem proper; but colored pupils shall not be excluded from instruction in the public school in the section or ward where they reside." See Fingard, *supra* note 23; Winks, *supra* note 5 at 376–80; "Segregation", *supra* note 66 at 184; Thomson, *supra* note 51 at 9.

84. These provisions were continued with minor wording alterations by *The Education Act*, R.S.N.S. 1900, c. 52, s. 5(14), as am. by S.N.S. 1911, c. 2, s. 5(14); S.N.S. 1918, c. 9, s. 5(p); R.S.N.S. 1923, c. 60, s. 5(q). The latter statute substituted the word "race" for "color" as follows:

Lower Sackville, in Halifax County, barred Black children from attending the only public school in the area, and until 1959 school buses would stop only in the white sections of Hammonds Plains.⁸⁵ In 1960 there would still be seven formal Black school districts and three additional exclusively Black schools in Nova Scotia.⁸⁶ "Only the most blind of school inspectors could have pretended that separate education was also equal education," concludes Winks.⁸⁷

Beyond the schools, racial segregation riddled the country. The colour bar was less rigidified than in the United States, varying between regions and shifting over time.⁸⁸ But Canadian employers commonly selected their workforce by race rather than by merit.⁸⁹ Access to land grants and

"to receive the recommendation of any inspector for separate apartments or buildings in any section for the different sexes or different races of pupils, and to make such decisions thereon as it deems proper, subject to the provision that colored pupils shall not be excluded from instruction in the public school in the section in which they reside."

The provisions were repealed in *The Education Act*, S.N.S. 1950, c. 22, s. 4. At no point in any of these enactments were the terms "race", "color" or "colored pupils" defined. See also Winks, *supra* note 5 at 376–80; "Segregation", *supra* note 66 at 186–87.

85. Winks, *ibid.* at 376–80; "Segregation", *ibid.* at 188–89. In Lower Sackville, Mrs. Pleasah Lavinia Caldwell, a Black Nova Scotian responded by opening a "kitchen school" in her home, which educated Blacks in the area until her death in 1950. See H. Champion, "School in a Kitchen" unlabelled clipping dated 9 November 1949, held by P.A.N.S., Mgl, vol. 1767 #42a.

86. In 1964, four such districts continued: Beechville, Hammond Plains, Lucasville and Cherry Brook, all in Halifax County. See Winks, *ibid.* at 376–80; "Segregation", *ibid.* at 191.

87. For details of the lack of funding and difficulties recruiting teachers, obtaining equipment, premises and transportation in Nova Scotia, see "Segregation", *ibid.* at 186–87.

88. Winks, *supra* note 5 at 325 comments on the "formlessness of the racial barrier", and noting at 326 (*ibid.*): "In the United States the Negro was somewhat more sure—sure of where he could and could not go, of when to be meek and when to be strong. In Canada he was uncertain."

89. According to Oliver, *supra* note 23 at 129–35, most Black males could not find work except in the heaviest and most poorly paid jobs: agriculture, mining, lumbering, steel, railway & shipping industries. In most cases, they were also barred from membership in unions. Business ventures were limited to barber shops, beauty parlours, taxi business, trucking, shoe-making, a newspaper and one co-operative store. Prior to World War II, Black females were limited to teaching school or domestic work. The nursing field opened to women in 1949, when two Blacks graduated as registered nurses.

Morton, *supra* note 48 at 67 notes: "African-Nova Scotian women had virtually no legal wage-earning opportunities outside domestic service, taking in laundry, or sewing. Regardless of the status in the community, property holdings or occupation of the husband, married women and widows charred, and young women were servants."

Williams, *supra* note 24 at 45 notes that the Superintendent of Nurses of the Montreal General Hospital admitted in the 1930s that Black nurses could not find employment in Montreal, "since there were not enough Black patients to care for in the hospitals (and White patients would not allow Black nurses to touch them)." See also "Girl Barred by Color from Nurses Training Course" *The [New Glasgow] Clarion* 2:15 (6 October 1947) 1, recounting race barriers against Black women throughout Ontario. Williams also notes (*ibid.*) that Blacks were barred from doing medical internships in Montreal between 1930 and 1947. The Faculty of Medicine at McGill University arranged instead for Blacks to serve their internships with Howard University in Washington, D.C.

residential housing was frequently restricted by race.⁹⁰ Attempts were

D.H. Clairmont & D.W. Magill, "Nova Scotia Blacks: Marginality in a Depressed Region" in W.E. Mann, ed., *Canada: A Sociological Profile* (Toronto: Copp Clark, 1971) at 177ff quote P.E. MacKerrow, *A Brief History of the Colored Baptists of Nova Scotia* (Halifax: 1895): "the United States with her faults, which are many, has done much for the elevation of the coloured race. Sad and sorry are we to say that is more than we can boast of here in Nova Scotia. Our young men as soon as they receive a common school education must flee away to the United States and seek employment. Very few ever receive a trade from the large employers, even in the factories, on account of race prejudices. . . ."

A.S. Green, *The Future of the Canadian Negro*, (1904), P.A.N.S. V/F vol. 144 #11 at 17, wrote: "How many negroes do you find as clerks, book-keepers, or stenographers within the provinces? I know of but *one*. . . . Our people are excluded from such lucrative positions, not so much from disqualification, as from race-prejudice." See also Walker, *supra* note 66 at 15, where he notes that during the inter-war years, Black men were concentrated in the following specialized areas: waiters, janitors, barbers and labourers. The elite among the men worked as railway waiters and porters.

See also D. Brand, *No Burden to Carry: Narratives of Black Working Women in Ontario 1920s to 1950s* (Toronto: Women's Press, 1991) at 155ff.

90. Residential segregation began almost immediately upon the arrival of the first large group of Black Loyalists. The initial land grants issued to the immigrants were carefully segregated by race, with the Black settlers given smaller parcels of land with poorer soil at less favourable locations than whites received. See Winks, *supra* note 5 at 36; Walker, *supra* note 34 at 18–64. Winks notes (*ibid.* at 325) that this pattern continued well into the 20th century, with some towns barring all Blacks from residence: "In Pictou County [Nova Scotia], by convention, Negroes were not permitted to live in Stellarton, Westville, Trenton, or Pictou itself. . . ." Hill, *supra* note 24 at 105 notes that Blacks were refused the right to buy town lots in Windsor in 1855. In Montreal, Williams, *supra* note 24 at 36–38 indicates that Westmount was similarly restricted. Housing was so difficult for Blacks to obtain in Montreal that a Black real estate company, the Eureka Association, was founded in the 1920s to pool money to purchase tenement housing for rental to Blacks. Williams notes at 58 (*ibid.*): "Blacks in the forties usually had to put double the downpayment on a house that they wanted to purchase. This kept homeownership out of the reach of all but the upper middle class Blacks."

Blacks who attempted to challenge residential segregation could find their property and persons endangered. Winks, *supra* note 5 at 419–20 recounts an incident where a Black purchased a house in a white area of Trenton, Nova Scotia in 1937: "A mob of a hundred whites stoned the owner and broke into his home. After being dispersed by the Royal Canadian Mounted Police, the mob returned the following night—now four hundred strong—and destroyed the house and its contents. The RCMP would not act unless requested to do so by the mayor, who refused, and the mob moved on to attack two other Negro homes. The only arrest was of a New Glasgow black, who was convicted of assault on a woman during the riot; and the original Negro purchaser abandoned efforts to occupy his property."

M. Haley, Letter, *The [Halifax] Mail-Star* (2 December 1959) 4, noted that she had rented an apartment in Dartmouth, but when she prepared to move in, and appeared at the apartment with a "colored" friend, the landlord advised her that Blacks were not to be brought into the building. "I explained that I myself am colored," explained Haley, who shortly thereafter "received word from the landlord that I could not have the apartment." Adding that "I am told that my case is a single case among many," she concluded: "I need shelter and place for my children to live and this need is not any less because of the color of my skin."

The [Halifax] Mail-Star (15 March 1960) 3, reported on a meeting of the NSAACP, chaired by Pearleen Oliver, to discuss the widespread racial discrimination in housing in Halifax. Blacks who had tried to rent reported that "various excuses were given, ranging from the frank view that owners don't want to rent to colored people, to the fact that the owners themselves don't mind but they have to think of their neighbors." Those who attempted to

made to bar Blacks from jury service.⁹¹ The military was rigorously segregated.⁹² Blacks were denied equal service to some forms of public transportation.⁹³ Blacks and whites tended to worship in separate churches, sometimes by choice, other times because white congregations refused membership to Blacks.⁹⁴ Orphanages could be segregated by race.⁹⁵ Some hospitals refused access to facilities to Black physicians and service to Black patients.⁹⁶ Blacks were even denied burial rights in segregated cemeteries.⁹⁷ While no consistent pattern ever emerged,

purchase homes also faced difficulties. "A house that was advertised for \$18,000 would only be sold to us for \$26,000", reported one Black participant. See additional accounts in the *The [Halifax] Chronicle-Herald* (9 May 1962) 34.

See also "Negroes in the Maritimes", *supra* note 51 at 467; Brand, *supra* note 89 at 155. For some details regarding similar discrimination against the Chinese in British Columbia, see K.J. Anderson, *Vancouver's Chinatown: Racial Discourse in Canada, 1875-1980* (Montreal: McGill-Queen's University Press, 1991) at 122-27.

91. Winks, *supra* note 5 at 251 and 284-86 notes that there was a challenge to Black jurors and jury foremen in Toronto in 1851, which was unsuccessful. Blacks were excluded from jury service in Victoria between 1864 and 1872. Walker, *supra* note 34 at 8 notes that Blacks "could not serve on juries or claim a jury trial."

92. During World War I, enlisting Blacks were relegated to a corps of foresters who were assigned to manual-labour tasks in France. At Gagetown, New Brunswick, the local commanding officer insisted upon the segregation of Blacks from whites because "no Canadian fighting man could be asked to sit next to a coloured man." See "Negroes in the Maritimes", *supra* note 51 at 466-67. The Reverend W.P. Oliver, the only Black chaplain in the Canadian army, was appointed to minister to "Coloured Personnel".

93. Winks, *supra* note 5 at 248 notes that Blacks could not purchase cabin-class tickets on the Chatham steamer in the 1850s. Hill, *supra* note 24 at 105 notes that Blacks were discriminated against on steamboats and stage coaches. Hill recounts one mid-19th century incident (*ibid.*): "Peter Gallego, while travelling by boat between Toronto and Kingston, was told to keep out of the captain's dining room. When he defiantly entered, the captain attacked him. Gallego knocked the man down and proceeded, undisturbed, to eat his meal. When the ship reached Kingston, the captain charged Gallego with assault. Gallego, in turn, charged the captain with denying him his natural rights. The case went to court, where both men were fined, Gallego 5 pounds and the captain 20 pounds."

94. See "Negroes in the Maritimes", *supra* note 51 at 466; Winks, *supra* note 5 at 286 and 325; Hill, *supra* note 24 at 104.

95. The Nova Scotia Home for Colored Children was opened in Halifax in 1921 and continued in operation until 1965. Winks, *supra* note 5 at 349 notes: "Despite denials that the province encouraged segregation, so long as the Protestant-based Home for Colored Children existed, no Negro was admitted to other public or private homes. Race, not religion, was the criterion for placement of abandoned or orphaned children. . . ."

96. Winks, *supra* note 5 at 420 indicates that during the 1940s "an Edmonton hospital admitted to drawing the color line." Pearleen Oliver has noted that in the mid-1940s, Black physicians practising in Halifax were denied access to the city hospitals: Pearleen Oliver, *supra* note 26.

97. Winks, *supra* note 5 at 325 notes that in Halifax, Fredericton and Colchester, Blacks could not be buried in Anglican churchyards. See also "Baby Refused Burial in St. Croix Cemetery" *The [Halifax] E.N.* (11 October 1968) which describes a 1907 by-law concerning the St. Croix Cemetery, near Windsor, N.S., still in force, which provided: "Not any negro or colored person nor any indian shall be buried in St. Croix Cemetery."

various hotels, restaurants, theatres, athletic facilities, parks, swimming pools, beaches, dance pavilions, skating rinks, pubs and bars were closed to Blacks across the country.⁹⁸

There were as yet no Canadian statutes expressly prohibiting such behaviour. The first statutes to contain anti-discrimination provisions had been passed in the 1930s and '40s.⁹⁹ A 1932 Ontario act made it an offence for insurers to discriminate unfairly on the basis of "the race or religion of the insured".¹⁰⁰ Several British Columbia statutes passed between 1931

98. Winks, *supra* note 5 at 248 and 283–86 notes that hotels in Hamilton, Windsor, Chatham and London refused admission to Blacks in the mid 19th century. In the 1860s in Victoria, the chief theatre refused Blacks access to the dress circle or to orchestra seats, the Bank Exchange Saloon refused service to Blacks, and they were also excluded from Queen Victoria's birthday ball and from the farewell banquet for Governor James Douglas. The colour line remained visible in British Columbia in restaurants and places of entertainment prior to World War I. Winks notes (*ibid.* at 325) that Blacks were not admitted to the boy scout troops or the YMCA in Windsor and Black musicians had to establish their own orchestra in Owen Sound. Winks continues (*ibid.* at 420): "In 1924 the Edmonton City Commissioner barred Negroes from all public parks and swimming pools—and was overruled by the city council; in Colchester, Ontario, in 1930, police patrolled the parks and beaches to keep blacks from using them. In Saint John all restaurants and theaters closed their doors to Negroes in 1915; two years later the chief theaters of Hamilton also did so. . . . In 1929, when the World Baptist Conference was held in Toronto, Negro delegates were denied hotel rooms. . . . Only one hotel in Montreal could be depended upon not to turn Negroes away in 1941. . . . Many dance pavilions, skating rinks and restaurants made it clear they did not welcome blacks; and several pubs in Saskatchewan and British Columbia insisted that Negroes sit in corners reserved for them." Even into the 1960s, Winks notes (*ibid.* at 457) that Black residents were virtually barred from community restaurants, and (*ibid.* at 388) that Windsor barkeepers designated separate "jungle rooms" for Blacks until 1951.

