

“SO SELDOM FOR US, SO OFTEN AGAINST US: BLACKS AND LAW IN CANADA

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Dalhousie University

2006-2007 Canada-US Fulbright Visiting Scholar (Temple University)

ABSTRACT

Among the many un-probed strands of Canada-U.S.A. ‘racial history,’ needing to be examined, problematized, and explained, is the obfuscated role of Law and ‘Race’. It is a role of collusion with ‘Race’ that more often than not has aided and abetted racism and racial discrimination. Knowledge of this historical complicity and duplicity between Law and ‘Race’ is a pre-condition for understanding the *material reality* of the racism that daily textures, blights, and scars the lifescapes of Black children, women and men in Canada today. For, African descended People living with the Canadian Justice System have all too often known Law more as a sword of oppression, and not as a shield of protection. Consequently, in the name of *Diasporic Literacy*, it is timely to start opening up the Canadian Record so as to better comprehend how Law as an institution has so often behaved with impunity, and continues to operate as if there were nothing about Black People worth honoring! Yet, despite the fact that in this country we have more often than not experienced the oppressive heel of Law—particularly in matters of racism and racial discrimination—Law remains too precious a tool for Black People to abandon, ever.

INTRODUCTION

*“The law is the witness and external deposit
of our moral life. Its history is the history
of the moral development of the race.”*

Justice Oliver Wendell Holmes, 1897

Precisely because Law figures prominently as both protagonist and antagonist in the lifescapes of Blacks in Canada, a critical retrospective on the history and role of Law becomes a pre-requisite for understanding the *material reality*¹ of Canada’s Communities of African Descent.

Even today, too little is known—not only about the unfeeling cruelty, malice, and force that characterized New World slavery—but also about its enduring legacy and the vestigial traces of trauma that still pervade the Americas.² For example, Black people have been dehumanized, objectified and commodified on both sides of the Canada-U.S. border; and there exist many unprobed strands of racial history that need to be examined, explored and brought to light. Therefore, it is more than fitting that we engage in some *legal archaeology* and start opening up the Canadian Record for Diasporic scrutiny.³ Far too many African Americans, for example, are

¹ “*Material reality*”-means that which is real, concrete, palpable. See E.M.A. Thornhill, “Focus on Racism: Legal Perspectives from a Black Experience”. *Judicial Awareness: Race, Culture and the Courts*. Volume of Reference Materials. Ottawa: National Judicial Institute, 1995, p.95 at note 20.

² Joy DeGruy Leary, *Post Traumatic Slave Syndrome: America's Legacy of Enduring Injury and Healing*. Portland: Uptone Press, 2005.

³ **Diasporic scrutiny** is a necessary pre-requisite to achieving **Diasporic Literacy**. What I term **Diasporic Literacy** is the need for Black people, globally, to become equally informed about both their own local and immediate racialized trajectory and that of other Blacks in the Diaspora. Clearly, the time has come for peoples of African descent in Canada to outreach and start proactively engaging other Diasporic members, be they located in North, Central or South America, or elsewhere. For us, social context education entails the global context. Hence our goal of **Diasporic Literacy**.

not yet familiar with the *quasi* mirror-like experiences of Blacks⁴ on the Canadian side of the longest (formerly) unguarded border in the world.

The above title, *So Seldom For Us, So Often Against Us*,⁵ underscores the importance of Law as a stabilizer and societal corrective *par excellence*; it pinpoints the aspirations and concomitant legitimate expectations Black people hold that Law should and would also serve and protect us; at the same time, this title exposes the glaring contradiction between the abiding faith and buoying hope we optimistically cherish, and the shards⁶ of brutal disappointment when Law fails us (Thornhill,1995).

A cursory perusal of Canada's legal past reveals the enabling role of accommodation that Law has consistently played throughout history in the subordination of peoples of African descent. It is a role of **collusion** with 'Race' that more often than not has aided and abetted racism and racial discrimination. As a direct consequence, Black Communities across Canada have come to regard as "inherently suspect" both Law and legal institutions—be they federal immigration agents, municipal police officers, subway constables, or private security guards (Thornhill,1995). Why? Because individually and collectively, Black people have had countless occasions to stockpile a mountain of evidence that reflects Law's track record: intimate knowledge, streams of consciousness, genetic Memory of Survival, encoded and passed on by foremothers and forefathers.... Far more forceful than persuasive, this compelling body of evidence shows how

⁴ E.M.A. Thornhill, *Battle-scarred Lessons from the Canadian Front: Racial Hostility to Curriculum Change in the Academy*. Paper delivered to the Xth Annual Conference of the National Council for Black Studies, San Diego: March 14th -17th 2007.

