

4-1-1998

## No Dichotomies: Reflections on Equality for African Canadians in R. v. R.D.S.

April Burey

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

April Burey, "No Dichotomies: Reflections on Equality for African Canadians in R. v. R.D.S." (1998) 21:1 Dal LJ 199.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

# Forum on R. v. R.D.S.

---

April Burey\*

No Dichotomies: Reflections on  
Equality for African Canadians  
in *R. v. R.D.S.*\*\*

---

*Every valley shall be exalted, and every mountain and hill shall be made low: and the crooked shall be made straight, and the rough places plain*

*Isaiah 40:4*

## *Preface*

The contrasts, in form and substance, were stark. In form, I was a black woman in a wheelchair, pleading before an all-white, able-bodied and almost all-male Supreme Court of Canada.<sup>1</sup> The usually empty public galleries in the Ottawa courtroom were filled with people of colour, who had come from across the country to witness the hearing of this landmark case.<sup>2</sup> On their entrance, the nine white judges, dressed in their staid, black robes made an almost audible gasp as they were met with this colourfully clad, intently silent band of people of colour.

In substance, the case directly raised before the Court issues of race and racism, though in its earlier *Charter* decisions the Court, as though functioning in a colour-blind world, had not ruled on racial equality. The case raised fundamental issues of the apparent contrast between an objective notion of judicial impartiality and the subjective, personal experience of the black, female judge of first instance. In substance too,

---

\* B.A., LL.B. (Dalhousie), LL.M. (Harvard). My profound thanks go to my beloved teachers, Professors Derrick Bell and Leon Trakman, my professors at Harvard and Dalhousie respectively, who both gave insightful and very helpful comments to earlier drafts of this paper. They have also generously given me much needed academic, political and spiritual encouragement far beyond this paper.

\*\* This paper's exploration of no dichotomies rests in much of critical legal thought: see, for example, C. Lawrence, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism" (1987) 39 Stan. L. Rev. 317; M. Minnow, "Justice Engendered" (1987) 101 Harv. L. Rev. 10; J. Singer, "The Player and The Cards: Nihilism and Legal Theory" (1984) 94 Yale L. J. 1.

1. On that memorable day, March 10, 1997, when *R. v. R.D.S.* was heard in the Supreme Court of Canada, three black lawyers argued. Burnley "Rocky" Jones appeared on behalf of the accused/appellant. Yola Grant appeared for L.E.A.F. I appeared for an intervening coalition of black groups, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada (hereinafter referred to as the Coalition).

2. I was later informed that many of those who came did not get into the courtroom as the public galleries were already full to overflowing.

I was attempting to transform the written, technical arguments made in my factum and to passionately articulate new, dynamic, moral and political issues in an old, established, static, legal structure.

I felt like the quintessentially powerless, silent-silenced, “outsider-other” individual, trying to be heard by an ultimately powerful, “insider-normative” institution.

The form and substance of these manifold and manifest contrasts were to merge and then melt away as *R. v. R.D.S.* unfolded. In the final analysis, the case stands as a powerful and positive witness to the revelation that, in equality, there are essentially no dichotomies in apparent contrasts of whatever kind.

### *Introduction*

*R. v. R.D.S.*<sup>3</sup> involved the appeal of the judgment of an African Canadian female judge to acquit an African Canadian youth, on the basis that it gave rise to a reasonable apprehension of bias.

The case presented several contrasts which appeared as dichotomies of the objective versus the subjective; normative versus “other” perspectives; the legal versus the moral and political; the reasoned and reasonable versus the passionate and experiential; the powerful “insiders” versus the powerless “outsiders”; public versus private; and white versus black.

What follows in this short paper is a hopeful telling of the merging and melting of those apparent contrasts into no dichotomies. The paper proceeds in three parts. First, I discuss the decision in the Supreme Court of Canada. The bulk of the paper is dedicated to the second part. In it, I discuss some future implications of the case for the equality of African Canadians, both within and outside of the *Charter* and law. Third, I give some concluding thoughts.

I have an express purpose in focusing on the revelation of no dichotomies in *R.D.S.* That purpose is to call us all to a sober, thoughtful and compassionate return to the essential value underlying Section 15, the *Charter* as a whole, and indeed the laws of any society based on the equality of all. This essential value is the equality of those most vulnerable and disadvantaged among us. Dichotomies divide. Their basic function is to keep some people in and others out. They serve to marginalize and silence the powerless while privileging and centralizing the voice of the powerful. They rely on divisions, both hidden and explicit, to defeat the essential task of equality.

---

3. *R. v. R.D.S.*, [1997] 3 S.C.R. 484 [hereinafter *R.D.S.*].

Focusing on those most vulnerable among us calls us to our truest selves. Since I deeply believe that we are all part of, One with each other, the exclusion of one of us implicates us all. The African Canadian experience in law reveals that vulnerability on the basis of race is a present, pernicious reality, which must be acknowledged and overcome if the mandate of equality is to succeed. Further, focusing on those living at the intersections of these vulnerabilities—for example, black women—illuminates the equality of the whole. *R.D.S.* provides that focus.

### I. *The R.D.S. Decision in the Supreme Court of Canada*

#### 1. *Facts and Lower Court Decisions Appealed From*<sup>4</sup>

R. D. S. is an African Canadian youth. On 17 October 1993, in Halifax, Nova Scotia, he was arrested by a white police officer and charged with three offences.<sup>5</sup> He was 15 years old at the time. His trial proceeded in a Halifax Youth Court before the Honourable Judge Corrine Sparks, an African Canadian female judge. At the trial there were only two witnesses, R.D.S. himself and the white police officer, Constable Stienburg. Since their testimony as to the events leading to the arrest differed widely, their credibility would determine the outcome of the case.