See H. Lawrence, Article, *The [New Glasgow] Clarion* 2 (December 1946) 2, in which he urges the Black community to establish a community centre because "every place is closed to us." See A.M. Galante, "Ex-mayor Lewis broke new ground" in "Afro-Nova Scotian Portraits" *The [Halifax] Chronicle-Herald* and *The [Halifax] Mail-Star* (19 February 1993) P7, where Daurene Lewis notes that the dances in Annapolis Royal were always segregated (circa 1940s–50s), and attempts were made to segregate the movie house as well. See also D.G. Hill, "Black History in Early Ontario" in *Canadian Human Rights Yearbook* (Human Rights Research and Education Centre, University of Ottawa, 1984–85) at 265 [hereinafter "Early Ontario"]; "Negroes in the Maritimes", *supra* note 51 at 467; "Segregation", *supra* note 66 at 189; A.P. Stouffer, *The Light of Nature and the Law of God: Anti-Slavery in Ontario, 1833–1877* (Montreal: McGill-Queen's Press, 1992) at 200–01; Brand, *supra* note 89 at 134ff.

See also McKenzie, *supra* note 26 at 201, who notes that "[Negroes] are not always served in the best restaurants, nor admitted to high-class hotels. They are restricted, in cities, to the poorer residential districts, and are not accepted socially."

99. See W.S. Tarnopolsky & W.F. Pentley, *Discrimination and the Law* (Don Mills, Ontario: Richard DeBoo, 1985) [hereinafter Tarnopolsky]. This article will not attempt to chronicle the various municipal by-laws which contributed to racist practices, nor those which attempted, beginning in the 1940s, to reduce racist behaviour. The discussion which follows is limited to provincial and federal enactments.

100. *The Insurance Act, 1932*, S.O. 1932, c. 24, s. 4 provided:

The Insurance Act is amended by adding thereto the following section: 92a. Any licensed insurer which discriminates unfairly between risks within Ontario because of the race or religion of the insured shall be guilty of an offence.

and 1945 attempted to ensure that there would be no discrimination in the provision of unemployment relief or welfare because of "race, political affiliation or religious views."¹⁰¹ A 1934 Manitoba statute authorized courts to issue injunctions against "the publication of a libel against a race or creed likely to expose persons belonging to the race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people."¹⁰² Two years before the Desmond trial, Ontario had passed a statute prohibiting the publication or display of signs, symbols, or other representations expressing racial or religious discrimination.¹⁰³ None of these laws directly tackled segregation on the

101. See *Unemployment Relief Act*, S.B.C. 1931, c. 65, which validated a federal-provincial agreement, allowing the province to receive money for relief work projects. Clause 8 of the agreement provided that "in no case shall discrimination be made in the employment of any persons by reason of their political affiliation". *Unemployment Relief Act, 1932*, S.B.C. 1932, c. 58, validated clause 15 of the federal-provincial agreement that "in no case shall discrimination be made or permitted in the employment of any persons by reason of their political affiliation, race or religious views". *Unemployment Relief Act 1933*, S.B.C. 1933, c. 71, ratified a prior agreement with the federal government to pay part of the cost of placing families on land for farming. Clause 4 provided that "the selection of families shall be made without discrimination by reason of political affiliation, race, or religious views". *Social Assistance Act*, S.B.C. 1945, c. 62, s. 8, provided that "in the administration of social assistance there shall be no discrimination based on race, colour, creed or political affiliations".

102. *The Libel Act*, S.M. 1934, c. 23, s. 13A, amending R.S.M. 1913, c. 113 provided:

13A. (1) The publication of a libel against a race or creed likely to expose persons belonging to the race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, shall entitle a person belonging to the race or professing the creed to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of King's Bench is empowered to entertain the action.

(2) The action may be taken against the person responsible for the authorship, publication, or circulation of the libel.

(3) The word "publication" used in this section shall be interpreted to mean any words legibly marked upon any substance or object signifying the matter otherwise than by words, exhibited in public or caused to be seen or shewn or circulated or delivered with a view to its being seen by any person.

Manitoba would also enact *The Law of Property Act*, S.M. 1950, c. 33, amending R.S.M. 1940, c. 114 [hereinafter *Manitoba Property Act*] to prohibit racial and religious restrictions on the sale and tenancy of land.

103. *The Racial Discrimination Act, 1944*, S.O. 1944, c. 51. The act stated:

s.1. No person shall -

(a) publish or display or cause to be published or displayed; or

(b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls,

any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

basis of race. The first such statute would not appear until more than a full year after Viola Desmond launched her civil suit, when Saskatchewan finally banned race discrimination in "hotels, victualling houses, theatres or other places to which the public is customarily admitted."¹⁰⁴ The 1947 *Saskatchewan Bill of Rights Act*, which also barred discrimination in employment, business ventures, housing and education, constituted Canada's first comprehensive human rights legislation.¹⁰⁵ The act would

s.2. This Act shall not be deemed to interfere with the free expression of opinions upon any subject by speech or in writing and shall not confer any protection to or benefit upon enemy aliens.

s.3. Every one who violates the provisions of section 1 shall be liable to a penalty of not more than \$100 for a first offence nor more than \$200 for a second or subsequent offence and such penalties shall be paid to the Treasurer of Ontario.

s.4. (1) The penalties imposed by this Act may be recovered upon the application of any person with the consent of the Attorney General, to a judge of the Supreme Court by originating notice and upon every such application the rules of practice of the Supreme Court shall apply.

(2) The judge, upon finding that any person has violated the provisions of section 1 may, in addition to ordering payment of the penalties, make an order enjoining him from continuing such violation.

(3) Any order made under this section may be enforced in the same manner as any other order or judgment of the Supreme Court.

See also R.S.O. 1950, c.328.

104. *The Saskatchewan Bill of Rights Act, 1947*, S.S. 1947, c. 35, s. 11 reads: "Every person and every class of persons shall enjoy the right to obtain the accommodation or facilities of any standard or other hotel, victualling house, theatre or other place to which the public is customarily admitted, regardless of the race, creed, religion, colour or ethnic or national origin of such person or class of persons. The statute came into force on 1 May 1947, as stipulated in s.19.

105. Despite its broad scope, however, the act (*ibid.*) did not prohibit discrimination on the basis of sex. It provided as follows:

s.8. (1) Every person and every class of persons shall enjoy the right to obtain and retain employment without discrimination with respect to the compensation, terms, conditions or privileges of employment because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

(2) Nothing in subsection (1) shall deprive a religious institution or any school or board of trustees thereof of the right to employ persons of any particular creed or religion where religious instruction forms or can form the whole or part of the instruction or training provided by such institution, or by such school or board of trustees pursuant to the provisions of *The School Act*, and nothing in subsection (1) shall apply with respect to domestic service or employment involving a personal relationship.

s.9. Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

offer victims of race discrimination the opportunity to prosecute offenders upon summary conviction for fines of up to \$200. The Court of King's Bench was also empowered to issue injunctions to restrain the offensive behavior.¹⁰⁶ And in 1950 the Ontario Legislature would amend its labour

s.10. Every person and every class of persons shall enjoy the right to acquire by purchase, to own in fee simple or otherwise, to lease, rent and to occupy any lands, messuages, tenements or hereditaments, corporeal or incorporeal, of every nature and description, and every estate or interest therein, whether legal or equitable, without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

s.12. Every person and every class of persons shall enjoy the right to membership in and all of the benefits appertaining to membership in every professional society, trade union or other occupational organization without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

s.13. (1) Every person and every class of persons shall enjoy the right to education in any school, college, university or other institution or place of learning, vocational training or apprenticeship without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons.

(2) Nothing in subsection (1) shall prevent a school, college, university or other institution or place of learning which enrolls persons of a particular creed or religion exclusively, or which is conducted by a religious order or society, from continuing its policy with respect to such enrolment.

s.14. (1) No person shall publish, display or cause or permit to be published or displayed on any lands or premises or in any newspaper, through any radio broadcasting station, or by means of any other medium which he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict, because of the race, creed, religion, colour or ethnic or national origin of any person or class of persons, the enjoyment by any such person or class of persons of any right to which he or it is entitled under the law.

(2) Nothing in subsection (1) shall be construed as restricting the right to freedom of speech under the law, upon any subject.

106. See *ibid.*:

s.15. (1) Every person who deprives, abridges, or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of any right under this Act or who contravenes any provision thereof shall be guilty of an offence and liable on summary conviction to a fine of not less than \$25 nor more than \$50 for the first offence, and not less than \$50 nor more than \$200 for a subsequent offence, and in default of payment to imprisonment for not more than three months.

(2) The penalties provided by this section may be enforced upon the information of any person alleging on behalf of himself or any class of persons that any right which he or any class of persons or any member of such class of persons is entitled to enjoy under this Act has been denied, abridged or restricted because of the race, creed, religion, colour, ethnic or national origin of himself, or of any such class of persons or of any member of any such class of persons.

s.16. Every person who deprives, abridges or otherwise restricts or attempts to deprive, abridge or otherwise restrict any person or class of persons in the enjoyment of any right under this Act may be restrained by an injunction issued in an action in the Court of

relations statute to provide that a collective agreement between an employer and a trade union was invalid if it discriminated against any person "because of his race or creed."¹⁰⁷ But none of this would assist Viola Desmond in November of 1946.

V. *Preparing for Legal Battle*

Had Viola Desmond wished to retain a Black lawyer to advise her on legal options, this would also have presented difficulties. Nine Black men appear to have been admitted to the bar of Nova Scotia prior to 1946, but few were available for hire. The first two to have been called to the bar were now deceased.¹⁰⁸ Frederick Allan Hamilton was still practising, but not in Halifax. A Black native of Tobago, he had left Halifax after only a few months of practice in 1923 to set up his office in Cape Breton, where there was a substantial West Indian immigrant community.¹⁰⁹ Six additional West Indian Blacks had graduated from Dalhousie Law School between 1900 and 1931, five of them admitted to the Nova Scotia bar, but

King's Bench brought by any person against the person responsible for such deprivation, abridgment or other restriction, or any attempt thereat.

See also *An Act to Amend the Saskatchewan Bill of Rights Act, 1947*, S.S. 1949, c. 29, amending S.S. 1947, c. 35, which struck out the portion of s. 15(2) following the word "restricted".

107. *The Labour Relations Act*, S.O. 1950, c. 34, s. 34(b) provided: An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(b) if it discriminates against any person because of his race or creed.

That same year, Ontario would also pass *The Conveyancing and Law of Property Amendment Act, 1950*, S.O. 1950, c. 11, s. 1, which prohibited restrictions on the sale and use of land because of race, nationality or creed.

108. James Robinson Johnston, the first Black, was called to the Nova Scotia bar in 1900, and died in 1915. The second was Joseph Eaglan Griffith, a Black immigrant from the British West Indies, who had been called to the bar in 1917 and practised in Halifax until his death in 1944.

Blacks had been admitted to law practice in other provinces somewhat earlier. Robert Sutherland, an African-American, was admitted to the bar of Ontario in 1855. Joshua Howard, another African-American, commenced practice in Victoria, British Columbia in 1858. Abraham Beverly Walker, an African-Canadian, was admitted to the bar of New Brunswick in 1882, and Delos Rogest Davis, another native African-Canadian, to the bar in Ontario in 1886. See Cahill, *supra* note 36 at 345; Clarke, *supra* note 51 at 170-71.