⁵ E.M.A. Thornhill, *So Seldom for Us, So Often Against Us: Blacks and Law in Canada*, " Fulbright Public Lecture delivered during 2006-2007 Canada-Us Fulbright Visiting Professorship at Temple University to the African American Museum of Philadelphia (AAMP) as part of the Museum's African Liberation/The Brutality of Enslavement Lecture Series, Philadelphia, January 27th 2007.

⁶ "Shards of brutal disappointment" – The word 'shards' is the *mot juste*, the perfect descriptor in this case. A 'shard' is a sharp piece of pottery, a potsherd or 'ostrakon' (Greek). When voting to exile or banish someone, the Athenians would mark the name of the individual on a piece of broken pottery or potsherd /potshard—whence the derivatives: *ostracism, ostracize*. Clearly, when Law fails peoples of African descent, we feel ostracized by Law, as if Law has voted to exclude, expel, or banish us from the Courts' "Arena of Fairness and Justice".

Law, by acts of omission and commission, has pointedly interacted with ‘Race’ to significantly impact the lives of peoples of African descent.

In August 2001 the NY Times reported that,

“Some folks are under the misperception that Canada’s Black population consists largely of [a few] descendants of escaped African American slaves, that Canada never had slavery, and that the country is devoid of racism. Not so, said experts at a recent conference here aimed to overturn these and other myths about Black life North of the U.S. border”⁷

The scarcely known and unknown story of Black people in Canada—still largely obfuscated—needs to be acknowledged and brought to light. Just as the African presence in this Western Hemisphere pre-dates that 1492 accidental yet glorified arrival of Christopher Columbus (Van Sertima, 1976), so too does the documented presence in Canada of people of African descent pre-date the 17th Century arrival in Canada of such European self-proclaimed, triumphant Adiscoverers@ as Samuel de Champlain, or Jacques Cartier (Bertley, 1976; Winks, 1971).

African descended peoples, whose ancestors were uprooted and brought, shackled in captivity to North, Central and South America to be enslaved as chattel property, entered virtually every Canadian province and territory, from Nova Scotia to British Columbia, both voluntarily and involuntarily (Hill, 1981; Killian, 1978; Pachai, 1987; Trudel, 1960; Walker, 1971; Winks, 1971;). Fleeing United States slavery and racism, most of them saw Canada as a welcoming sanctuary or

⁷ August 2001 *NY Times* Report on the *Racism and the Black World Response Symposium*. International Symposium convened by E.M.A. Thornhill, the **First James Robinson Johnston Endowed Chair in Black Canadian Studies**, Dalhousie University, Halifax, Nova Scotia, August 5th -10th 2001.

*frontière de la liberté*⁸ – a beacon beckoning them unto a “promised land” where they and their descendants could live out their lives as free citizens (Walker, 1971). They came in differing trickles, streams and waves of migration and immigration, in small and large numbers, and under varying conditions and circumstances (Walker, 1971).

Spurred on by British government promises of free land grants in addition to freedom for themselves, some Blacks came as free men and women, and others as pioneering settlers; still others were brought as slaves to do the back-breaking work of their White owners; while yet others arrived as desperate, self-liberated fugitives... as thankful passengers on the Underground Railroad... and as war refugees of the American Revolutionary War, the Civil War, the War of 1812—and even of the Viet Nam War. Black people came to Canada as hopeful immigrants, as migrant adventurers, as hardworking domestics and railroad porters, as skilled professionals, as ambitious and clever entrepreneurs, as industrious laborers, as talented artisans, as creative artists ... (Pachai 1987; Walker, 1971; Winks, 1971).

They all brought, and still continue to bring to the promised land their skills, talent, vision, labour, experience, determination, buying power **and**, their loyalty and commitment—all for the shelter and opportunity they legitimately hoped to receive. Yet, from the beginning, in the words of Bridglal Pachai, “clouds gathered over the promised land of Canada” (Pachai, 1987). In very little time, most of the promises became “broken promises” that ultimately resulted in (Thornhill, 1995):

mass exodus back to Africa, to the Caribbean and to the United States;
government promises of land grants that never were processed;
forced removals from the land without either consultation or compensation;

⁸ *Frontière de la liberté* (“Land of Freedom”) also the French title of a National Film Board of Canada (NFB) docudrama, entitled, *Voice of the Fugitive* and directed by René Bonnière, 1978. 28:55, color. 16mm. This film dramatizes the escape of a group of self-liberated Blacks fleeing US slavery to gain sanctuary and freedom in Southern Ontario, Canada.

alienation in isolated or far flung Communities;⁹
segregation in *separate* and inferior schools;
denial of opportunity and access to public education and services;
entrenched racial gate-keeping that slammed shut the doors of Opportunity and Access to meaningful political, professional and economic participation in Canadian society;
on-going exclusion from gainful employment;
ubiquitous, pervasive racial stereotypes that continue to defy correction;
endemic racial discrimination and lack of meaningful legal recourse or redress.

