

# **The Role of the Judiciary in Racial Profiling: A Case Study of Canada\***

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\* For a more detailed study on a related topic see author's April 2001 LLM Thesis in criminal law at Osgoode Hall Law School, entitled Danger to the Public Under the Criminal Code and the Immigration Act of Canada: A Comparative Constitutional Analysis (2001). One can also see The Practice of Law in Canada (Manuscript).

The title paper is a revised version of a paper given at the Osgoode Hall Law School 2nd Annual Human Rights Symposium: Focus on Racial Discrimination, Toronto May 22nd and 23rd, 2003 and at the Annual Staff Conference of the Ontario Human Rights Commission: Mediation and Investigation Branch, Toronto June 16 - 20, 2003.

A certain conspiracy of silence is binding the entire Canadian criminal, civil and immigration systems of justice. A conspiracy of silence prevails when it comes to dealing with issues involving systemic racism and racial discrimination in Canada's criminal, civil and immigration courts and tribunals. When silence does not work, discrimination when it exists and is documented, is denied<sup>1</sup>. This study has documented this conspiracy of silence.

When denial no longer works and racism and discrimination is acknowledged, this acknowledgement is decontextualized and removed from the adversarial system, which prevents the immediate litigant or the community at large from benefiting from the acknowledgement. When it has to help a particular litigant as well as the community at large, racism and discrimination issues are avoided. In some cases, the requested finding that discriminatory laws or practices led to disparate impacts on racial minorities is postponed to be decided in another "more appropriate" case in the future. Given the history of racism and discrimination in Canada, this future day may never come.

The aim of this paper is two fold: firstly it is to show that the judiciary is at the forefront of denying any allegations of racial profiling and secondly to discuss how the issue of racism and discrimination has been decontextualized in the litigation process so as to have no immediate impact on the litigants and the broader community and how using the critical race theory framework, race litigation may be prosecuted in order to obtain the desired positive impact outcomes. I will discuss a few cases to illustrate these issues. By positive impact outcomes, I do not mean necessarily an acquittal of a client or an award of monetary damages, but in its larger framework, including public or societal education. It could be in terms of deterring the practitioners of racial profiling and racial discrimination, individually or systemically. In this

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<sup>1</sup> See for a useful analysis of discrimination and denial in Clayton James Mosher, Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems (Toronto: U. of T. Press, 1998); Munyonzwe

study, the aim has been to show how discrimination against African-Canadians has operated and to argue for its elimination on constitutional grounds.

Of all the enumerated grounds prohibited for discrimination by Section 15 of the Canadian Charter of Rights and Freedoms, only the ground of race has not been directly litigated at the Supreme Court of Canada, to confer an advantage to a racialized minority or community. All the other enumerated prohibited grounds of discrimination have been there, some repeatedly. Even some un-enumerated but analogous grounds in their various consequences have been litigated at the Supreme Court of Canada<sup>2</sup>. This is the larger picture in which race litigation must take place.

It is in the explosion of equality cases and some quite fundamental outcomes and benefits that this paper can safely say that there has been a “Revolution” in Canada because some of the areas were impossible to litigate at the Supreme Court of Canada and in the lower courts before the advent of the Charter, particularly under Section 15. It is also necessary to point out that there has been a “Counter-Revolution” because the backlash from the critics of the Charter and particularly its Section 15 jurisprudence has unleashed a counter-revolution. In the immigration law context, particularly dealing with racial discrimination, there has not been any revolution at all. Counter-revolution has predominated.

Lost in the revolution of the equality jurisprudence is the fact that one of the major apexes of discrimination has not been litigated and benefited from this revolution - i.e. race, while at the same time, the counter-revolutionary backlash has assumed that racial equality has

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Hamalengwa, The Practice of Law in Canada, manuscript.

<sup>2</sup> See LEAF, Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada (Toronto: Emond Montgomery, 1996).

been promoted by the equality section of the Charter<sup>3</sup>. Race litigation is the missing link in this “Revolution” and “Counter-Revolution” that has been permitted by the advent of the Charter.

It is my thesis that race litigation has not made its way to the Supreme Court of Canada and the lower courts because among other grounds, the issue of race has been silenced, denied or decontextualized if and when initially raised in a case. Immigration law has been stunted as a result. The judiciary has been vicious in condemning any allegation of racial profiling and discrimination in the litigation process.

It is quite astounding how such a potent issue as race has been missing in action in the Supreme Court of Canada when it has been virtually documented as a major point of inequality and discrimination throughout Canada’s history both in the criminal and immigration law contexts as many studies have shown. For example, the Report of the Commission on Systemic Racism in the Ontario Criminal Justice System<sup>4</sup>, has documented that discrimination against blacks is usually found in systemic form and concealed in system, practices, policies and laws that may appear neutral on their face but have a serious detrimental effect on people of colour. Immigration law, policies and practices have been informed fundamentally by racial over-tones and under-tones.

The report also notes that black males were significantly more likely than whites or Chinese to be stopped by police, that a disturbingly high percentage of blacks perceived that judges treat blacks worse than they do whites. Black areas are over-policed. Blacks were less likely to receive police bail or judicial interim release than whites. Further a person who was

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<sup>3</sup> See F. L. Morton and Rainer Knopff, The Charter Revolution and the Court Party (Peterborough: Broadview, 2000).