109. Frederick Allan Hamilton of Scarborough, Tobago, graduated with a B.A. (in 1921) and the LL.B. (1923) from Dalhousie University, and was admitted to the bar of Nova Scotia in 1923. After articling with Griffith, Hamilton opened his law office on Cunard Street, near the heart of the Black community. According to Cahill, the legal business of the Black community was not sufficient to accommodate the three Black lawyers then in practice: Griffith, Rowland Parkinson Goffe and Hamilton. Within months Hamilton had closed his office and relocated his practice to industrial Cape Breton, practising first in Glace Bay, then in Sydney. He was appointed King's Council in 1950, the second African-Canadian lawyer to receive the designation. See Cahill, *ibid.* at 373; *The [New Glasgow] Clarion* 2:1 (January 1947).

none had remained in the province.¹¹⁰ The only Black lawyer currently practising in Halifax was Rowland Parkinson Goffe. A native of Jamaica, Goffe had practised initially in England, taking his call to the Nova Scotia bar in 1920. Goffe travelled abroad frequently, operating his legal practice in Halifax only intermittently.¹¹¹ For reasons which are unclear, Viola Desmond did not retain Goffe. He may have been away from Halifax at the time.

Four days after her arrest, on November 12th, Viola Desmond retained the services of a white lawyer named Frederick William Bissett. Rev. William Oliver knew Bissett, and it was he who made the initial arrangements for Viola to see the lawyer. A forty-four year old native of St. John's, Newfoundland, Bissett had graduated in 1926 from Dalhousie Law School with a reputation as a "sharp debater". Called to the bar in Nova Scotia that year, he had immediately opened his own law office in Halifax, where he would practice alone until his elevation to the Supreme Court of Nova Scotia in 1961. A noted trial lawyer, Bissett was acclaimed for his "persistence and resourcefulness", his "keen wit and an infectious sense of humour". Those who knew him emphasized that above all, Bissett was "gracious and charming", a true "gentleman". This last feature of his character would potentially have been very helpful to Viola Desmond and her supporters. Their case would be considerably aided if the courts could be induced to visualize Viola Desmond as a "lady" wronged by rough and racist men. The affront to customary gender assumptions might just have been the thing to tip the balance in the minds of judges who would otherwise have been reluctant to oppose racial segregation. A "gentleman" such as Bissett would have been the perfect choice to advocate extending the mantle of white chivalry to cover Black women.¹¹²

110. Cahill mentions seven, one of whom would have been Hamilton. Most of these men articulated with Griffith. There would not be a second indigenous Afro-Nova Scotian graduate of Dalhousie Law School admitted to the bar until George W.R. Davis, in 1952. Recently retired from the firm of Moore, MacDonald and Davis, 2194 Gottingen Street, Halifax, Mr. Davis is also the first native Afro-Nova Scotian lawyer to have been appointed a Queen's Counsel. See Cahill, *ibid.* at 374.

111. Cahill, *ibid.* at 373 notes that Goffe had been admitted to Gray's Inn in 1905, and called to the bar by Gray's Inn in 1908. He practised at the English bar for six years, and "was employed in various government departments" during and after World War I. He died in 1962 in his ninetieth year.

112. For biographical details on F.W. Bissett, see "Bissett, Frederick William, B.A., LL.B." in *Maritime Reference Book: Biographical and Pictorial Record of Prominent Men and Women of the Maritime Provinces* (Halifax: Royal Print & Litho., 1931) at 34 [hereinafter *Maritime Reference*]; "Mr. Justice F.W. Bissett: *The [Halifax] Mail-Star* (11 November 1978) 67; "Mr. Justice Bissett, 76, Dies in Halifax" *The [Halifax] Mail-Star* (10 November 1978) 1; "Tributes Paid to Mr. Justice F.W. Bissett" *The [Halifax] Mail-Star* (11 November 1978) 1.

Bissett's first task was to decide how to frame Viola Desmond's claim within the doctrines of law. One option might have been to mount a direct attack on the racially-restricted admissions policy of the theatre. There was an excellent precedent for such a claim in an earlier Quebec Superior Court decision, *Johnson v. Sparrow*. Here the court had awarded \$50 damages in 1899 to a Black couple barred from sitting in the orchestra section of the Montreal Academy of Music. Holding that a "breach of contract" had occurred, a white judge, John Sprott Archibald J., had reasoned that "any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible with our free democratic institutions."¹¹³

Apart from Reverend Oliver's recommendation, it remains unclear why Viola Desmond selected F.W. Bissett. She seems to have been familiar with at least some other white members of the legal profession prior to this. Earlier in November, 1946, she had retained Samuel B. Goodman, a white lawyer from Halifax, to issue a writ against Philip Kane, the car dealer who sold her the 1940 Dodge, for overcharging her in violation of the Wartime Prices and Trade Board Order. See *Viola Desmond v. Philip Kane*, P.A.N.S. RG39 "C" [Halifax] vol. 936, # S.C. 13304.

113. *Johnson v. Sparrow* (1899), 15 C.S. 104 at 108. Drawing upon the English common law rule which obliged hotel-keepers "to receive every traveller until his hotel is full unless he can assign good cause for refusal," the court stressed "the similarity between a theatre and a hotel in almost every point which can affect their relations to the public." Any differences were "one of degree and not of kind", noted the judgment:

[T]he municipal authority acting in the public interest in both cases, grants license to do business, and exercises surveillance afterwards. This constitutes a privilege granted to the licensees by the public, and naturally the public ought to receive a corresponding benefit. . . . Public notices and advertisements which all theatres issue. . . . are treated as offers to the public and to every member of it, and these offers are accepted by the tender of the price of any seat which the spectator may desire, if it is still vacant. . . . [T]he payment of the entree forms a contract of lease of the particular seat indicated on the ticket. These considerations give the plaintiff a right to judgment in his favour.

Discussing this case, Winks, *supra* note 5 at 431 notes that nearly a dozen Black witnesses swore that they had been admitted at earlier times.

Winks also mentions another case, which he does not cite, which followed the *Johnson* case:

A similar decision was reached in Toronto soon after: a light-skinned Negro woman purchased a ticket for her son at a skating rink; the boy—who was much darker—was refused admittance when he appeared, and his mother sought damages in the divisional court. The company agreed to pay twenty-five cents, the price of the ticket, and the judge dismissed the action with the opinion that no other damages beyond the ticket could be shown.

Winks makes reference (*ibid.* at 284) to an earlier case, also uncited, which would have been helpful, although marginally less so. Jacob Francis, a Black resident of Victoria, had been denied service by the Bank Exchange Saloon, and challenged the refusal before Victoria Police Court Magistrate Augustus F. Pemberton in 1862. Pemberton ordered the barkeeper to serve Black customers, warning that "a fine would be levied for a second offence." Pemberton's ruling was qualified by his statement that the proprietor could charge Blacks "whatever he liked", thus setting up the possibility of prices differentially based on race.

A similar position had been taken in British Columbia in 1914, in the case of *Barnswell v. National Amusement Company, Limited*. The Empress Theatre in Victoria had promulgated a "rule of the house that coloured people should not be admitted." When the theatre manager turned away Mr. Barnswell, a Black man who had been a long-time resident of Victoria, he sued for breach of contract and assault. The white trial judge, Peter Secord Lampman J., found the defendant company liable for breach of contract, and awarded Mr. Barnswell \$50 in damages for humiliation. The British Columbia Court of Appeal affirmed the result.¹¹⁴

A string of other cases had done much to erode these principles. In 1911 a Regina newspaper announced that a local restaurant was planning to charge Black customers double what whites paid for meals, in an effort to exclude them from the local lunch-counter.¹¹⁵ When William Hawes, a Black man, was billed \$1.40 instead of the usual \$.70 for a plate of ham and eggs, he took restaurant-keeper, W.H. Waddell, to court one week later, claiming that Waddell had obtained money "by false pretences." The case was dismissed in Regina's Police Court, with the local white magistrates concluding that Hawes had known of the double fare when he entered the restaurant, and that this barred a charge of false pretences.¹¹⁶

114. *Barnswell v. National Amusement Co.* (1914), 21 B.C.R. 435, [1915] 31 W.L.R. 542 (C.A.) [hereinafter *Barnswell*]. The breach of contract was premised on the sale of a ten cent ticket to the plaintiff at the wicket of the theatre. The plaintiff was then refused admission inside the lobby by the door-keeper, whose decision was supported by the manager. According to Paulus Aemilius Irving, "the plaintiff had entered the building as a spectator who had duly paid his money to see the entertainment. He was, therefore, entitled to remain." Albert Edward McPhillips dissented from the majority decision, claiming that it was "in the public interest and in the interest of society that there should be law which will admit of the management of places of public entertainment having complete control over those who are permitted to attend all such entertainments."

115. "Colored Patrons Must Pay Double" *The [Regina] Leader* (9 October 1911) 7: "One of the city's restaurants has decided to draw the colored line and in future all colored patrons will pay just double what their white brothers are charged. This, of course, is not a money-making venture, but is a polite hint to these people that their patronage is not wanted. It is understood that the change is made at the urgent request of some of the most influential patrons, and not on the initiative of the management. It is an innovation in the running of hotels, cafes and restaurants of the city and the experiment will be watched with interest."

116. The exact basis for the ruling, which was not reported in the published legal reports, is somewhat difficult to reconstruct from the press account (*ibid.*). The paper specifies that the case was "a charge of obtaining money under false pretences", laid against W.B. Waddell by William Hawes. There was some factual dispute over whether Hawes had been notified of the double charge prior to ordering, with Hawes claiming he had not, and Waddell claiming he had. Magistrates Lawson and Long concluded that Hawes had, and held that therefore there was no case of false pretences. The press seems to have been less convinced, claiming that the case stood for the proposition that "a restaurant keeper has the right to exclude colored patrons by charging double prices without, however, taking proper steps to make the charge known to those whom he proposes to exclude." The press report also hints that the claim may have been

Another example of judicial support for racial segregation occurred during the upsurge of racial violence at the close of World War I. In 1919 the majority of the white judges on the Quebec Court of King's Bench held in *Loew's Montreal Theatres Ltd. v. Reynolds* that the theatre management had "the right to assign particular seats to different races and classes of men and women as it sees fit."¹¹⁷ Theatre proprietors from Quebec east to the maritimes had greeted this ruling with enthusiasm, using it to contrive new and expanded policies of racially segregated seating.¹¹⁸ In *Franklin v. Evans* a white judge from the Ontario High Court had dismissed a claim for damages "for insult and injury" from W.V.

rooted in breach of contract, recounting that the plaintiff tried to show that Hawes "had no knowledge of [the double price] arrangement when he gave his order, and that the bill of fare from which he ordered constituted a contract. . . ." The contract issues appear to have been ignored by the court. Counsel for Hawes, Mr. Barr, sought leave to appeal, but this was denied. 117. *Loew's Montreal Theatres Ltd. v. Reynolds*, *supra* note 42 at 466. This ruling was a reversal of the decision at trial, which had been heard in the Superior Court by Judge Thomas Fortin. Press coverage of the trial decision, "Court Says Color Line is Illegal; All Equal in Law" *The [Montreal] Gazette* (5 March 1919) 4, suggests that a number of Black men and women, members of the Coloured Political and Protective Association of Montreal, had deliberately attempted to challenge the policy of the theatre barring Blacks from the orchestra seats. Norris Augustus Dobson, a Black chemist, and his wife had claimed \$1000 damages when theatre employees forcibly ejected them from the theatre because of their race. The Dobsons' claim had been rejected at trial, with the judge concluding that Mr. Dobson had created a loud disturbance in the theatre when some members of his party were refused seating in the orchestra section. The ejection was premised upon the plaintiff's disruptive behaviour, and not his race, concluded the trial court. Sol Reynolds, a Black plaintiff who had claimed \$300 damages because he was refused admission to the orchestra chairs, was more successful. The trial court awarded him nominal damages of \$10, stating: "In this country the colored people and the white people are governed by the same laws, and enjoy the same rights without any distinction whatever, and the fact that Sol Reynolds was a colored man offers no justification for Montreal Theatre Limited refusing him admission to the orchestra chairs in its theatre after issuing to him a ticket for such seat and after acceptance of the same by its collector." The ruling was initially hailed by the *Gazette* as establishing "jurisprudence governing the question of the rights of discrimination against colored people in this province." See also coverage in the newspaper published by the N.A.A.C.P., *The Crisis* 18:1 (May 1919) 36. However, the trial decision was overruled on appeal by the King's Bench. The appeal court distinguished *Loew's* case from *Johnson* upon the basis that it was a test case, in which the plaintiffs had deliberately set out to challenge a racially-based seating policy.

Thomson, *supra* note 5 at 82 mentions that an earlier situation in Edmonton had reached a more informal, but similar resolution. His source is *The [Edmonton] Capital* (9 April 1912), which contained the following entry: "Irate Negroes were turned down services in two hotels. They ask, 'Have Edmonton bartenders the right to draw the colour line?' The attorney-general's department said while it gives the hotel keeper the right to sell liquor, 'it cannot compel him to sell to anyone if he does not wish to do so.'" See also "Edmonton Color Line" *The [Regina] Daily Province* (10 April 1912) 5, which reports the complaint of the "dark-skinned citizens", who were "almost dandified in their get-up and in their bearing". Condescending commentary, frequently intended to create and inflame racist stereotypes, appeared regularly in Canadian press reports of Blacks.

