

# **The Historical Construction of Racial Identity and Implications for Reconciliation**

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Himani Bannerji, one of Canada's leading anti-racist theorists, writes that the word "identity" has recently become a "common word in our political vocabulary." She notes that "the passion of naming" extends beyond the individual to a "historical" and a "collective" process. She queries: "Who experiences this gesture as positive, as that of creation of a community, and who as an exclusion, and why? What are the different versions of 'identity,' their distinctions and slippages in actual historical moments?"<sup>1</sup>

This paper will attempt to explore the historical construction of racial identity, as glimpsed through the lens of the Canadian political state and its legal system during the first half of the 20<sup>th</sup> century. It will examine a series of landmark judicial cases in which racial identification featured as the critical variable in creating and bolstering hierarchical groupings within the Canadian population. It will seek to answer Himani Bannerji's question, as to who experienced this process of identification as "positive" and who did not. To the extent that the political and legal framework that pinpointed racialized identities primarily served the interests of the dominant white population, the paper will also consider whether recognition of past injustices may be important to the on-going project of reducing racism and fostering reconciliation within the Canadian social fabric.

The concept of "race" is rarely constructed without reference to gender, class, religion, dis/ability and sexual identity. Some of this will become evident in the descriptions of the cases that follow. The markers of identity are interwoven and complex in their multiple manifestations. The unifying theme of this paper, however, is to begin to document the process of racialization through Canadian legal history.

There are many groups in Canadian society who have begun to put forward claims for public recognition and the redress of past racist acts. The Japanese community has sought apology and compensation for its experience of displacement, dispossession and internment during World War II. The Chinese community has launched a class action lawsuit for compensation for the head tax that immigrants from China were unjustly forced to pay during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. Aboriginal peoples are bringing a multitude of individual and class-based legal claims for compensation for physical, sexual, psychological and cultural abuses that they experienced in residential schools. Many white Canadians are surprised and bewildered by the number and range of such claims. They are unaware of the long-standing historical foundation that racial inequality has recorded in Canada. They erroneously think of Canada primarily as a "raceless" country, with little or no history of racism. Thus it is important to turn to the lessons of history, to examine how categories of racial identity have been constructed in law, and how these artificial classifications have been used in the service of racial discrimination perpetrated by the state. Canadians must recognize past injustices in order to begin to come to grips with the long-term and difficult process of reconciliation. Without a clear, public recognition of the history of racism, it will be impossible to transform the legacy that racism has wrought. Recognition is the mandatory first step, without which none of us can move towards healing and restoration.

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<sup>1</sup> Himani Bannerji Thinking Through: Essays on Feminism, Marxism, and Anti-Racism (Toronto: Women's Press, 1995) at 17, 20-1.

The historical material in this paper will focus on the manner in which law was initially used to construct racial identity. Without a legally-enforced framework for racial classification, it would have been impossible to make sense of racially discriminatory laws. Six cases will be used to serve as illustrations of the historical construction of racial identity. *The King v. Pickard* was a 1908 Alberta judicial decision that tried to make sense of evolving definitions of “Indian-ness” in its racial identification of a Stony Plain man, making reference to a host of variables that would strike most Canadians in the early 21<sup>st</sup> century as remarkably illusory.<sup>2</sup> *Rex v. Quong Wing* was a 1912 decision in which the racial identification of a Chinese man from Moose Jaw was contested and subsequently confirmed by no fewer than three levels of the judiciary, including the Supreme Court of Canada.<sup>3</sup> That same year in Saskatoon in *R. v. Yoshi*, the racial identity of three female waitresses described as “Russian” and “German” provoked similar scrutiny before they were confirmed as “white” by the police magistrate in charge.<sup>4</sup> *R. v. Phillips*, a criminal prosecution of a Ku Klux Klan adherent from Hamilton in 1930, raised great public furore over the racial designation of the victim of a racist campaign of terror – an alleged “Negro” man slated to marry a young “white” woman.<sup>5</sup> *Re Eskimos*, a 1939 decision of the Supreme Court of Canada, produced the most protracted anthropological and ethnographical submissions on racial identification ever filed with a Canadian court, all in aid of finding an answer to the elusive question of whether “Eskimos” living in the Ungava Peninsula in northern Quebec were “Indians” under Canadian law.<sup>6</sup> The criminal prosecution of Viola Desmond in 1946, for refusing to leave the “whites-only” main floor of a movie theatre in New Glasgow, Nova Scotia, provoked discussion within the African-Canadian community in Halifax and beyond as to the racial motivations of the chief protagonist and the nature of “passing.”<sup>7</sup>

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<sup>2</sup> *The King v. Pickard* (1908), 14 Canadian Criminal Cases 33 (Alberta District Court).

<sup>3</sup> *Rex v. Quong Wing*, Saskatchewan Archives Board, Police Magistrate’s Court, City of Moose Jaw, 27 May 1912; “Stated Case for the Supreme Court of Saskatchewan” 2 July 1912; *Quong Wing v. The King* (1914), 49 Supreme Court Reports 440.

<sup>4</sup> The case is not reported in the law reports, and the records come from the Saskatoon *Daily Star* “What is White Woman? Definition Puzzled Magistrate and Lawyers in Case of Orientals in Court” 14 August 1912, p.3; “Counsel for Defence in Orientals Case Questions Authority of Provincial Legislature to Pass Act” 15 August 1912, p.3.

<sup>5</sup> The Ontario Supreme Court records for this case were destroyed due to “extensive culling” of the Ontario Archives, but the Ontario Court of Appeal file is reported at (1930), 55 Canadian Criminal Cases 49.

<sup>6</sup> *Re Eskimos*, [1939] 80 Supreme Court Reports 104; Factum on Behalf of the Attorney General of Canada and the Attorney General of Quebec, in the Supreme Court of Canada, In the Matter of a Reference as to whether the term “Indians” in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec.

<sup>7</sup> *His Majesty the King v. Viola Irene Desmond*, Public Archives of Nova Scotia, RG39, “C” Halifax, v.937, Supreme Court of Nova Scotia no. 13347; *The King v. Desmond* (1947), 20 Maritime Provinces Reports 297 (Nova Scotia Supreme Court).

These six cases combine to demonstrate the transitoriness of racial designation, and the fictitious nature of the exercise. At the same time, the legal rulings illustrate the draconian impact that the process of racialization wrought. Legislators, lawyers and judges used the concept of “race” to fashion legal outcomes that provided unearned rights, privileges, resources and power to those defined as “white,” while wresting these from groups defined as “non-white.” The legal results of racialization appear to have been predominantly detrimental to those excluded from classification as “white.”

The case of *The King v. Pickard* was provoked by a liquor prosecution against a white, middle-class, male shop owner in Edmonton in 1908.<sup>8</sup> Between the 18<sup>th</sup> and 20<sup>th</sup> centuries, Canadian legislators had enacted a series of laws prohibiting the sale of alcohol to Aboriginal peoples. Alcohol had been introduced to North America by fur traders, as a bartering tool to inflate profits and crush Aboriginal resistance to European control. When the level of violence and social dislocation caused by alcoholism within First Nations’ communities ultimately proved disruptive to white society, the legislators adopted punitive measures. They criminalized Aboriginal involvement with alcohol, by fining and imprisoning “drunk Indians” and whites who sold alcohol to “Indians.” At the same time, they failing miserably to offer any support to those within First Nations’ communities who were trying to deal with the problem in culturally indigenous ways.<sup>9</sup>

The legislation also spawned a host of difficulties with racial definition. Court after court encountered individuals accused of selling alcohol to Indians who defended themselves by insisting that their customer was not, in fact, an “Indian.” The very word reduced a multitude of politically, culturally, and linguistically distinct nations to one amorphous, erroneously-named mix. Federal and provincial legislators had experimented with different definitions, promulgating tests that were based on such elusive phrases as being “of Indian blood,” “reputed to belong to a particular body or tribe,” “of Indian extraction,” “having a home upon or within the confines of an Indian reserve,” and “living the Indian life.”<sup>10</sup> The definition set out in the 1876 *Indian Act* offered little concrete assistance: “any male person of Indian blood reputed to belong to a particular band, any child of such person, and any woman who is or was lawfully married to such person.”<sup>11</sup>

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<sup>8</sup> *The King v. Pickard* (1908), 14 Canadian Criminal Cases 33 (Alberta District Court).