In short, second class citizen status.

IMPORTANCE OF LAW

One very important area of deception and disappointment effectively fuelled, legitimated and entrenched this second class citizen status: The historic role of *complicity* and *duplicity* that Law and Canadian Legal Culture have played in the lives of Black people living in Canada. Even though it is true that Law should be liberatory and emancipatory for everyone, yet Black People living with the Canadian Justice System have all too often known Law only as a sword of oppression, and not as a shield of protection. For Canada's Legal System has **not** managed to escape the racism that permeates Canadian life (Thornhill, 1995).

I believe that for Black Communities throughout this Western Hemisphere, it is the clear, factual and unmitigated knowledge of our forefathers' and foremothers' experiences under the heel of the Law which will help provide us with the proper context and perspective from which to assess how we deal with and mediate our respective legal

⁹ Two illustrative examples are the Communities of Africville in Halifax, in Nova Scotia and Little Burgundy, in Montreal, Quebec.

systems. I am further convinced that it is these multiple streams of consciousness—individual and collective—that will also help us to understand how both *written* and *unwritten law*,¹⁰ have coloured and continue to texture the quality of our participation in Canadian society.

LEGAL HISTORY

Consequently, conscious knowledge of Canada’s legal history is of critical importance in order for people of African descent to locate and position ourselves as effective Equality and Justice Seekers. For example, we must be conscious of the fact that **it was Law in 1734** which sanctioned the public execution of Montreal enslaved Black woman, Marie-Joseph-Angélique for having rebelled and defied the institution of slavery.¹¹

ABareheaded in a shift (chemise) with a cord around her neck and a burning two-pound torch in her right hand, she was to be driven by the Executioner in a refuse tumbril marked AArsonist@ through the public streets to the portals of the parish church of Montreal. There, on her knees, repentful, she was to beg royal pardon of King Louis, of God, and of the Court for her sinful act before having her wrist lopped off on a stake planted at the Church entrance. Then, after a further drive through the streets along the fire path to the public square, Marie-Joseph-Angélique would be chained to a stake and burned alive before having her ashes scattered to the winds@. (Beaugrand, 2004; Cooper, 2006; Thornhill, NCBS, 1982, 1995, 2003; Trudel, 1960;).

¹⁰ For more on “*written*” and “*unwritten law*,” see E.M.A. Thornhill, “Focus on Racism: Legal Perspectives from a Black Experience”, *supra* note 1 at p.87.

¹¹ This Black woman, born Southeast of Portugal was enslaved to one Niclus Block [*sic*] of New England, who then sold her to the wealthy merchant De Francheville of Montreal. Several weeks after a February 1734 aborted escape attempt, Marie-Joseph-Angélique was accused of arson, then tried, convicted, tortured and executed in June 1734 for having set fire to her mistress’ house.

This harsh sentence was appealed before the *Conseil supérieur* of the colony in Quebec City, and on June 12th 1734, the *Conseil* upheld the death penalty sentence, merely modifying certain details of the punishment (Cooper, 2006:217):

AHer wrist would NOT be chopped off in front of the Parish Church, and she would be first hung until dead before being burnt at the stake@ (Beaugrand, 2005:225; Cooper, 2006:280; Thornhill, 1982).

On June 21st 1734 in the prison of Montreal, after having been repeatedly tortured (four bouts), Marie-Joseph-Angélique broke silence, confessed to the crime, and the sentence was carried out. Her alleged crime? Having set fire during the night of April 10th -11th 1734 to the residence of her mistress, the wealthy widow De Francheville. The ensuing conflagration quickly spread and razed to the ground 46 buildings, among which were the Hôtel Dieu Hospital, a convent, and a church. Although no one actually did see how the fire started, everyone was convinced that the Black slave woman Marie-Joseph-Angélique was the culprit; and she was convicted on the strength of the tardy and mysterious declaration of a five-year old child (Beaugrand, 2005; Cooper, 2006).

It was Law in 1743 that notarized and authenticated the Bill of Sale of five (5) Negroes by businessman Charles Rhéaume to Louis Cureux de St-Germain, a resident of Montreal, thus making it normal, legitimate and commonplace for Black persons to be dehumanized, objectified, commodified and put up for sale, for auction and for lease... units of labour—collateral to be mortgaged, ceded, deeded, bartered, loaned, rented... objects to be used, misused, abused, enjoyed, damaged, or destroyed... all at the whim or whimsy of the White owner (Thornhill, 1992, 1995, 2003).

