severe curtailment of Black educational and occupational opportunities, which placed impenetrable restrictions upon full participation in Canadian society; and the many instances of inter-racial mob violence which had marred Canadian history. A creative lawyer might have contended that rules which enforced racial divisions undeniably fomented immorality and the disruption of public peace.

Similar arguments had been made before the Ontario Supreme Court in 1945, in the landmark case of *Re Drummond Wren*. The issue there was the legality of a restrictive covenant registered against a parcel of land, enjoining the owner from selling to "Jews or persons of objectionable nationality." Noting that there were no precedents on point, Justice John Keiller MacKay, a Gentile, quoted a legal rule from *Halsbury*: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy."[142] Holding that the covenant was unlawful because it was "offensive to the public policy of this jurisdiction", MacKay J. stated:

> In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas. . . . It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.[143]

The common law was not carved in stone, nor was the judicial understanding of "public policy", which as MacKay J. stressed, "varies from time to time."[144]

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142. *Re Wren*, [1945] O.R. 778, 4 D.L.R. 674 (H.C.), MacKay J. [hereinafter *Wren* cited to O.R.].

143. *Ibid.* at 782.

144. *Ibid.* at 780. See also *Essex Real Estate Co.* v. *Holmes* (1930), 37 O.W.N. 392 (H.C.), in which the court took a narrow interpretation of the following restrictive covenant: "that the lands shall not be sold to or occupied by persons not of the Caucasian race nor to Europeans except such as are of English-speaking countries and the French and the people of French descent", holding that a Syrian was not excluded by such a clause. See also *Bryers* v. *Morris* (1931), 40 O.W.N. 572 (H.C.).

In assessing his strategy in the Desmond case, Bissett would have had to consider many factors: the wishes of his client, the resources available to prepare and argue the case, the social and political climate within which the case would be heard, and the potential receptivity of the bench. Viola Desmond would have been soundly behind a direct attack on racial

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One year after the Desmond litigation, another set of white Gentile judges would disagree with MacKay J.'s ruling. In *Noble* v. *Alley*, [1948] O.R. 579, O.W.N. 546, 4 D.L.R. 123 (H.C.), aff'd [1949] O.R. 503, O.W.N. 484, 4 D.L.R. 375 (C.A.), they explicitly upheld a restrictive covenant prohibiting the sale or lease of a summer resort property to "any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood". Fearful of "inventing new heads of public policy" that would impede "freedom of association", the judges espoused racial exclusivity as an obvious social right. Ontario Court of Appeal Chief Justice Robert Spelman Robertson wrote:

> It is common knowledge that, in the life usually led at such places, there is much intermingling, in an informal and social way, of the residents and their guests, especially at the beach. That the summer colony should be congenial is of the essence of a pleasant holiday in such circumstances. The purpose of [the restrictive covenant] here in question is obviously to assure, in some degree, that the residents are of a class who will get along well together. To magnify this innocent and modest effort to establish and maintain a place suitable for a pleasant summer residence into an enterprise that offends against some public policy, requires a stronger imagination than I possess. . . . There is nothing criminal or immoral involved; the public interest is in no way concerned. These people have simply agreed among themselves upon a matter of their own personal concern that affects property of their own in which no one else has an interest.

This ruling was later overturned, *Noble* v. *Alley*, [1951] 92 S.C.R. 64, 1 D.L.R. 321. The Supreme Court justices made no explicit comment on the public policy reasoning of the earlier decisions. Instead they held the covenant void for uncertainty: "it is impossible to set such limits to the lines of race or blood as would enable a court to say in all cases whether a proposed purchaser is or is not within the ban." See also *McDougall* v. *Waddell*, [1945] O.W.N. 272 (H.C.), where the court considered a restrictive covenant that prohibited the sale or occupation of lands "by any person or persons other than Gentiles (non-semetic [sic]) of European or British or Irish or Scottish racial origin." The court held that such provisions did not violate the newly enacted Ontario *The Racial Discrimination Act, 1944*, S.O. 1944, c. 51, and that there were no legal restrictions to affect their implementation.

Ontario would become the first province to ban restrictive covenants in 1950, when it passed *The Conveyancing and Law of Property Amendment Act*, S.O. 1950, c. 11, which received royal assent on 24 March 1950. Section 1 provided:

1. *The Conveyancing and Law of Property Act* is amended by adding thereto the following section:

> RESTRICTIVE COVENANTS
>
> 20a. Every covenant made after this section comes into force which but for this section would be annexed to and run with land which restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person shall be void and of no effect.

Manitoba would be second, banning restrictive covenants that same year, when it passed the *Manitoba Property Act*, *supra* note 102 at 6A:

> "Every covenant made after this section comes into force that, but for this section, would be annexed to and run with land and that restricts the sale, ownership, occupation, or use, of land because of the race, colour, nationality, ancestry, place of origin, or creed of any person shall be void."

segregation. She had come seeking public vindication for the racial discrimination she had suffered. The community support and funding from the NSAACP would have strengthened her claim. The Halifax beautician would have been viewed as a conventionally "good" client, a successful business entrepreneur, a respectable married woman who had proven to be well-mannered throughout her travails. The traditional assumptions about race relations were also under some scrutiny. Although Nova Scotians continued to sponsor racial segregation in their schools, housing and work force, the unveiling of the Nazi death camps toward the end of World War II had riveted public attention upon the appalling excesses of racial and religious discrimination. In October of 1945 the Canadian Parliament had entertained a motion to enact a formal Bill of Rights, which would guarantee equal treatment before the law, irrespective of race, nationality, religious or political beliefs.[145] Public sentiment might have been sufficiently malleable to muster support for more racial integration. Viola Desmond's case potentially offered an excellent vehicle with which to test the capacity of Canadian law to further racial equality.