118. See "Negroes in the Maritimes", *supra* note 51 at 467.

Franklin, a Black watch-maker from Kitchener, who had been refused lunch service in The Cave, a London restaurant.¹¹⁹ In *Rogers v. Clarence Hotel* the majority of the white judges on the British Columbia Court of Appeal held that the white female proprietor of a beer parlour could refuse to serve a Black Vancouver businessman on the grounds of race. The

119. *Franklin v. Evans*, *supra* note 42. See also "Dismisses Suit of Colored Man" *The [London] Evening Free Press* (15 March 1924), which gives the name as W.K. Franklin. Strangely, neither *Johnson* nor *Barnswell* were cited in the legal decision, and Judge Haughton Lennox concluded that there were no authorities or decided cases in support of the plaintiff's contention. Most of the decision centred on common law rules requiring hotel-keepers to "supply . . . accommodation of a certain character, within certain limits, and subject to recognized qualifications, to all who apply." Contrasting restaurants with inn-keepers, Lennox held that the common law obligations did not apply to the defendant. The judge did, however, seem to have been ambivalent about the result he reached in this case. Disparaging the conduct of the restaurant owner and his wife, whose attitude toward the plaintiff Lennox described as "unnecessarily harsh, humiliating and offensive", Lennox contrasted their situation with that of the plaintiff: "The plaintiff is undoubtedly a thoroughly respectable man, of good address, and, I have no doubt, a good citizen, and I could not but be touched by the pathetic eloquence of his appeal for recognition as a human being, of common origin with ourselves." Lennox then expressly ducked the issue: "The theoretical consideration of this matter is a difficult and decidedly two-sided problem, extremely controversial, and entirely outside my sphere in the administration of law—law as it is." Lennox dismissed the action without costs.

Curiously, the account in the local Black newspaper, *The Dawn of Tomorrow*, suggests that the plaintiff won: "W.V. Franklin Given Damages" [*London] Dawn of Tomorrow* (2 February 1924) 1; "W.V. Franklin's Victory: [*London] Dawn of Tomorrow* (16 February 1924) 2. This coverage appears to be clearly erroneous in asserting that "the jury took only 20 minutes to decide that Mr. Franklin should be awarded damages," since the law report notes that there was no jury, and that the claim was dismissed. However, the Black press, unlike the white press, did recount the plaintiff's testimony in valuable detail:

When Mr. Franklin was called to the witness box for the defence counsel [and asked], "Have you any ground for damages?", Mr. Franklin's eloquent and polished reply was: "Not in dollars and cents, but in humiliation and inhuman treatment at the hands of this fellow man, yes. Because I am a dark man, a condition over which I have no control, I did not receive the treatment I was entitled to as a human being. God chose to bring me into the world a colored man, and on this account, defendant placed me on a lower level than he is."

Reference is also made in the Black press, on 16 February 1924, to the views of the Black community on the necessity of bringing the case:

In a recent article in our paper we stated that the colored people of London stood solidly behind Mr. Franklin. On the whole we did stand behind him but a few there were who doubted the wisdom of his procedure, believing, as they expressed it, that his case would cause ill feeling between the races. . . . [N]othing in respect is ever gained by cringing or by showing that we believe ourselves to be less than men. Nothing will ever be gained by submitting to treatment which is less than that due to any British subject.

The financial cost of bringing such an action was acknowledged by the *Dawn of Tomorrow*, which made an express appeal to readers to contribute money to assist Mr. Franklin in defraying the costs of the case, since "the monetary damages awarded him by the courts is far below the actual cost to him."

doctrine of "complete freedom of commerce" justified the owner's right to deal "as [she] may choose with any individual member of the public."¹²⁰

Christie v. The York Corporation, ultimately reaching a similar result, had wound its way through the Quebec court system right up to the Supreme Court of Canada in 1939.¹²¹ The litigation began when the white manager of a beer tavern in the Montreal Forum declined to serve a Black customer in July of 1936. Fred Christie, a resident of Verdun, Quebec, who was employed as a private chauffeur in Montreal, had sued the proprietors for damages. Louis Philippe Demers J., a white judge on the Quebec Superior Court, initially awarded Christie \$25 in compensation for humiliation, holding that hotels and restaurants which provided "public services" had "no right to discriminate between their guests."¹²² The majority of the white judges of the Quebec Court of King's Bench had reversed this ruling, preferring to champion the principle that "*chaque propriétaire est maître chez lui*".¹²³ This philosophy was endorsed by the majority of the white judges on the Supreme Court of Canada, who agreed that it was "not a question of motives or reasons for deciding to deal or not to deal; [any merchant] is free to do either." Conceding that the "freedom of commerce" principle might be restricted

120. *Rogers*, *supra* note 42, Macdonald C.J. and Sloan J.A.

121. *Christie* (1937), *supra* note 42, rev'd (1938), 65 Que. K.B. 104 (C.A.), aff'd [1940] S.C.R. 139.

122. *Christie* (1937), *ibid*. Although the claim was grounded in contract and delict (or tort), the trial judge relied upon the statutory provisions in the *Quebec Licence Act*, R.S.Q. 1925, c. 25, s. 33, which required that "no licensee for a restaurant may refuse, without reasonable cause, to give food to travelers."

123. *Christie* (C.A.), *supra* note 121. Dismissing the contract argument, William Langley Bond, J. noted at 107: "There was an implied if not an express invitation on the part of the appellant, —but I have been unable to find any legal ground or justification for the contention that the appellant was not at liberty to attach conditions to its offer or to restrict it. . . . There was consequently no contract ever completed—no bargain struck, notwithstanding the respondent's insistence." Discounting the argument based in delict, or tort, Bond continued at 112: "In order to invoke article 1053 C.C., the respondent must show some breach of a duty or fault on the part of the appellant; and I am unable to find any such wrong committed. If, as I have pointed out, there was not duty cast by law upon the appellant to serve the respondent, then its refusal to do so is an innocent act, and not a violation of any right on the part of the respondent." The statutory provisions upon which the trial judge based his decision were inapplicable, according to the majority of the court, because a tavern did not constitute a restaurant within the meaning of the enactment. Gregor Barclay, J. was the most explicit about his views toward the policy, noting at 124–5: "The fact that a tavern-keeper decides in his own business interests that it would harm his establishment if he catered to people of colour cannot be said to be an action which is against public morals or good order. The argument that, if all tavern-keepers were to take the same stand, a situation would arise which would be likely to lead to disorder, is not sound. The fact that a particular individual has certain preferences is not a matter of public concern."

where a merchant adopted "a rule contrary to good morals or public order," Thibaudeau Rinfret J. concluded that the colour bar was neither.¹²⁴

But a series of judges had dissented vigorously in these latter cases. In *Loew's Montreal Theatres Ltd. v. Reynolds*, a white judge, Henry-George Carroll J., had taken pains to disparage the situation in the United States, where law was regularly used to enforce racial segregation. Stressing that social conditions differed in Canada, he insisted: "Tous les citoyens de ce pays, blancs et noirs, sont soumis à la même loi et tenus aux mêmes obligations." Carroll J. spoke pointedly of the ideology of equality which had suffused French law since the revolution of 1789, and reasoned that Mr. Reynolds, "un homme de bonne education", deserved compensation for the humiliation that had occurred.¹²⁵

In *Rogers v. Clarence Hotel*, Cornelius Hawkins O'Halloran J.A. had written a lengthy and detailed rebuttal to the majority decision. Noting that the plaintiff was a British subject who had resided in Vancouver for more than two decades, with an established business in shoe-repair, O'Halloran J.A. insisted that he should be entitled to obtain damages from any beer parlour that barred Blacks from admission. "Refusal to serve the respondent solely because of his colour and race is contrary to the common law," claimed the white judge. "All British subjects have the same rights and privileges under the common law—it makes no difference whether white or coloured; or of what class, race or religion."¹²⁶

In *Christie v. The York Corporation*, the first dissent had come from Antonin Galipeault J., a white judge of the Quebec Court of King's Bench. Pointing out that the sale of liquor in Quebec taverns was already extensively regulated by law, he concluded that the business was a "monopoly or quasi-monopoly", which ought to be required to service all members of the public. Galipeault J. noted that if tavern-keepers could bar Blacks, they could also deny entry to Jews, Syrians, the Chinese and the Japanese. Bringing the matter even closer to home for the majority of Quebecers, he reasoned that "religion" and "language" might constitute the next grounds for exclusion. Galipeault J. insisted that the colour bar should be struck down.¹²⁷

At the level of the Supreme Court of Canada, Justice Henry Hague Davis expressly sided with Galipeault J., concluding that racial segregation was "contrary to good morals and the public order". "In the changed and changing social and economic conditions," wrote the white Supreme

124. *Christie* (S.C.C.), *supra* note 121 at 141ff, Rinfret J.

125. *Loew's*, *supra* note 42 at 462, Carroll J.

126. *Rogers*, *supra* note 42, O'Halloran J.A.

127. *Christie* (C.A.), *supra* note 121 at 125–39.

Court justice, "different principles must necessarily be applied to new conditions." Noting that the legislature had developed an extensive regulatory regime surrounding the sale of beer, Davis J. concluded that such vendors were not entitled "to pick and choose" their customers.¹²⁸

What is obvious from these various decisions is that the law was unsettled, as Davis J. had frankly admitted: "The question is one of difficulty, as the divergence of judicial opinion in the courts below indicates."¹²⁹ Where the judges expressly offered reasons for arriving at such different results, their analysis appears to be strained and the distinctions they drew were arbitrary. Some tried to differentiate between a plaintiff who had prior knowledge of the colour bar and one who did not. Some considered the essential point to be whether the plaintiff had crossed the threshold of the premises before being ejected. *Ad nauseam* the judges compared the status of theatres, restaurants, taverns and hotels. They argued over whether public advertisements issued by commercial establishments constituted a legal "offer", or merely "an invitation to buy". They debated whether a stein of beer had sufficient "nutritive qualities" to be regarded as food.

Despite the endless technical arguments, the real issues dividing the judges were relatively straightforward. There were two fundamental principles competing against each other: the doctrine of freedom of commerce and the doctrine of equality under a free and democratic society. Although the judges appear to have believed that they were merely applying traditional judicial precedents to the case at hand, this was something of a smokescreen. Some judges were choosing to select precedents extolling freedom of commerce, while others chose to affirm egalitarian principles. There was nothing which irretrievably compelled them to opt for one result over the other except their own predilections. Bora Laskin would make this explicit in a legal comment on the *Christie* case, written in 1940: "The principle of freedom of commerce enforced by the Court majority is itself merely the reading of social and economic doctrine into law, and doctrine no longer possessing its nineteenth century validity."¹³⁰

Furthermore, no court had yet ruled on the validity of racial segregation in hotels, theatres, or restaurants in the province of Nova Scotia. A cautious lawyer, one easily cowed by the doctrinal dictates of *stare*

128. *Christie* (S.C.C.), *supra* note 121 at 147 and 152, Davis J.

129. *Christie* (S.C.C.), *ibid.* On the significance of the many dissenting judges, see F.R. Scott, *Essays on the Constitution* (Toronto: University of Toronto Press, 1977) at 333.

130. B. Laskin, "Tavern Refusing to Serve Negro—Discrimination" (1940) 18 Can. Bar Rev. 314 at 316. See also F.R. Scott *The Canadian Constitution and Human Rights* (Canadian Broadcasting Company, 1959) at 37.

decisis, might have concluded that the “freedom of commerce” principle enunciated by the majority of judges in the Supreme Court of Canada would govern. A more adventuresome advocate might have surveyed the range of judicial disagreement and decided to put the legal system to the challenge once more.

The reform-minded lawyer would have gone back to the original decisions in *Johnson v. Sparrow* and *Barnswell v. National Amusement Co.*, which most of the judges in the later cases had curiously ignored.¹³¹ Quebec Justice John Sprott Archibald, in particular, had laid a firm foundation in *Johnson v. Sparrow*, eloquently proclaiming the right of Canadians of all races to have equal access to places of public entertainment. Roundly criticizing the policy of racially segregated seating, he explained:

This position cannot be maintained. It would perhaps be trite to speak of slavery in this connection, and yet the regulation in question is undoubtedly a survival of prejudices created by the system of negro slavery. Slavery never had any wide influence in this country. The practice was gradually extinguished in Upper Canada by an act of the legislature passed on July 9th, 1793, which forbade the further importation of slaves, and ordered that all slave children born after that date should be free on attaining the age of twenty-one years. Although it was only in 1834 that an act of the imperial parliament finally abolishing slavery throughout the

131. None of the later cases mentioned *Barnswell*, *supra* note 114: The reluctance of Canadian judges to discuss matters of race explicitly may have had something to do with this. County Court Judge Lampman’s trial decision in *Barnswell* was the only portion of the judgment which mentioned the plaintiff’s race. In the report of the decision in the *Western Law Reporter*, Lampman J.’s trial decision was not included, even in summary form. Since the appeal rulings made no express mention of race, a legal researcher would have been hard pressed to conclude that the case was an anti-discrimination precedent. The report in the *British Columbia Reports*, however, did make the issue of race explicit.