On the one hand, Constable Stienburg testified that, on the day in question, he was riding with his partner in their police cruiser when a radio transmission advised that other officers were in pursuit of a stolen van whose occupants were “non-white” youths. As the constable and his partner drove along, they saw two black youths running across the street. Steinburg then detained one of those youths, N.R., as his partner pursued the other youth. While Constable Stienburg was standing with N.R., the accused R.D.S. ran into the constable’s legs with his bicycle, yelled at him and pushed him. The constable then placed R.D.S. under arrest.

On the other hand, R.D.S. testified that, on the day in question, he had been riding his bike from his grandmother’s to his mother’s house when he saw a police car and a crowd standing beside it. He said that he was being “nosey” when he stopped to look. He saw that his cousin, N.R., was in handcuffs and tried to talk to him to ask whether he, R.D.S., should tell N.R.’s mother what had happened. Constable Stienburg then told him

---

4. The following synopsis is based on Cory J.’s summary of the facts and lower court decisions, *ibid.* at 513-22.

5. The three offenses were: unlawfully assaulting Constable Donald Stienburg; unlawfully assaulting Constable Stienburg with the intention of preventing the arrest of N.R. (another youth); and unlawfully resisting Constable Stienburg in the lawful execution of his duty.

“Shut up, shut up, or you’ll be under arrest too.” When R.D.S. again sought to elicit a response from N.R, the constable then put both youths in chokeholds. He further testified that at no point did he intend to, or in fact, run into the officer with his bike, speak to the officer — since he spoke only to N.R. — or touch, much less push, the officer.<sup>6</sup>

The Honourable Judge Corrine Sparks entered an acquittal of R.D.S. on all three charges. In her oral reasons, delivered at the trial’s close, she reviewed the opposing testimony of both witnesses and basically accepted the youth’s testimony. She found that the Crown had not discharged its onus of proving its case beyond a reasonable doubt. She noted, in particular, that she found R.D.S. to be a “rather honest young boy” and that his testimony had a “ring of truth.”

The Crown had specifically asked the judge why she would not believe the testimony of the police officer over that of the youth and she concluded her oral reasons with the remarks that gave rise to the appeal. They were:

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

At any rate, based upon my comments and based upon all the evidence before the Court, I have no other choice but to acquit.<sup>7</sup>

About one month later, the judge issued written reasons, supplemental to those delivered orally at the close of the trial.<sup>8</sup> Though these reasons did not form part of any appeal,<sup>9</sup> it is worthwhile noting her observation that “the racial configuration in the court [during the trial] . . . consisted of the accused, the defence counsel, the court reporter and the judge all being of African-Canadian ancestry.”<sup>10</sup>

---

6. I am informed that all charges against N.R. regarding the stolen van were later dropped.

7. *Supra* note 3 at 517-18.

8. *R. v. R.D.S.*, [1994] N.S.J. No. 629 (QL).

9. *R.D.S.*, *supra* note 3 at 523.

10. *Supra* note 8 at para. 6; see also the dissenting reasons of Freeman J.A. in *R. v. R.D.S.* (1995), 145 N.S.R. (2d) 284 at 294 (C.A.).

The Crown appealed the decision to acquit the youth on the basis that it gave rise to a reasonable apprehension of bias.<sup>11</sup> Both the Nova Scotia Supreme Court<sup>12</sup> and the Nova Scotia Court of Appeal,<sup>13</sup> Freeman J.A. dissenting, upheld the Crown's position, finding that the decision gave rise to a reasonable apprehension of bias.

## 2. *The Reasons of the Supreme Court of Canada*

By a majority of six to three, the Supreme Court of Canada, in allowing the *R.D.S.* appeal, restored the judgment of acquittal at trial and found that the trial judge's decision did *not* give rise to a reasonable apprehension of bias. Four judges in the majority were firmly on the side of the trial judge's decision, holding that there was no reasonable apprehension of bias.<sup>14</sup> Two of the six judges, while forming part of the majority in result, issued separate reasons,<sup>15</sup> finding that though her remarks were "close to the line,"<sup>16</sup> they did not give rise to an apprehension of bias. The three judges in the minority firmly dissented in the result and found that the impugned remarks did give rise to such apprehended bias.<sup>17</sup>

L'Heureux-Dubé and McLachlin JJ. jointly wrote the reasons for four of the six judges in the majority. I intend to focus here on those reasons and will indicate where they were concurred in by the other justices, both the other two in the majority and the three in dissent.

L'Heureux-Dubé and McLachlin JJ. gave the applicable test,<sup>18</sup> agreed with by the other justices<sup>19</sup> when they stated that the test for reasonable apprehension of bias was that set out by de Grandpré, J. in *Committee for Justice and Liberty v. National Energy Board*

the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information . . . . [T]hat test is 'what would an informed person, viewing the matter realistically and practically—and

---

11. The Crown also appealed on the basis of *actual* bias. After the first level of appeal, the case proceeded only on apprehended bias.

12. *R. v. R.D.S.*, [1995] N.S. J. No. 184 (QL), decision of Glube, C.J.S.C.

13. *Supra* note 10.

14. *Supra* note 3 at 501-13. Madame Justice L'Heureux-Dubé and Madame Justice McLachlin wrote these majority reasons in which La Forest and Gonthier JJ. concurred.

15. *Ibid.* at 513-48. Cory, J. wrote these reasons in which Iacobucci, J. concurred.

16. *Ibid.* at 545.

17. *Ibid.* at 493-500. Major, J. wrote these reasons in which Lamer C.J. and Sopinka J. concurred.

18. *Ibid.* at 502.

19. *Ibid.* at 497, 530-31.

having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.’