But Frederick William Bissett decided not attack the racial segregation directly. Perhaps he simply accepted the Supreme Court of Canada ruling in *Christie* v. *York Corporation* as determinative. Perhaps he could not imagine how to push the boundaries of law in new, more socially progressive directions. Perhaps he was intimately acquainted with the white judges who manned the Nova Scotia courts, and knew their predilections well. Whatever the reason, Bissett settled upon a more conventional litigation strategy. That he would fail, even in this more limited effort, may suggest that a more dramatic challenge would have fallen far short of the goal. I prefer to think that the stilted narrowness of the vision dictated an equally narrow response.

VI. *Rex versus Desmond*

Bissett caused a writ to be issued on Wednesday, 14 November 1946, naming Viola Desmond as plaintiff in a civil suit against two defendants, Henry L. McNeil and the Roseland Theatre Co. Ltd. Bissett alleged that Henry MacNeil had acted unlawfully in forcibly ejecting his client from the theatre. He based his claim in intentional tort, a legal doctrine that contained little scope for discussion of race discrimination. The writ

145. The debate on the motion, which failed to lead to the incorporation of a Bill of Rights in the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act*, 1867), is recorded in U.K., H.C., *Parliamentary Debates*, col.900 (10 October 1945).

stipulated that Viola Desmond was entitled to compensatory damages on the following grounds: 1) assault, 2) malicious prosecution, and 3) false arrest and imprisonment.[146] Bissett did not add a fourth and lesser known tort, abusing the process of the law, which might have offered more scope for raising the racial issues that concerned his client.[147] The three grounds he did enunciate were all advanced in racially neutral terms.

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146. See *Viola Irene Desmond* v. *Henry L. McNeil and Roseland Theatre Co. Ltd.,* P.A.N.S. RG 39 "C", [Halifax] vol. 936–937, Supreme Court of Nova Scotia, #13299, filed 14 November 1946. On 12 December 1946, Bissett filed a notice of discontinuance against the Roseland Theatre Company Ltd., along with a writ alleging the same claim against the parent corporation: *Viola Irene Desmond* v. *Odeon Theatres of Canada Ltd. & Garson Theatres Ltd.*, P.A.N.S. RG 39 "C" [Halifax] vol. 936–37, Supreme Court of Nova Scotia, #13334.

"Assault" is defined as "an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant." "Battery" is defined as "the intentional application of force to another person." Bissett must have meant his claim for "assault" to cover "battery" as well. "False imprisonment" is defined as "the infliction of bodily restraint which is not expressly or impliedly authorized by the law." In an action for "malicious prosecution", the plaintiff was "required to prove: 1) that the defendant prosecuted him; and 2) that the prosecution ended in the plaintiff's favour; and 3) that the prosecution lacked reasonable and probable cause; and 4) that the defendant acted maliciously." See P.H. Winfield, *A Text-Book of the Law of Tort* (Toronto: Carswell, 1946) at 207ff. See also W.T.S. Stallybrass, *Salmond's Law of Torts* (Toronto: Carswell, 1945) at 328 and 618.

147. A.T. Hunter, *Canadian Edition of the Law of Torts by J.F. Clerk and W.H.B. Lindsell* (Toronto: Carswell, 1908) at 662 describes this form of action as follows: "A legal process, not itself devoid of foundation, may be maliciously employed for some collateral object of extortion or oppression; and in such case the injured party may have his right of action, although the proceedings of which he complains may not have been determined in his favour." The action, adds Hunter, "was not for the malicious arrest, but for abusing the process of the law to effect an object not within its proper scope."

This tort had been formally designated "malicious abuse of legal process" in the United States, where it appears to have been more thoroughly discussed and defined. C.G. Addison defines "malicious abuse of legal process" as follows: "Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is amenable to an action for damages for an abuse of the process of the court. . . . And when the complaint is, that the process of the law has been abused and prostituted to an illegal purpose, it is perfectly immaterial whether or not it issued for a just cause of action or whether the suit was legally terminated or not." See C.G. Addison, *A Treatise on the Law of Torts*, vol. 2, ed. by H.G. Wood (New Jersey: Frederick D. Linn, 1881) at 82.

Prosser notes: "A tort action for abuse of process may be maintained for the use of legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed. The action differs from malicious prosecution in that it is not necessary for the plaintiff to show lack of probable cause, or termination of the proceeding in his favor. Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish." See W.L. Prosser, *Handbook of the Law of Torts* (St. Paul, Minnesota: West, 1941) at 892.