<sup>4</sup> (Toronto: Government Printers, 1995). For a comprehensive study of racial profiling in the immigration context, see Munyonzwe Hamalengwa, Danger to the Public Under the Criminal Code and The Immigration Act of Canada: A Comparative Constitutional Analysis (LLM Thesis in Criminal Law, Osgoode Hall Law School, 2001).

not given bail was more likely to be convicted and sent to gaol than a person who was on bail. The report noted that prosecutors were more likely to proceed by indictment when they tried a black defendant than when they tried a white defendant. A sample of defendants, which included both whites and blacks, found that 49% of Blacks who were convicted of possession of drugs, compared with 18% of White offenders were incarcerated<sup>5</sup>. Those who have been declared to pose a danger under the Immigration Act have been overwhelmingly Black.

According to Mosher, this data by the Commission on Systemic Racism validates what has been the usual practice in Canada historically. The incarceration rate for Blacks in federal prisons in 1911 for example was eighteen times that of whites, relative to their representation in the population. Further Mosher shows that throughout Canada's history, race was a determining factor in differential treatment accorded to diverse racial groups with deleterious effects on Blacks and Chinese<sup>6</sup>. Criminal and immigration laws have had a discriminatory impact on Blacks and Asians, according to Mosher<sup>7</sup>.

A recent study by the Toronto law firm of Hinkson, Sachak, Mcleod used in a criminal defence case, found that Canada Customs, stopped and searched a disproportionate number of Black Jamaicans disembarking from Jamaica at Pearson International Airport than Whites. Inevitably, if they are searching for drugs, they are more likely to find it on more of the people they search - Blacks coming from Jamaica<sup>8</sup>.

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<sup>5</sup> Ibid.

<sup>6</sup> Mosher, supra note 1 pp. 26 and 119 - 137; Hamalengwa supra note 4.

<sup>7</sup> Ibid pp. 119 - 137.

<sup>8</sup> Scot Wortley, An Analysis of the Airport Study (1999) (unpublished litigation document).

Nor is this revelation a new one, Canada's immigration has been based on selective discriminatory exclusion of Blacks, Chinese, Indians and other racialized minorities<sup>9</sup>.

A previous new law under the Immigration Act which had been brought about by Bill C-44, otherwise popularly known as the "Danger to the Public" law had been documented in many studies was shown to have a disparate impact on Black Jamaicans and other Blacks in Canada. It was shown that this law was brought into being with Black Jamaicans as its alleged principal trigger but also as its main target<sup>10</sup>.

The culture of racism has also been documented as pervasive in the media. A study by Ryerson Polytechnic University Professor, Frances Henry entitled, The Racialization of Crime in Toronto's Print Media<sup>11</sup> documents how Blacks in general are criminalized in the media, particularly, Black Jamaicans. This criminalization has extended to police stoppages of Black motorists for no other reason than that someone was driving while black (DWB)<sup>12</sup> and more seriously to disproportionate shootings of Blacks by White police officers. The declaration that Blacks pose danger to the public in Canada follows suit.

Section 15 of the Charter requires the equal protection and benefit and application of the law. Clearly the evidence marshalled in many studies about racial discrimination against Blacks under Canada's criminal and immigration systems demonstrate that Blacks do not benefit equally and that the law does not protect and apply equally to them. Blacks are systematically

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<sup>9</sup> See Sherene Razack, Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms (Toronto: U. of T. Press, 1998); Hamalengwa supra note 4.

<sup>10</sup> See Julian Falconer and C. Ellis, Colour Profiling, a paper presented to the American Bar Association Annual Conference, Toronto, August 1998 and Colin Richards, "Bill C-44 Condemned as Anti-Jamaican" Pride November 5-11, 1998; see also Danger to the Public, A Play (Toronto, 2001).

<sup>11</sup> (Toronto: Ryerson Polytechnic, August 1999.)

<sup>12</sup> See allegations in R. v. Richards Docket: (29243 (May 1999)) (Ontario C.A.) See also David Tanovich, "Operation Pipeline And Racial Profiling" (2002) 1C.R. (6th) 52.

discriminated against. The courts will be shown in this study have completely ignored or sidestepped or rejected this issue while interpreting section 15 quite liberally in other contexts and pronouncements.

With all that evidence of discrimination, why hasn't an earth-shattering case reached the Supreme Court of Canada challenging the unequal application of the laws and the disparate impact of these laws on Blacks in Canada? The opportunities and possibilities abound to challenge racial discrimination in Canada. But these opportunities and possibilities are blunted by the courts as we will see in this study.

However, the obstacles abound as well as already alluded to, above. The obstacles are both individual and systemic, interacting at various levels: Historically, politically, economically, socio-culturally. Most intractably, the courts including the Supreme Court of Canada have affirmed racial discrimination in the past. So the institution that one could run to in order to seek solace and protection has been historically implicated in the affirmation of racial inequality, exclusion and discrimination. James Walker, a professor of history at Wilfred Laurier University in his path breaking book, entitled, "Race", Rights and the Law in the Supreme Court of Canada<sup>13</sup> has demonstrated how the Supreme Court of Canada had given a legal imprimatur to racial discrimination in the past. He chose four cases for detailed examination. Quong Wing v. The King<sup>14</sup> involved a Chinese-Canadian who was charged under a Saskatchewan statute preventing Chinese men from employing White females. The Supreme Court of Canada upheld the statute. Christie v. York Corp<sup>15</sup> involved a Black Canadian who was refused service in a

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<sup>13</sup> (Toronto: Osgoode Society, 1997).