The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the ‘very sensitive or scrupulous conscience.’<sup>20</sup>

They noted that the presumption of the impartiality of judges carries considerable weight. Their decisions have enjoyed considerable deference by appellate courts when the latter inquire into questions of bias.<sup>21</sup> In addition, when assessing bias, the impugned, oral decision must be read as a whole and not certain comments in isolation.<sup>22</sup>

In discussing whether a reasonable person would apprehend bias, Justices L’Heureux-Dubé and McLachlin highlighted the necessary diversity of life experiences *all* judges must bring to adjudication. For example, they noted that judges in a “bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives”<sup>23</sup> and that these perspectives must reflect a variety of experiences, if the judiciary is to be diverse.<sup>24</sup> Such diversity of experience is not antithetical to an impartial judiciary, but rather an integral part of it.<sup>25</sup>

Moreover, judges must inquire into the context within which litigation arises.<sup>26</sup> This inquiry into context is not only consistent with judicial impartiality, it may also be seen as its “essential precondition.”<sup>27</sup> Any reasonable person would possess knowledge of the racial dynamics of the community, including its history of “widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing

---

20. [1978] 1 S.C.R. 369 at 394.

21. *Supra* note 3 at 503: For judges “are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances”: *United States v. Morgan*, 313 U.S. 409 (1941), at 421. This presumption of judicial impartiality and high threshold for findings of judicial bias was agreed in by the two other judges in the majority, *supra* note 3 at 532-33, 539, 542.

22. *R.D.S.*, *supra* note 3 at 509-10 and concurred in by Cory J., *ibid.* at 539, 545.

23. *Ibid.* at 505.

24. *Ibid.* In their separate reasons which concurred in the result, the two judges also endorsed diversity and the notion that judicial neutrality included a “wealth of personal . . . experience”: *ibid.* at 533-34. Even the dissent paid lip service to “life experience” as an “important ingredient” in judging: *ibid.* at 497.

25. On the importance of life experience in judging, see generally, *ibid.* at 505-6.

26. On the importance of judicial inquiry into the background context, see generally *ibid.* at 506-7. The other two judges forming the majority in result also agreed with the importance of context in judicial decision-making: *ibid.* at 531, 535.

27. *Ibid.* at 507.

issues.”<sup>28</sup> Awareness of this context would thus not constitute evidence of bias, but rather be “consistent with the highest tradition of judicial impartiality.”<sup>29</sup>

Similarly, the reasonable person would support the fundamental principle of equality set out in section 15 of the *Charter* and endorsed in nation-wide, quasi-constitutional provincial and federal human rights legislation. Such a person would be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*’s equality guarantee.<sup>30</sup>

Justices L’Heureux-Dubé and McLachlin went on specifically to disagree with the separate reasons of the two judges who concurred in the majority result, noting that Judge Sparks’ comments were not “unfortunate” or “close to the line.”<sup>31</sup> On the contrary, while Judge Sparks did not rule that the probable overreaction by Constable Stienburg was motivated by racism, there was evidence capable of supporting a finding of racially motivated overreaction.<sup>32</sup> They found that “in alerting herself to the racial dynamics of the case, [Judge Sparks] was simply engaging in the process of contextualized judging which . . . was entirely proper and conducive to a fair and just resolution of the case before her.”<sup>33</sup>

In essence, a majority of the Supreme Court of Canada rejected the false dichotomy between the subjective experiences of the trial judge and an objective notion of judicial impartiality. In affirming the decision at trial, the Supreme Court also rejected as false the dichotomy between normative and “other” perspectives. Nor would it marginalize and silence the black voice as being biased in an existing context where the white voice had always been heard as central and unbiased.

The following section explores *R.D.S.*’s implications for a legal approach to equality that eschews all dichotomies as false. These implications are explored in four related sections: 1) implications within law; 2) implications within the *Charter*; 3) implications outside the *Charter*; and 4) implications outside law.

---

28. *Ibid.* at 508.

29. *Ibid.* at 509.

30. *Ibid.* at 507-8.

31. *Ibid.* at 502.

32. *Ibid.* at 511-12.

33. *Ibid.* at 513.



## II. *Some Future Implications of the Supreme Court's Decision*

### 1. *Implications Within Law*

#### a. *Judicial Notice of Anti-Black Racism. The False Dichotomy of a Central White Experience versus a Marginal Black Experience*

The Supreme Court's rejection of the false dichotomy between a central white experience and a marginal, black experience has far-reaching implications for law in general. Judicial notice<sup>34</sup> of anti-black racism in Canadian society would give general, legal recognition to the centrality of the African Canadian experience.<sup>35</sup>

In *R.D.S.*, four Supreme Court of Canada judges did just that<sup>36</sup> in citing with approval the specific passage from the decision of the Ontario Court of Appeal<sup>37</sup> where Doherty J.A. for a unanimous court stated,

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate these negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. [Blacks are among the primary victims of that evil.]<sup>38</sup>

While those four judges specifically noted that the "history of discrimination faced by disadvantaged groups in Canadian society [is a matter] of which judicial notice may be taken,"<sup>39</sup> the other two judges forming the majority specifically declined to take judicial notice of racism in this

---

34. *Black's Law Dictionary* defines judicial notice as, *inter alia*, "The cognizance of certain facts which [courts] may properly take and act upon without proof, because they already know them." *Black's Law Dictionary, Sixth Edition* (St. Paul, Minn: West Publishing Co., 1990).

35. On the harsh historical and present-day reality of anti-black racism in the African Canadian experience, see generally, *Royal Commission on the Donald Marshall, Jr. Prosecution: Commissioner's Report: Findings and Recommendations* (Halifax: The Commission, 1989); B. Pachai, *Beneath the Clouds of the Promised Land: The Survival of Nova Scotia's Blacks, Vol. II: 1800-1989* (Hantsport, NS: Lancelot Press Ltd., 1990); W. Tarnopolsky and W. Pentney, *Discrimination and the Law* (Scarborough: Carswell, 1994); J. W. Walker, *The Black Loyalists: The Search for a Promised Land in Nova Scotia and Sierra Leone 1783-1870* (Toronto: University of Toronto Press, 1992); R. Winks, *The Blacks in Canada: A History*, 2nd ed. (Montreal and Kingston: McGill-Queen's University Press, 1997).