Johnson, *supra* note 113, was mentioned briefly, in *Loew’s*, *supra* note 42, which distinguished it on two rather peculiar grounds: that the plaintiff in *Johnson* had already purchased a ticket prior to the refusal of entry while the plaintiff in *Loew’s* had not, and that the plaintiff in *Johnson* had been unaware of the colour bar, whereas the plaintiff in *Loew’s* was deliberately challenging the policy. Although the Quebec Court of King’s Bench in *Christie* (C.A.), *supra* note 121, also cited *Johnson*, the Supreme Court ruling made no mention of the decision, nor did the other cases discussed above. The curious erasure of the earlier anti-discrimination rulings is underscored by the comments of Lennox J. in *Franklin*, *supra* note 42, who noted that counsel for the Black plaintiff, Mr. Buchner, “could find no decided case in support of his contention”. A scholarly article written years later, I.A. Hunter, “Civil Actions for Discrimination” (1977) 55 Can. Bar Rev. 106, also fails to mention the *Johnson* case or the *Barnswell* case, although the author discusses the others in detail. See also D.A. Schmeiser, *Civil Liberties in Canada* (London: Oxford University Press, 1964) at 262–74, who erroneously refers to *Loew’s* as “the earliest reported Canadian case in this area”, ignores *Johnson* and *Barnswell*, and then concludes: “The foregoing cases clearly indicate that the common law is particularly barren of remedies guaranteeing equality of treatment in public places or enterprises. . . .”

British colonies was passed, yet long before that, in 1803, Chief Justice Osgoode had declared slavery illegal in the province of Quebec. Our constitution is and always has been essentially democratic, and does not admit of distinctions of races or classes. All men are equal before the law and each has equal rights as a member of the community.¹³²

Archibald J.'s recollection of the legal history of slavery in Canada was something of a benign understatement. The first Black slave arrived in Quebec in 1628, with slavery officially introduced by the French into New France on 1 May 1689.¹³³ After the British Conquest in 1763, General Jeffery Amherst had confirmed that all slaves would remain in the possession of their masters.¹³⁴ In 1790 the English Parliament had expressly authorized individuals wishing to settle in the provinces of Quebec and Nova Scotia to import "negroes" along with other "household furniture, utensils of husbandry or cloathing" free of duty.¹³⁵ In 1762 the Nova Scotia General Assembly gave indirect statutory recognition to slavery when it explicitly adverted to "Negro slaves" in the context of an act intended to control the sale of liquor on credit.¹³⁶ In 1781 the legislature of Prince Edward Island (then Isle St. Jean) passed an act declaring that the baptism of slaves would not exempt them from bondage.¹³⁷

132. *Johnson, supra* note 113 at 107.

133. The first Black slave, baptized under the name Olivier Le Jeune, from Madagascar, was a gift to David Kirke, who would become the first governor of Newfoundland. But it was not until 1 May 1689, that the French King Louis XIV gave permission to import African slaves to New France. After this date, slave-owning became quite common among the French merchants and clergy. See "Early Ontario", *supra* note 98; Williams, *supra* note 24 at 7-8; Winks, *supra* note 5 at 3-23.

134. The 1763 Treaty of Paris, in which France ceded its mainland North American empire to Great Britain, contained a clause affirming that all slaves would remain the possessions of their masters and that they might continue to be sold. See Winks, *supra* note 5 at 24, citing A. Shortt & A.G. Doughty, eds., *Documents relating to the Constitutional History of Canada, 1759-1791*, 2d ed. (Ottawa, 1918) at 1 and 22.

135. *An Act For Encouraging New Settlers in His Majesty's Colonies and Plantations in America* (U.K.), 30 Geo. III, c. 27. The act authorized duty-free importation up to the value of "fifty pounds for every person" in the family. Section 2 expressly endorsed the "sales" of negroes of bankrupt or deceased owners.

136. *An Act For the Regulating Innholders, Tavern-keepers, and Retailers of Spirituous Liquors*, S.N.S. 1762, c. 1. The statute was designed to ensure no debts could be recovered for alcoholic beverages sold to soldiers, sailors, servants, day labourers or "negro slaves" for any sum above five shillings. If anyone, including a "negro slave" left a pawn or pledge worth more than five shillings with a liquor vendor, that person or his owner could initiate proceedings to reclaim it, and the vendor would be liable for a fine.

137. *An Act, Declaring That Baptism of Slaves Shall Not Exempt Them From Bondage*, S.P.E.I. 1781, c. 15 provided as follows:

Whereas some Doubts have arisen whether Slaves by becoming Christians, or being admitted to Baptism, should, by Virtue thereof, be made free:

I. Be it therefore enacted by the Governor, Council, and Assembly That all Slaves, whether Negroes or Mulattos, residing at present on this Island, or that may hereafter

The 1793 Upper Canada statute, of which Archibald J. was so proud, countenanced a painfully slow process of manumission. The preamble, which noted that it was “highly expedient to abolish slavery in this province, so far as the same may gradually be done without violating private property”, said it all. The act freed not a single slave. Although the statute did ensure that no additional “negro” slaves could be brought into the province, it also confirmed the existing property rights of all current slave-owners. Furthermore, children born of “negro mother[s]” were to remain in the service of their mothers’ owners until the age of twenty-five years, (not twenty-one years as Archibald J. had noted). And the act may actually have discouraged voluntary manumission, by requiring slave-owners to post security bonds for slaves released from service, to cover the cost of any future public financial assistance required.¹³⁸ Confronted with litigants who contested the legal endorsement of slavery, judges in Lower Canada, Nova Scotia and New Brunswick dispatched inconsistent judgments.¹³⁹ Portions of the area that was to become Canada remained

be imported or brought therein, shall be deemed Slaves notwithstanding his, her, or their Conversion to Christianity; nor shall the Act of Baptism performed on any such Negro or Mulatto alter his, her, or their Condition.

II. And be it further enacted, That all Negro and Mulatto Servants, who are now on this Island, or may hereafter be imported or brought therein (being Slaves) shall continue such, unless freed by his, her, or their respective Owners.

III. And be it further enacted by the Authority aforesaid, That all Children born of Women Slaves, shall belong to, and be the property of, the Masters or Mistresses of such Slaves.

The statute was repealed in 1825, in an effort to abolish slavery in law: *An Act to Repeal an Act Made and Passed in the Twenty-first Year of His late Majesty's Reign, intituled "An Act Declaring That Baptism of Slaves Shall Not Exempt Them From Bondage"*, S.P.E.I. 1825, c. 7, and Winks, *supra* note 5 at 44.

138. *An Act to Prevent the Further Introduction of Slaves, and to Limit the Term of Contracts For Servitude Within This Province*, S.C. 1793, c. 7, ss. 1–5. See also Power & Butler, *supra* note 66. *An Act respecting Master and Servant*, C.S.U.C. 1859, c. 75 continued the prohibition on slavery:

s.1. The Governor shall not license for the importation of any Negro or other person to be subjected to the condition of a Slave, or to a bounden involuntary service for life, into any part of Upper Canada; nor shall any Negro, or other person, who comes or is brought into Upper Canada, be subject to the conditions of a Slave, or to such service as aforesaid, within the same.

s.2. No voluntary contract of service or indentures entered into by any parties within Upper Canada, shall be binding on them, or either of them, for a longer time than a term of nine years, from the day of the date of such contract.

These provisions were continued in *An Act respecting Master and Servant*, R.S.O. 1877, c. 133, ss. 1–2; R.S.O. 1887, c. 139, ss. 1–2; R.S.O. 1897, c. 157, ss. 1–2.

139. The record of the courts was mixed. The Lower Canadian judges were the least likely to support slavery in their rulings. Chief Justice James Monk, of the Court of King's Bench in Lower Canada, released two Black slaves, “Charlotte and Jude” in 1798, noting in *obiter* that

slave territory under law until 1833, when a statute passed in England emancipated all slaves in the British Empire.¹⁴⁰ Slavery had persisted in British North America well after it had been abolished in most of the northern states.¹⁴¹

However, Archibald J.'s ringing declaration that the constitution prohibited racial discrimination was an outstanding affirmation of equality, which could potentially have been employed to attack many of the racist practices currently in vogue. A thoughtful attorney could have created an opening for argument here, reasoning that the freedom of commerce principle should be superseded by equality rights as a matter of constitutional interpretation. These arguments had apparently not been made to the Supreme Court of Canada when the *Christie v. York Corporation* case had been litigated. There should have been room for another try.

In addition, the Supreme Court had expressly admitted that freedom of commerce would have to give way where a business rule ran "contrary to good morals or public order." No detailed analysis of the ramifications of racial discrimination had ever been presented in these cases. A concerted attempt to lay out the social and economic repercussions of racial segregation might have altered the facile assumptions of some of the judges who could find no fault with colour bars. So much could have been argued: the humiliation and assault on dignity experienced by Black men, women and children whose humanity was denied by racist whites; the

slavery did not exist in the province; (the case is unreported, but discussed in Winks, *supra* note 5 at 100.) In 1800, Monk refused to uphold a slave-owner's request for the return of a fugitive slave, arguing that there was no legislation in effect in Lower Canada to authorize slavery; (*R. v. Robin* (February 1800), (K.B.) [unreported] as discussed in Winks, *ibid.* at 101.) The Nova Scotia judges were unwilling to go as far as their Lower Canadian counterparts, in declaring all slaves free, although they did issue several judgments generally opposed to slavery. In *DeLancey v. Worden* (1803), (N.S.) [unreported] as discussed in Winks, *ibid.* at 105, Nova Scotia Chief Justice Sampson Salter Blowers refused to order a fugitive slave, "Negro Jack", returned to his owner. The Supreme Court of New Brunswick issued two opinions in 1800 and 1805 in which the judges divided over the legality of slavery, thus allowing a continuation of the practice. (*R. v. Jones* (1800), (N.B.) [unreported]; *R. v. Agnew* (1805), (N.B.) [unreported] as discussed in D.G. Bell, "Slavery and the Judges of Loyalist New Brunswick" (1982) 31 U.N.B.L.J. 9.)

140. *An Act For the Abolition of Slavery Throughout the British Colonies; for Promoting the Industry of the Manumitted Slaves; and For Compensating the Persons Hitherto Entitled to the Services of Such Slaves* (U.K.), 3 & 4 Wm. IV, c. 73, emancipated all slaves as of 1 August 1834.

141. The last Canadian born into slavery died in Cornwall, Ontario, in 1871. For discussion of the tenacity of slavery in Canada, see "Negroes in the Maritimes", *supra* note 51; Winks, *supra* note 5; R.W. Winks, "The Canadian Negro: A Historical Assessment" (1968) 53:4 *Journal of Negro History* 283 [hereinafter "Assessment"]; Hill, *supra* note 24; "Early Ontario", *supra* note 98; Bell, *supra* note 139; Williams, *supra* note 24 at 11; Stouffer, *supra* note 98; Power & Butler, *supra* note 66.

severe curtailment of Black educational and occupational opportunities, which placed impenetrable restrictions upon full participation in Canadian society; and the many instances of inter-racial mob violence which had marred Canadian history. A creative lawyer might have contended that rules which enforced racial divisions undeniably fomented immorality and the disruption of public peace.

Similar arguments had been made before the Ontario Supreme Court in 1945, in the landmark case of *Re Drummond Wren*. The issue there was the legality of a restrictive covenant registered against a parcel of land, enjoining the owner from selling to "Jews or persons of objectionable nationality." Noting that there were no precedents on point, Justice John Keiller MacKay, a Gentile, quoted a legal rule from *Halsbury*: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy."¹⁴² Holding that the covenant was unlawful because it was "offensive to the public policy of this jurisdiction", MacKay J. stated:

In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas. . . . It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.¹⁴³

The common law was not carved in stone, nor was the judicial understanding of "public policy", which as MacKay J. stressed, "varies from time to time."¹⁴⁴

142. *Re Wren*, [1945] O.R. 778, 4 D.L.R. 674 (H.C.), MacKay J. [hereinafter *Wren* cited to O.R.].

143. *Ibid.* at 782.

144. *Ibid.* at 780. See also *Essex Real Estate Co. v. Holmes* (1930), 37 O.W.N. 392 (H.C.), in which the court took a narrow interpretation of the following restrictive covenant: "that the lands shall not be sold to or occupied by persons not of the Caucasian race nor to Europeans except such as are of English-speaking countries and the French and the people of French descent", holding that a Syrian was not excluded by such a clause. See also *Bryers v. Morris* (1931), 40 O.W.N. 572 (H.C.).