Blacks as chattel property or movables became as commonplace as were the abundant public advertisements, posters and notices of which they were the subjects (Thornhill, 2003):

A likely well-made Negro Boy about 16 years old.

NS Gazette & Weekly Chronicle, March 28th 1771

An able Negro wench about 21 years of age capable of performing both town and country work.

NS Gazette & Weekly Chronicle, June 1779

Sales at Auction by William Millett At his Auction Room, on Thursday next, the 9th Inst., at 12 o'clock. About 2 Tons of Ship Bread, A Few Barrels of Mess Pork, Indian and Rye Meal, Some Household Furniture, A Stout likely Negro Man And sundry other Articles.

Royal Gazette & Nova Scotia Advertiser, 7 September, 1790

To be sold. A Black Woman named Peggy, aged 40 years, and a boy, her son, named Jupiter, aged about 15 years, both of them the property of the Subscriber.

Peter Russell, York February 10, 1806

It was Law in 1760 which decreed in the *Capitulations of Montreal*—when the French surrendered to the English—that Negroes and Native People of both sexes would remain slaves, the sellable property of their French and Canadian owners. For, the institution of slavery was accorded such compelling recognition that the “peculiar institution” was actually incorporated into the very *Treaty of Capitulations*, thereby making bondage and servitude a continuing legal fact of life in Canada for Black and Aboriginal Peoples ... under both the French and British Regimes.

At the Negroes and Panis of both sexes shall remain

in their quality of slaves @¹²

This particular stipulation of the Treaty made it incontrovertibly clear, legally and socially, that Black and Aboriginal Peoples would remain chattel under the conquering British Regime—disposable property to be owned and disposed of by White masters.

It was Law in 1775 which proclaimed¹³ that every Black Loyalist loyal to the British flag and coming to Canada would be promised full security to “follow within these lines any occupation which he think proper”. Ten per cent of these 40,000-50,000 Loyalists were free Blacks; and approximately 1,200 were Loyalist slaves. The majority of the Loyalists went to the Maritime provinces of the Atlantic region with 30,000 settling in Nova Scotia; others went to New Brunswick, some to Quebec and others to Southern Ontario (Hill, 1981; Pachai, 1987; Walker, 1971).

It was Law on July 26th 1784 that countenanced the following attack¹⁴:

Great Riot Today [26 July 1784]. The disbanded soldiers have risen against the Free negroes to drive them out of Town, because they labour cheaper than theyC the

¹² Article 47 of the 1760 *Capitulations of Montreal* stipulates that:

The negroes and panis of both sexes shall remain , in their quality of slaves, in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service I n the colony, or to sell them; and they may also continue to bring them up in the Roman religion.—GRANTED, except those 'who shall have been made prisoners.'

In Ministère de l'éducation du Québec, *Some Missing Pages. The Black Community in the History of Quebec and Canada*. Primary and Secondary Source Materials. Quebec: Ministère de l'éducation du Québec, 1996, p.17; also in Leo Bertley, *Canada and its People of African Descent*. Pierrefonds: Bilongo Publishers, 1976, p.35; and in E.M.A. Thornhill, *Critical Race and Legal Theory I: A Survey of 'Race' and Law in Canada*. Course Materials. Vol. I. Halifax: Dalhousie Law School, Fall 2003, [hereafter *CRLT I*], p.82.

¹³ Lord Dunmore's *Proclamation* is considered to be the legal source for the making of the Loyalists. See E.M.A. Thornhill, *Critical Race and Legal Theory I*. *supra* note 12 at p. 90.

¹⁴ R.W. Winks, *The Blacks in Canada: A History*. Montreal: McGill-Queen's University Press, 1971, p.38-39; James W. St.-G. Walker, *Racial Discrimination Against Blacks in Canada*, Ottawa: Historical Society of Canada, 1985 at p.3.

soldiers.

Riot Continues [27 July 1784]. The soldiers force the negroes
To quit the TownC pulled down about 20 of their houses.

The Founding of Shelburne and Early Miramichi:
Marston=s Diary 1784

It was to Law that Loyalist Petitioner Richard Pierpoint appealed as a last resort in 1821. This native of Bondou, Africa was a hero of the time, had been instrumental in the founding of the Company of Coloured Men, and was an inhabitant of Upper Canada since 1780. Pierpoint declared in his petition (Thornhill, CRLT I, 2003:94):

...that the Petitioner, is now old and without property;
that he finds it difficult to obtain a livelihood by his
labour; that he is above all things desirous to return
to his native Country; that His Majesty's Government
be graciously pleased to grant him any relief, he wishes
it may be by affording him the means to proceed to
England and from thence to a settlement near the
Gambia or Senegal Rivers, from whence he could
return to Bondou...