M.M. Bigelow, *The Law of Torts*, 7th ed. (Boston: Little, Brown, 1901) at 133 states that in "malicious abuse of process, process which in itself may have been lawful has been perverted to a purpose not contemplated by it. In other words the exigency of the writ has not been followed. Malice again, as a distinct entity, plays no part in the case; all that is required for a cause of action is proof that the writ has been applied to a purpose not named or implied by it,

Whether there would have been an opportunity to address the issue of race discrimination indirectly within the common law tort actions will never be known. The civil claim apparently never came to trial, and the archival records contain no further details on the file. Why Bissett decided not to pursue the civil actions is unclear. Perhaps he felt that the tort claim would be difficult to win. The common law principle of defence of property might have been invoked to justify the use of force by property owners against trespassers.[148] The defendants would also have been entitled to raise the defence of "legal authority", asserting that they were within their rights in removing someone who had breached the tax provisions of the *Theatres Act*.[149] The conviction which had been registered against Viola Desmond bolstered this line of argument, confirming that at least one court had upheld the defendants' actions. It also served as a complete defence to the claim for malicious prosecution. Upon reflection, Bissett may have decided that he needed to overturn the initial conviction before taking any further action upon the civil claim.

On 27 December 1946, Bissett announced that he would make an application for a writ of *certiorari* to ask the Supreme Court of Nova Scotia to quash Viola Desmond's criminal conviction. There was "no evidence to support" the conviction, he contended, and the magistrate

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to the damage of the plaintiff. Perversion or 'abuse' of the process gives the name 'malicious' to the case; the malice is fictitious, or may be."

F.V. Harper, *A Treatise on the Law of Torts* (Indianapolis: Bobbs-Merrill, 1938) at 272ff: "The process of the law must be used improperly and this means something more than a proper use from a bad motive. The 'malice' in the sense of unjustifiable or improper motive is essential to a recovery for malicious abuse of process, it is not alone sufficient. If the process is employed from a bad or ulterior motive, the gist of the wrong is to be found in the uses which the party procuring the process to issue attempts to put it. If he is content to use the particular machinery of the law for the immediate purpose for which it was intended, he is not ordinarily liable, notwithstanding a vicious or vindictive motive. But the moment he attempts to obtain some collateral objective, outside the scope of the operation of the process employed, a tort has been consummated. The most common instance of the operation of this principle is an attempt to extort money from the person subjected to the process. There are some situations in which a tort will be committed by the unjustifiable use of a power of legal and economic pressure to accomplish a collateral objective necessitating harm to others. This type of wrong is on the frontier of the law of tort and there is an insufficient number of cases to make prediction reliable."

Bissett could have argued that MacNeil had invoked summary criminal prosecution under *The Theatres Act*, *supra* note 9 a process not unlawful in itself, for the collateral and improper motive of enforcing racial segregation. The conviction would have become irrelevant, with the sole focus being whether racial segregation constituted an "unjustifiable" ulterior motive for the theatre manager's acts, which necessitated harm to others.

148. Stallybrass, *supra* note 146 at 335 notes that "it is lawful for any occupier of land, or for any other person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to eject him after entry."

149. "A trespass to the person may be justified on the ground . . . that [the defendant] was stopping a breach of the peace . . . or apprehending an offender against the criminal law. . . .

lacked the "jurisdiction" to convict her. In support, Bissett filed an affidavit sworn by Viola Desmond, outlining how she had asked for a downstairs ticket and been refused, describing in detail her physical manhandling by the theatre manager and police officer, and documenting the failings in the actual trial process itself. Nothing in the papers filed alluded directly or indirectly to race.[150] Viola Desmond, Reverend W.P. Oliver and William Allison (a Halifax packer) jointly committed themselves to pay up to two hundred dollars in costs should the action fail.[151]

A writ of *certiorari* allowed a party to transfer a case from an inferior tribunal to a court of superior jurisdiction by way of motion before a judge. In this manner, the records of proceedings before stipendiary magistrates could be taken up to the Supreme Court for reconsideration. The availability of this sort of judicial review was restricted, however. Parties dissatisfied with their conviction could not simply ask the higher court judges to overrule it because the magistrate's decision had been wrong. Instead, they had to allege that there had been a more fundamental denial of justice or that there was some excess or lack of jurisdiction.[152]

There is no written record of what Bissett argued when he appeared before Nova Scotia Supreme Court Justice Maynard Brown Archibald on 10 January 1947.[153] But the white judge was clearly unimpressed. A native

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[W]hat is *prima facie* a wrongful act is committed under the authority of the law. . . ." Hunter, *supra* note 147 at 199.

150. "Notice of Motion", 27 December 1946, and "Affidavit of Viola Irene Desmond", 29 January 1947, *His Majesty the King* v. *Viola Irene Desmond*, P.A.N.S., RG 39 "C" [Halifax], Vol. 937, Supreme Court of Nova Scotia, #13347. The notice was served upon Rod G. MacKay and Henry MacNeil on 30 December 1946.

151. "Recognizance for Certiorari" in *ibid.* Litigants were required to put up financial sureties before filing actions for judicial review.

152. The editors of the *Criminal Reports* advised that *certiorari* applications were available where there was (a) a total want of jurisdiction in the tribunal (e.g.: where the subject-matter is not within its jurisdiction); (b) a defect in the jurisdiction of the tribunal (e.g.: where an essential step preliminary to its exercise is omitted); (c) an excess of jurisdiction (e.g.: where a penalty is imposed beyond that authorized by law); (d) an irregularity of substance appearing on the face of the proceedings; and (e) exceptional circumstances (e.g.: fraud or perjury in procuring the conviction of the accused). See "Practice Note" at (1947), 4 C.R. 200.