<sup>14</sup> ((1914), S.C.R. 440).

<sup>15</sup> ([1940] S.C.R. 139).

tavern because of his race. The Supreme Court upheld the prohibition. Noble and Wolfe v. Alley<sup>16</sup> involved a Canadian Jew who was denied the right to purchase a cottage because of a restrictive covenant preventing owners from selling to Jews. The covenant survived. Narine-Singh v. Attorney General of Canada<sup>17</sup> involved an East-Indian Trinidadian who was excluded by the Immigration Act because he was of the “Asian race.” The Supreme Court upheld the exclusion on racial grounds. Professor Nancy Backhouse while at the University of Western Ontario, in her book Colour-Coded: A Legal History of Racism in Canada 1900-1950<sup>18</sup> supplements this analysis. She details numerous cases where courts have upheld discriminatory laws and practices. Essentially the courts rubber-stamped practices of racial profiling.

During this same period, the legislatures were enacting laws against immigration of racial minorities, they were sending back a ship carrying Jewish refugees from Nazi Germany; they were interning Japanese Canadians; they were constructing apartheid-type reserves for Native Canadians; schools were segregated along racial lines; the Klu Klux Klan was allowed to exist and so on. One can say that this politico-judicial conspiracy to validate racism is a long-standing and complex one. It would take more than one blow to demobilize it.

How much has the picture changed? As already alluded to, the laws and practices as well as outcomes are now subtler and quite systemically embedded. Section 15 of the Charter and human rights codes prohibit discrimination. Institutions cannot openly practice it.

Professor Carol Aylward of Dalhousie University in her widely acclaimed book, Canadian Critical Race Theory: Racism and the Law<sup>19</sup> has attempted to catalogue the

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<sup>16</sup> ([1951] 92 S.C.R. 64).

<sup>17</sup> ([1955] S.C.R. 395).

<sup>18</sup> (Toronto: Osgoode Society, 1999).

<sup>19</sup> (Halifax: Fernwood, 1999).

explanations for the paucity of race litigation in Canada compared to the United States. There is no overarching litigation group in Canada as is the case historically in the U.S. with the National Association for the Advancement of Coloured People (NAACP) or similar in singular purpose to the Canadian women's Legal Education and Action Fund (LEAF). There is a paucity of Black lawyers willing and capable of engaging in race-litigation. Black lawyers (and judges) are of recent vintage in Canada. Black lawyers or groups have no organization and/or financial largesse to mount race litigation. It is also proffered that the critical race theory has not been transplanted into Canadian legal discourse and it is just now beginning to flourish.

The opportunities for race litigation however have presented themselves abundantly in Canada. The numerous shootings of Blacks by police have raised the issue of the motive of race. Racial discrimination in the immigration law context is another opportunity. According to Aylward, all the criminal cases were prosecuted by White prosecutors who never brought up the possibility of the issue of racial motive in the shootings of Blacks by police. The police officers who have shot these Blacks have overwhelmingly been White.

It is stated therefore that the colour or race of the prosecutors has consciously or unconsciously prevented the airing of racial motives for commission of offences against Blacks. At a conference sponsored by The Nelson Mandela Academy of Applied Legal Studies in November 1996 on the then delay by the Ontario government to implement the recently released report of the Commission on Systemic Racism in the Ontario Criminal Justice System<sup>20</sup>, Susan Mulligan, a White lawyer candidly admitted that as a defence lawyer, bringing the issue of racial animus in a criminal case will alienate the judge, police, prosecutors and the jury, all of whom are most likely White, and will likely ensure a conviction. Aylward points out that White

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<sup>20</sup> Supra, note 4.

lawyers have been unwilling or unable to inject the issue of race in the courts resulting in the “conspiracy of silence” that I started out with in this chapter - White judge, White prosecutor, White juror, White police officer and White defence lawyer. And the lone Black accused. Critical race theory cannot assist given this constellation of forces. Things are changing, however, as will be seen below.

Aylward mentions another obstacle to the success of critical race theory. In all the police shooting cases, the jury was entirely White. Juries are ordinary folks. The police, prosecutors, and defence counsel came from the same racial and cultural background. It is unlikely that even if the issue of the racial motive for a shooting were to be ventilated, that it would receive a welcome reception. Judge Maryka Omatsu’s observation that “the Canadian judiciary is a homogeneous institution that is overwhelmingly middle-class, White and male and that greater racial, cultural and gender diversity is required on the bench in order to ensure justice reflects and is seen to reflect Canadian society,”<sup>21</sup> applies as much to the needed composition of the jury pools and panels as well as the mix of prosecutors and defence counsel.

