

Articles

Constance Backhouse*

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

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

In 1947
Viola Desmond was arrested
At the Roseland Theatre in New Glasgow,
Viola had gone that evening to see her
favourite show,
In New Glasgow a law forbids blacks from
sitting in the downstairs section,
It was reserved for whites only.
They wanted her to go upstairs
Because it was the balcony —
They called it “A Nigger’s Heaven.”
I CRY —
Feeling the depth of black pain

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

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

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

I. *The Arrest at the Roseland Theatre*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. *The Trial*

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

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

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

7. "Negress Alleges", *ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

even mentioned that Viola Desmond was Black, that her accusers and her judge were white. On its face, the proceeding appears to be simply a prosecution for failure to pay provincial tax. In fact, if Viola Desmond had not taken any further action in this matter, the surviving trial records would leave no clue to the real significance of the case.²¹

III. *The Community Responds to the Conviction*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47. Pearleen Oliver, *supra* note 26.

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

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

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

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