For some judicial discussion of the principles of judicial review as they apply to writs of *certiorari*, see *Re Dwyer* (1938), 13 M.P.R. 82 (N.S.S.C.); *R.* v. *Walsh* (1897), 29 N.S.R. 521 (C.A.) [hereinafter *Walsh*]; *R.* v. *Hoare* (1915), 49 N.S.R. 119 (C.A.); *R.* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.) [hereinafter *Nat Bell*].

153. There was no published report of the case brought before Archibald, J., and the press coverage contains no further details: see "Supreme Court Ruling Sought" *The [Halifax] Herald* (10 January 1947) 18. The "Notice of Motion" in *Desmond*, *supra* note 150, lists three grounds, although the vagueness of the claims permits little analysis: 1. That there is no evidence to support the aforesaid conviction. 2. That there is evidence to show that the aforesaid Viola Irene Desmond did not commit the offence hereinbefore recited. 3. That the information or evidence did not disclose any offence to have been committed within the jurisdiction of the convicting

of Colchester County, Nova Scotia, Archibald J. had been called to the bar in 1919, and practised law in Halifax continuously from 1920 until his appointment to the bench in 1937.[154] Although he was an erudite lecturer in Dalhousie's law school, Archibald did not choose to elaborate upon legal intricacies in his decision in the Desmond case. Viola Desmond had no right to use the process of *certiorari*, he announced, and he curtly dismissed her application on January 20th. The cursory ruling of less than two pages contained a mere recitation of conclusion without any apparent rationale. "It is clear from the affidavits and documents presented to me that the Magistrate had jurisdiction to enter upon his inquiry," Archibald J. noted. "This court will therefore not review on *certiorari* the decision of the Magistrate as to whether or not there was evidence to support the conviction."[155]

The best clue to deciphering the decision is found in the judge's final paragraph:

> It was apparent at the argument that the purpose of this application was to seek by means of *certiorari* proceedings a review of the evidence taken before the convicting Magistrate. It is obvious that the proper procedure to have had such evidence reviewed was by way of an appeal. Now, long after the time for appeal has passed, it is sought to review the Magistrate's decision by means of *certiorari* proceedings. For the reasons that I have already given, this procedure is not available to the applicant.[156]

A part-time stipendiary magistrate for a brief period during his days of law practice, Archibald J. was clearly concerned that lower court officials be free from unnecessary, burdensome scrutiny by superior court judges. Earlier Nova Scotia decisions had reflected similar fears, suggesting that access to judicial review be restricted to prevent "a sea of uncertainty", in which the decisions of inferior tribunals were subjected to limitless second-guessing.[157] The proper course of action, according to Archibald

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Magistrate. The report of the appeal of Judge Archibald's ruling, *R.* v. *Desmond*, [1947] 4 D.L.R. 81, (1947), 20 M.P.R. 297, 89 C.C.C. 278, 4 C.R. 200 (N.S.C.A.) [hereinafter *Desmond* (1947) cited to M.P.R.] at 298ff, suggests that Bissett also tried at first instance to make a technical argument that the prosecution had failed to allege the location where the offence took place. Apparently he abandoned this claim when the original information, stipulating that the acts occurred "in the Town of New Glasgow," was located.

154. For biographical details on Judge Archibald, who was born in Manganese Mines, Colchester County, see "Archibald, The Hon. Maynard Brown" *Who's Who in Canada, 1945–46* (Toronto: International Press, 1946) at 1042 [hereinafter Who's Who 1945–46]; "Archibald, The Hon. Maynard Brown" *Who's Who in Canada 1951–52* (Toronto: International Press, 1952) at 612; Maritime Reference, *supra* note 112 at 23; and Obituary, "Prominent Jurist Held Many Important Posts" *The [Halifax] Chronicle-Herald* (10 July 1953) 1.

155. *Desmond* (1947), *supra* note 153.

156. *Ibid.* at 299.

157. See e.g. *Walsh*, *supra* note 152 at 527, Townsend J. quoting Rigby J.

J., would have been to appeal Magistrate MacKay's conviction to County Court under the *Nova Scotia Summary Convictions Act*.[158]

Why Bissett had originally chosen to bring a writ of *certiorari* rather than an appeal is not clear. The *Nova Scotia Summary Convictions Act* required litigants to choose one route or the other, not both. An appeal permitted a full inquiry into all of the facts and law surrounding the case, with the right to call witnesses and adduce evidence, and the appeal court entitled to make a completely fresh ruling on the merits. Although an appeal would seem to have offered greater scope to the defence, Bissett may have preferred to make his arguments before the more elevated Nova Scotia Supreme Court, which heard applications for *certiorari*, rather than the County Court, which heard appeals from summary convictions. Or he may simply have missed the time limit for filing an appeal, which was set as ten days from the date of conviction.[159] He had issued the civil writ a mere five days after the initial conviction, but the writ of *certiorari* was not filed until almost a full month afterwards. Possibly by the time Bissett turned away from the civil process to canvass his options with respect to the criminal law, it was already too late for an appeal.