<sup>9</sup> For more details regarding the provincial and federal statutes enacted between 1777 and 1951, and failure of legal measures to respond to the impact of alcohol upon Aboriginal communities, see Constance Backhouse “‘Your Conscience Will Be Your Own Punishment’: The Racially-Motivated Murder of Gus Ninham, Ontario, 1902” in Blaine Baker and Jim Phillips, eds. *Essays in the History of Canadian Law* (Toronto: The Osgoode Society, 1999).

<sup>10</sup> For more details regarding the statutory racial definitions of “Indian,” see Constance Backhouse *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) 21-27. In 1887, Parliament purported to make the superintendent general of Indian Affairs the complete arbiter of “membership in an Indian band.” See *An Act to amend ‘The Indian Act’*, Statutes of Canada 1887, c.33, s.1.

<sup>11</sup> *The Indian Act, 1876*, Statutes of Canada 1876, c.18, s.3. See also *The Indian Act*, Revised Statutes of Canada 1886, c.43, s.2(h); *Indian Act*, Revised Statutes of Canada 1906, c.81, s.2(f). George Manuel and Michael Posluns *The Fourth World: An Indian Reality* (Don

Making precise racial designations was the specific problem that faced the Edmonton District Court in 1908. The shop owner who was being prosecuted claimed that he neither knew nor suspected that Ward, the male customer to whom he had sold liquor, was an “Indian.” After lengthy testimony, the judge rejected the shop owner’s defence in a decision that ranks as one of the most transparent efforts at racial characterization in Canadian jurisprudence. The range of features that the Alberta judge used to determine that Ward was an “Indian,” and to conclude that any reasonable person would have known this, was extraordinary. One definitive characteristic was Ward’s attire; he wore moccasins. Another telling point was language. Ward “could speak little or no English.” In fact, he purchased a calendar from the shop owner by “pointing” and “asking in Cree.” Skin colour seems to have been equally determinative, and the judge noted that Ward was “fairly dark.” Without further elaboration, he concluded that the man looked “a great deal like an Indian.” The judge’s certainty was belied in part by a shrewd tactic employed by the defence lawyer, who brought into court that day a number of individuals whose race was difficult to discern from appearance. “It is true that there are many half-breeds that look like Indians,” the judge admitted,

and the counsel for the accused brought into Court many for that purpose, but to my mind, this makes my contention all the stronger that Pickard, knowing how difficult it was to distinguish the Indian from the half-breed, should have been on his guard and refused the liquor till he found out whether they were Indians or half-breeds.<sup>12</sup>

In what appears the most far-fetched variable of all, racial status seems also to have been ascertained by the company Ward kept. The judge reconstructed in depth the racial designation of Ward’s companion, a man named Bonenose, who had accompanied him into the store. He also wore moccasins. He, too, bought a calendar by asking for it in Cree. He “was rather darker than Ward,” and was “very much like an Indian in appearance, even more so than Ward.” Since the shop owner was not charged with selling liquor to Bonenose, there was no need to delve into his racial attributes. It was solely his value as companion to Ward that was under appraisal. One’s racial status seems to turn here in part on the racial designation of one’s friends and acquaintances. In the end, the court concluded that Ward, a resident of Stony Plain, was indeed an “Indian,” and that the shop-owner had unlawfully sold him alcohol.<sup>13</sup>

The complexity of defining what was meant by “Indian” was baldly obvious. Attire, linguistic facility, skin colour, “looking like an Indian,” and the company one kept were all pressed into service as racially-defining characteristics. In other legal cases, judges would offer similar perspectives, occasionally adding new variables, such as employment history, demeanour, whether one paid taxes or filed for land grants,

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Mills, Ont.: Collier-Macmillan Canada, 1974) critiqued this definition at 21, noting that it constituted “a strict tracing of male blood line, an English way of tracing lineage not accepted by very many Indian societies.”

<sup>12</sup> *The King v. Pickard* at 33-5.

<sup>13</sup> *The King v. Pickard* at 33-5.

whether one “lived like an Indian,” and whether one was known to “hunt or fish.”<sup>14</sup> Throughout the complex proceedings, no one sought the views of the Aboriginal communities on their understanding of racial designation. Aboriginal spokespersons might have advised on the multiplicity of indigenous ways of defining identity, devised across centuries of political, economic, and spiritual experience. Instead, Aboriginal history and culture went dismissively unheeded in the development of legal definitions.<sup>15</sup> Arrogantly autonomous, Canadian legislators and judges used the law to draw racial boundaries, cutting through the morass of uncertainty, concretizing distinction.

Racial identity was even more hotly contested in Saskatchewan in 1912, when Quong Wing was prosecuted for violating the *White Women’s Labour Law*. The statute prohibited “any Japanese, Chinaman or other Oriental person” from hiring a “white woman or girl.”<sup>16</sup> First enacted several months before the trial, the legislation was the culmination of the efforts of an all-white coalition of labour organizations, small businessmen, Protestant moral reformers, and women’s groups. The archly-racist coalition had mounted a campaign to minimize interracial social contact, and to erode the profit margins of Asian restaurateurs and laundry operators by eliminating their access to a potential pool of cheap employees.<sup>17</sup> Quong Wing had immigrated from China at the turn of the century, had become a “naturalized citizen” in 1905, and settled in Moose Jaw, where he purchased and operated the C.E.R. Restaurant. For over a year, he had employed two “white” female waitresses. As one of the most prominent Asian entrepreneurs in the province, he decided to test the new law in the courts.<sup>18</sup>

Seizing on the fact that there was no definition of the word “Chinaman” in the statute, Quong Wing’s lawyer maintained that it was impossible to ascertain what the legislators had meant. In response, the Crown prosecutor led evidence that Quong Wing spoke “Chinese” when conversing with other “Chinese people,” and then called another

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<sup>14</sup> See, for example, *Rex v. Tronson* (1931), 57 Canadian Criminal Cases 383 (B.C. County Court); *Regina v. Howson* (1894), 1 Territories Law Reports 492 (Northwest Territories Supreme Court); *The Queen v. Mellon* (1900), 7 Canadian Criminal Cases 179 (Northwest Territories Supreme Court); *Rex v. Verdi* (1914), 23 Canadian Criminal Cases 47 (Halifax County Court); *Rex v. Bennett* (1930), 55 Canadian Criminal Cases 27 (Ontario County Court). For details of other relevant cases, see Backhouse *Colour-Coded* at 21-7.

<sup>15</sup> Manuel and Posluns *The Fourth World* note at 241 that “Indian customs of inheritance and for defining identity have varied from nation to nation according to political and economic structure and religious beliefs.”

<sup>16</sup> *Rex v. Quong Wing*, Saskatchewan Archives Board, Police Magistrate’s Court, City of Moose Jaw, 27 May 1912; “Stated Case for the Supreme Court of Saskatchewan” 2 July 1912; *Quong Wing v. The King* (1914), 49 Supreme Court Reports 440. See also *An Act to Prevent the Employment of Female Labour in Certain Capacities*, Statutes of Saskatchewan 1912, c.17, s.1.

<sup>17</sup> For a detailed discussion of the genesis of this legislation, which was later duplicated in Manitoba, Ontario and British Columbia, see Backhouse *Colour-Coded* at 136-46.

<sup>18</sup> For a more detailed discussion of the case, see Constance Backhouse “The White Women’s Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada” *Law and History Review* 14:2 (Fall 1996) 315-68.