21 July 1821 York, Upper Canada

It was Law in 1833 which, through the *Emancipation Proclamation*, made a commitment to abolish slavery in Canada and throughout the British colonial holdings.¹⁵ Yet, even though the declared up-front purpose of the British Imperial Parliament's *Emancipation Proclamation*'s

¹⁵ *The Emancipation Proclamation- 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.* [28th August 1833] 3 & 4 Gulielmi IV A.D. 1833, Cap.73. CAP. LXXIII, reproduced in E.M.A. Thornhill, CRLT I, *supra* note 12 at p.116.

was to manumit or set free all slaves throughout the British colonies, a close examination of its dispositions nevertheless reveals the extent to which this British statute stipulated very detailed provisions for the **Slavery System** to roll over, and morph, seamlessly, into a replacement **Apprenticeship Regime** that would mitigate or soften the financial trauma of imminent profit loss that White slave owners faced. This glaring cognitive dissonance forces us to conclude that perhaps an infinitely more fitting title for this statute should have been: “*The Slave Owners Compensation Board Act!*”¹⁶

It was Law in 1846 that allowed School Authorities to affirm in no uncertain terms that:

A it is to be deplored that there exists great prejudice in
the minds of the [W]hite population here, against [B]lacks,
who are very numerous; so much so, that amongst the
several common school divisions, I know of none that

¹⁶ It is important to point out that that the *Emancipation Proclamation* ensured that “compensation” went only to slave owners. According to the international NGO, the Global Afrikan Congress (GAC), **Slave owners were indemnified to the tune of 20 million pounds sterling**. By way of illustration, consider the following excerpts from a formal letter which the GAC Chair, Cikiah Thomas, addressed to a number of Caribbean Heads of State in November 2006:

[...] The year 2007 will mark 200 years since the British Parliament voted to ``officially`` end the Trade in Afrikans as slaves. It took the British Empire another 27 years before they agreed to end direct chattel slavery (1834 emancipation) and another 128 years before agreeing to the first national resumption of some Afrikans governing themselves in the Caribbean with the political independence of Jamaica in 1962.

[...] I am taking this opportunity to remind you that in 1834, at the time of emancipation of the Afrikans from direct slavery, reparations were paid to the slave owners. The emancipation legislation in each and every Caribbean country made provision for reparations to be paid. This payment of reparations was made to the slave owners as if to reward the horror and injustice of their actions over centuries. **The benefits of ending slavery in the British slave owning colonies went not to the victims but to the criminals who received a sum total of 20 million pounds sterling.**

In Barbados the slave owners were paid 1,659, 315 pounds, 0 shilling, 9 pence and 0 farthing..... . In Dominica the slave owners were paid 265, 071 pounds, 9 shilling, 0 pence and 0 farthing..... . In Grenada the slave owners were paid 570, 775 pounds, 1 shilling, 7 pence and 3/4 farthing..... . In St. Kitts the slave owners were paid 309, 908 pounds, 5 shilling, 7 pence and 1/4 farthing..... . In Antigua the slave owners were paid 415,173 pounds, 14 shilling, 1 pence and 1/ 4 farthing..... . In Jamaica the slave owners were paid 5, 853, 976 pounds, 10 shilling, 11 pence and 3/ 4 farthing. [...]

would allow the [C]oloured children to attend school with the [W]hite children. The *Common School Act* gives equal privileges to all, and [C]oloured people tried without success, to avail themselves of that *Act*, but their children were refused admission by the [W]hite people .@ ¹⁷

*Amherstburg, 1846 Excerpts from
The Modern Witness*

And, **it was Law** that allowed a Black segregated run-down school in a rural area near Windsor, Nova Scotia to exist until its embarrassing discovery in 1964 (Walker, 1997; Winks, 1971).

It was to Law that Delos Rogest Davis resorted in 1884, petitioning the *Ontario Legislature* and asking¹⁸:

That *The Supreme Court of Judicature* Admit Him to The Bar Without Articling if He Could Pass The Examination and Pay The Fee, because:

A..... ever since the year one thousand eight hundred and seventy-three, and from before that time he has endeavoured and has been anxious to enter the profession of the law; that in consequence of prejudices against his colour and because of his being of African descent he has not articled to any attorney or solicitor, or served any articles ... @

¹⁷ In 1981 Mrs. Ruth Jones, an African Canadian, Alberta born and bred, still could painfully recall:

*AWe used to live in Campsie when we were children. There=s one thing that I remember, that I'll never forget, that was the Jim Crow Law they had out there. When we were young they opened the school and because we were a Black family, my oldest sister and brother could not go to school... One day my mother took one of the girls over to the school to see what would happenC the teacher wouldn't open the door; they just shut the school right down." (In Walker, 1985 *supra* note 14 at p.5)*

¹⁸ E.M.A. Thornhill , "Focus on Racism...", *supra* note 1 at p. 97, see note 37.