In assessing his strategy in the Desmond case, Bissett would have had to consider many factors: the wishes of his client, the resources available to prepare and argue the case, the social and political climate within which the case would be heard, and the potential receptivity of the bench. Viola Desmond would have been soundly behind a direct attack on racial

One year after the Desmond litigation, another set of white Gentile judges would disagree with MacKay J.'s ruling. In *Noble v. Alley*, [1948] O.R. 579, O.W.N. 546, 4 D.L.R. 123 (H.C.), aff'd [1949] O.R. 503, O.W.N. 484, 4 D.L.R. 375 (C.A.), they explicitly upheld a restrictive covenant prohibiting the sale or lease of a summer resort property to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood". Fearful of "inventing new heads of public policy" that would impede "freedom of association", the judges espoused racial exclusivity as an obvious social right. Ontario Court of Appeal Chief Justice Robert Spelman Robertson wrote:

It is common knowledge that, in the life usually led at such places, there is much intermingling, in an informal and social way, of the residents and their guests, especially at the beach. That the summer colony should be congenial is of the essence of a pleasant holiday in such circumstances. The purpose of [the restrictive covenant] here in question is obviously to assure, in some degree, that the residents are of a class who will get along well together. To magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than I possess. . . . There is nothing criminal or immoral involved; the public interest is in no way concerned. These people have simply agreed among themselves upon a matter of their own personal concern that affects property of their own in which no one else has an interest.

This ruling was later overturned, *Noble v. Alley*, [1951] 92 S.C.R. 64, 1 D.L.R. 321. The Supreme Court justices made no explicit comment on the public policy reasoning of the earlier decisions. Instead they held the covenant void for uncertainty: "it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban." See also *McDougall v. Waddell*, [1945] O.W.N. 272 (H.C.), where the court considered a restrictive covenant that prohibited the sale or occupation of lands "by any person or persons other than Gentiles (non-semetic [sic]) of European or British or Irish or Scottish racial origin." The court held that such provisions did not violate the newly enacted Ontario *The Racial Discrimination Act, 1944*, S.O. 1944, c. 51, and that there were no legal restrictions to affect their implementation.

Ontario would become the first province to ban restrictive covenants in 1950, when it passed *The Conveyancing and Law of Property Amendment Act, S.O. 1950, c. 11*, which received royal assent on 24 March 1950. Section 1 provided:

1. *The Conveyancing and Law of Property Act* is amended by adding thereto the following section:

RESTRICTIVE COVENANTS

20a. Every covenant made after this section comes into force which but for this section would be annexed to and run with land which restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person shall be void and of no effect.

Manitoba would be second, banning restrictive covenants that same year, when it passed the *Manitoba Property Act*, *supra* note 102 at 6A:

"Every covenant made after this section comes into force that, but for this section, would be annexed to and run with land and that restricts the sale, ownership, occupation, or use, of land because of the race, colour, nationality, ancestry, place of origin, or creed of any person shall be void."

segregation. She had come seeking public vindication for the racial discrimination she had suffered. The community support and funding from the NSAACP would have strengthened her claim. The Halifax beautician would have been viewed as a conventionally “good” client, a successful business entrepreneur, a respectable married woman who had proven to be well-mannered throughout her travails. The traditional assumptions about race relations were also under some scrutiny. Although Nova Scotians continued to sponsor racial segregation in their schools, housing and work force, the unveiling of the Nazi death camps toward the end of World War II had riveted public attention upon the appalling excesses of racial and religious discrimination. In October of 1945 the Canadian Parliament had entertained a motion to enact a formal Bill of Rights, which would guarantee equal treatment before the law, irrespective of race, nationality, religious or political beliefs.¹⁴⁵ Public sentiment might have been sufficiently malleable to muster support for more racial integration. Viola Desmond’s case potentially offered an excellent vehicle with which to test the capacity of Canadian law to further racial equality.

But Frederick William Bissett decided not attack the racial segregation directly. Perhaps he simply accepted the Supreme Court of Canada ruling in *Christie v. York Corporation* as determinative. Perhaps he could not imagine how to push the boundaries of law in new, more socially progressive directions. Perhaps he was intimately acquainted with the white judges who manned the Nova Scotia courts, and knew their predilections well. Whatever the reason, Bissett settled upon a more conventional litigation strategy. That he would fail, even in this more limited effort, may suggest that a more dramatic challenge would have fallen far short of the goal. I prefer to think that the stilted narrowness of the vision dictated an equally narrow response.

VI. *Rex versus Desmond*

Bissett caused a writ to be issued on Wednesday, 14 November 1946, naming Viola Desmond as plaintiff in a civil suit against two defendants, Henry L. McNeil and the Roseland Theatre Co. Ltd. Bissett alleged that Henry MacNeil had acted unlawfully in forcibly ejecting his client from the theatre. He based his claim in intentional tort, a legal doctrine that contained little scope for discussion of race discrimination. The writ

145. The debate on the motion, which failed to lead to the incorporation of a Bill of Rights in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*), is recorded in U.K., H.C., *Parliamentary Debates*, col.900 (10 October 1945).

stipulated that Viola Desmond was entitled to compensatory damages on the following grounds: 1) assault, 2) malicious prosecution, and 3) false arrest and imprisonment.¹⁴⁶ Bissett did not add a fourth and lesser known tort, abusing the process of the law, which might have offered more scope for raising the racial issues that concerned his client.¹⁴⁷ The three grounds he did enunciate were all advanced in racially neutral terms.

146. See *Viola Irene Desmond v. Henry L. McNeil and Roseland Theatre Co. Ltd.*, P.A.N.S. RG 39 "C", [Halifax] vol. 936-937, Supreme Court of Nova Scotia, #13299, filed 14 November 1946. On 12 December 1946, Bissett filed a notice of discontinuance against the Roseland Theatre Company Ltd., along with a writ alleging the same claim against the parent corporation: *Viola Irene Desmond v. Odeon Theatres of Canada Ltd. & Garson Theatres Ltd.*, P.A.N.S. RG 39 "C" [Halifax] vol. 936-37, Supreme Court of Nova Scotia, #13334.

"Assault" is defined as "an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant." "Battery" is defined as "the intentional application of force to another person." Bissett must have meant his claim for "assault" to cover "battery" as well. "False imprisonment" is defined as "the infliction of bodily restraint which is not expressly or impliedly authorized by the law." In an action for "malicious prosecution", the plaintiff was "required to prove: 1) that the defendant prosecuted him; and 2) that the prosecution ended in the plaintiff's favour; and 3) that the prosecution lacked reasonable and probable cause; and 4) that the defendant acted maliciously." See P.H. Winfield, *A Text-Book of the Law of Tort* (Toronto: Carswell, 1946) at 207ff. See also W.T.S. Stallybrass, *Salmond's Law of Torts* (Toronto: Carswell, 1945) at 328 and 618.

147. A.T. Hunter, *Canadian Edition of the Law of Torts by J.F. Clerk and W.H.B. Lindsell* (Toronto: Carswell, 1908) at 662 describes this form of action as follows: "A legal process, not itself devoid of foundation, may be maliciously employed for some collateral object of extortion or oppression; and in such case the injured party may have his right of action, although the proceedings of which he complains may not have been determined in his favour." The action, adds Hunter, "was not for the malicious arrest, but for abusing the process of the law to effect an object not within its proper scope."

This tort had been formally designated "malicious abuse of legal process" in the United States, where it appears to have been more thoroughly discussed and defined. C.G. Addison defines "malicious abuse of legal process" as follows: "Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. . . . And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action or whether the suit was legally terminated or not." See C.G. Addison, *A Treatise on the Law of Torts*, vol. 2, ed. by H.G. Wood (New Jersey: Frederick D. Linn, 1881) at 82.

Prosser notes: "A tort action for abuse of process may be maintained for the use of legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed. The action differs from malicious prosecution in that it is not necessary for the plaintiff to show lack of probable cause, or termination of the proceeding in his favor. Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." See W.L. Prosser, *Handbook of the Law of Torts* (St. Paul, Minnesota: West, 1941) at 892.

M.M. Bigelow, *The Law of Torts*, 7th ed. (Boston: Little, Brown, 1901) at 133 states that in "malicious abuse of process, process which in itself may have been lawful has been perverted to a purpose not contemplated by it. In other words the exigency of the writ has not been followed. Malice again, as a distinct entity, plays no part in the case; all that is required for a cause of action is proof that the writ has been applied to a purpose not named or implied by it,

Whether there would have been an opportunity to address the issue of race discrimination indirectly within the common law tort actions will never be known. The civil claim apparently never came to trial, and the archival records contain no further details on the file. Why Bissett decided not to pursue the civil actions is unclear. Perhaps he felt that the tort claim would be difficult to win. The common law principle of defence of property might have been invoked to justify the use of force by property owners against trespassers.¹⁴⁸ The defendants would also have been entitled to raise the defence of "legal authority", asserting that they were within their rights in removing someone who had breached the tax provisions of the *Theatres Act*.¹⁴⁹ The conviction which had been registered against Viola Desmond bolstered this line of argument, confirming that at least one court had upheld the defendants' actions. It also served as a complete defence to the claim for malicious prosecution. Upon reflection, Bissett may have decided that he needed to overturn the initial conviction before taking any further action upon the civil claim.

On 27 December 1946, Bissett announced that he would make an application for a writ of *certiorari* to ask the Supreme Court of Nova Scotia to quash Viola Desmond's criminal conviction. There was "no evidence to support" the conviction, he contended, and the magistrate

to the damage of the plaintiff. Perversion or 'abuse' of the process gives the name 'malicious' to the case; the malice is fictitious, or may be."

F.V. Harper, *A Treatise on the Law of Torts* (Indianapolis: Bobbs-Merrill, 1938) at 272ff: "The process of the law must be used improperly and this means something more than a proper use from a bad motive. The 'malice' in the sense of unjustifiable or improper motive is essential to a recovery for malicious abuse of process, it is not alone sufficient. If the process is employed from a bad or ulterior motive, the gist of the wrong is to be found in the uses which the party procuring the process to issue attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. But the moment he attempts to obtain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated. The most common instance of the operation of this principle is an attempt to extort money from the person subjected to the process. There are some situations in which a tort will be committed by the unjustifiable use of a power of legal and economic pressure to accomplish a collateral objective necessitating harm to others. This type of wrong is on the frontier of the law of tort and there is an insufficient number of cases to make prediction reliable."

Bissett could have argued that MacNeil had invoked summary criminal prosecution under *The Theatres Act*, *supra* note 9 a process not unlawful in itself, for the collateral and improper motive of enforcing racial segregation. The conviction would have become irrelevant, with the sole focus being whether racial segregation constituted an "unjustifiable" ulterior motive for the theatre manager's acts, which necessitated harm to others.

148. Stallybrass, *supra* note 146 at 335 notes that "it is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry."

149. "A trespass to the person may be justified on the ground . . . that [the defendant] was stopping a breach of the peace . . . or apprehending an offender against the criminal law. . . .

lacked the “jurisdiction” to convict her. In support, Bissett filed an affidavit sworn by Viola Desmond, outlining how she had asked for a downstairs ticket and been refused, describing in detail her physical manhandling by the theatre manager and police officer, and documenting the failings in the actual trial process itself. Nothing in the papers filed alluded directly or indirectly to race.¹⁵⁰ Viola Desmond, Reverend W.P. Oliver and William Allison (a Halifax packer) jointly committed themselves to pay up to two hundred dollars in costs should the action fail.¹⁵¹

A writ of *certiorari* allowed a party to transfer a case from an inferior tribunal to a court of superior jurisdiction by way of motion before a judge. In this manner, the records of proceedings before stipendiary magistrates could be taken up to the Supreme Court for reconsideration. The availability of this sort of judicial review was restricted, however. Parties dissatisfied with their conviction could not simply ask the higher court judges to overrule it because the magistrate’s decision had been wrong. Instead, they had to allege that there had been a more fundamental denial of justice or that there was some excess or lack of jurisdiction.¹⁵²

There is no written record of what Bissett argued when he appeared before Nova Scotia Supreme Court Justice Maynard Brown Archibald on 10 January 1947.¹⁵³ But the white judge was clearly unimpressed. A native

[W]hat is *prima facie* a wrongful act is committed under the authority of the law. . . .” Hunter, *supra* note 147 at 199.

150. “Notice of Motion”, 27 December 1946, and “Affidavit of Viola Irene Desmond”, 29 January 1947, *His Majesty the King v. Viola Irene Desmond*, P.A.N.S., RG 39 “C” [Halifax], Vol. 937, Supreme Court of Nova Scotia, #13347. The notice was served upon Rod G. MacKay and Henry MacNeil on 30 December 1946.

151. “Recognizance for Certiorari” in *ibid.* Litigants were required to put up financial sureties before filing actions for judicial review.

152. The editors of the *Criminal Reports* advised that *certiorari* applications were available where there was (a) a total want of jurisdiction in the tribunal (e.g.: where the subject-matter is not within its jurisdiction); (b) a defect in the jurisdiction of the tribunal (e.g.: where an essential step preliminary to its exercise is omitted); (c) an excess of jurisdiction (e.g.: where a penalty is imposed beyond that authorized by law); (d) an irregularity of substance appearing on the face of the proceedings; and (e) exceptional circumstances (e.g.: fraud or perjury in procuring the conviction of the accused). See “Practice Note” at (1947), 4 C.R. 200.