“Chinese” businessman to testify that he understood Quong Wing to be “Chinese.” Quong Wing’s lawyer was undeterred, and grilled all of the Crown witnesses on their inability to pinpoint a precise definition. Emphasizing that none of them was a “professional ethnologist,” Quong Wing’s lawyer forced them to admit that they had never been to China, had no direct knowledge of Quong Wing’s place of birth, of his citizenship, of his parents or of their place of birth. When one witness defined a “Chinaman” as “a man being born there, his parents being Chinese,” counsel countered with a hypothetical question: “Say a British Subject or Consul at Hong Kong has a white wife, who has a child. That child would be a Chinese?” The hapless witness was forced to back off, and replied that such a child “could not be Chinese.” The most pointed query was directed at the local police chief who had laid the charges: “Do you know the difference between a Chinaman and any other man? Is there any difference between a Chinaman and any other man?” Taking umbrage at such skirmishing, the chief snapped back: “I know the difference when I see them.” The Crown prosecutor professed himself astonished at the defence strategy, and interjected mockingly at one point that “perhaps” Quong Wing was “Scotch.” The *Moose Jaw Evening News* expressed equal incredulity:

Is anyone in Moose Jaw really certain that many Chinese in the city are actually Chinamen? Th[is] absorbing quer[y] occupied the attention of sparring barristers and Magistrate Dunn at the session of the city police court yesterday. Mr. Craig closely questioned the witnesses whether any one of them had known Hong Wing [sic] in China or actually knew him to be a Chinaman, and within the meaning of the cat[egory]. None of the witnesses unfortunately had known Hong’s parents or had ever been on close terms with him across the Pacific. For a time Hong’s nationality was uncertain, some venturing he was Scotch. At last the court decided after much legal sparring that Hong was a “Chink” absolutely.<sup>19</sup>

The inquiry into Quong Wing’s “Chinese-ness” seemed to follow a number of directions. Some thought it potentially connected to birth in China, the birth of one’s parents in China, physical presence in China such as “standing on Chinese soil,” and citizenship. Others focussed on reputation within the community and proficiency in the Chinese language. One of the white waitresses, who stood to lose her job if Quong Wing was convicted, stubbornly refused to make any racial designation of her employer, insisting: “I treat him as myself.” The police chief was the only witness to make visual identification an overt component.

The defence argument laid bare the nonsense of racial classification, challenging those who believed the notion of “race” to be an immutable, natural concept. “Race” is not a biological or trans-historical feature, but a sociological classification situated in a particular time and context. It is shaped and moulded by economic, political, and cultural forces as well as resistance and challenges. Racial categories form a continuum of

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<sup>19</sup> “Chinese Make Case a Test” *Moose Jaw Evening News* 28 May 1912. Racist references to “Chinks” were commonplace in Canadian newspapers of the time; for details, see Backhouse “The White Women’s Labor Laws.”

gradual change, not a set of sharply demarcated types. There are no intrinsic isolating mechanisms between people and, given the geographic dispersion of populations over time, the concept of “pure” human “races” is absurd.<sup>20</sup> As the testimony indicated, it is almost impossible to define “Chinese-ness” as a fixed concept, transported without variation across generations and location. It is difficult to comprehend how the single label “Chinese” could serve as a monolithic identifier for the multiplicity of communities that make up the richly varied diaspora of peoples originating from China. How potentially misleading it is to adopt one term to signify equally a person born in China, an immigrant of Chinese origins living in Saskatchewan, a second-generation person of Chinese origin living in Africa, and a third-generation Canadian of Chinese origin living in Vancouver.<sup>21</sup>

The vagaries of racial definition were banished in the Moose Jaw courtroom that day, as the presiding police magistrate pronounced Quong Wing to be a “Chinaman” without any serious consideration of the defence arguments. Although the witnesses might have had difficulty articulating what they meant by the word “Chinaman,” almost all were adamant that Quong Wing was one. Rooted in a particular historical context, racial distinctions came to take on a certain “common sense” quality, an unconscious and visceral reflection of community assumptions and prejudice. The magistrate was so sure of his ground that he saw no need to offer any rationale or analysis of the matter in his judgment. Nor did the appellate courts disagree. A number of Chinese merchants organized to raise money to finance a constitutional challenge to the conviction of Quong Wing, but the legislation and conviction were upheld by the Supreme Court of

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<sup>20</sup> See, for example, Kay J. Anderson Vancouver’s Chinatown: Racial Discourse in Canada, 1875-1980 (Montreal and Kingston: McGill-Queen’s University Press, 1991); Peter Fryer Black People in the British Empire: An Introduction (London: Pluto Press, 1988) 61-2; M.F. Ashley Montagu Man’s Most Dangerous Myth: The Fallacy of Race (New York: Columbia University Press, 1942); B. Singh Bolaria and Peter S. Li Racial Oppression in Canada 2<sup>nd</sup> ed. (Toronto: Garamond Press, 1988) 13-25; F. James Davis Who is Black? One Nation’s Definition (University Park: Pennsylvania State University Press, 1991); Audrey Kobayashi and Peter Jackson “Japanese Canadians and the Racialization of Labour in the British Columbia Sawmill Industry” B.C. Studies 108 (Autumn 1994) 33-58; Audrey Kobayashi “Viewpoint: A Geographical Perspective on Racism and the Law” Canadian Law and Society Bulletin 11 (Spring 1991) 4-6; Audrey Kobayashi “Racism and Law in Canada: A Geographical Perspective” Urban Geography 11:5 (October 1970) 447-73; A. Sivanandan “Challenging Racism: Strategies for the 80s” Race and Class 25 (1983) i-ii; Peter Jackson “The Idea of ‘Race’ and the Geography of Racism” in Peter Jackson ed. Race and Racism (London: Unwin Hyman, 1987) 3-21; Ronald T. Takaki Iron Cages: Race and Culture in Nineteenth-Century America (New York: Knopf, 1979); Gloria A. Marshall “Racial Classifications: Popular and Scientific” in Sandra Harding ed. The “Racial” Economy of Science: Toward a Democratic Future (Bloomington: University of Indiana Press, 1993) 116.

<sup>21</sup> Anderson Vancouver’s Chinatown 3-18.

Saskatchewan in 1913 and the Supreme Court of Canada in 1914.<sup>22</sup> The criminal prosecution represented a successful effort on the part of the state to “racialize” Quong Wing as Chinese, despite his decision to move from China, to set up a permanent life in Canada, to take out British naturalization, to purchase real estate, to establish himself as a middle-class businessman, and to become a full-fledged member of the Saskatchewan community.

The *Yoshi* case a few months later involved a similar prosecution against the male proprietor of a restaurant in nearby Saskatoon. Here the defence strategy was not to contest the “Asian-ness” of the Tokyo-born defendant Yoshi, but to put the Crown to the strict proof that the three female waitresses he employed were “white.”<sup>23</sup> In fact, the *White Women’s Labour Law* was anomalous in designating “whiteness” as a racial category. Prior to this, most racial classifications in Canadian statutes purported to identify peoples of colour. Various enactments dealt with “Indians,” “colonial people,” the “Chinese,” “Japanese,” and “Hindu.”<sup>24</sup> Racial designations in law were typically assigned by whites to non-whites. While the property of “whiteness” was clearly a definable asset, from which all manner of privilege and power flowed, it usually tended to disappear into invisibility in legal terminology. The *White Women’s Labour Law* appears to have marked the first overt racial recognition of “whiteness” in Canadian law.<sup>25</sup>

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<sup>22</sup> *Rex v. Quong Wing*, (1913) 21 Canadian Criminal Cases 326 (Supreme Court of Saskatchewan); *Quong Wing v. The King* (1914), 49 Supreme Court Reports 440 (Supreme Court of Canada).

<sup>23</sup> Saskatoon *Daily Star* “What is White Woman? Definition Puzzled Magistrate and Lawyers in Case of Orientals in Court” 14 August 1912, p.3.

<sup>24</sup> For examples of such statutory designations, see Backhouse *Colour-Coded* 348, footnote 10.

<sup>25</sup> Although this appears to be the first legislative articulation of the concept of the “white” race, a subsequent Alberta statute purporting to define “Metis” utilized the same word. *An Act Respecting the Metis Population of the Province* Statutes of Alberta 1938 (2nd Sess.), c.6, s.2(a) defined “Metis” as “a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in *The Indian Act*.” See also *An Act to Amend and Consolidate The Metis Population Betterment Act* Statutes of Alberta 1940, c.6, s.2(a). The only other statutes that purport to make reference to the dominant “white” race do so in different terms. *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* Statutes of the Province of Canada 1850, c.42, s.1 refers to “persons of European descent.” For reference to the “Caucasian race,” see *An Act Respecting Liquor Licences and the Traffic in Intoxicating Liquors* Statutes of British Columbia 1910, c.30, s.25-6; and Revised Statutes of British Columbia 1911, c.142, s.24-5, enacted in the context of taking a count of the population to determine whether liquor licences should be issued. See also *An Act to amend the Provincial Elections Act* Statutes of British Columbia 1907, c.16, s.2 and *An Act respecting Elections of Members of the Legislative Assembly* Statutes of British Columbia 1920, c.27, s.2(1), defining “Hindu” as “any native of India not born of Anglo-Saxon parents and shall include such person whether a British subject or not.”