Since the limitation period for appeals had already run, Bissett had no other option but to review the ruling of Archibald before the full bench of the Nova Scotia Supreme Court by way of *certiorari*.[160] Carrie Best was personally in attendance for the hearing, which was argued on March 13th. Acknowledging in *The Clarion* that it was an emotionally tense experience to sit through the hearing, "hoping against hope that justice will not be blind in this case", Carrie Best admitted that she had "watched breathlessly as the calm, unhurried, soft-spoken Bissett argued his appeal."[161] Bissett admitted that the time to lodge the original appeal had "inadvertently slipped by", but that this should not bar the court from reviewing on *certiorari*. "The appellant is entitled to the writ," claimed Bissett, "whether she appealed or not, if there has been a denial of natural justice."

The affidavit Viola Desmond had filed to support her case had set out in detail the many ways in which she felt the trial had been procedurally unfair. She had not been told of her right to counsel or her right to seek

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158. *The Nova Scotia Summary Convictions Act*, S.N.S. 1940, c. 3, s. 58, amending R.S.N.S. 1923, c. 224.

159. *Ibid.*, ss. 59, 60, 62, 66, as am. by S.N.S. 1945, c. 65.

160. "Notice of Appeal", 20 January 1947, and "Entry of Appeal", 21 February 1947, P.A.N.S. See also "Reserve Appeal Decision in Desmond Case" *The [Halifax] Herald* (14 March 1947) 18. For details of the appellant's and respondent's arguments, see *Desmond* (1947), *supra* note 153 at 299ff.

161. "Clarion Went A-Visiting!" *The [New Glasgow] Clarion* 2:5 (15 March 1947) 2.

an adjournment. She had not understood that she was entitled to cross-examine the prosecution witnesses. She had been sentenced without any opportunity to make submissions to the court. These several omissions would have more than sufficed to constitute a denial of natural justice, as lawyers understand the meaning of that term in the latter half of the 20th century. But at the time of the Desmond *certiorari* the concept of due process was much less clear. Justice John Doull, who issued his decision on this case on 17 May 1947, even disputed the use of the term "natural justice". A former Attorney General of Nova Scotia, Doull J. wrote:

> A denial of justice apparently means that before the tribunal, the applicant was not given an opportunity of setting up and proving his case. (The words "natural justice" were used in some of the opinions of the judges but I doubt whether that is a good term.) At any rate a denial of the right to be heard is a denial of a right which is so fundamental in our legal practice that a denial of it vitiates a proceeding in which such denial occurs.[162]

The white judge conceded that if a "denial of justice" had been proven in Viola Desmond's affidavit, the failure to appeal would no longer suffice to bar her claim. But then Doull J., a former mayor of New Glasgow, concluded that there had been no such procedural omissions in the present case.[163] None of the other Supreme Court judges differed from this view.[164]

Bissett's other argument, on the lack of jurisdiction, was vigorously disputed by respondent's counsel, Edward Mortimer Macdonald, Jr. K.C. Henry MacNeil's lawyer was a forty-seven year old, white, New Glasgow resident who had received degrees from Dalhousie University, Bishop's College and McGill. He had practised law in Montreal from 1924 to 1930, then returned to practice in his birth province of Nova Scotia, where he served as the town solicitor for New Glasgow.[165] "The magistrate [had] jurisdiction, [and] tried the case on the evidence before him," asserted Macdonald. "The sole objection remaining to the appellant is that the evidence does not support a conviction. The proper remedy therefore is by way of appeal."

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162. See *Desmond* (1947), *supra* note 153 at 307. For biographical details on Doull, who was born in New Glasgow on 1 November 1878, see *The [Halifax] Chronicle-Herald* (1 October 1960) 32; Who's Who 1945–46, *supra* note 154 at 474.

163. *Desmond* (1947), *ibid.* at 309, Doull J. He served as Mayor of New Glasgow in 1925.

164. Robert Henry Graham J. noted (*ibid.* at 304) that Bissett had argued a denial of natural justice, relying on *R.* v. *Wandsworth*, [1942] 1 All E.R. 56, in which the court overturned the conviction of a defendant who had been denied the opportunity to defend himself. Graham J., however, made no reference to Viola Desmond's detailed affidavit alleging similar treatment and refused to find a denial of natural justice in the present case.

165. For biographical details on E.M. Macdonald, see Maritime Reference, *supra* note 112 at 11; "Macdonald, E.M.: Death: Town solicitor for New Glasgow dies: P.A.N.S. MG1, vol. 2022 #20.

Bissett did not argue that it was beyond the jurisdiction of a magistrate to apply the Nova Scotia *Theatres, Cinematographs and Other Amusements Act* to enforce racial segregation. He should have. Courts had long held that it was an abuse of process to bring criminal charges as a lever to enforce debt collection.[166] Here the theatre manager was not trying to help the province collect tax, but to bring down the force of law upon protestors of racial segregation. That Bissett might have drawn an analogy to the abuse of process decisions was suggested months later in a *Canadian Bar Review* article written by J.B. Milner, a white professor at Dalhousie Law School. Calling the Desmond case "one of the most interesting decisions to come from a Nova Scotia court in many years", Milner asserted that Henry MacNeill was prosecuting Viola Desmond "for improper reasons". MacNeill's "desire to discriminate between negro and white patrons of his theatre" transformed the criminal proceeding into "a vexatious action", Milner argued.[167]

But none of this was addressed at the appeal. Instead, Bissett confined his jurisdictional point to the insufficiency of evidence at trial, leaving himself wide open to procedural critique. Justice Robert Henry Graham emphasized that the evidentiary matters in this case did not relate to jurisdiction:

> A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not.[168]

There could be no question "raised as to the jurisdiction of the stipendiary magistrate" in this case, concluded Graham J., himself another former white mayor and stipendiary magistrate from New Glasgow. Furthermore, Graham J. added, "no reason except inadvertence was given to explain why the open remedy of appeal was not taken." Justices William Francis Carroll and William Lorimer Hall, the other two white judges

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166. See *e.g.* cases cited in J.B. Milner, Case and Comment (1947) 25 Can. Bar Rev. 915 at 920: *R.* v. *Michigan Central Railroad Co.* (1907), 17 C.C.C. 483 (Ont. H.C.); *R.* v. *Thornton* (1926), 46 C.C.C. 249 (B.C.C.A.); *R.* v. *Leroux* (1928), 50 C.C.C. 52 (Ont. C.A.); *R.* v. *Bell* (1929), 51 C.C.C. 388 (B.C.C.A.), Martin J.A. dissenting.

167. Milner, *ibid.* at 919. Interestingly, Milner did not believe that the trial decision to convict Viola Desmond was incorrect, describing it as "technically perfect".

168. *Desmond* (1947), *supra* note 153 at 305, quoting Viscount Caldicott in *Nat Bell*, *supra* note 152 at 151. For biographical details on Judge Graham, who was born in New Glasgow on 30 November 1871, see Obituary, *The [Halifax] Mail-Star* (28 May 1956) 1; Who's Who 1945–46, *supra* note 154 at 466. Graham served as Town Councillor in New Glasgow in 1898, Mayor in 1900, and Stipendiary Magistrate from 1906–10.

who delivered concurring opinions in the case, agreed that *certiorari* was not procedurally available to overturn the conviction.

Three of the judges, however, felt inclined to make some comment about the sufficiency of evidence at trial. Graham J.'s view was that the charge had been substantiated: "[Viola Desmond] knew that the ticket she purchased was not for downstairs and so that she had not paid the full tax."[169] Carroll J. disagreed: "the accused did actually pay the tax required by one purchasing such a ticket as she was sold."[170] Hall J., the only judge to make even passing reference to the racial issues, was most explicit:

> Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman.
>
> One wonders if the manager of the theatre who laid the complaint was so zealous because of a *bona fide* belief there had been an attempt to defraud the Province of Nova Scotia of the sum of one cent, or was it a surreptitious endeavour to enforce a Jim Crow rule by misuse of a public statute.[171]

Despite their differing opinions, however, all four judges took the position that Viola Desmond's application should be denied. Her conviction would stand.

The decision to apply for *certiorari* rather than to appeal had cost Viola Desmond dearly. Respondent's counsel, E.M. Macdonald laid the blame squarely at Bissett's feet. "The appellant had full benefit of legal advice before the expiry of the delays for appeal," he had insisted at the Supreme Court hearing. More than five days before the expiration of the time for

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169. *Desmond* (1947), *ibid.*

170. *Ibid.* at 306. Unlike Doull J. and Graham J., Carroll J. had not been born in New Glasgow, but in Margaret Forks, Nova Scotia on 11 June 1877. Educated at St. Francis Xavier College in Antigonish and at Dalhousie University, he had been called to the bar of Nova Scotia in 1905, serving several terms as a Liberal M.P. For biographical details, see Obituary, *The [Halifax] Chronicle Herald* (26 August 1964) 16; Who's Who 1945–46, *supra* note 154 at 666.

171. *Desmond* (1947), *ibid.* at 307. The decision on file at the archives, "Decision of Hall, J.", P.A.N.S., shows that the original typed version read: "Had the matter reached the Court by some method other than *certiorari*, there might have been opportunity to right the wrong done this unfortunate woman, *convicted on insufficient evidence.*" (Emphasis added.) The latter phrase was crossed out by pen, initialled by Hall J., and did not appear in the reported version of the decision.

Judge Hall was born in Melvern Square, Annapolis County on 28 July 1876 and educated at Acadia and Dalhousie University. He practised law in Liverpool from 1902–18, and then became Halifax Crown Prosecutor. Active in the Conservative Party, he was elected to the provincial legislature and served as Attorney General in 1926. He was appointed to the Nova Scotia Supreme Court in 1931. He was an active worker for welfare organizations in Halifax, and his daughter, Mary, would marry Robert L. Stanfield, who later became the premier of Nova Scotia. For biographical details, see Obituary, "Veteran Jurist Dies at 81" *The [Halifax] Mail-Star* (27 May 1958) 3; P.A.N.S. Biographical Card File, MG9, Vol. 41, p. 262; Who's Who 1945–46, *supra* note 154 at 1494.

appeal, Bissett was actively on the case, having already launched the civil action for assault, malicious prosecution, false arrest and imprisonment. His decision to opt for judicial review rather than an appeal of the original conviction had proven disastrous. He had chosen to argue the case in a conservative and traditional manner, relegating the race issues to the sidelines of the legal proceeding. Yet even within this narrow venue, Bissett had failed to deliver.