The petition continued by explaining that for eleven years Delos Rogest Davis had studied law and had practised as fully as he could without being a solicitor. He had already been appointed in 1871, a Commissioner for taking affidavits, affirmations and recognizances of bail in the **Court of Queen=s Bench**, and in 1873, he had become a duly appointed and constituted Notary Public for the **Province of Ontario**. The petition therefore enacted the following:

*Alt shall and may be lawful for the **Supreme Court of Judicature for Ontario**, at any time hereafter, to admit the said Delos Rogest Davis to practise as a solicitor of the said court, upon paying the proper fees in that behalf and passing the final examination for admission prescribed by the rules of the Law Society of Upper Canada.... @*

Petition of Delos Rogest Davis to the Ontario Legislature 1884

Delos Rogest Davis passed the examination, paid the fee, and was admitted to the **Law Society of Upper Canada** on May 19th 1885. He never served articles (Hill, 1981; Thornhill, 1995).

It was Law in 1911 that, through public petitions and Municipal Council resolutions—such as that of the City of Edmonton—opposed migration, immigration and settlement of Blacks in Canada (Thornhill, 1995; Winks, 1971), thus incontrovertibly sowing the seeds that would root in Canadian society an enduring anti-Black racism—a ubiquitous and omnipresent racial animus of hostility which remains very much alive and well, even today.

As if this were not enough, law-makers validated this hostility. In 1911, Government Minister Frank Oliver rose in the House of Commons and unabashedly made the following pronouncements, as recorded in the *Hansard Reports* (Bertley, 1976):

There are many cases where the admission or exclusion

of an immigrant depends on a strict or a lax interpretation of the law, so that if the immigrant is what we would call **the desirable class** it may be that they are administered laxly, and if he is of the presumably less desirable class, then they are administered more restrictedly.¹⁹

Minister of Immigration, Frank Oliver

House of Commons March 1911

It was Law in 1914 that allowed the then-Superintendent of Immigration to invoke the so-called “climatic unsuitability” of Blacks and declare that Black immigration would not be in Canada’s best interests. More precisely, section 38(b) of the 1910 *Immigration Act* prohibited “the landing in Canada of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada.”²⁰ The ensuing effect of this euphemistic invocation of “climatic unsuitability” was that, *de facto*, A>race= was now legally designated as an immigration category@, and Athose >races= supposed to be genetically incapable of assimilation could be kept out by the sheer discretionary decision of immigration officials—a decision not even subject to a hearing or review@ (Walker, 1971).

This collusion on the part of Law-makers helped to taint Canadian Immigration policy, and vitiate its implementation, irrevocably skewing outcomes in such ways that Blacks—even when grudgingly admitted—were and are still perceived as interlopers, and outsiders, treated as not rightfully belonging.

It was Law during the two World Wars which discouraged “coloured” recruits from serving in the Armed Forces and effectively sanctioned their exclusion. For example, we are taken aback by the utterances of the 1916 Chief of General Staff, Major-General W.G. Gwatkin (Bertley, 1976):

¹⁹ *Minister of Immigration, Frank Oliver*, Hansard, 2, 22, & 23 March 1911, 4470-71, 5911-13, 5943-47.

²⁰ *The Immigration Act- An Act Respecting Immigration* S.C. 1910. c.27, article 38(c).

Nothing is to be gained by blinking facts. The civilized Negro is vain and imitative; in Canada he is not being impelled to enlist by a high sense of duty; in the trenches he is not likely to make a good fighter; and the average white man will not associate with him on terms of equality.

*Major-General W.G. Gwatkin,
Chief of General Staff
Ottawa, 13 April, 1916*

Such policy positions by Public Authority led to the Canadian Government openly resorting to and enforcing Jim Crow policy during World War I. by setting up the segregated *No.2 Construction Battalion* because, purportedly, **no White man would associate with a Black man on terms of equality** (Bertley, 1976; Ruck, 1987; Winks, 1971).