The issue was complicated by the ethnic origins of the working-class women concerned, who were described as “Russian” and “German.” As such, the women represented two immigrant communities that had not been fully accepted by the Euro-Canadian elite. On the other hand, they were difficult to classify as “non-white.” Since the statute contained no definition of “white woman,” the Crown endeavoured to supply one, arguing that the court should “give these words the meaning which is commonly applied to them; that is to say the females of any of the civilized European nations.” Professing great confusion, the police magistrate adjourned the trial to consider the dilemma.

Racial visibility can change dramatically over time. People objectified as racially different in one place and time may find themselves shuffled and recategorized, or rendered racially invisible in others. The divisions in Canada between the English and French, and Jews and Gentiles have been depicted in “racial” terms.<sup>26</sup> In the late 19<sup>th</sup> century, British officials referred to natives of India as “niggers,” but by the first decade of the 20<sup>th</sup> century the Canadian press described them as “Orientals” and “Asiatic.”<sup>27</sup> One witness who testified before the 1902 Canadian Royal Commission on Chinese and Japanese Immigration announced: “I never call Italians white labour.”<sup>28</sup> A Saskatchewan historian writing in 1924 claimed that Slovaks (or Polaks), Germans, Hungarians, Scandinavians, Finns, and Serbians were each discrete groups in a “racial sense.”<sup>29</sup> In early 20<sup>th</sup> century Saskatchewan, residents of English or Scottish origin would have been extremely reluctant to identify racially with Russian or German immigrants in matters of employment or social intermingling. What was at stake in this trial, however, was whether the latter should be racialized as “white” in distinction to Asian immigrants, in the context of the *White Women’s Labour Law*.

In an effort to provide some assistance to the court, one citizen wrote to the *Saskatoon Daily Star*:

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<sup>26</sup> See, for example, Angus McLaren Our Own Master Race: Eugenics in Canada, 1885-1945 (Toronto: McClelland and Stewart, 1990) 25; Ruth A. Frager “Class, Ethnicity, and Gender in the Eaton Strikes of 1912 and 1934” in Franca Iacovetta and Mariana Valverde eds. Gender Conflicts (Toronto: University of Toronto Press, 1992) 189 at 209.

<sup>27</sup> For the “nigger” reference, see Fryer Black People at 53, citing H.J.S. Cotton New India or India in Transition (London: Kegan Paul, Trench, 1885) 37, 41-2. The white British imperialist Cecil Rhodes identified people from Africa and Asia as sharing the same skin pigmentation, referring to “the dark-skinned myriads of Africa and Asia”: Fryer at 68, citing W.T. Stead, ed. The Last Will and Testament of Cecil John Rhodes..., Review of Reviews Office (1902) 140. For an “Oriental” reference, see *Vancouver Sun* 18 and 19 June 1907 and F.W. Howay British Columbia: The Making of a Province (Toronto: Ryerson Press, 1928) 266.

<sup>28</sup> Richard Marpole, Vancouver, general superintendent of the Pacific Division of the Canadian Pacific Railway, Report of the Royal Commission on Chinese and Japanese Immigration (1902) 194.

<sup>29</sup> John Hawkes The Story of Saskatchewan and Its People v.3 (Chicago and Regina: S.J. Clarke, 1924) 681, 690.

Sir – Having in mind the adjournment of the [Yoshi] case...I take the liberty of offering enlightenment as to the definition of the term “white” ... Fingier, the famous ethnologist, says that the white races or Caucasians include Europeans, Armenians and Russians, other than Tartars who are included in the Yellow or Mongolian class. The white races as defined above, are opposed to the black or Negroids, the brown Malays, the red or American aborigines, and the yellow or Mongolians, including the Chinese and Japanese.

This information can be readily obtained from any good encyclopaedia, and the writer humbly suggests that some reference be supplied the magistrates in this city, as it is deplorable that such culpable ignorance should delay or prevent the dispensation of justice. [...]

#### ONE WHO HAS LIVED IN CHINA<sup>30</sup>

The police magistrate issued his ruling the next day. He announced that he had decided to settle the question “by taking his own opinion,” and the names of the waitresses turned out to be key. The names revealed Russian and German nationality, and although the magistrate “did not think it necessary to go into the classification of the white race,” he was of the opinion by way of “illustration,” that “Germans and Russians were members of [the] Caucasian race.” The decision stands as a hallmark of the utility of law in consolidating various strains of national groups into a central “white” Canadian identity, in stark opposition to the “Asian” other.

The overt discussion of whiteness was far less central to the 1930 *R. v. Phillips* decision.<sup>31</sup> This was an era in which the Ku Klux Klan flourished in Canada, with active members estimated to number in the five- or six-figure range nationally.<sup>32</sup> Canadian offshoots of the racist American-based organization went by names such as the Ku Klux Klan of Kanada, the Kanadian Knights of the Ku Klux Klan, and the Ku Klux Klan of the British Empire. They spawned incendiary cross-burnings and fomented acts of intimidation, property damage, and inter-personal violence in furtherance of their goals of white Protestant supremacy. The KKK was preoccupied with notions of “race purity,” insistent that social, sexual and marital relations across “racial” lines signified white female exploitation and a violation of divine authority against the intermingling of “white and coloured blood.” The Canadian “Constitution and Laws of the Invisible Empire” declared it a “major offence” to be “responsible for the polluting of Caucasion [*sic*] blood

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<sup>30</sup> *Saskatoon Daily Star* “Letters to the Editor: The White Help Question”; *Regina Morning Leader* 19 August 1912.

<sup>31</sup> The Ontario Supreme Court records for this case were destroyed due to “extensive culling” of the Ontario Archives, but the Ontario Court of Appeal file is reported at (1930), 55 Canadian Criminal Cases 49.

<sup>32</sup> In 1925, there were estimates of eight thousand Klan members in Toronto and one thousand in both Woodstock and Dorchester. By 1927, ten thousand watched hooded Klansmen burn a six-foot cross in Moose Jaw, and subsequent reports credited the western wing of the KKK with having signed up 25,000 members. Alberta membership peaked between 5,000 and 7,000, but the Klan newspaper produced out of Edmonton purported to maintain a circulation of 250,000. For details, see Backhouse *Colour-Coded* 181-93.

through miscegenation.”<sup>33</sup> Klan members called for Canadian legislation to ban mixed-race marriages, and used more informal means to intimidate couples who defied their proscriptions.

On the night of 28 February 1930, 75 KKK members, clad in white gowns and hoods, marched through the town of Oakville, planted a massive cross in the centre of the main street, and set a torch to the oil-soaked rags tied around it. They then proceeded to the home of Ira Johnson, a man they believed to be a “Negro” who was engaged to be married to a “white girl” named Isabel Jones. They pounded on the door, demanded that the two come out, and then spirited Isabel away to the custody of the Salvation Army. The Klansmen burned a second cross on the front yard, and threatened Ira Johnson that if he was “ever seen walking down the street with a white girl again,” the Klan “would attend to him.”<sup>34</sup>

The combined pressure of African-Canadian citizens, organized labour and the Jewish community ultimately provoked the office of the attorney general to lay criminal charges against several of the men involved. Dr. William Phillips, a Hamilton chiropractor who had led the march, was convicted of “having his face masked or being otherwise disguised by night without lawful excuse,” a violation of the *Criminal Code*. The penalty dispensed at trial, a fine of fifty dollars, was upgraded to a jail sentence of three months on appeal. The trial generated much public debate about the goals of the KKK (most of it laudatory) and the methods by which it pursued its aims (somewhat more critical). In the midst of the furore, however, the *Toronto Star* dropped a bombshell with a front page headline proclaiming: “Has No Negro Blood, Klan Victim Declares.”<sup>35</sup>

The paper had done some investigative sleuthing to trace Ira Johnson’s heritage, and discovered that he claimed to be descended from white and “Indian” relations originally from Indiana and Maryland. The perennial conundrum of racial identity had surfaced, unbidden and ultimately unresolvable. The *Toronto Star* indicated that Johnson’s mother, described by the reporter as “a refined and intelligent woman,” was the daughter of Rev. Junius Roberts, a “white” who “preached for many years to negro congregations at Guelph, Hamilton and Oakville more than forty years ago.” Johnson explained that the reason his grandfather preached in a “church for negroes” was because “Mrs. Roberts was so dark that some objections had been taken to her by members of the white congregations.” Either Johnson’s maternal grandmother’s claim to be “a Cherokee Indian” had not convinced the concerned parishioners, or else they believed that “Indian” heritage was just as sullyng as Black. The *Toronto Star* indicated that Rev. Roberts’s father was of English and Scottish descent, while his mother was a “Cherokee half-breed from Indiana.” On his paternal side, Ira Johnson’s great-grandfather was another “Cherokee half-breed” and his great-grandmother was Irish.