VII. *The Aftermath*

What must Viola Desmond have thought of the ruling? It is our great loss that no retrievable records of her reaction appear to have survived.[172] We can perhaps extrapolate what she may have felt from the written account of Ida B. Wells, an African-American woman who lost a lawsuit in Memphis, Tennessee in the late 19th century, after she had been denied accommodation in the "ladies' only" (white) railway carriage. Ida B. Wells' diary entry reads:

> I felt so disappointed because I had hoped such great things for my people generally. I have firmly believed that the law was on our side and would, when we appealed to it, give us justice. I feel shorn of that belief and utterly discouraged, and just now, if it were possible, would gather my race in my arms and fly away with them.[173]

Viola Desmond must have been equally appalled, not only by the ruling, but by the way in which her attempt to seek legal protection from racial discrimination had been turned into a purely technical debate over the intricacies of criminal procedure. None of the judges had even noted on the record that she was Black. The intersection of "white male chivalry" with "Black womanhood" lay completely unexamined. Nor was there any direct reference to the Roseland Theatre's policy requiring racially segregated seating. Hall J. had been the only one to advert to the "Jim Crow rule", a reference to the practices of racial segregation spawned in the United States after the abolition of slavery. And his professed concern had done little to dissuade him from reaching the same conclusion as his brothers on the bench: that the court was powerless to intervene. Professor Milner took up this very point in his review of the case; "discrimination against colour", he noted, took place "outside the sphere of legal rules." The theatre manager had "apparently violated no law of human rights and fundamental freedoms in this free county in refusing admission to part of his theatre to persons of negro extraction."

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172. I have been unable to find any account of Viola Desmond's personal reaction to the defeat of her legal claim.

173. Duster, *supra* note 67 at xvii.

What struck Milner as particularly unfair was that the manager had not only removed Viola Desmond, "as our democratic law says he may", but had also successfully prosecuted her for violating a quasi-criminal provision in a provincial statute.[174]

The Clarion's coverage of the "disappointing" decision, on 15 April 1947, was muted. Politely expressing appreciation for "the objective manner in which the judges handled the case", the editor noted:

> It would appear that the decision was the only one possible under the law. While in the moral sense we feel disappointed, we must realize that the law must be interpreted as it is.
>
> The Clarion feels that the reason for the decision lies in the manner in which the case was presented to the Court. This was very strongly implied by the Supreme Court. This is a regrettable fact.[175]

Bissett, who was carefully not mentioned by name, was clearly taking the fall here. It was his choice of an application for *certiorari*, rather than appeal, which was singled out as the reason for the legal loss. His conservative strategy of camouflaging race discrimination underneath traditional common law doctrines, his decision not to attack the legality of racial segregation with a frontal assault, was not discussed.

The Clarion did, however, take some solace from "Jim Crow" remarks of Hall J., which it quoted in full, adding:

> The Court did not hesitate to place the blame for the whole sordid affair where it belonged. . . . It is gratifying to know that such a shoddy attempt to hide behind the law has been recognized as such by the highest Court in our Province. We feel that owners and managers of places of amusement will now realize that such practices are recognized by those in authority for what they are,—cowardly devices to persecute innocent people because of their outmoded racial biases.[176]

Some Blacks believed the whole incident would have been better left alone. Walter A. Johnston, a Black Haligonian employed as a chef with the immigration department, made a point of criticizing Viola Desmond at an Ottawa national convention of the Liberal Party in October of 1948. Viola Desmond had been "censured by the Halifax colored group" for her

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174. Milner, *supra* note 166 at 915ff.

175. "The Desmond Case" *The [Truro] Clarion* (15 April 1947) 2 [hereinafter "Desmond Case"]; "Dismisses Desmond Application", *ibid.* at 4.

176. "Desmond Case", *ibid. The Clarion* would later reprint Editorial, *Maclean's Magazine* (15 July 1947) 1, in which the Desmond case was described and critiqued: "In a free country one man is as good as another—any well-behaved person may enter any public place. In Nova Scotia a Negro woman tried to sit in the downstairs section of a theatre instead of the Jim Crow gallery. Not only was she ejected by force, but thereafter she, not the theatre owner, was charged and convicted of a misdemeanour. Most Canadians have been doing a fair amount of grumbling lately about the state of our fundamental freedoms. Maybe it's time we did more than grumble." See "Is This A Free Country?" *The [Truro] Clarion* 2:12 (15 August 1947) 2.

activism, he advised. "We told her she was not helping the New Glasgow colored people by motoring over there to cause trouble." Johnston complained of racial "agitators", who would "increase the racial problem and set back the progress towards good feeling." The policy he counselled: to "shrug . . . off the trouble we met", with a "soft-answer-that-turneth-away-wrath".[177]

James Calbert Best, the Black associate editor of *The Clarion*, had an entirely different perspective. Calling for legislation which would put the right to racial equality above the privileges of those in business, he claimed:

> People have come to realize that the merchant, the restaurant operator, the theatre manager all have a duty, and the mere fact that such enterprises are privately owned is no longer an excuse for discrimination on purely racial grounds. . . . Here in Nova Scotia, we see the need for such legislation every day."[178]

Comparing the situation of Blacks in Nova Scotia with those in the American south, Best castigated Canadians for their complacency:

> We do have many of the privileges which are denied our southern brothers, but we often wonder if the kind of segregation we receive here is not more cruel in the very subtlety of its nature. . . .
>
> True, we are not forced into separate parts of public conveyances, nor are we forced to drink from separate faucets or use separate washrooms, but we are often refused meals in restaurants and beds in hotels, with no good reason.
>
> Nowhere do we encounter signs that read "No Colored" or the more diplomatic little paste boards which say "Select Clientele," but at times it might be better. At least much consequent embarrassment might be saved for all concerned.[179]

Bolstered by the apparent inability of the courts to stop racial discrimination, Canadian businesses continued to enforce their colour bars at whim. The famous African American sculptress, Selma Burke, was

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177. "N.S. Negroes Libelled by Attack" *The [Truro] Clarion* 2:8 (13 October 1948) 1.