36. *Supra* note 3 at 508.

37. *R. v. Parks* (1993), 15 O. R. (3rd) 324 (C. A.), leave to appeal denied, [1994] 1 S.C.R. x.; see following *Parks*, *R. v. Wilson* (1996), 29 O.R. (3rd) 97 (C.A.).

38. *Parks*, *ibid.* at 342. In that case the issue was whether a potential juror could be challenged for cause on the basis that the juror might be racially biased. The question permitted by the court was whether the juror's ability to judge the evidence without bias would be affected by the fact that the accused was a black man and the deceased white.

39. *R.D.S.*, *supra* note 3 at 508.

case.<sup>40</sup> They did, however, note that evidence “suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination . . . [and that] racism may have been exhibited by police officers in arresting young black males.”<sup>41</sup>

Explicit legal recognition, through judicial notice, of the context of anti-black racism in Canada, is not biased and antithetical to judicial impartiality. On the contrary, the very *failure* to recognize the reality of this context within which we live, can lead to partiality and bias in decision-making. It can lead to perpetuation of a racist and unequal status quo.

Such recognition of the context of anti-black racism was particularly relevant in *R.D.S.*, for as I noted before the Court,

This case involves a reverse triangle. In courts all across this country, a common case is that of a white judge, a white police officer and a black accused in the middle. What made and makes this case distinct is that here we have an African Canadian judge, an African Canadian youth, and a white police officer in the middle. The issue of race was therefore brought to the observable centre, in sight and subconscious, in the instant case . . . . No one would seriously suggest that anti-black racism has not been a harsh historical truth and continues to be a present-day reality in Nova Scotia . . . . Such a position would be absurd!<sup>42</sup>

Nor should one fear that this inquiry into context would give license to those judges seeking to use, for example, their own racist or sexist experiences in judging. For it is precisely this explicit inquiry into context that provides judges with the tools to judge rightly. An open, legal acknowledgment of the realities of the unequal, discriminatory treatment

---

40. *Ibid.* at 535. The position of those two judges was that, despite the voluminous material filed on anti-black racism, since the appellant had not put forward the principles of judicial notice in this case, it would be inappropriate to do so here. The appellant's contention had been that references to social context by Judge Sparks simply made use of her background experience and knowledge. The L.E.A.F. interveners had specifically argued for judicial notice. The Coalition's position was set out in paragraph 31 of its factum: “Whether Judge Sparks took judicial notice of and/or used her common sense knowledge in taking race into account is not at issue in the Coalition's argument. The Coalition does, however, now invite this Honourable Court to take judicial notice of anti-black racism in Canada.”

41. *R.D.S.*, *supra* note 3 at 544.

42. *Ibid.* (oral argument of the Coalition). Matters of race and racism were central in this case. The entire Crown appeal was based on the alleged *racial* bias of the African Canadian trial judge. Note too the passage in the four-person majority reasons where they quote Freeman J.A., “The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offense”: *ibid.* at 512; and the racial configuration of the trial court: *supra* note 8 at para. 6. The Supreme Court's dissenters chose to “bury their heads in the sand” rather than confront the racial realities of the case, stating that “[w]hether racism exists in our society is not the issue.” *Supra* note 3 at 495.

in our society of the vulnerable and disadvantaged among us is essential to judging. As the two judges concurring in the majority result noted in their separate reasons, “not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavorable disposition is objectively justifiable—in other words, it is not ‘wrongful or inappropriate.’”<sup>43</sup> As the reasons of the four judges in the majority noted, judicial inquiry into the context or background essential to judging is not new and may be gained from “expert witnesses . . . academic studies . . . and from the judge’s personal understanding and experience of the society in which the judge lives and works.”<sup>44</sup>

It is hoped that one future implication of *R.D.S* within law in general will be judicial notice of anti-black racism in Canada.<sup>45</sup>

---

43. *Supra* note 3 at 528, where Cory, J. cites Scalia, J. in *Liteky v. U.S.*, 114 S.Ct. 1147 at 1155 (1994). It was precisely this point that the four-person majority made when they said, “[Judicial impartiality] recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence”: *supra* note 3 at 501.

44. *Supra* note 3 at 507, citing with approval *R. v. Lavallee*, [1990] 1 S.C.R. 852, *R. v. Parks*, *supra* note 37, and *Moge v. Moge*, [1992] 3 S.C.R. 813. The other two judges concurring in the majority result also agreed that expert evidence can be used to establish social context, as can be the personal experience of the adjudicating judge: *supra* note 3 at 535, 537, 539.

45. Since the writing of this article, but before its publication, the case of *R. v. Williams*, [1998] S.C.J. No. 49 QL (unreported judgment rendered 4 June 1998) has been delivered by the Supreme Court of Canada. In a unanimous judgment written by Madame Justice McLachlin, the Supreme Court held that racism against Aboriginal peoples in Canada could be used when challenging a potential juror for cause. With respect to judicial notice of racism in general, the Court stated, “Widespread racial prejudice, as a characteristic of the community, may . . . sometimes be the subject of a judicial notice” at 26 of unreported judgment. I submit that a unanimous Supreme Court has now gone a long way towards taking judicial notice of anti-black racism in Canada. It quoted with approval several passages from the Ontario Court of Appeal decision in *Parks*, *supra* note 37. It noted the “insidious nature of racial prejudice” . . . “buried deep in the human psyche” and that “racial prejudice and its effects are as invasive as they are corrosive” at 11-12. The Court stated that “widespread racial prejudice is by definition not exceptional” at 20 and that “subconscious racism may make it easier to conclude that a black or aboriginal accused engaged in the crime” at 15. It found that there was “ample evidence [of] widespread prejudice” against aboriginal people and that “there is evidence that . . . widespread racism has translated into systemic discrimination in the criminal justice system” at 28.