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<sup>33</sup> Knights of the KKK of Kanada Provisional Constitution and Laws of the Invisible Empire (n.p. 1925) 19.

<sup>34</sup> For details, see Backhouse Colour-Coded 173-4.

<sup>35</sup> *Toronto Daily Star* 5 March 1930. See also *Hamilton Spectator* 6 March 1930, p.22.

For those seeking an immediate and definitive racial designation, this was a confusing welter indeed.<sup>36</sup>

Visual identification was equally slippery. The *Toronto Star* described Johnson as “a fine-looking man and nearly white.” Upon closer inspection, the reporter offered his opinion that Johnson’s “features” portrayed “his Indian connection.” The major clue seems to have been the Klan victim’s hair, which the reporter described as “black and straight.” Although in demeanour Johnson was “quiet and unassuming,” he stood “over six feet in height” and cut “quite a figure in the town.” The *Toronto Globe* learned that Johnson had been “refused liquor because he was an Indian,” but recounted that “reliable sources” among the Black community insisted that he had “coloured blood in his veins.” It is also possible that Ira Johnson’s last name may have played some role in racial reputation, since “Johnson” was the name of several prominent Black families in the area.<sup>37</sup>

The Klan offered no public commentary on these revelations, and refused to budge from its position condemning the marriage of Ira Johnson to Isabel Jones. It is possible that the Klansmen took equal offence at the potential intermarriage between a white woman and an “Indian,” or that they did not believe the detailed racial accounting published by the *Toronto Star*. On the other hand, the Klansmen may have refused to address the issue because of some embarrassment over their alleged misidentification of Ira Johnson as a “Negro.” In the world view of the Ku Klux Klan, precise racial classifications were a critical prerequisite for the proper ordering of society. Racial mixture of the sort depicted in the *Toronto Star*’s detailed summary tolled the death-knell to rigid racial hierarchy. The nightmare of trying to untangle Ira Johnson’s racial identity underscored even more poignantly the essential need to deter “miscegenation.” The colour lines had to be kept unsmudged. In the end, the puzzle remained unsolved. The couple at the centre of the controversy wed on 22 March 1930, married by a First Nations pastor of the United Church from the New Credit Six Nations Territory. The headline blazoned across the *London Free Press*, “Indian Marries Oakville Girl,” was ambiguous. One reading suggests that the newspaper had settled the dilemma of Ira Johnson’s racial ambiguity in favour of a First Nations’ designation. Another reading suggests that the “Indian” referred to was the pastor who performed the wedding ceremony.<sup>38</sup>

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<sup>36</sup> On the combined history of the Cherokee Nation and Blacks in the United States, see R. Bruce Shepard Deemed Unsuited: Blacks from Oklahoma Move to the Canadian Prairies in Search of Equality in the Early 20th Century Only to Find Racism in their New Home (Toronto: Umbrella Press, 1997) 19-21; Katja May African Americans and Native Americans in the Creek and Cherokee Nations, 1830s to 1920s (New York: Garland, 1996). On the complexity of designations regarding Black and Aboriginal communities, see also Jack D. Forbes "The Manipulation of Race, Caste and Identity: Classifying AfroAmericans, Native Americans and Red-Black People" The Journal of Ethnic Studies 17:4 (Winter 1990) 1-51.

<sup>37</sup> *Toronto Globe* 17 March 1930, p.13.

<sup>38</sup> *London Free Press* 24 March 1930, p.15.

The 1939 *Re Eskimos* decision offered the Supreme Court of Canada the widest opportunity yet to establish legal definitions of racial identity.<sup>39</sup> The dispute arose when two levels of government began to argue over who should pay for the food and supplies necessary to rescue the Inuit of the Ungava Peninsula in northern Quebec from starvation. The lives of the Aboriginal peoples of the Arctic had been profoundly disrupted by the intrusion of white traders, missionaries and police. The question was whether the federal government or the Quebec government ought to pay the costs of beginning to deal with the severe economic dislocation. The Quebec government argued that the Inuit, whom they erroneously called “Eskimos,” were “Indians,” for whom the federal government maintained responsibility under the constitution. The federal government insisted that “Eskimos” were racially distinct from “Indians” and remained the responsibility of the provincial government.<sup>40</sup> The resulting litigation allowed lawyers for the federal and Quebec governments to introduce voluminous exhibits and testimony from anthropologists, ethnologists and others who professed expertise in racial identification. The case offers a snapshot in time through which to study the historical foundations of racial classification.

The white scholars whose treatises were cited before the Supreme Court of Canada held varying opinions over the number of “races” that divided the world’s population. Early “scientific” classifications enumerated four: *Europaeus albus*, *Asiaticus luridus*, *Americanus rufus*, and *Afer niger*. Blumenbach identified five: Caucasian, Mongolian, Ethiopian, American, and Malayan. Nott and Gliddon changed the names slightly and added two more: European, Asiatic, Negro, American, Malay, Australian and Arctic. Deniker had arrived at no less than seventeen main races and twenty-nine sub-races.<sup>41</sup> The doctrines of natural selection and “survival of the fittest” laid the intellectual framework. Those who claimed descent from western European stock fancied themselves representatives of the highest plane of “civilization,” well above the more “primitive” racial stages. Anxious to pin down the categories more precisely, white physicians, biologists, psychologists and ethnologists conducted scores of studies. They measured head length, head width, face height, nose height, nose width, facial angle, stature, eye colour, hair colour and form, thickness of lips, and beard characteristics. Debates erupted over gradations of skin colour, with one anthropologist postulating that there were no fewer than thirty-four shades differentiating the races.<sup>42</sup>

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<sup>39</sup> *Re Eskimos*, [1939] 80 Supreme Court Reports 104.

<sup>40</sup> For details of the dispute and the case, see Backhouse *Colour-Coded* chapter 2.

<sup>41</sup> “Exhibit C-100,” Canada Case, at 384, citing C. Linnaeus *Systema Naturae* 5<sup>th</sup> ed. (London, 1747); Otto Klineberg *Race Differences* (New York: Harper, 1935) at 20, citing J.F. Blumenbach *Anthropological Treatises* (London, 1865); J.C. Nott and G.R. Gliddon *Types of Mankind* (Philadelphia, 1854); M. Muller *Lectures on the Science of Language* (London: 1864); Muller *Biographies of Words and the Home of the Aryas* (London, 1888); and J. Deniker *The Races of Man* (New York, 1900); references in “Exhibit C-46,” Canada Case at 267-302, “Exhibit C-100,” Canada Case at 384; Canada Factum at 24, 27, “Exhibit C-99,” Canada Case at 383, “Exhibit C-114,” Canada Case at 397-9.