It was Law during the period between the two World Wars that, in multiple Court rulings decreed that the right of a White merchant to contract freely with whomever he pleased outweighed the right of a Black member of the Canadian public to be shielded or protected from discriminatory treatment. According to Canadian Courts:

The management of a Theatre may impose restrictions and make rules as to the place which each person should occupy during a representation. Therefore, when a coloured man bearer of a ticket of general admission, wants to take a seat in a part of the House **which he knows** is by the rule of a manager prohibited to a coloured person, he cannot complain

if he is refused admission.²¹ [Emphasis ours]

In taverns, restaurants, music halls, theatres, cinemas, and even in cemeteries across Canada, Blacks were denied admittance and service. Law's clear priority was to protect the comfort level and interests of prejudiced White Canadians. Blacks enjoyed no entitlement, nor were they perceived to be of any account in the eyes of the Law. Take, for example, the case of Viola Desmond, an African Nova Scotian hairdresser and beautician from Halifax, who was arrested on the evening of November 8th, 1946 in the Roseland Theatre in New Glasgow. Viola had decided to sit downstairs instead of seating herself in the upstairs balcony to which Blacks were routinely relegated on the basis of widespread *de facto* racially segregated arrangements. She had transgressed racial boundaries in not abiding by the pervasive *unwritten law*—that tacitly accepted entrenched, unspoken code of racist behaviour that dictated the proper place of Blacks (Backhouse, 1999; Thornhill, 1995; Walker, 1971; Winks, 1971).

It was Law which determined that for this offense, Viola Desmond should be thrown in jail for 12 hours after having been so manhandled and roughed up that she lost a shoe and her purse. The following day, Viola was charged with attempting to defraud the Federal Government of one cent in Amusement Tax on the basis that the tax levied for an upstairs seat was 2 cents, while it was 3 cents for a seat downstairs **even though the only ticket that Viola Desmond and any other Black person would have been allowed to purchase in the Roseland Theatre was a ticket for an upstairs seat.**

Viola Desmond was convicted and sentenced to a fine of \$20.00 plus costs, or 30 days in jail. She paid the fine. The province's Black Community rallied around the case. The Nova Scotia Association for the Advancement of Coloured People (NSAACP) appealed the decision, but lost on a technicality although the Judge did agree that the real motive in the case against Viola Desmond was a "surreptitious endeavour" to enforce racial segregation by subverting the public statute. According to him,

²¹ *Loew=s Montreal Theatres Ltd. vs. Reynolds* (1921), 30 Quebec King's Bench 459.

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 Jim Crow rule by misuse of a public statute.²²

It was Law in the 1950's that conferred legitimacy on the Federal Government's exploitative Domestic Scheme that mandated Canadian civil servants to visit the Caribbean and recruit young, healthy, educated Black Women, "with no dependents", to come as immigrant domestic workers and serve the needs of well-to-do Canadian families (Calliste, 1989).

It was Law in 1976 which allowed the emergence of the newly coined euphemistic criterion, "Canadian experience," so as to curtail and restrict Black access to the workplace.

It was Law that the Supreme Court of Canada invoked in 1997 during Gloria Augustus' nine-year quest for justice in the wrongful shooting death of her unarmed son by a 17-year veteran Montreal Urban Community police officer in a police station parking lot when it ruled that this Black mother had not received adequate compensation. Madame Justice Claire L'Heureux Dubé went on to explain that:

"... The suffering that accompanies this unnatural event has no equivalent in intensity aside from the immeasurable joy that can result from the birth of a child.

²² Justice William Hall, in *The King v. Desmond* (1947), 20 M.P.R. 297.

Such suffering is so acute that it seems impossible even to assess it in monetary terms.”

Confirming that under Quebec law compensation was available for the grief and distress resulting from the death of a close relative or friend, the Supreme Court suggested that, instead of the Quebec Court of Appeal’s \$17,000 award, a quantum of about \$25,000 would constitute a “fair and reasonable” award for Gloria Augustus. And, **it was in the name of Law** that, with this pronouncement, the Supreme Court Justices who, according to Augustus’ lawyer, “had the power to put an end to this case,” referred the case right back to the Quebec Court of Appeal for a definitive ruling. (*The Gazette*, Montreal, Friday, October 4th 1996, p. A3).²³

It was in the name of Law that the 1995 decision and judicial authority of the only Black female judge in Nova Scotia was attacked for alleged “apprehension of bias”. Two years later, in 1997, the Supreme Court of Canada upheld and confirmed the impugned decision.²⁴ Yet, despite this ultimate validation, and in spite of her being at that time the most senior female as well as the only racialized minority judge on the province’s Family Court Bench, Judge Corrine Sparks was pointedly overlooked for promotion several months later in Spring 1998 when the Provincial Family Court of Nova Scotia was restructured.²⁵

It was Law in 2001 that allowed Moncton, New Brunswick Royal Canadian Mounted Police

²³ Stephen Bindman, “Award for Griffin slaying too small high court” *The Gazette*, Montreal, Friday October 4th 1996.

²⁴ *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484.