178. "Toronto Leads the Way" *The [Truro] Clarion* 2:12 (15 August 1947) 2. The same paper reported that the City of Toronto Board of Police Commissioners had passed a regulation (inserted in a city by-law governing the licensing of public places), providing a penalty of licence cancellation for any hall, rink, theatre or other place of amusement in the city which refused to admit anyone because of race, color or creed. See "Toronto Against Discrimination" and "Toronto Leads the Way" *The [Truro] Clarion* 2:12 (15 August 1947) 1ff.

179. "No Discrimination" *The [Truro] Clarion* 2:12 (15 August 1947) 2. *Saturday Night* also drew a comparison with the United States (7 December 1946) 5: "Racial segregation is so deeply entrenched in what the American people are accustomed to call their way of life that the problems which it raises in a democracy (it raises none in a totalitarian state) will not be solved in the United States without a good deal of conflict. Canada is in a position to avoid most of that conflict if she avoids getting tied into the American way of life in that respect, and now is the time to take action to avoid it."

denied service in a Halifax restaurant in September 1947. "We had expected to find conditions in Canada so much better than in the States," explained her white companion, "but I'm sorry to say we were mistaken."[180] Grantley Adams, the Black Prime Minister of Barbados, was refused a room in a Montreal hotel in 1954 because the hotel had "regulations."[181] The racial intolerance in New Glasgow intensified and spread to other groups. In September of 1948 a gang of hooded marauders burned a seven foot cross on the front lawn of the home of Joe Mong, the Chinese proprietor of a New Glasgow restaurant. Police investigated but pronounced themselves sceptical that the incident had "anything to do with K.K.K. activities". It was simply "a private matter", they concluded.[182] Akin to "freedom of commerce".

As a matter of legal precedent, the Viola Desmond case had been an absolute failure. The lawsuit had been framed in such a manner that the real issues of white racism were shrouded in procedural technicalities. The judges had turned their backs on Black claims for racial equality, in certain respects openly condoning racial segregation. But Viola Desmond's legal challenge had touched a nerve within the Black community, creating a dramatic upsurge in race consciousness, according to Pearleen Oliver. The funds raised for legal fees were diverted to serve as seed money for the fledgling NSAACP, after Frederick William Bissett declined to bill his client, substantially strengthening the ability of the Black organization to lobby against other forms of race discrimination.[183] While there were undeniably those who thought the struggle better left unwaged, the leaders of Nova Scotia's Black community felt differently. Asked to reflect on Viola Desmond's actions fifteen years later, Dr.

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180. "American Artists Score Racial Discrimination" *The [Halifax] Chronicle* (15 September 1947); "More Discrimination" *The [Truro] Clarion* 2:16 (1 November 1947) 2. Selma Burke's female companion was A.F. Wilson, a noted American author of several books on race discrimination. *The Clarion* 2:11 (1 August 1947) 1ff, reported that a New Glasgow restaurant had refused service to a young West Indian student working with the provincial highways department. The same article noted that a Black couple, Mr. and Mrs. A.T. Best, had also been refused seating in a small fruit store and fountain in New Glasgow.

181. E. Thornhill, "So Often Against Us: So Seldom For Us, Being Black and Living with the Canadian Justice System" (Paper presented to IXth Biennial Conference of the Congress of Black Women of Canada, Halifax, 1989).

182. See "New Glasgow" *The [Truro] Clarion* 3:6 (8 September 1948) 3.

183. Pearleen Oliver, *supra* note 26; P.D. McClain, *Alienation and Resistance: The Political Behaviour of Afro-Canadians* (Palo Alto: R. & E. Research Associates, 1979) at 59 notes that the NSAACP was responsible for integrating barbershops in Halifax and Dartmouth, sponsoring the first Blacks for employment in Halifax and Dartmouth stores, integrating the nurses' training and placement programs, persuading insurance companies to sell Blacks policies other than industrial insurance, and initiating a controversy that resulted in the Dartmouth school board hiring Blacks.

William Pearly Oliver tried to explain the enormous symbolic significance of the case. His appreciation for her effort transcends the failures of the legal system, and puts Viola Desmond's contribution in clearer perspective:

> . . . [T]his meant something to our people. Neither before or since has there been such an aggressive effort to obtain rights. The people arose as one and with one voice. This positive stand enhanced the prestige of the Negro community throughout the Province. It is my conviction that much of the positive action that has since taken place stemmed from this. . . .[184]

Viola Desmond, whose legal challenge would finally receive immortalization in David Woods's poem, died on 7 February 1965.[185]

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184. Thomson, *supra* note 51 at 84.

185. See Obituary, *The [Halifax] Chronicle-Herald* (10 February 1965) 26; Obituary, *The [Halifax] Mail-Star* (10 February 1965) 8.