<sup>42</sup> H.L. Shapiro *The Alaskan Eskimo: A Study of the Relationship between the Eskimo and the Chipewyan Indians of Central Canada* (New York: American Museum of Natural History,

Skull measurement was touted as the quintessential identifying characteristic, since scientists concluded that intelligence must be related to brain size. The celebrated white Philadelphia physician Samuel George Morton, whose writings were cited by counsel in *Re Eskimos*, collected thousands of human skulls between 1820 and 1851. Dr. Morton filled the cranial cavity with sifted white mustard seed, poured the seed back into a graduated cylinder, and read the skull's volume in cubic inches. Published in lavish, beautifully illustrated volumes, Morton's findings ascertained that the races descended in mental worth in the following order: 1) "whites" ranked into sub-groups in descending order, of "Teutons and Anglo-Saxons," "Jews," and "Hindus,;" 2) "Indians"; and 3) "blacks."<sup>43</sup>

The industrious measurers of cranial characteristics ran into problems when their theories ran afoul of their data. Shaken researchers discovered that "Eskimos, Lapps, Malays, Tartars and several other peoples of the Mongolian type" had larger cranial capacity than "the most civilized people of Europe." Instead of reordering the racial hierarchy, anthropologists circumvented the problem, claiming that "brain size and intelligence" might not correlate "at the upper end of the scale," because "some inferior groups" had "large brains." Others speculated that "almost all the peculiarities of the [Eskimo] skull" might harken back "to the masticatory apparatus," which had seen extraordinary development as a result of their "flesh and fish diet and the energetic uses to which they put their teeth." Comparable problems developed with the measurement of the arm. The famous white French scientist Paul Broca surveyed the ratio of the size of the radius bone in the lower arm to the humerus bone in the upper arm, on the theory that a long forearm was "more characteristic of the ape." His studies showed "blacks" to have relatively longer forearms than "whites," but "Eskimos and Australian Aborigines" to have shorter forearms than either. Some suggested that, at least in the case of the Eskimos, the frigid Arctic weather might have stunted arm growth.<sup>44</sup> There were a few countervailing voices, some of whom noted that all of these data were

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1931); Thomas F. Gossett Race: The History of an Idea in America (Dallas: Southern Methodist University Press, 1963) at 69, citing Paul Broca, who founded the Anthropological Society in Paris in 1859.

<sup>43</sup> Canada Factum at 24; "Exhibit C-100," Canada Case at 384-7; "Exhibit C-114," Canada Case at 397-9; Stephen Jay Gould "American Polygeny and Craniometry before Darwin: Blacks and Indians as Separate, Inferior Species" in Sandra Harding ed. The "Racial" Economy of Science (Bloomington: Indiana University Press, 1993) at 99-102.

<sup>44</sup> Klineberg Race Differences at 36, 77; William I. Thomas "The Scope and Method of Folk-Psychology" American Journal of Sociology v.1 (November 1895) 434 at 436-7; Kay Birket-Smith The Eskimos (London: Methuen, 1959, orig. pub. 1936, 1<sup>st</sup> Danish ed. 1927) at 42; H.L. Shapiro "Extract from Some Observations on the Origin of the Eskimo" (Toronto, 1934), Exhibit Q-190" at 665; Shapiro "Monograph on the Indian Origin of the Eskimo (New York: 1937), Exhibit Q-193" at 698, both in Quebec Case; Paul Broca "Sur les proportions relatives du bras..." Bulletin Société d'Anthropologie Paris 3:2 (1862) 1 at 11; A. Fullerton & Co. "Extracts from Gazetteer of the World (London 1857) Exhibit Q-133" in Quebec Case at 401.

extremely unreliable, but the importance of the hierarchical classification exercise was rarely contested.<sup>45</sup>

Scientists who professed to research the anthropological traits of “Eskimos” were described as specialized “Eskimologists.” Diamond Jenness, one of the most prominent of this group, published studies that professed to be able to identify Eskimos by their skin colour, hair, cheekbones, stocky build, nose, face and head, skull, jaw, teeth, legs, arms, hands, and feet. Jenness testified on behalf of the federal government that although some scholars considered Eskimos “but an offshoot of the Indians,” he thought the verdict was still out.<sup>46</sup> Kaj Birket-Smith, another “Eskimologist,” claimed that the Eskimos represented a complex racial puzzle:

The racial position of the Eskimos then may be approximately expressed thus, that the face is Asiatic Mongoloid and the brain-case of the ‘Lagoa Santa-type,’ while the exceedingly narrow nose places them outside both categories. Their blood group may or may not place them on the same level of development as the American Indian. Not much more can be said until the science of genetics has advanced farther than at present.<sup>47</sup>

The lawyers for the federal government urged the Supreme Court to draw a legal distinction between “Eskimos” and “Indians,” stressing that no one could deny that the “Eskimo had evolved a distinct civilization and that in physical characteristics, culture, customs, habits and language he forms a group highly differentiated from any of the other aborigines.” The lawyers for Quebec, on the other hand, claimed that “Eskimos” were Indians “by their blood,” and “by definition.” “In a zoological sense,” they argued, “our eastern Eskimos of the Province of Quebec” can reasonably be believed to be Indians “in bone, flesh and blood.”<sup>48</sup>

Legal decisions drawing racial distinctions in the past had been based on an amazing array of factors: language, customs and habits, mode of life, manner of dress, diet, demeanour, occupation, wealth, voting history, religion, blood, skin colour, head shape, hair texture, thickness of lips, beard characteristics, facial features, teeth size, eye shape and colour, nasal aperture, cranial capacity, stature, intermarriage, adoption, legitimacy at birth, place of residence, reputation, and the racial designation of one’s companions, to offer just a few examples. Presented with the confusing welter of

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<sup>45</sup> For example, Klineberg Race Differences critiqued Dr. Morton’s data as “extremely unreliable” on brain weight and volume, due to inconsistent preservation methods and differential skull shrinkage.

<sup>46</sup> “Exhibit C-47” Canada Case at 303-4, citing Diamond Jenness Indians of Canada (Ottawa: National Museum of Canada, 1932) at 246-7; Diamond Jenness “The Problem of the Eskimo” in Jenness The American Aborigines: Their Origin and Antiquity (Toronto: University of Toronto Press, 1933) at 374.

<sup>47</sup> Birket-Smith The Eskimos at 44, extracts quoted in “Exhibit Q-191” Quebec Case at 67-93.

<sup>48</sup> Canada Factum at 23, 27; Quebec Factum at 2, 22, 25, 62.

anthropological evidence in *Re Eskimos*, the Supreme Court judges seem to have throw up their hands and shrunk from entangling themselves in the morass. In the end, they did not hesitate to pronounce “Eskimos” to be “Indians.” But they did so without reference to the avalanche of anthropological studies cited in argument. Perhaps this was wise, given the profuse and rambling list of variables proffered by the scientists.

Instead, the court relied on 19<sup>th</sup> century correspondence, proclamations and dictionaries, all written exclusively by persons of European heritage. The deciding factors were promulgated with no apparent concern for the absence of Aboriginal perspective. An English House of Commons committee had placed the Eskimo under the general designation “Indians” in census documents and a map in 1856-1857. Officials of the Hudson’s Bay Company regarded the “Eskimo” as “an Indian tribe” prior to Confederation. In 1762, General Murray, governor of Quebec, had classified the “Eskimos” as “Savages,” a term frequently used in preference to “aborigènes,” “indigènes,” or “Indiens” in the French language. Proclamations from government officials, journals from explorers, and reports from missionaries, clergymen, cartographers, and geographers made reference to the term “Esquimaux Indians.” And there were dictionaries that had defined the “Esquimaux” as “Indians.”<sup>49</sup> No persons of Aboriginal heritage were consulted or permitted to speak to an issue that would have an enormous impact on their status in law. Indeed, no one seems to have thought their omission worthy of comment. And no one seems to have criticized the justice system for drawing such arbitrary racial lines in the face of overwhelmingly contradictory data. The law required that “Eskimos” be classified as “Indians” or “not Indians,” and the Supreme Court was prepared to rise to the task.

The 1946 criminal prosecution of Viola Desmond, Canada’s predecessor to Rosa Parks, presents yet another significant moment in the history of racial classification in law. Viola Desmond was a thirty-two-year-old, Halifax-born beauty salon entrepreneur, whose car broke down while she was on a business trip to New Glasgow, Nova Scotia. Forced to wait while her Dodge sedan was being repaired, she decided to take in the evening movie at the Roseland Theatre. Although Viola Desmond asked to purchase a main floor ticket, the white cashier would only sell her a balcony ticket, explaining: “I’m sorry but I’m not permitted to sell downstairs tickets to you people.” Recognizing instantly that she was being denied seating on the basis of her race, Viola Desmond made the spontaneous decision to take a seat in the downstairs portion of the theatre. The white theatre manager, with the assistance of the white police chief, arrested Desmond, and physically dragged the petite, four-foot-eleven inch woman, who weighed less than 100 pounds, out of the cinema and down to the jail.<sup>50</sup>

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<sup>49</sup> *Re Eskimos* at 117.