As recent as 1989, Clayton Ruby, a renowned criminal lawyer would write:

We need to identify the kind of judiciary that is best suited to guide the province into the 21<sup>st</sup> century. This process necessarily entails taking a hard look at the present judges against the background of an increasingly diverse, multicultural and multiracial community.

Judges play an important role in expounding upon, preserving and protecting constitutional rights. These demands call for a different kind of judiciary. Ontario deserves candidates for the provincial court who better reflect the multicultural nature of the province of Ontario than have appointments in the past. Sexual composition is equally important. We have not shown ourselves willing to address this fact.<sup>22</sup>

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<sup>21</sup> In “The Fiction of Judicial Impartiality” and “On Judicial Appointments: Does Gender Make a Difference” as quoted in Charles Smith, “Addressing Racism and Equity in Canada Today: Now More Than Ever” Law Society of Upper Canada, Race, Courts and Tribunals: Emerging Doctrines and Their Impact (Toronto: LSUC, 2000).

<sup>22</sup> Clayton Ruby, Toronto Star November 6, 1989. I have also written articles on this issue that have appeared in Law Times; Pride; the Toronto Star; Lawyers’ Weekly and Osgoode Hall Law School’s Obiter Dicta: See also

Many years later, the picture in the composition of the judiciary has not changed a bit, vis a racial minorities. The Federal Court, which is competent to adjudicate on immigration matters among others, has absolutely no African Canadian on it. This is the same as the Supreme Court of Canada. There is also no African Canadian on any provincial Court of Appeal in the country.

The composition of the participants in a criminal trial is key to the success or failure of race litigation. Professor David Cole of Georgetown University Law Centre has commented in his book No Equal Justice: Race and Class in the American Criminal Justice System<sup>23</sup> on studies conducted by the National Law Journal that show that in a sample of 800 jurors, 42% of White jurors compared to 25% of Black jurors would believe a police officer's version of the story rather than that of the defendant. In race litigation cases, it goes without saying that a Black accused is trying to "indict" either a white police officer, a white immigration or customs officer or a white adjudicator and must likely, before an all-white jury.

David Cole goes further to say that jury studies consistently show that jurors are in general more sympathetic to victims of their own race and are more forgiving of defendants of their own race.<sup>24</sup> Any allegation of racial profiling in this kind of context is destined to be rejected.

It is therefore, not surprising that one of the first critical points of attack in race litigation both in the U.S. and Canada has been on the exclusion of Blacks from juries or composition of the jury pools. It was stated that equality in the administration of justice would only result if jurors were racially mixed. It was no secret that white juries routinely convicted Black

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Hamalengwa, For the Equal Benefit, Equal Application and Protection of the Law (Manuscript); Hamalengwa, Justice in Our Life Time (manuscript).

<sup>23</sup> (New York: The New Press, 1999), p. 123.

<sup>24</sup> Ibid.

defendants even on flimsy evidence or acquitted White defendants even when evidence for conviction was overwhelming.

In the U.S., race litigation has engaged the criminal justice system much more broadly than just in jury exclusion or composition. There, they have litigated among other issues selective prosecution<sup>25</sup>; differential punishment<sup>26</sup>; excessive force<sup>27</sup>; racist discrimination<sup>28</sup> and challenged airport and roadside stoppages of Blacks by police officers. These are the same issues that arise in Canada that cry out for race litigation using the critical race theory framework.

In Canada, race litigation however, is just in its infancy, for reasons already given above.

Canadian lawyers zeroed in on challenges for cause on racial grounds in the late 1980s and early 1990s. In the case of Parks<sup>29</sup> a trial judge had in keeping with judicial tradition and precedent, refused to allow a Black drug dealer of Jamaican origin to challenge the jury on grounds of potential racial prejudice. The accused was convicted. On appeal, the Ontario Court of Appeal allowed the appeal and sent the matter back for retrial where the accused would be permitted to challenge the jury for cause on racial grounds.

Judge Doherty's statement about the prevalence of racism in Canada has been quoted ad infinitum. He stated: "Racism, and in particular anti-Black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our

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<sup>25</sup> U.S. v. Armstrong 116 S. Ct. 1480 (1996).

<sup>26</sup> The State v. Russell, 477 N.W. 2<sup>nd</sup> 886 (Minn. 1991).

<sup>27</sup> The People v. Powell et al, 1991, 232 Cal. App. [3d].

<sup>28</sup> O.J. Simpson BA 097211 [Cal S. Ct.] 199 and 1995 WLS 16132.

<sup>29</sup> R. v. Parks (1993), 84 C.C.C. (3d) 353.

institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes”<sup>30</sup>. This was an eye-popping and revolutionary statement.

This case opened the floodgates to challenges for cause on racial prejudice and other areas. It is now settled that in the majority of cases, one need not prove by empirical evidence the need to challenge the prospective jurors for cause on racial prejudice. Judges can take judicial notice of the probable existence of racial prejudice and allow the challenge for cause on this basis<sup>31</sup>.

While these jury cases have been important in weeding out overtly racist jurors who have had no trouble in openly stating that they had racial biases and for the education of the populace, these cases have had no effect on the actual end result of the composition of a jury that tries a case. For example, in Toronto, if the jury pool is 100% White, all the jurors at the end of the challenge for cause process will be White. I have already alluded to the studies that show that jurors prefer the evidence of police officers and are sympathetic to victims and defendants from their racial background.