For some judicial discussion of the principles of judicial review as they apply to writs of *certiorari*, see *Re Dwyer* (1938), 13 M.P.R. 82 (N.S.S.C.); *R. v. Walsh* (1897), 29 N.S.R. 521 (C.A.) [hereinafter *Walsh*]; *R. v. Hoare* (1915), 49 N.S.R. 119 (C.A.); *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.) [hereinafter *Nat Bell*].

153. There was no published report of the case brought before Archibald, J., and the press coverage contains no further details: see “Supreme Court Ruling Sought” *The [Halifax] Herald* (10 January 1947) 18. The “Notice of Motion” in *Desmond*, *supra* note 150, lists three grounds, although the vagueness of the claims permits little analysis: 1. That there is no evidence to support the aforesaid conviction. 2. That there is evidence to show that the aforesaid Viola Irene Desmond did not commit the offence hereinbefore recited. 3. That the information or evidence did not disclose any offence to have been committed within the jurisdiction of the convicting

of Colchester County, Nova Scotia, Archibald J. had been called to the bar in 1919, and practised law in Halifax continuously from 1920 until his appointment to the bench in 1937.¹⁵⁴ Although he was an erudite lecturer in Dalhousie's law school, Archibald did not choose to elaborate upon legal intricacies in his decision in the Desmond case. Viola Desmond had no right to use the process of *certiorari*, he announced, and he curtly dismissed her application on January 20th. The cursory ruling of less than two pages contained a mere recitation of conclusion without any apparent rationale. "It is clear from the affidavits and documents presented to me that the Magistrate had jurisdiction to enter upon his inquiry," Archibald J. noted. "This court will therefore not review on *certiorari* the decision of the Magistrate as to whether or not there was evidence to support the conviction."¹⁵⁵

The best clue to deciphering the decision is found in the judge's final paragraph:

It was apparent at the argument that the purpose of this application was to seek by means of *certiorari* proceedings a review of the evidence taken before the convicting Magistrate. It is obvious that the proper procedure to have had such evidence reviewed was by way of an appeal. Now, long after the time for appeal has passed, it is sought to review the Magistrate's decision by means of *certiorari* proceedings. For the reasons that I have already given, this procedure is not available to the applicant.¹⁵⁶

A part-time stipendiary magistrate for a brief period during his days of law practice, Archibald J. was clearly concerned that lower court officials be free from unnecessary, burdensome scrutiny by superior court judges. Earlier Nova Scotia decisions had reflected similar fears, suggesting that access to judicial review be restricted to prevent "a sea of uncertainty", in which the decisions of inferior tribunals were subjected to limitless second-guessing.¹⁵⁷ The proper course of action, according to Archibald

Magistrate. The report of the appeal of Judge Archibald's ruling, *R. v. Desmond*, [1947] 4 D.L.R. 81, (1947), 20 M.P.R. 297, 89 C.C.C. 278, 4 C.R. 200 (N.S.C.A.) [hereinafter *Desmond* (1947) cited to M.P.R.] at 298ff, suggests that Bissett also tried at first instance to make a technical argument that the prosecution had failed to allege the location where the offence took place. Apparently he abandoned this claim when the original information, stipulating that the acts occurred "in the Town of New Glasgow," was located.

154. For biographical details on Judge Archibald, who was born in Manganese Mines, Colchester County, see "Archibald, The Hon. Maynard Brown" *Who's Who in Canada, 1945-46* (Toronto: International Press, 1946) at 1042 [hereinafter *Who's Who 1945-46*]; "Archibald, The Hon. Maynard Brown" *Who's Who in Canada 1951-52* (Toronto: International Press, 1952) at 612; Maritime Reference, *supra* note 112 at 23; and Obituary, "Prominent Jurist Held Many Important Posts" *The [Halifax] Chronicle-Herald* (10 July 1953) 1.

155. *Desmond* (1947), *supra* note 153.

156. *Ibid.* at 299.

157. See e.g. *Walsh*, *supra* note 152 at 527, Townsend J. quoting Rigby J.

J., would have been to appeal Magistrate MacKay's conviction to County Court under the *Nova Scotia Summary Convictions Act*.¹⁵⁸

Why Bissett had originally chosen to bring a writ of *certiorari* rather than an appeal is not clear. The *Nova Scotia Summary Convictions Act* required litigants to choose one route or the other, not both. An appeal permitted a full inquiry into all of the facts and law surrounding the case, with the right to call witnesses and adduce evidence, and the appeal court entitled to make a completely fresh ruling on the merits. Although an appeal would seem to have offered greater scope to the defence, Bissett may have preferred to make his arguments before the more elevated Nova Scotia Supreme Court, which heard applications for *certiorari*, rather than the County Court, which heard appeals from summary convictions. Or he may simply have missed the time limit for filing an appeal, which was set as ten days from the date of conviction.¹⁵⁹ He had issued the civil writ a mere five days after the initial conviction, but the writ of *certiorari* was not filed until almost a full month afterwards. Possibly by the time Bissett turned away from the civil process to canvass his options with respect to the criminal law, it was already too late for an appeal.

Since the limitation period for appeals had already run, Bissett had no other option but to review the ruling of Archibald before the full bench of the Nova Scotia Supreme Court by way of *certiorari*.¹⁶⁰ Carrie Best was personally in attendance for the hearing, which was argued on March 13th. Acknowledging in *The Clarion* that it was an emotionally tense experience to sit through the hearing, "hoping against hope that justice will not be blind in this case", Carrie Best admitted that she had "watched breathlessly as the calm, unhurried, soft-spoken Bissett argued his appeal."¹⁶¹ Bissett admitted that the time to lodge the original appeal had "inadvertently slipped by", but that this should not bar the court from reviewing on *certiorari*. "The appellant is entitled to the writ," claimed Bissett, "whether she appealed or not, if there has been a denial of natural justice."

The affidavit Viola Desmond had filed to support her case had set out in detail the many ways in which she felt the trial had been procedurally unfair. She had not been told of her right to counsel or her right to seek

158. *The Nova Scotia Summary Convictions Act*, S.N.S. 1940, c. 3, s. 58, amending R.S.N.S. 1923, c. 224.

159. *Ibid.*, ss. 59, 60, 62, 66, as am. by S.N.S. 1945, c. 65.

160. "Notice of Appeal", 20 January 1947, and "Entry of Appeal", 21 February 1947, P.A.N.S. See also "Reserve Appeal Decision in Desmond Case" *The [Halifax] Herald* (14 March 1947) 18. For details of the appellant's and respondent's arguments, see *Desmond* (1947), *supra* note 153 at 299ff.

161. "Clarion Went A-Visiting!" *The [New Glasgow] Clarion* 2:5 (15 March 1947) 2.

an adjournment. She had not understood that she was entitled to cross-examine the prosecution witnesses. She had been sentenced without any opportunity to make submissions to the court. These several omissions would have more than sufficed to constitute a denial of natural justice, as lawyers understand the meaning of that term in the latter half of the 20th century. But at the time of the *Desmond certiorari* the concept of due process was much less clear. Justice John Doull, who issued his decision on this case on 17 May 1947, even disputed the use of the term “natural justice”. A former Attorney General of Nova Scotia, Doull J. wrote:

A denial of justice apparently means that before the tribunal, the applicant was not given an opportunity of setting up and proving his case. (The words “natural justice” were used in some of the opinions of the judges but I doubt whether that is a good term.) At any rate a denial of the right to be heard is a denial of a right which is so fundamental in our legal practice that a denial of it vitiates a proceeding in which such denial occurs.¹⁶²

The white judge conceded that if a “denial of justice” had been proven in Viola Desmond’s affidavit, the failure to appeal would no longer suffice to bar her claim. But then Doull J., a former mayor of New Glasgow, concluded that there had been no such procedural omissions in the present case.¹⁶³ None of the other Supreme Court judges differed from this view.¹⁶⁴

Bissett’s other argument, on the lack of jurisdiction, was vigorously disputed by respondent’s counsel, Edward Mortimer Macdonald, Jr. K.C. Henry MacNeil’s lawyer was a forty-seven year old, white, New Glasgow resident who had received degrees from Dalhousie University, Bishop’s College and McGill. He had practised law in Montreal from 1924 to 1930, then returned to practice in his birth province of Nova Scotia, where he served as the town solicitor for New Glasgow.¹⁶⁵ “The magistrate [had] jurisdiction, [and] tried the case on the evidence before him,” asserted Macdonald. “The sole objection remaining to the appellant is that the evidence does not support a conviction. The proper remedy therefore is by way of appeal.”

162. See *Desmond* (1947), *supra* note 153 at 307. For biographical details on Doull, who was born in New Glasgow on 1 November 1878, see *The [Halifax] Chronicle-Herald* (1 October 1960) 32; *Who’s Who* 1945–46, *supra* note 154 at 474.

163. *Desmond* (1947), *ibid.* at 309, Doull J. He served as Mayor of New Glasgow in 1925.

164. Robert Henry Graham J. noted (*ibid.* at 304) that Bissett had argued a denial of natural justice, relying on *R. v. Wandsworth*, [1942] 1 All E.R. 56, in which the court overturned the conviction of a defendant who had been denied the opportunity to defend himself. Graham J., however, made no reference to Viola Desmond’s detailed affidavit alleging similar treatment and refused to find a denial of natural justice in the present case.

165. For biographical details on E.M. Macdonald, see Maritime Reference, *supra* note 112 at 11; “Macdonald, E.M.: Death: Town solicitor for New Glasgow dies: P.A.N.S. MG1, vol. 2022 #20.

Bissett did not argue that it was beyond the jurisdiction of a magistrate to apply the Nova Scotia *Theatres, Cinematographs and Other Amusements Act* to enforce racial segregation. He should have. Courts had long held that it was an abuse of process to bring criminal charges as a lever to enforce debt collection.¹⁶⁶ Here the theatre manager was not trying to help the province collect tax, but to bring down the force of law upon protestors of racial segregation. That Bissett might have drawn an analogy to the abuse of process decisions was suggested months later in a *Canadian Bar Review* article written by J.B. Milner, a white professor at Dalhousie Law School. Calling the Desmond case “one of the most interesting decisions to come from a Nova Scotia court in many years”, Milner asserted that Henry MacNeill was prosecuting Viola Desmond “for improper reasons”. MacNeill’s “desire to discriminate between negro and white patrons of his theatre” transformed the criminal proceeding into “a vexatious action”, Milner argued.¹⁶⁷

But none of this was addressed at the appeal. Instead, Bissett confined his jurisdictional point to the insufficiency of evidence at trial, leaving himself wide open to procedural critique. Justice Robert Henry Graham emphasized that the evidentiary matters in this case did not relate to jurisdiction:

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.¹⁶⁸

There could be no question “raised as to the jurisdiction of the stipendiary magistrate” in this case, concluded Graham J., himself another former white mayor and stipendiary magistrate from New Glasgow. Furthermore, Graham J. added, “no reason except inadvertence was given to explain why the open remedy of appeal was not taken.” Justices William Francis Carroll and William Lorimer Hall, the other two white judges

166. See e.g. cases cited in J.B. Milner, Case and Comment (1947) 25 Can. Bar Rev. 915 at 920; *R. v. Michigan Central Railroad Co.* (1907), 17 C.C.C. 483 (Ont. H.C.); *R. v. Thornton* (1926), 46 C.C.C. 249 (B.C.C.A.); *R. v. Leroux* (1928), 50 C.C.C. 52 (Ont. C.A.); *R. v. Bell* (1929), 51 C.C.C. 388 (B.C.C.A.), Martin J.A. dissenting.

167. Milner, *ibid.* at 919. Interestingly, Milner did not believe that the trial decision to convict Viola Desmond was incorrect, describing it as “technically perfect”.

168. *Desmond* (1947), *supra* note 153 at 305, quoting Viscount Caldicott in *Nat Bell*, *supra* note 152 at 151. For biographical details on Judge Graham, who was born in New Glasgow on 30 November 1871, see Obituary, *The [Halifax] Mail-Star* (28 May 1956) 1; Who’s Who 1945–46, *supra* note 154 at 466. Graham served as Town Councillor in New Glasgow in 1898, Mayor in 1900, and Stipendiary Magistrate from 1906–10.

who delivered concurring opinions in the case, agreed that *certiorari* was not procedurally available to overturn the conviction.

Three of the judges, however, felt inclined to make some comment about the sufficiency of evidence at trial. Graham J.'s view was that the charge had been substantiated: "[Viola Desmond] knew that the ticket she purchased was not for downstairs and so that she had not paid the full tax."¹⁶⁹ Carroll J. disagreed: "the accused did actually pay the tax required by one purchasing such a ticket as she was sold."¹⁷⁰ Hall J., the only judge to make even passing reference to the racial issues, was most explicit:

Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman.

One wonders if the manager of the theatre who laid the complaint was so zealous because of a *bona fide* belief there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a public statute.¹⁷¹

Despite their differing opinions, however, all four judges took the position that Viola Desmond's application should be denied. Her conviction would stand.