<sup>50</sup> *His Majesty the King v. Viola Irene Desmond*, Public Archives of Nova Scotia, RG39, “C” Halifax, v.937, Supreme Court of Nova Scotia no. 13347; *The King v. Desmond* (1947), 20 Maritime Provinces Reports 297 (Nova Scotia Supreme Court). For a more detailed discussion of the case, see Backhouse *Colour-Coded*, chapter 7.

She was brought before the white, New Glasgow police magistrate the next morning, and charged with tax evasion. The astonishing legal ploy was necessary because there were no formal laws on the books to enforce racial segregation in theatres. Instead, the authorities used the provincial *Theatres, Cinematographs and Amusements Act*, which required that theatre patrons pay an amusement tax based on the price of the ticket. The Roseland Theatre charged forty cents for downstairs seats, and thirty for upstairs seats. These prices included a tax of three cents on the downstairs tickets and two cents on the upstairs. Since Viola Desmond had insisted on sitting in a downstairs seat, while holding an upstairs ticket, she was one cent short on tax. Viola Desmond was the only non-white person in court during her trial. She was not advised of her right to counsel, or told she might seek an adjournment. Her efforts to explain that she had offered to purchase the more expensive downstairs ticket and been rebuffed, were ignored. She was convicted and fined twenty dollars and costs.

Shocked and dismayed by her arrest and conviction, Viola Desmond returned home to Halifax and began to organize the Black community to help her mount an appeal. A solidly middle-class business woman who was married to a Black barber, Viola Desmond owned “Vi’s Studio of Beauty Culture,” which provided hair and cosmetic services to a racially-mixed clientele in the old north end of Halifax. Her “Desmond School of Beauty Culture” trained Black female beauticians drawn from across Nova Scotia, New Brunswick and Quebec, all of them denied admission to whites-only beauty academies. Viola Desmond spoke with a number of the leaders of the Black community in Halifax, who convened a meeting of the newly-organized Nova Scotia Association for the Advancement of Colored People (NSAACP). The question of whether to appeal Viola Desmond’s conviction, and whether to begin fund-raising to bankroll such an initiative, provoked some internal debate. Those who expressed caution seem to have been motivated by fears of fostering racist backlash, concerns about using the law to confront racial segregation, and questions about whether equal admission to theatres was a pressing issue. Some wrote letters to the Black newspaper arguing that jobs and housing were far more fundamental to racial uplift. Those who advocated the elimination of racial segregation in public facilities eventually won out, and the NSAACP joined with the Black press to support the legal challenge.

Underlying some of the internal dissension was the question voiced in some quarters of whether Viola Desmond might have been trying to “pass” as white on the evening that she was arrested.<sup>51</sup> Viola Desmond had a complicated family history, with a degree of racial diversity that made firm racial characterizations tenuous. She had been born into a prominent, middle-class, self-identified “coloured” family. Her father and paternal grandfather were both self-employed Black barbers and businessmen, who had carved out a successful living in Halifax’s North End. Viola’s mother, Gwendolin Irene Davis was the daughter of a Baptist minister, Henry Walter Johnson, who has been described by one of his descendants as “maybe seven-eighths white” and who identified as being

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<sup>51</sup> For reference to allegations that Viola Desmond might have been trying to “pass,” see Interview with Wanda Robson, Viola Desmond’s sister, conducted by Constance Backhouse, North Sydney, 22 March 1995.

“of mixed race.” Describing the racial designation of Viola Desmond’s maternal grandfather, this family descendent noted: “His father was a white plantation owner.... I can’t tell you about his mother – I don’t know. This is where the mixed race comes in. Henry Walter Johnson was maybe seven-eighths white – who is white, who is Black, I don’t know.”<sup>52</sup> Viola Desmond’s maternal grandmother, Susan Smith, is generally identified as “white.”<sup>53</sup> The problems of racial classification are exemplified by a mixed race history such as this. Even within Viola Desmond’s family, there was disagreement about designation. Given the racial history of Viola’s maternal grandparents, some members of the family identified Gwendolin Irene Davis as “white,” while others defined her as “Black.”<sup>54</sup>

Some have suggested that it is a fundamental premise of racial ideology, rooted in the history of slavery, that if individuals have even “one Black ancestor,” regardless of their skin colour, they qualify for classification as “Black.”<sup>55</sup> A 1920 decision of the Ontario High Court depicted the child of a “white” mother and a “negro” father as “coloured.”<sup>56</sup> The instructions given to Canadian enumerators for the early 20<sup>th</sup> century censuses indicated that “the children begotten of marriages between white and black or yellow races” should be “recorded as Negro, Chinese, Japanese, Indians, etc., as the case may be.”<sup>57</sup> Yet the tensions posed within a racist society by mixed-race families often came home to roost on the children born to James and Gwendolin Davis. Viola’s younger sister recalls children taunting them in the schoolyard, jeering: “They may think you’re white because they saw your mother at Parents’ Day, but they haven’t seen your

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<sup>52</sup> Interview with Wanda Robson, Viola Desmond’s sister, conducted by Constance Backhouse, North Sydney, 22 March 1995.

<sup>53</sup> Interview with Wanda Robson, Viola Desmond’s sister, conducted by Constance Backhouse, North Sydney, 22 March 1995.

<sup>54</sup> Wanda Robson described Gwendolin Irene Davis as “white;” Interview with Wanda Robson, Viola Desmond’s sister, conducted by Constance Backhouse, North Sydney, 22 March 1995. Sharon Clyde Oliver, J.D., a niece of Viola Desmond and the daughter of Emily (Desmond) Clyde, described Gwendolin Irene Davis as “Black,” noting: “She was the daughter of Rev. Henry Johnson, a Black Baptist minister from New Haven, Connecticut, via Virginia. Her mother, my great-grandmother was White and died when my grandmother Gwendolin was young. Rev. Johnson brought Gwendolin to Nova Scotia when she was in her late teens. Mrs. Elizabeth Parsons, a wonderful woman from Lucasville boarded her until she met and married my Grandfather Jim Davis. Gwendolin, mother of 13 children, participated actively with the Black women’s group in Halifax to improve social conditions for women and children. She strongly identified with the Black community and race. I know Grandmother would be very disturbed if history reflects the mother of Viola was white.” Communication from Sharon Oliver to Constance Backhouse, email 6 February 2001.

<sup>55</sup> F. James Davis *Who Is Black? One Nation’s Definition* (University Park: Pennsylvania State University Press, 1991).

<sup>56</sup> *Gordon v. Adamson* (1920), 18 Ontario Weekly Notes 191 at 192 (Ontario High Court).

<sup>57</sup> See, for example, W. Burton Hurd “Racial Origins and Nativity of the Canadian People” *Census of Canada 1931* v.13 (Ottawa: Supply and Services, 1942) at vii.

father.” Viola Desmond self-identified both as “mixed race” and as “coloured,” the latter being a term of preference during the 1930s and 1940s.<sup>58</sup>

The evidence does not bear out the speculation that Viola Desmond was trying to “pass” as white in the Roseland Theatre the evening of her arrest. She was apparently unaware of the segregated seating policy, and initially sought a seat on the main floor because she was short-sighted and had found that she could see the picture more clearly from closer range. When she was told to remove herself to the balcony, she made the decision to stay seated as part of a conscious effort to demand equality for the Black community in Nova Scotia, not as part of any ploy to profess white identity. Those Black individuals who queried Viola Desmond’s motivation were eventually outvoted. The Black community rallied strongly in her support, raised funds to finance the hiring of legal counsel, and firmly backed Viola Desmond’s determined efforts to seek redress. Their collective efforts to challenge the legal decision resulted in tragic defeat when the Nova Scotia Supreme Court dismissed the application for judicial review in 1947.<sup>59</sup> The failure of the legal battle allowed a brief upsurge of internal critique once more, as some Blacks labelled Viola Desmond a “racial agitator” whose mother’s white heritage had caused her to put on airs and sit where she ought never to have sat.<sup>60</sup> But this was a distinctly minority opinion, with most observers noting that the legal challenge had created a dramatic upsurge in race consciousness within the Black community. The white lawyer who had defended Viola Desmond donated his fee back to the NSAACP, which used the funds to finance a number of successful campaigns for integration within the workplace.<sup>61</sup> Reverend William Pearly Oliver, reflecting upon the significance of Viola Desmond’s actions some years later claimed that the “aggressive

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<sup>58</sup> Wanda Robson discusses her sister’s racial identification in the following terms: “Would Viola have defined herself as ‘mixed race’? Of course. Would you be wrong in describing her as Black? Not as far as I am concerned. I am of the generation that was raised to be proud of being Black. Viola is clearly Black. I know what I am, she is my sister.” Interview with Wanda Robson.