Furthermore, the composition of the jury has no effect on the prior decision outcome that led to the arrest or charge of a person. For example, a person may have been stopped at the airport or street because he is Black. The decision to exclude the evidence obtained as a result of an improper motive or conduct by the police is not made by a previously challenged jury, but by a judge in the absence of the jury.

Challenges for cause have no impact on the decisions made well before i.e. the decision to grant or deny bail, the decision to proceed by summary procedure or indictment and so on.

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<sup>30</sup> Ibid p. 369.

<sup>31</sup> R. v. Williams [1998], 124 C.C.C. (3d) 481 (S.C.C.).

In the end, this much-litigated area while it has injected equality of some sort in the administration of justice, has had no impact on substantive equality in the administration of the broader system of justice. Challenge for cause does not very much positively help individual litigants. This practice is more formalistic than substantive.

When litigants wanted to take the issue of racial prejudice to the next level i.e. the substantive level, the courts have rebuffed them.

Clifton Richards, a Black resident of Jamaica was stopped by a White police officer for an alleged traffic violation. At trial, he alleged that he was stopped because of his race. The arresting police officer's notes contained detailed racial descriptions of Mr. Richards. The trial judge ruled among others, that if he accepted that the police officer was racist, that would end the police officer's career. The end result was that he convicted Mr. Richards.

On appeal, Mr. Richards alleged that he was stopped because he was driving while Black (DWB) and the court stated that "the real matter of contention in this case is whether Constable Aikman's investigation was racially motivated..."<sup>32</sup>. However, the Court of Appeal completely avoided delving into the grounds central to the appeal i.e. racial motive in the arrest of the Appellant, but instead, reversed the conviction because the trial judge made errors in his rulings on credibility. The trial judge did not want to ruin the officer's career if he ruled that he had stopped Mr. Richards because of his racial background. The Court of Appeal completely avoided this issue of race. Many cases would have been affected if they ruled in favour of Mr. Richards on the issue of race. The Appellant had submitted a great deal of documentation to show that Mr. Richards was stopped because he was driving while Black.

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<sup>32</sup> R.v. Richards File C29243, April 1999, paragraph 21 (Ont. C.A.).

There is voluminous anecdotal evidence of Black people being stopped just because of their colour. When a person is stopped, the police are likely to find something with which to charge the person. Further, Black and White lawyers in their discussions among themselves detail numerous cases where judges have simply avoided the issue of race that has been brought up by the litigant.

The limited helpfulness of the jury selection cases in the furtherance of equality in the administration of justice was revealed in the Dudley Laws case<sup>33</sup>. Dudley Laws, the head of the Black Action Defence Committee (BADC) was charged with a slew of offences. He challenged the composition of the jury and wanted specifically a mixed race jury to be empanelled in order to have a possibility of a fair trial. The Court of Appeal summarily dismissed that ground of appeal. There would be a real advance if this ground of appeal were granted.

The present author was also rebuffed on two occasions when he demanded a jury pool that was reflective of the racial make-up of Toronto. The jury pool that was brought into the courtroom to be selected to try a Black defendant was 100% White<sup>34</sup>. So have many defence counsel been rebuffed on the same issue.

The present author also challenged in Federal Court the constitutionality of subsection 70(5) of the former Immigration Act on the ground that people who are declared to pose danger to the public and therefore lose their right of appeal are disproportionately of Black ancestry and principally Black Jamaicans. Both the trial division and appeal division of the Federal Court of Canada dismissed this constitutional challenge and the case headed to the Supreme Court of

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<sup>33</sup> R. v. Laws (1998) 128 C.C.C. (3d) 516.

<sup>34</sup> R. v. Eric Kusi April 1998, (Ont. Ct. Gen. Div.) and R. v. Challenger, April 3, 2001 (Superior Court of Justice); R v. Eze, June 16th 2003, (Ontario Superior Court of Justice).

Canada<sup>35</sup>. Many lawyers have met a similar fate despite presenting the courts with voluminous documents as evidence of the disparate impact of the danger to the public law on Black criminals particularly those from Jamaica.

In some of these cases, the appellants have tried to rely on “social context” or “social contextualization” of race to advance their cases. The Supreme Court of Canada ruled in R.D.S.<sup>36</sup> that the social context in judging a case must be taken into account. These would encompass for example, taking into account the prevalence of racism in a particular context. In R.D.S., the trial judge had taken into account the social context in which a Black teenager encountered a White police officer in Halifax where allegations of police racism are legendary. The acquittal of the Black youth by a Black judge resulted in a crown appeal alleging racial bias on the part of the Black judge. The next two appeal levels composed of White judges sided with the crown and reversed the acquittal. On further appeal to the Supreme Court of Canada, the Court sided with the decision of the trial judge.

However, while the approach and theory of social contextualization is sound and good on paper, when it comes to actually deciding a concrete case where racism is alleged, judges and adjudicators demur.