*b. The Inclusion of African Canadians in the Judiciary and in Law Schools. Diversity and the False Dichotomy of Legal Insiders versus Outsiders*

In *R.D.S.*, all nine judges recognized the constitutional, legislative, moral and political imperative of diversity.<sup>46</sup> As the separate reasons of the two judges concurring in the majority result stated, "Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the Charter."<sup>47</sup>

It is this very diversity which the judiciary needs in order to fulfill its adjudicative function in this multiracial and multiethnic society.<sup>48</sup> As the four judges in their majority reasons stated,

[J]udges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary.<sup>49</sup>

Indeed, to the Coalition, it seemed that underlying the whole Crown appeal, and the decisions of the courts below, was an unwillingness and even inability to accept this diversity. In this regard, the Coalition cited the judgment of the highly regarded African American jurist, Higginbotham J.:

46. On diversity in general see *e.g.*, *Charter* section 27; *Canadian Multiculturalism Act*, R.S.C. 1985 (4th Supp.) c. 24; and *Courts of Justice Act*, R.S.O. 1990, c. 43, ss. 43(3) and 49(4) as am. by *Courts of Justice Statute Law Amendment Act*, 1994, S. O. 1994, c. 12, s. 16.

47. *Supra* note 3 at 524.

48. On diversity in the judiciary, see *e.g.*, Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Yvon Blais, 1991); B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921); R. McMurtry, "Access to Justice in a Pluralistic Society" (Address to the Canadian Bar Association, 16 October 1996) [unpublished]; J. Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 *McGill L.J.* 91; M. Omatsu "The Fiction of Judicial Impartiality" (1997) 9 *C.J.W.L.* 1; Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: The Commission, 1991); S.M. Smith, "Diversifying The Judiciary: The Influence of Gender and Race on Judging" (1994) 28 *Richmond L. Rev.* 178; L. Washington, *Black Judges on Justice* (New York: The New Press, 1994); B. Wilson "Will Women Judges Really Make A Difference" (1990) 28 *Osgoode Hall L.J.* 50.

49. *Supra* note 3 at 505. As Cory J. stated, "The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging," *supra* note 3 at 534.

Perhaps among some whites, there is an inherent disquietude when they see that occasionally blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no black judges sit on such matters or, if one cannot escape a black judge, then by having the latter bend over backwards to the detriment of black litigants and black citizens and thus assure that brand of 'impartiality' which some whites think they deserve.

If blacks could accept the fact of their manifest absence from the . . . judicial process for almost two centuries, the plain truth is that white litigants are now going to have to accept the new day where the judiciary will not be entirely white and where some black judges will adjudicate cases involving race relations.<sup>50</sup>

Statistics support the arrival of this diverse "new day."<sup>51</sup>

In arguing this case, it was particularly important for me to impress upon the Court my own, deep belief in diversity and the moral and legal necessity of including previously silenced black voices, those among the most vulnerable and disadvantaged. There, I said,

It is my own personal, firm belief that we are each particular, unique expressions, the pressing out, of the Universal and Divine. Only God is all-seeing, omnipotent, omniscient, completely impartial. The moral and legal mandate of diversity allows us all, collectively, to approach the knowledge and practical actualization of God . . . .

For this reason, the goal of impartiality is best assured by making the judiciary as diverse as possible . . . . We *all* need African Canadian female judges like the Honourable Judge Sparks. And we need *all* judges, like her, to take race into account, where it may be a factor. This is not merely a policy directive. This is a positive, legal duty.<sup>52</sup>

Judge Sparks, the trial judge whose decision was appealed on the basis of racial bias, was born and raised in the province of Nova Scotia. She is the first African Canadian judge in that province, which now has only one other. Further, she is the first African Canadian female judge in all Canada, and is now one of only two such judges nationwide.<sup>53</sup> As provincial court judges they sit on the lowest rung of the judiciary. No African Canadian woman, no other visible minority woman and only one

---

50. *Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 388 F. Supp. 154 at 177 (1974) [hereinafter *Local Union 542*], cited in the Coalition's factum, *supra* note 3 at para 49.

51. The *Toronto Star* (11 June 1998) reports that at present almost 41% of Torontonians are non-white, and that by the year 2001 the figure will be 53%. Statistics Canada reports that its 1996 Census figures show that 11.2% of all Canadians are visible minorities.

52. *Supra* note 3 (Coalition oral argument).

53. The other African Canadian female judge is the Honourable Micheline Rawlins, who sits in Windsor, Ontario.

Aboriginal woman,<sup>54</sup> has ever been federally appointed to the bench in Canada. *R.D.S.* highlights the desperate need for African Canadians in the judiciary.<sup>55</sup>

Similarly, the case highlights the necessity of having African Canadians in law school student bodies and on law faculties.<sup>56</sup> The accused's lawyer, Burnley "Rocky" Jones, is the unsung hero of this case. *R.D.S.* is testament to his courage, to his refusal to give up despite tremendous odds, and to his committed pursuit of a just result. His own life experience as an African Canadian, born and raised in the province where the events occurred, allowed him to see, understand and pursue the important issues of racial equality in this case. Nor could the Coalition's factum have been prepared without the dedicated support of several recent African Canadian law school graduates.<sup>57</sup> Further, with only two tenured black law professors nationwide,<sup>58</sup> it is small wonder that the African Canadian perspective has gained scant legal recognition or protection.<sup>59</sup>

It is therefore hoped that one future implication of *R.D.S.* will be the meaningful inclusion of African Canadians in the judiciary and in law schools.