<sup>59</sup> The writ of *certiorari* was dismissed by Supreme Court Justice Maynard Brown Archibald, sitting alone, and again upon review by the full court of Justice John Doull, Robert Henry Graham, William Francis Carroll and William Lorimer Hall. The judicial review was argued on the technical issues of jurisdiction and procedural due process, without any overt reference to race. Although the judges were well aware of the racial significance of the case, the decision was based solely on jurisdictional and procedural grounds, allowing the bench to hide behind abstract technicalities as it turned its back on Black claims to racial equality and wielded the force of law to bolster racist seating policies.

<sup>60</sup> Walter A. Johnson, a Black Haligonian employed as a chef in the Immigration department, criticized Viola Desmond in these terms at an Ottawa national convention of the Liberal Party in October 1948; see “N.S. Negroes Libelled by Attack” *Truro, N.S. The Clarion* 3:8 (13 October 1948) at p.1.

<sup>61</sup> Backhouse Colour-Coded at 271.

effort to obtain rights” had “enhanced the prestige of the Negro community throughout the province” and spawned “much of the positive action” that subsequently ensued.<sup>62</sup>

The six cases described above provide a series of glimpses into the historical construction of racial identity within the Canadian legal system during the first half of the 20<sup>th</sup> century. To adopt Himani Bannerji’s words, the records reveal multiple versions of “identity,” with moments of “distinctness” and moments of “slippage.” Her question as to who experiences the “passion of naming” as a positive “creation of a community” and who experiences it as an “exclusion” seems fairly clearly answered.<sup>63</sup> Whites benefited from the hierarchical racial classifications that were delineated by Canadian legislators and judges, while people of colour were systematically denied access to full civic participation, social justice, economic opportunities and public services. Whiteness has always been an affirmative racial identity, from which extraordinary privilege, power and entitlement flow. Undeniably, there must have been many moments in Canadian history when individuals and communities of colour claimed their multiple racial identities with great pride and recognition of shared heritage. But the legal record unearths precious little trace of the utilization of Canadian law as a tool to enhance civic participation and social justice within the multiplicity of racialized communities.

Many Canadians mistakenly think of their history as primarily “raceless” and as comparatively innocent of racism.<sup>64</sup> Yet our legislators and judges routinely drew racial designations that played havoc with legal entitlements. Recognition that the process of hierarchical racial classification has proved devastatingly disadvantageous to people of colour is the first step towards reconciling the historical record of unmerited white privilege. We cannot begin to debate strategies and devise policies to eradicate racism if we remain ignorant of the pervasive history of racism in Canada. Societies are not shaped by accident. The level of white privilege that exists today within the Canadian political framework, economic structure, social landscape and legal system is not the result of white merit. It is the direct result of individual and systemic race discrimination.

There is a critical role for historians and other researchers to play at this juncture. We must explore past and current manifestations of racism, and produce persuasive expositions and analyses of the racial injustice that underlies Canadian legal, political, economic and social structures. We must ensure that this research is presented to legislators, judges, policy makers, students and citizens generally. The information needs to be produced in a variety of formats that encompass scholarly publications as well as documentary film, radio, television, newspaper and magazine articles. Organizations such as the CBC, the National Film Board and other governmental and non-governmental cultural agencies should be partners in such projects. We must also

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<sup>62</sup> Colin A. Thomson Born with a Call: A Biography of Dr William Pearly Oliver, C.M. (Dartmouth, N.S.: Black Cultural Centre, 1986) at 84.

<sup>63</sup> Himani Bannerji Thinking Through: Essays on Feminism, Marxism, and Anti-Racism (Toronto: Women’s Press, 1995) at 17, 20-1.

<sup>64</sup> For a detailed discussion of the Canadian mythology of “racelessness” and the “stupefying innocence” of racism, see Backhouse Colour-Coded at 1-14.

be prepared to meet the predictable responses of some Canadians who will simply say “so what?” Historians and other researchers will need to make a convincing case that evidence of past injustice demands public apology, redress, and creative, affirmative efforts to dismantle the legacy of historical racism.

The effort to transform Canadian consciousness will undoubtedly provoke incredulity, defensiveness, resistance and outright hostility. Many white Canadians are highly vested in the comfortable assumption that they are free of racial prejudice and owe their status in society to merit and earned rewards. Many will take issue with the public critique of unearned white privilege. The revision of Canadian history and mythology to encompass the fullness of racialization may initially lead to rancorous debate and painful rifts. The path towards reconciliation is unlikely to be either short or straight. This is not a reason to hesitate from tackling historic injustices. It is just to register a caution that the relationships may become more fractured before they become healthier.

Once Canadians recognize their culpability for inheriting the results of racism, the second step is to chart a new path of racial construction. Although it is tempting to latch on to the powerful critique of racial classification to demand an elimination of all racial designations, this would be highly premature. Proponents of “race-neutrality” fail to recognize that our society has been built upon centuries of racial division and discrimination. To advocate “colour-blindness” as an ideal for the immediate future is to condone the continuation of white supremacy across Canadian society. The entrenched patterns of racial discrimination require concerted and multi-directional challenges, many of which will require the use of racialized classifications to reverse centuries of unearned white privilege. If the lessons of history teach anything, it is that strategies that foster racial equality should not utilize concepts of racial identity equally for whites and people of colour. Racialized designations ought not to be allowed in the service of white claims to rights or entitlements. But where such designations are required to allow historically oppressed communities to overturn past injustices, this is a positive and legally justifiable mechanism to secure full civic participation and social justice for the racially disadvantaged. Racial identification must not be permitted to maintain past and existing racial hierarchies, but only to dismantle them. As Bannerji argues: “Identities need to be signs and signals of the future – they must speak to individuals as collectivities of resistance, summoning and interpellating them in their names of resistance, beyond the ‘house of bondage.’”<sup>65</sup>

In order to achieve a full recognition of the historical and current levels of racism in Canada, much research remains to be completed. “Race” is a mythical construct, but “racism” is not. To document the full dimensions of racist practice, a much fuller understanding of the historical construction of racial identification is necessary. This paper begins to address the impact of racialization in law, but many questions remain outstanding. How have “white” Canadians divided themselves from the individuals and groups they designate as “racially other”? To what extent did racially subordinated groups construct their own racial identities? What combinations of factors have whites

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<sup>65</sup> Bannerji Thinking Through at 37.

used to delineate “race” through time? Are these same factors accepted by racially subordinated communities, or do they prefer to use distinctive methods of identification? What practical impact has such racial distinction had upon whites and other racialized communities? Is there any record of resistance to the process of racialization? From whites? From within racially subordinated groups? Assuming that such records exist, what avenues of resistance proved successful, and what strategies did not? Is it possible to develop policies that use racial identifications in service of anti-racist work, but to deny racial identifications that continue to privilege whites? The recent publication of a series of books exploring the history of race and racism in Canada has only begun to skim the surface of such questions. Much remains for study.

As answers to these outstanding research questions are pursued, it will be critical to avoid the pernicious patterns of the past, where white scientists, legislators, lawyers and judges captured complete authority to develop racial classifications and policies without consultation or input from racially subordinated groups. As we attempt to work towards racial reconciliation, it is minority groups which must hold power over matters of racial definition and analysis. Members of racially subordinated groups must be centrally involved in the design of future research, in the prioritizing of research agendas, in the conduct and dissemination of all such investigations. The unfortunate legacy of centuries of racism means that racially subordinated groups will probably experience internal disagreements between differently-situated racial communities. The prospect of such difficulties must not detract from the necessity of ensuring that all racial identity research remains supervised and controlled by minority groups. This is probably the single most obvious lesson from the legacy of Canada’s legal history.