It is also possible that R.D.S. may never have arisen had it not been for the fact that at trial, the Black youth appeared before a Black judge and he was represented by a Black lawyer. The court reporter was also Black. The tables were turned, as only the police officer was

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<sup>35</sup> Rolston Ricardo Moffatt v. Minister of Citizenship and Immigration A-679-97, April 7<sup>th</sup>, 2000 (F.C.A.). The author had another case at the Trial Division of the Federal Court of Canada on the same issue, see, Grandison v. MCI IMM File No. 6308-98; leave to appeal in Moffatt was denied by the Supreme Court of Canada on March 22<sup>nd</sup>, 2001, File No. 2786. Grandison was also dismissed. No reasons were given. A constitutional class action suit alleging discriminatory deportation of Nigerians was dismissed in Okojie et al. Reg. Imm. No. 4358-03.

<sup>36</sup> R. v. R.D.S. (1997) 118 C.C.C. (3d) 353.

White.<sup>37</sup> This validates the contention that equal justice for all races composing Canada requires a judiciary, prosecutorial service, police cadres, and juries reflective of the racial diversity of Canada.

The next stage in race litigation is to crack open the judicial armour. This may have been made possible by the acceptance of challenge for cause on racial grounds and the social contextualization of cases in which judging is to take place.

The test had come when the present author sought leave in Moffatt to argue the danger to the public law in the Supreme Court of Canada or when the firm of Hinkson, Sachak, Mcleod argued its case in the Superior Court of Justice on the disproportionate stoppages and searchings of Black Jamaicans by Canada Customs at Pearson Airport.<sup>38</sup>

Immigration law needs extensive race litigation. There is however no sympathetic judiciary among other issues.

The ground-breaking Supreme Court of Canada Immigration decision in the case of Mavis Baker<sup>39</sup> has left unremarked by the Supreme Court of Canada Justices and other commentators some of the most pressing issues of the day which without their resolution will act as a break rather than a gigantic positive development in the use of law by disempowered immigrants. In Baker, the Supreme Court decided among others, that: (a) a decision maker has to take into account the best interests of the children whose parent(s) are facing deportation consequences, (b) that the standard of review of a humanitarian and compassionate decision is that of simple reasonableness, rather than the higher standard of patently unreasonable, and (c)

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<sup>37</sup> See Aylward, supra note 19, p. 94.

<sup>38</sup> See also an interesting article, Julian Falconer, "Litigating Race in the Criminal Courts" in C. Boyle, M. MacCrimmon and Dianne Martin, The Law of Evidence: Fact Finding, Fairness and Advocacy (Toronto: Emond Montgomery, 1999). The Moffatt case was dismissed. Hinkson, Sachak abandoned the case.

<sup>39</sup> Baker v. Canada (M.C.I.) (2000) 1 Imm. L.R. (3d) 1.

that international treaties that Canada has ratified but not incorporated into domestic law are not binding on Canada but are of persuasive interpretative force.

No equality rights issue had been certified in Baker, a major lost opportunity for litigating a race specific equality issue. Baker however, dealt mainly with the best interests of the child.

The Baker decision is the most important Supreme Court of Canada Immigration decision since that of Singh<sup>40</sup> handed down in 1985. Singh decided that refugee claimants had a right to an oral hearing rather than being subjected merely through the paper process, since issues of credibility were involved. You cannot negatively decide someone's credibility without affording them an opportunity to be personally heard by personal appearance.

The Baker decision has brought to the fore but without being remarked upon by the Supreme Court Justices and other commentators some of the most vexing questions of our time.

The first question is: why are immigrants denied access to justice in Canada given that in a lot of cases, the central issue is what are the best interests of the Canadian born children – to remain in Canada or to be removed from Canada along with their parents? How is it that Baker is the first immigration case to reach the Supreme Court dealing with the issue of best interests of children?

How is it that race has not been litigated in the immigration context in the Supreme Court of Canada?

Immigrants are denied access to justice in the following way and the recent decision has not provided any solutions whatsoever. There is no right of appeal to a court of law when a negative decision in an immigration context is handed down. There is a right of appeal in

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<sup>40</sup> Singh v. Canada (M.E.L.) [1985] 1 S.C.R. 177.

criminal cases involving convictions, except to the Supreme Court of Canada, where leave is required except if a judge of the Court of Appeal dissented.

In the immigration context, an immigrant has to seek leave from the Federal Court of Canada. A very small percentage of leave applications are ever granted. No reasons for a negative decision are given. Seeking leave simply means one is asking a court to allow him or her a foot in the door of the court. It is left to judicial discretion to grant leave. The ground is staked against immigrants in this process.

If leave is granted but judicial review is denied, there is no right of appeal to the Federal Court of Appeal. In some cases the very judge who denied the application for judicial review may be persuaded to certify a question of general importance for the applicant to take to the Federal Court of Appeal. Certification is not a right. It involves asking a judge to allow an applicant to proceed further. Certification of questions to the Federal Court of Appeal is rare. Mavis Baker got through.

If the certified question or other issues in the Federal Court of Appeal are dismissed, there is no right of appeal to the Supreme Court of Canada. One has to seek leave. The Supreme Court grants even less leave applications. No reasons for a negative decision are given.

