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

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

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

> 13A. (1) The publication of a libel against a race or creed likely to expose persons belonging to the race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, shall entitle a person belonging to the race or professing the creed to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of King's Bench is empowered to entertain the action.
>
> (2) The action may be taken against the person responsible for the authorship, publication, or circulation of the libel.
>
> (3) The word "publication" used in this section shall be interpreted to mean any words legibly marked upon any substance or object signifying the matter otherwise than by words, exhibited in public or caused to be seen or shewn or circulated or delivered with a view to its being seen by any person.

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

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

> s.1. No person shall -
>
> (a) publish or display or cause to be published or displayed; or
>
> (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls,
>
> any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106. See *ibid.*:

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

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

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

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

V. *Preparing for Legal Battle*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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rooted in breach of contract, recounting that the plaintiff tried to show that Hawes "had no knowledge of [the double price] arrangement when he gave his order, and that the bill of fare from which he ordered constituted a contract. . . ." The contract issues appear to have been ignored by the court. Counsel for Hawes, Mr. Barr, sought leave to appeal, but this was denied.

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

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

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

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

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

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

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

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

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

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

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

Christie v. *The York Corporation*, ultimately reaching a similar result, had wound its way through the Quebec court system right up to the Supreme Court of Canada in 1939.[121] The litigation began when the white manager of a beer tavern in the Montreal Forum declined to serve a Black customer in July of 1936. Fred Christie, a resident of Verdun, Quebec, who was employed as a private chauffeur in Montreal, had sued the proprietors for damages. Louis Philippe Demers J., a white judge on the Quebec Superior Court, initially awarded Christie $25 in compensation for humiliation, holding that hotels and restaurants which provided "public services" had "no right to discriminate between their guests."[122] The majority of the white judges of the Quebec Court of King's Bench had reversed this ruling, preferring to champion the principle that *"chaque proprietaire est maitre chez lui"*.[123] This philosophy was endorsed by the majority of the white judges on the Supreme Court of Canada, who agreed that it was "not a question of motives or reasons for deciding to deal or not to deal; [any merchant] is free to do either." Conceding that the "freedom of commerce" principle might be restricted

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

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

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

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

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

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

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

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

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

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124. *Christie* (S.C.C.), *supra* note 121 at 141ff, Rinfret J.
125. *Loew's*, *supra* note 42 at 462, Carroll J.
126. *Rogers*, *supra* note 42, O'Halloran J.A.
127. *Christie* (C.A.), *supra* note 121 at 125–39.

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

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

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

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

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

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

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

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

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

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

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

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

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

Archibald J.'s recollection of the legal history of slavery in Canada was something of a benign understatement. The first Black slave arrived in Quebec in 1628, with slavery officially introduced by the French into New France on 1 May 1689.[133] After the British Conquest in 1763, General Jeffery Amherst had confirmed that all slaves would remain in the possession of their masters.[134] In 1790 the English Parliament had expressly authorized individuals wishing to settle in the provinces of Quebec and Nova Scotia to import "negroes" along with other "household furniture, utensils of husbandry or cloathing" free of duty.[135] In 1762 the Nova Scotia General Assembly gave indirect statutory recognition to slavery when it explicitly adverted to "Negro slaves" in the context of an act intended to control the sale of liquor on credit.[136] In 1781 the legislature of Prince Edward Island (then Isle St. Jean) passed an act declaring that the baptism of slaves would not exempt them from bondage.[137]

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

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

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

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

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

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

> Whereas some Doubts have arisen whether Slaves by becoming Christians, or being admitted to Baptism, should, by Virtue thereof, be made free:
>
> I. Be it therefore enacted by the Governor, Council, and Assembly That all Slaves, whether Negroes or Mulattos, residing at present on this Island, or that may hereafter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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