The decision to apply for *certiorari* rather than to appeal had cost Viola Desmond dearly. Respondent's counsel, E.M. Macdonald laid the blame squarely at Bissett's feet. "The appellant had full benefit of legal advice before the expiry of the delays for appeal," he had insisted at the Supreme Court hearing. More than five days before the expiration of the time for

169. *Desmond* (1947), *ibid.*

170. *Ibid.* at 306. Unlike Doull J. and Graham J., Carroll J. had not been born in New Glasgow, but in Margaret Forks, Nova Scotia on 11 June 1877. Educated at St. Francis Xavier College in Antigonish and at Dalhousie University, he had been called to the bar of Nova Scotia in 1905, serving several terms as a Liberal M.P. For biographical details, see Obituary, *The [Halifax] Chronicle Herald* (26 August 1964) 16; Who's Who 1945–46, *supra* note 154 at 666.

171. *Desmond* (1947), *ibid.* at 307. The decision on file at the archives, "Decision of Hall, J.", P.A.N.S., shows that the original typed version read: "Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman, *convicted on insufficient evidence.*" (Emphasis added.) The latter phrase was crossed out by pen, initialled by Hall J., and did not appear in the reported version of the decision.

Judge Hall was born in Melvern Square, Annapolis County on 28 July 1876 and educated at Acadia and Dalhousie University. He practised law in Liverpool from 1902–18, and then became Halifax Crown Prosecutor. Active in the Conservative Party, he was elected to the provincial legislature and served as Attorney General in 1926. He was appointed to the Nova Scotia Supreme Court in 1931. He was an active worker for welfare organizations in Halifax, and his daughter, Mary, would marry Robert L. Stanfield, who later became the premier of Nova Scotia. For biographical details, see Obituary, "Veteran Jurist Dies at 81" *The [Halifax] Mail-Star* (27 May 1958) 3; P.A.N.S. Biographical Card File, MG9, Vol. 41, p. 262; Who's Who 1945–46, *supra* note 154 at 1494.

appeal, Bissett was actively on the case, having already launched the civil action for assault, malicious prosecution, false arrest and imprisonment. His decision to opt for judicial review rather than an appeal of the original conviction had proven disastrous. He had chosen to argue the case in a conservative and traditional manner, relegating the race issues to the sidelines of the legal proceeding. Yet even within this narrow venue, Bissett had failed to deliver.

VII. *The Aftermath*

What must Viola Desmond have thought of the ruling? It is our great loss that no retrievable records of her reaction appear to have survived.¹⁷² We can perhaps extrapolate what she may have felt from the written account of Ida B. Wells, an African-American woman who lost a lawsuit in Memphis, Tennessee in the late 19th century, after she had been denied accommodation in the “ladies’ only” (white) railway carriage. Ida B. Wells’ diary entry reads:

I felt so disappointed because I had hoped such great things for my people generally. I have firmly believed that the law was on our side and would, when we appealed to it, give us justice. I feel shorn of that belief and utterly discouraged, and just now, if it were possible, would gather my race in my arms and fly away with them.¹⁷³

Viola Desmond must have been equally appalled, not only by the ruling, but by the way in which her attempt to seek legal protection from racial discrimination had been turned into a purely technical debate over the intricacies of criminal procedure. None of the judges had even noted on the record that she was Black. The intersection of “white male chivalry” with “Black womanhood” lay completely unexamined. Nor was there any direct reference to the Roseland Theatre’s policy requiring racially segregated seating. Hall J. had been the only one to advert to the “Jim Crow rule”, a reference to the practices of racial segregation spawned in the United States after the abolition of slavery. And his professed concern had done little to dissuade him from reaching the same conclusion as his brothers on the bench: that the court was powerless to intervene. Professor Milner took up this very point in his review of the case; “discrimination against colour”, he noted, took place “outside the sphere of legal rules.” The theatre manager had “apparently violated no law of human rights and fundamental freedoms in this free county in refusing admission to part of his theatre to persons of negro extraction.”

172. I have been unable to find any account of Viola Desmond’s personal reaction to the defeat of her legal claim.

173. Duster, *supra* note 67 at xvii.

What struck Milner as particularly unfair was that the manager had not only removed Viola Desmond, “as our democratic law says he may”, but had also successfully prosecuted her for violating a quasi-criminal provision in a provincial statute.¹⁷⁴

The Clarion’s coverage of the “disappointing” decision, on 15 April 1947, was muted. Politely expressing appreciation for “the objective manner in which the judges handled the case”, the editor noted:

It would appear that the decision was the only one possible under the law. While in the moral sense we feel disappointed, we must realize that the law must be interpreted as it is.

The *Clarion* feels that the reason for the decision lies in the manner in which the case was presented to the Court. This was very strongly implied by the Supreme Court. This is a regrettable fact.¹⁷⁵

Bissett, who was carefully not mentioned by name, was clearly taking the fall here. It was his choice of an application for *certiorari*, rather than appeal, which was singled out as the reason for the legal loss. His conservative strategy of camouflaging race discrimination underneath traditional common law doctrines, his decision not to attack the legality of racial segregation with a frontal assault, was not discussed.

The Clarion did, however, take some solace from “Jim Crow” remarks of Hall J., which it quoted in full, adding:

The Court did not hesitate to place the blame for the whole sordid affair where it belonged. . . . It is gratifying to know that such a shoddy attempt to hide behind the law has been recognized as such by the highest Court in our Province. We feel that owners and managers of places of amusement will now realize that such practices are recognized by those in authority for what they are,—cowardly devices to persecute innocent people because of their outmoded racial biases.¹⁷⁶

Some Blacks believed the whole incident would have been better left alone. Walter A. Johnston, a Black Haligonian employed as a chef with the immigration department, made a point of criticizing Viola Desmond at an Ottawa national convention of the Liberal Party in October of 1948. Viola Desmond had been “censured by the Halifax colored group” for her

174. Milner, *supra* note 166 at 915ff.

175. “The Desmond Case” *The [Truro] Clarion* (15 April 1947) 2 [hereinafter “Desmond Case”]; “Dismisses Desmond Application”, *ibid.* at 4.

176. “Desmond Case”, *ibid.* *The Clarion* would later reprint Editorial, *Maclean’s Magazine* (15 July 1947) 1, in which the Desmond case was described and critiqued: “In a free country one man is as good as another—any well-behaved person may enter any public place. In Nova Scotia a Negro woman tried to sit in the downstairs section of a theatre instead of the Jim Crow gallery. Not only was she ejected by force, but thereafter she, not the theatre owner, was charged and convicted of a misdemeanour. Most Canadians have been doing a fair amount of grumbling lately about the state of our fundamental freedoms. Maybe it’s time we did more than grumble.” See “Is This A Free Country?” *The [Truro] Clarion* 2:12 (15 August 1947) 2.

activism, he advised. "We told her she was not helping the New Glasgow colored people by motoring over there to cause trouble." Johnston complained of racial "agitators", who would "increase the racial problem and set back the progress towards good feeling." The policy he counselled: to "shrug . . . off the trouble we met", with a "soft-answer-that-turneth-away-wrath".¹⁷⁷

James Calbert Best, the Black associate editor of *The Clarion*, had an entirely different perspective. Calling for legislation which would put the right to racial equality above the privileges of those in business, he claimed:

People have come to realize that the merchant, the restaurant operator, the theatre manager all have a duty, and the mere fact that such enterprises are privately owned is no longer an excuse for discrimination on purely racial grounds. . . . Here in Nova Scotia, we see the need for such legislation every day."¹⁷⁸

Comparing the situation of Blacks in Nova Scotia with those in the American south, Best castigated Canadians for their complacency:

We do have many of the privileges which are denied our southern brothers, but we often wonder if the kind of segregation we receive here is not more cruel in the very subtlety of its nature. . . .

True, we are not forced into separate parts of public conveyances, nor are we forced to drink from separate faucets or use separate washrooms, but we are often refused meals in restaurants and beds in hotels, with no good reason.

Nowhere do we encounter signs that read "No Colored" or the more diplomatic little paste boards which say "Select Clientele," but at times it might be better. At least much consequent embarrassment might be saved for all concerned.¹⁷⁹

Bolstered by the apparent inability of the courts to stop racial discrimination, Canadian businesses continued to enforce their colour bars at whim. The famous African American sculptress, Selma Burke, was

177. "N.S. Negroes Libelled by Attack" *The [Truro] Clarion* 2:8 (13 October 1948) 1.

178. "Toronto Leads the Way" *The [Truro] Clarion* 2:12 (15 August 1947) 2. The same paper reported that the City of Toronto Board of Police Commissioners had passed a regulation (inserted in a city by-law governing the licensing of public places), providing a penalty of licence cancellation for any hall, rink, theatre or other place of amusement in the city which refused to admit anyone because of race, color or creed. See "Toronto Against Discrimination" and "Toronto Leads the Way" *The [Truro] Clarion* 2:12 (15 August 1947) 1ff.

179. "No Discrimination" *The [Truro] Clarion* 2:12 (15 August 1947) 2. *Saturday Night* also drew a comparison with the United States (7 December 1946) 5: "Racial segregation is so deeply entrenched in what the American people are accustomed to call their way of life that the problems which it raises in a democracy (it raises none in a totalitarian state) will not be solved in the United States without a good deal of conflict. Canada is in a position to avoid most of that conflict if she avoids getting tied into the American way of life in that respect, and now is the time to take action to avoid it."

denied service in a Halifax restaurant in September 1947. "We had expected to find conditions in Canada so much better than in the States," explained her white companion, "but I'm sorry to say we were mistaken."¹⁸⁰ Grantley Adams, the Black Prime Minister of Barbados, was refused a room in a Montreal hotel in 1954 because the hotel had "regulations."¹⁸¹ The racial intolerance in New Glasgow intensified and spread to other groups. In September of 1948 a gang of hooded marauders burned a seven foot cross on the front lawn of the home of Joe Mong, the Chinese proprietor of a New Glasgow restaurant. Police investigated but pronounced themselves sceptical that the incident had "anything to do with K.K.K. activities". It was simply "a private matter", they concluded.¹⁸² Akin to "freedom of commerce".

As a matter of legal precedent, the Viola Desmond case had been an absolute failure. The lawsuit had been framed in such a manner that the real issues of white racism were shrouded in procedural technicalities. The judges had turned their backs on Black claims for racial equality, in certain respects openly condoning racial segregation. But Viola Desmond's legal challenge had touched a nerve within the Black community, creating a dramatic upsurge in race consciousness, according to Pearleen Oliver. The funds raised for legal fees were diverted to serve as seed money for the fledgling NSAACP, after Frederick William Bissett declined to bill his client, substantially strengthening the ability of the Black organization to lobby against other forms of race discrimination.¹⁸³ While there were undeniably those who thought the struggle better left unwaged, the leaders of Nova Scotia's Black community felt differently. Asked to reflect on Viola Desmond's actions fifteen years later, Dr.

180. "American Artists Score Racial Discrimination" *The [Halifax] Chronicle* (15 September 1947); "More Discrimination" *The [Truro] Clarion* 2:16 (1 November 1947) 2. Selma Burke's female companion was A.F. Wilson, a noted American author of several books on race discrimination. *The Clarion* 2:11 (1 August 1947) 1ff, reported that a New Glasgow restaurant had refused service to a young West Indian student working with the provincial highways department. The same article noted that a Black couple, Mr. and Mrs. A.T. Best, had also been refused seating in a small fruit store and fountain in New Glasgow.

181. E. Thornhill, "So Often Against Us: So Seldom For Us, Being Black and Living with the Canadian Justice System" (Paper presented to IXth Biennial Conference of the Congress of Black Women of Canada, Halifax, 1989).

182. See "New Glasgow" *The [Truro] Clarion* 3:6 (8 September 1948) 3.

183. Pearleen Oliver, *supra* note 26; P.D. McClain, *Alienation and Resistance: The Political Behaviour of Afro-Canadians* (Palo Alto: R. & E. Research Associates, 1979) at 59 notes that the NSAACP was responsible for integrating barbershops in Halifax and Dartmouth, sponsoring the first Blacks for employment in Halifax and Dartmouth stores, integrating the nurses' training and placement programs, persuading insurance companies to sell Blacks policies other than industrial insurance, and initiating a controversy that resulted in the Dartmouth school board hiring Blacks.

William Pearly Oliver tried to explain the enormous symbolic significance of the case. His appreciation for her effort transcends the failures of the legal system, and puts Viola Desmond's contribution in clearer perspective:

. . . [T]his meant something to our people. Neither before or since has there been such an aggressive effort to obtain rights. The people arose as one and with one voice. This positive stand enhanced the prestige of the Negro community throughout the Province. It is my conviction that much of the positive action that has since taken place stemmed from this. . . .¹⁸⁴

Viola Desmond, whose legal challenge would finally receive immortalization in David Woods's poem, died on 7 February 1965.¹⁸⁵

184. Thomson, *supra* note 51 at 84.

185. See Obituary, *The [Halifax] Chronicle-Herald* (10 February 1965) 26; Obituary, *The [Halifax] Mail-Star* (10 February 1965) 8.