With these hurdles to surmount, it becomes clear that Mavis Baker through her lawyers, waged a tenacious struggle to proceed. By the same token, because of the denial of access to justice, which this process engenders, it can be imagined how many worthy cases were or are lost in the process. People have been turfed out of Canada or went underground because they were denied access to justice as a result of this process. The criminal process is entirely different. There is a right of appeal to the Court of Appeal where the majority of cases end.

So the fundamental question in an immigration context is: How can access to justice be accessed or opened up? In the United States of America, access to Justice has been recognized as a fundamental interest worthy of constitutional protection.<sup>41</sup> In Canada not only is this not recognized, a person has no right of appeal or to a written decision. Access to justice ought to be recognized as a fundamental interest worthy of constitutional protection.

Access to justice is further denied because of poverty or economic circumstances of the majority of immigrants affected by negative immigration decisions. While legal aid is generally accessible in criminal appeals, it is not available to prosecute immigration appeals. A lot of good cases go nowhere because immigrants cannot afford to hire lawyers. A lawyer cannot fight a case all the way to the Supreme Court of Canada without a retainer. And it is very expensive. The Department of Justice will fight any appeal process with all their might, using public resources.

So not only are immigrants denied access to justice because there is no right of appeal, they are also denied access because they are not given financial means to prosecute these cases even when they could have a chance to secure leave or to have their questions certified for higher courts.

It is therefore not surprising that the Supreme Court of Canada, the most progressive court in the land is rarely seized of otherwise good cases, because cases rarely, if ever, reach there.

Immigrants are deprived of the otherwise progressive decisions of the Supreme Court of Canada because their cases never make it there. Immigrants may be better off if their issues were ventilated before the highest court in the land. This is not only good for immigrants, it is

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<sup>41</sup> See Griffin v. Illinois, 351 U.S. 12 (1956).

also good for the development of the culture of the rule of law and enhancement of Canada's international reputation.

The second vexing question of our time is: should Canada be bound by the provisions of the international treaties it has ratified but not yet incorporated into domestic law? The Supreme Court of Canada has stated that international treaties that Canada has ratified are only of persuasive but not binding value.

This interpretation is a dumper. There is no justification to interpreting international treaties that way. There are two perspectives on this issue. One perspective – called the dualist view holds that a ratified treaty is not binding if it is not incorporated into domestic law. The other view is the monist view, which holds that by ratifying a treaty, a country is thereby bound by its provisions. The European Court of Human Rights (ECHR) compels member states to be bound by the treaties they have signed.

If the Supreme Court of Canada adopted the monist view, like the European Court of Human Rights, then Canada would perforce be bound by the international treaties it has signed. The Supreme Court of Canada has deferred to Canada's posture, that is, even though Canada ratified international treaties, it is not necessarily bound by these treaties. Canada, in turn can hide under the rulings of the Supreme Court of Canada, which has given imprimatur to its very practices.

International law prohibits racial discrimination of any kind. It is important to have to resort to it. Race litigation is now increasingly becoming a fertile ground in the advancement of equality rights in the administration of justice in Canada. However, race litigation is hobbled by the conspiracy of silence binding the judiciary, prosecutors, police, jurors, defence counsel, Canada customs, immigration and prevailing precedents. This conspiracy of silence is being

challenged in the courts even though courts are part of this conspiracy. It is cracking up as evidenced by the successes of the challenge for cause cases and the admission of social contextualization in the judging process. The racial and gender composition of the judiciary and tribunals should be encouraged to be more reflective of the society and localities. As more lawyers become familiar with the critical race theory and on how to litigate race cases, the possibilities of success will increase<sup>42</sup>.

The case of Brown v. The Queen<sup>43</sup> on racial profiling which was argued in the Court of Appeal for Ontario on January 17<sup>th</sup> 2003, elevated both the issue of racial profiling done by the police as well as the severe judicial resistance to the allegations of racial profiling. The trial judge was quite hostile to defence counsel and the accused Black person, when the issue of racial profiling as the motive for the stoppage on the highway was raised. Judicial comments and their vituperativeness have been quoted extensively to be reproduced here<sup>44</sup>. The accused was convicted and told to apologize to the police.

In an accused's appeal to the Superior Court of Justice, the summary conviction appeal Judge set aside the conviction on the ground that the trial judge may have displayed bias in his comments on racial profiling. The Crown appealed to the Court of Appeal for Ontario on the issue of reasonable apprehension of bias.<sup>45</sup>

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<sup>42</sup> See Law Society of Upper Canada seminar materials, Race, Courts and Tribunals: Emerging Doctrines and Their Impact, March 22<sup>nd</sup>, 2000.

<sup>43</sup> (2002), 48 C.R. (5th) 291 (Ont. S.C.J.)

<sup>44</sup> Quoted in ibid. See also entire transcript on appeal to the Court of Appeal.

<sup>45</sup> Brown v. The Queen, File C-37818. Case argued January 17th 2003. Now reported in (2003), 173 c.c.c. (3d) 23.

The Crown on appeal, has conceded that the police do conduct and engage in racial profiling, a concession that was received with tremendous hostility by the Minister of Public Security as well as the police forces and segments of the media, principally the National Post.

It is submitted that the crown concession as to the prevalence of racial profiling was reasonable in light of the recently publicized reports by the Toronto Star of the existence of evidence of widespread racial profiling by the police. This evidence had already been compiled by the Commission on Systemic Racism and other studies.