²⁵ At the time this article was penned in 2007, Judge C. Sparks was still an itinerant Judge. For additional information, see the 1998 Open Letter posted by the first holder of the **James Robinson Johnston Chair in Black Canadian Studies** at Dalhousie University. E.M.A. Thornhill, *Message from the Chair: Call for Action*. Open Letter dated March 27th 1999 at: <http://first.jamesrobinsonjohnstonchair.dal.ca/holder_pr_call_action.html> Accessed July 24th 2007.

officers to proceed with impunity and try to diminish, trivialize and race-erase²⁶ the racist implications of “a racially motivated act of ‘cross-burning’ perpetrated on the front lawn of a respectable and established Visible Minority family on the night of July 14th 2001.” It eventually took the hue and cry of outraged and concerned White neighbors of the affluent neighbourhood to compel the police officers to subsequently rectify the initial “property damage” charges laid, and replace them with charges that more accurately reflected the blatantly “discriminatory racial act” represented by that racially provocative cross-burning.

CONCLUSION

Over the course of 400 years, from the 1700s to this 21st Century, much has seemed to change but nothing in reality has changed, vis-à-vis the complicity of Law and ‘Race’. More often than not, Law in Canada has been subverted so as to facilitate and sustain an animus of hostility against African descended peoples. In sum, Law has colluded—and continues to collude—with ‘Race’ in ways that accommodate and foster on-going *Negrophobia, Afrophobia* or *Anti-Black Racism*.²⁷

It is against this historico-legal backdrop that Courts in Canada, through omission and by commission, have handed down rulings which upheld commonly practised notions of racial

²⁶ On **Race-erase**, see *Racism and the Black World Response Symposium Report* posted at: <http://first.jamesrobinsonjohnstonchair.dal.ca/symp_proceedings.pdf> Accessed July 25th 2007.

²⁷ African Canadians have taken the issue of Anti-Black Racism (*Afrophobia, negrophobia*) to the international arena . For example, to the UN Committee for the Elimination of Racial Discrimination (CERD) in Geneva, August 2002, and to the UN *Special Rapporteur for the Elimination of Racism* during his 2003 Country Visit to Canada. See, UN Committee for the Elimination of Racial Discrimination (CERD), *Concluding Observations of the Committee on the Elimination of Racial Discrimination Concerning Canada’s 13th and 14th Reports* 01/11/2002. A/57/18, paras.315-343 at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.57.18.paras.315-343.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.57.18.paras.315-343.En?OpenDocument) (Accessed July 24th 2007); and UN *Special Rapporteur on Contemporary Forms of Racism. Report by Mr. Doudou Diène, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Mission to Canada.* E/CN.4/2004/18/Add.2. 1 March 2004 , at: <<http://daccessdds.un.org/doc/UNDOC/GEN/G04/113/97/PDF/G0411397.pdf?OpenElement>> (Accessed July 24th 2007).

discrimination, thereby re-inscribing and perpetuating racial inequality. The foregoing sample of obfuscated factual antecedents from Canadian legal history are key components of the new *Diasporic Literacy*. For, global ‘Race’ Literacy has become a critical condition precedent if we legal scholars and peoples of African descent are truly determined to raise the level of debate and improve the quality of discourse around the ***material reality*** of the racism that daily continues to scar the lifescapes of African descended Communities located in ‘race’-conscious White dominant societies like Canada and the United States.

This untapped nexus between ‘Race’, Law and Black People’s reality is still insufficiently examined, interrogated, problematized or explained. Since Law is so powerful an institution, it is imperative that we comprehend fully its collusion and complicity in the ‘second-class-citizen’ social construction of our Black identity. We must also understand and critique the myriad ways in which Law as an institution has behaved with impunity in the past, and continues in the present to operate **as if there were nothing about Black People worth honoring!**

“Yet, we People of African descent, we too are
Significant Humanity. And Law for us should
also be liberatory and emancipatory; should
sustain us; and should enhance our existence
as a People. Despite the fact that in this country
we have more often experienced the oppressive
heel of Law, particularly in matters of racism
and racial discrimination, Law remains too

precious a tool for us to abandon, ever. ”²⁸

²⁸ Thornhill, E.M.A.. “Focus on Racism...,” *supra* note 1 at p.91. **Caveat:** My affirmation that Law is too precious a tool for Black People to ever abandon in no way signifies that I am oblivious to the inherent limitations of Law. If we understand past behaviour to be a solid predictor of future behaviour, and if we remain ever-mindful of our historical trajectory, we People of African descent dare not rely totally on Law as the panacea for our salvation; we must constantly remain cognizant of the pervasive role of Law in our society and the on-going perversity of Racism.

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