## 2. *Implications Within the Charter*

### a. *Section 15 and the False Dichotomy of "Norm" versus "Other"*

In *R.D.S.*, a majority of the Supreme Court of Canada confronted and overcame the usually assumed notion that the perspectives of white, male judges were the "norm" and thus the objective measure to which all "other" perspectives and experiences must be compared. This rejection of the false dichotomy of "norm" versus "other" has important ramifications for equality under Section 15 of the *Charter*.

---

54. She is Madame Justice Rose Boyko of the Ontario Court General Division.

55. These statistics are based on my own personal knowledge. Neither the Canadian Judicial Council nor the Office of the Commissioner for Federal Judicial Appointments keeps statistics for judicial appointments on the basis of race: interview with G. Beauparlant (28 April 1998).

56. For example, at the University of Toronto, Faculty of Law, where I have taught on a part-time basis, *all* tenured professors and *all* other full-time faculty, with one very recent exception are white. I understand that in its 1997 graduating class there were no blacks. Furthermore, in the 1997-98 first year class, there is only one black person.

57. They are Siobhan Alexander, Jewel Amoah, Jacqueline Lawrence, Margaret Parsons, Michelle Williams and Christopher Wilson of the law schools at the universities of Ottawa, Toronto, Windsor and York.

58. They are Professor Esmeralda Thornhill at Dalhousie Law School and Professor Toni Williams at Osgoode Hall Law School.

59. See forthcoming Canadian Bar Association report of its Working Group on Racial Equality in the Legal Profession.

In essence, what the cases under Section 15 of the *Charter* reveal is that, the closer a claimant is to the unstated and assumed "norm" (white, male, able-bodied, heterosexual), the more likely the claimant is to be afforded norm[al], equal treatment. The further from this "norm" claimants fall (*i.e.*, for those claimants most needing equal protection) the less likely they are to be extended norm[ative], equal treatment!

Section 15 (1) of the *Charter* provides,

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The first and leading decision under section 15 from the Supreme Court of Canada was *Andrews v. Law Society of British Columbia*.<sup>60</sup> That case dealt with equality on the basis of citizenship. Mr. Andrews, the claimant, met all other requirements to be called to the British Columbia bar as a lawyer, except that of Canadian citizenship. In striking down as unconstitutional the citizenship requirement, the Court described discrimination as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group which has the *effect* of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.<sup>61</sup>

The severe problems with this effects-based approach for the equality of African Canadians, those falling far from the "norm," would be made increasingly apparent in subsequent decisions of the Supreme Court. Those decisions revealed the painful limitations inherent in *Andrews*: that the subjective perspectives of the powerful, white, male judges would continue to dichotomize, and to determine who was sufficiently normative to be worthy of section 15 equal protection. The hidden dichotomy of "norm" versus "other" has thus led to discriminatory, unequal results under the very constitutional equal rights provision, that is meant to protect these vulnerable, "discrete and insular minorit[ies]"!<sup>62</sup>

60. [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 [hereinafter *Andrews*, cited to D.L.R.].

61. *Ibid.* at 18 [emphasis added].

62. *Ibid.* at 32 per Wilson, J. As she noted there, the section 15 equality guarantee was meant to protect "discrete and insular minorit[ies] . . . group[s] lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated."

I give only two brief illustrations of this point here. In *Symes v. Canada*,<sup>63</sup> the two dissenters and only women on the Court revealed what had been hidden: that Mr. Andrews was very much part of the unstated, assumed “norm” as a white, male, able-bodied lawyer.<sup>64</sup> In *Andrews*, the Court had willingly extended to him norm[ative], equal treatment. However, in *Symes*, the majority of the Court would not extend to Ms. Symes equal treatment on the basis of sex.<sup>65</sup> She had argued that as a woman in business, her child-care expenses should be an allowable income-tax business deduction as an expense incurred for the purpose of gaining or producing income.

Even more strikingly, in *Egan v. Canada*<sup>66</sup> the Supreme Court denied the claim to equal treatment on the basis of sexual orientation, upholding Parliament’s definition of “spouse” as being limited in meaning to only opposite-sex couples. Using its new requirement of relevance, the Court found that the impugned distinction was relevant because heterosexuality was “obvious and deeply rooted in [Canadian] fundamental values and traditions, values and traditions that could not have been lost on the framers of the Charter.”<sup>67</sup> Thus, norm[ative], equal treatment under section 15 was denied to same-sex couples.

Those who fall more than one step from the unstated “norm”—those most needing equal protection—are least likely to receive the equal treatment of the “norm.” These claimants live at the “intersection” of several grounds of disadvantage and are required by the categories in equal protection laws to divide and “disaggregate” their experience of discrimination and themselves into the discrete, existing categories of equal protection laws. In the United States, black women have asked courts to recognize that they are more than the simple combination of race and sex. Courts have limited their claims to “sex plus” (or “race plus”) only one other category.<sup>68</sup> Thus, a person even farther removed from the

---

63. [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 [hereinafter *Symes*, cited to D.L.R.].

64. I am told he was also South African.

65. In *Symes*, *supra* note 60, those two, dissenting judges said, “[The majority] refers to . . . the fact that single mothers may provide a clearer example of hardship suffered as a consequence of child care than does Ms. Symes. This may well be true, but this is no reason why [her] rights, under . . . section 15 of the Charter, should not be protected . . . . This is not the standard to which Mr. Andrews was held . . . . In *Andrews*, the Court did not look at the respondent and justify the infringement of his rights under section 15 on the basis that, in all other aspects of his life, as a white male lawyer of British descent, such discrimination on the basis of citizenship was acceptable, since he was likely better off than most other persons in the disadvantaged group of non-Canadian citizens”: *ibid.* at 510.

66. [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [hereinafter *Egan*, cited to D.L.R.].

67. *Ibid.* at 625.

68. See for example, *Jeffries v. Harris County Community Action Association*, 615 F. 2d. 1025 (1980) and *Judge v. Marsh*, 649 F. Supp. 770-1 (1986).