Judicial hostility to any allegations of racial profiling demonstrated in Brown is endemic albeit undocumented. In the case of Ranger v. The Queen (December 6th 1989, District Court of Ontario, unreported) a judge was quite hostile, although unprovoked, when he contemplated that racial profiling would be raised by defence counsel. This was a case where a black youth was shot by a white police officer. The youth survived. Judge David Humphrey stated, “The officer who fired the shots is extremely fortunate that the accused did not get shot. If that had happened, no doubt irresponsible members of the legal profession would have demanded murder charges be laid, accompanied by such irresponsible statements such as ‘Black people are sick of being shot by white police’.”

A judge of the Ontario Court of Justice in the case of Cox v. The Queen<sup>46</sup> was also defensively hostile when making a ruling on bail release involving a black youth where the Crown made extensive submissions on why the youth should not be granted bail because of his lack of employment among other factors, factors which the Commission on Systematic Racism attributed to be causes why black accused are usually not granted bail. Defence counsel pointed to that study thus eliciting the hostile judicial comments. Judge Hogg snapped, “Have you ever had any Court of Appeal Judge say that I was racially biased in any way or that I detain people

because they were black and because they did not work. Or that I detain people all over, white, black, green or yellow, that they didn't work? Have you ever got any - if you've got it for me, you show me it ...." The Judge had completely missed the boat in his rush to judgment. No one had accused him of racial bias. Defence counsel as the transcript demonstrates was responding to Crown submissions.

In another case, Mapp v. The Queen<sup>47</sup>, the judge accepted that the police in arresting only the black accused rather than the white perpetrators, engaged in racial profiling. However, instead of acquitting the black accused as a result of the admitted improper motive for the arrest, adjourned the case sin die (essentially terminating the proceedings), a remedy that is uncommon in criminal law. This remedy is similar to the prejudice evidenced in the Richards<sup>48</sup> case where the trial judge refused to acknowledge that racial profiling had occurred for fear of adverse career consequences for the police officer involved.

Some judges simply reject allegations of racial profiling in favour of police evidence<sup>49</sup>.

The battle for race litigation is thus most hardest in the trial courts. Most cases end there. Most times there is no record of those cases. What exists is anecdotal evidence.

However, there is light at the end of the tunnel. In the case of Golden v. The Queen<sup>50</sup>, the Supreme Court of Canada accepted that blacks and indigenous Canadians are disproportionately

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<sup>46</sup> (June 10th 2002, Ont. C.J.) (Hogg J.) unreported, transcript with author).

<sup>47</sup> File No. 01-10205 (May 6th 2002, Oshawa) (Halikowski, J.) (unreported, transcript with author).

<sup>48</sup> Supra note 32.

<sup>49</sup> See for example Tarik Johnson v. The Queen (September 25th 2002, Scarborough) (Feldman, J. ) (unreported, transcript with author).

<sup>50</sup> (2001), 47 C.R. (5th) 1 (S.C.C.)

stopped and strip-searched by police “inferentially accepting that racial profiling exists”<sup>51</sup>. It is hoped that the Brown<sup>52</sup> case on reserve in the Ontario Court of Appeal will advance to provide an opportunity for a conclusive pronouncement that racial profiling exists and renders the administration of justice unequal pertaining to black accused.

### **Futher Readings**

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- ✍ Gross, A. Paul et al (eds.) Commissions of Inquiry (Toronto, et al, Carswell, 1990).
- ✍ Hamalengwa, Munyonzwe, (ed.) Police Law (Toronto: Nelson Mandela Academy of Applied Legal Studies Course Kit, 1996).
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- ✍ Henry, Frances, The Racialization of Crime in Toronto’s Print Media (Toronto, 1999).
- ✍ Kaiser, H. Archibald, “The Aftermath of the Marshall Commission: A Preliminary Opinion”, in (1990) 13 Dalhousie Law Journal 364.
- ✍ Martin, Dianne L. “When The Rules Are Wrong: Wrongful Convictions and the Rules of Evidence” Paper presented at the Annual Conference of The Criminal Lawyers’ Association, Toronto, November, 1999.
- ✍ Nova Scotia. Royal Commission on the Donald Marshall Jr. Prosecution. 1989. Commissioner’s Report.

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<sup>51</sup> Tanovich supra note 12 at p.52 note 4.

<sup>52</sup> Supra note 45. Eventually Brown pleaded guilty on June 25th 2003 to drinking and driving. This however, does not mean that he was not initially arrested due to the exigencies of criminal and racial profiling.

- ✍ Ontario. Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. (Toronto: Queen's Printer, 1995).
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- ✍ Stenning, Philip, ed. Accountability for Criminal Justice: Selected Essays (Toronto: U of T Press, 1999).
- ✍ Trotter, Gary, 2<sup>nd</sup> ed. The Law of Bail in Canada (Toronto: Carswell, 1999)
- ✍ Williams, Toni, "Sentencing Black Offenders in the Ontario Criminal Justice System" in Julian Roberts and David Cole, (eds.) Making Sense of Sentencing (Toronto: U. of T. Press, 1999).