“norm,” for example a black woman with a physical disability, would be unable to bring a claim for her experience of discrimination based on her whole, undivided, “undisaggregated” self. The Supreme Court of Canada has not yet even begun to address openly the grave, inequitable consequences of the limits of dichotomization and comparison to a “norm,”<sup>69</sup> particularly for those who are perceived to live at these intersections.<sup>70</sup>

In *R.D.S.*, the judge whose decision was appealed on the ground of bias was at the intersection of race and gender grounds as an African Canadian woman. The importance of revealing the hidden, false dichotomy of “norm” versus “other” was thus essential to the Court’s finding of no apprehension of bias. As I argued before the Court,

All judges bring their own experiences to bear on the process of adjudication. To require Judge Sparks, an African Canadian woman born in Nova Scotia, to divorce herself from her environment would be to require her to be a machine . . . reflect[ing] [only] “normative”, white, male, able-bodied . . . perspectives . . . .

Not only would it be unreasonable to apprehend bias in this case—it would be unconstitutional . . . . For, substantively, the *effect* of [failing to take] race into account . . . would be to deny an [African Canadian] accused the right to equal treatment under . . . the *Charter*.<sup>71</sup> The substantive *effect* [of such failure] would also be to impose on an African Canadian judge, the [unequal, impossible] burden not imposed upon other judges, of not bringing her own common sense, knowledge and life experience to bear where race is a factor.<sup>72</sup>

It is hoped that one future implication of *R.D.S.* will be an understanding of how the false, hidden dichotomy of “norm” versus “other” works actively to subvert the constitutional guarantee of equality in section 15 of the *Charter*.

---

69. See however L’Heureux-Dubé’s dissent in *Egan*, *supra* note 63 at 635-37; and the dissenting opinions of the two women on the Supreme Court of Canada in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 at 626-7 (per Wilson J.) where they recognized that the mandatory retirement scheme under consideration had particularly harmful effects on older women living at the intersection of age and gender.

70. See *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) (N.S.C.A.) 224 at 232-35, where the court recognized that public housing tenants lived at the intersections of race, gender, age and family status.

71. An accused’s *Charter* rights include the right to life, liberty and security of the person: section 7; the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal: Section 11(d); and the right to equality: section 15; see also *R. v. Williams*, *supra* note 45 at 22-23.

72. See paragraphs 38-47 of the Coalition’s factum and my oral argument before the Court, *supra* note 3.

### 3. *Implications Outside the Charter*

#### a. *An Expansive Equality. The False Dichotomy of Legal Equality Within versus Outside the Charter*

In arriving at the decision, the four-member majority reasons of the *R.D.S.* Court made specific mention of *Charter* section 15 equality values as part of the fundamental values on which Canada is based.<sup>73</sup> Thus, although not directly relying on section 15, they focused on its equality values as part of the very atmosphere in which Canadian society must “live and move and have [its] being.”<sup>74</sup> Seen in this light, the value of equality is not subject to many of the *Charter*’s severe limitations. Rather, freed of the confines of the *Charter*’s limiting context, the fundamental value of equality can expand and grow.

This notion of an expansive equality, not limited to the specific confines of the *Charter*, was particularly relevant in *R.D.S.* For, in an earlier case, the Supreme Court of Canada had excluded the decisions of judges from the specific ambit of the *Charter* as not being “government”<sup>75</sup> for the purposes of section 32 of the *Charter*.<sup>76</sup> It was imperative to make the guarantee of equality apply to this decision of an African Canadian female judge who acquitted an African Canadian youth, despite the Supreme Court’s earlier ruling. Expanding the section 15 guarantee of equality beyond the specific confines of the *Charter* achieved that result, and as I argued, “ma[de] the guarantee of equality real, not illusory or ethereal.”<sup>77</sup>

---

73. They stated, “Canada . . . supports the fundamental principles entrenched in the Constitution by the . . . *Charter* . . . includ[ing] the principles of equality set out in s.15 . . . . The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*’s equality provisions.” *Ibid* at 507-8.

74. Acts of the Apostles 17: 28.

75. See *R. W. D. S. U. Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 in respect of a judge’s decision in a labour dispute. For the recent, hopeful broadening of “government,” see *Eldridge v. Attorney General of B.C.*, [1997] 3 S.C.R. 624 where “government” was held to include hospitals (once held by the Court to be private and not government) once they were fulfilling a specific, public, governmental function. See also *R. v. Williams*, *supra* note 45 at 22, where the Court states “particularly, where *Parliament* confers a discretion on a judge, it is presumed the Parliament intended the judge to exercise that discretion in accordance with the *Charter*.”

76. Section 32 (1) provides,  
“this Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province” [emphasis added].

77. *Supra* note 3 (oral argument of Coalition).

Indeed, this idea of an all-pervasive equality is not new. It is well known to the Supreme Court of Canada<sup>78</sup> and in Continental jurisprudence.<sup>79</sup>

It is hoped that one future implication of *R.D.S.* will be the growth of this notion of an expansive equality, which will govern even outside the specific confines of the *Charter* and, in so doing, lead to the equal protection of those most vulnerable among us.

#### *4. Implications Outside Law: Towards a Non-Comparative Equality. The False Dichotomy Inherent in All Comparison*

In *R.D.S.*, I caught a glimpse of the transforming vision of a non-comparative equality. In *Andrews v. Law Society of British Columbia*, its first and the leading case on section 15 equality under the *Charter*, the Supreme Court of Canada specifically found that equality was "a comparative concept."<sup>80</sup> As long as equality remains comparative, the question arises, "comparative to what or whom?" and the measure of an objective "norm" as the standard of comparison is automatically sought and assumed.

As discussed earlier, comparison with the unstated, assumed "norm" of a white, able-bodied, heterosexual male has led to grave inequalities. And the further one is from this "norm," (*i.e.*, the more one needs equal protection) the less likely one is to receive equal protection!<sup>81</sup> Moreover, as the standard of comparison, the treatment of the existing "norm" becomes the definition of equal treatment. Thus, our concepts of what

---

78. For example, Madame Justice L'Heureux-Dubé has said, "The paradigm of equality now extends far beyond the traditional human rights domain. It offers us new understandings in family law, in criminal law and into how the law affects the poor and the elderly. It is changing the way we approach sexual harassment, sexual assault, freedom of expression and pornography." The Honourable Justice Claire L'Heureux-Dubé, "Justice or 'Just us': Some Brief Thoughts on Equality" (Notes for an address to Dalhousie University, 31 October 1997) [unpublished]; see also, for example, *A. M. v. Ryan*, [1997] 1 S.C.R. 157 (in respect of the fundamental value of equality in a family law matter); *R. v. Keegstra*, [1990] 3 S.C.R. 697 (in respect of the fundamental value of equality in a freedom of expression, criminal law matter); *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (in respect of the fundamental value of equality in a sexual assault matter); *R. v. Williams*, *supra* note 45 at 22-24 where the Supreme Court held that statutory provisions and judicial discretion must be interpreted in light of *Charter* equality values and in accordance with applicable *Charter* rights. See also s.26 of the *Charter*.

79. For example, under the European Convention on Human Rights, the guarantee of equality infuses all other rights: see *Belgian Linguistic Case (No. 2)* (1968) European Ct. H. R. Ser. A, No. 6, 1 E.H.R.R. 252; "Respect for . . . human rights and fundamental freedoms . . . are the principles on which the European Community is based" in introduction to the European Community treaties, (1998) 37 I.L.M. 56 at 57.

80. "[Equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others . . . ." *Andrews*, *supra* note 57 at 10.

81. *Supra*, Section II.2(a).

equal treatment should and can mean are falsely constricted by what presently exists for the "norm." This has led to a present world, which falsely limits choices for both "norm" and "other."

A truly transforming equality transcends the notion of comparison altogether. The renowned Spanish philosopher, Miguel de Unamuno, once asked, "Do you aspire to be equal to another, are you equal to yourself?"<sup>82</sup> True equality must thus lie in the internal finding of the self's own spirit on which one's outward expression depends. And, seemingly paradoxically, this very finding leads to the transforming knowledge of the Oneness of all in the Spirit.

Thus is it hoped that one future implication of *R.D.S.* will be, not only the recognition and confronting of racism in law, but more, the realization of the transforming vision of an equal world that transcends all comparison and dichotomy.

### *Conclusion*

I find it difficult, even more than a year removed from my appearance before the Court in *R.D.S.*, to put into words my personal sense of disappointment, indignation and even outrage at the appeal of Judge Sparks' decision. After all, what had she done but responsibly discharged her duty as an adjudicator weighing contradictory testimony? Moreover, I knew that judges, as opposed to administrative tribunals, were very rarely appealed on the basis of bias, and never before on racial bias. I felt a tremendous sadness for what this case said about the state of racism in our country and for what Judge Sparks must have been personally enduring because of it.<sup>83</sup> My heart echoed the wise words, here paraphrased, of the learned Higginbotham J. when he said,

If [Canada] is going to have a total rendezvous with justice so that there can be full equality for blacks, other minorities, and women, it is essential that the 'instinct' for double standards be completely exposed and hopefully, through analysis, those elements of irrationality can be ultimately eradicated. It is regrettable that . . . [a judge] must take substantial time and effort to answer . . . meritless allegations, but in some respects the [case] merely highlight[s] the duality of burdens which blacks have in public life. Blacks must meet not only the normal obligations which confront their colleagues, but often they must spend extraordinary amounts of time in

---

82. This is my own, loose translation of the actual question, "Pretendes ser igual al otro, eres igual a ti mismo?"

83. Although she was the first, and I the second, African Canadian woman to graduate from Dalhousie Law School, we rarely correspond and have never spoken, directly or indirectly, about this case.

answering irrational positions and assertions before they can fulfill their primary public responsibilities.<sup>84</sup>

For me, the case spoke, at its essence, to the deep need of African Canadians, part of slavery's vast diaspora, to find inclusion in Canada, a country in which we have lived for centuries.<sup>85</sup> It was more than time for Canada to be cognizant and respectful of that need. I thus concluded my oral argument before the Court with these words,

[T]his case is fundamentally about home. For centuries, since our forcible enslavement from Africa, African Canadians have been seeking a place to call our own, to which we have a right; a place where our experiences, perspectives and knowledge are included as valid and valuable to the greater whole.

My personal engagement with the *R.D.S.* case proved, at once, emotionally moving, physically demanding,<sup>86</sup> and academically challenging. So intense was my effort, I remember being close to tears at the end of my oral presentation. So too, were many of those listening in the public galleries. And even all nine judges of the Supreme Court themselves seemed mesmerized by the passion and conviction which formed part of my reasoned arguments.<sup>87</sup> This was no coincidence, for the guiding Spirit of an ancestral "cloud of witnesses"<sup>88</sup> was present. It was this very Spirit, often palpably felt, that was responsible for my preparation and argument of the case and held everyone in the courtroom in Its thrall.

I have faith that *R.D.S.*, by its outer creation of no dichotomies, will lead us all to the inner discovery that equality is indivisible.

---

84. *Local Union 542*, *supra* note 50 at 181-82.

85. In 1608, Mathieu de Coste, a black servant, was already working for Acadia's governor: *The Blacks in Canada*, *supra* note 33 at 1.

86. Several years ago, I was diagnosed with multiple sclerosis.

87. The following day's *Ottawa Citizen* newspaper (11 March 1997), in its article about the case entitled "Lawyer fights for 'silent, silenced'," began, "The nine white judges of the country's top court sat in mesmerized silence as the young black lawyer in a wheelchair preached for her people."

88. Hebrews 12:1.