A defining moment to define substantive racial equality?
The Supreme Court of Canada's Judgements in *R. v. R.D.S.*, *R. v. Williams* and *Van de Perre v. Edwards*

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Abstract

Chief Justice Beverley McLachlin's assertion that the Supreme Court of Canada has developed a theory of substantive racial equality is premature. The court's decisions in *R. v. R.D.S.*, *R. v. Williams* and *Van de Perre v. Edwards* demonstrate that while the court is able to 'speak' the language of substantive equality, the court fails to apply a substantive approach. The judgements reveal that the court has not tackled conceptual fundamentals such as race and racism, and that the court remains committed to liberal legalism and liberal individualism. Without a strong theoretical base from which to depart, the court is ill-equipped to make the choices necessary to define the racial context of a case. Consequently, the court's ability to apply the contextual judging mandated by an ethic of substantive equality is compromised. Adoption by the court of a critical race perspective that is committed to a social construction understanding of race could accelerate the court's development of a theory of substantive racial equality.

In memory of Joyce

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CHAPTER ONE - INTRODUCTION

Between 1982 and 2004, forty-seven section 15, *Canadian Charter of Rights and Freedoms*[1] cases have been decided by the Supreme Court of Canada.[2] Of the cases decided at the Supreme Court level, sex was the ground of discrimination claimed in seven cases, disability in nine, religion in two, age in nine, a non-enumerated ground in twelve[3], and an analogous ground in nine[4]. Of the forty-seven cases decided by the Supreme Court of Canada, only two claimed race as a ground of discrimination.[5] As Iyer asserts, there has been a very low number of litigants either appearing in court, or seeking funding from the Court Challenges Program of Canada (CCPC) who have claimed 'race' as a ground of discrimination.[6] In this light, while the adoption of the *Charter* provides a basis in *theory* for challenging racist legislation and practices by governments, the *Charter*

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.)., 1982, c.11 [*Charter*].

[2] Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions* (Ottawa: Library of Parliament, 2004), 16-29.

[3] The non-enumerated grounds included: employment; province of prosecution/residence; litigants against the Crown; membership in the military; permanent residents convicted of relevant offences; new residents of province; persons committing crimes outside Canada; employment status; immigrant status; family status, and; non-registration under the *Indian Act*.

[4] The analogous grounds included: citizenship; sexual orientation; marital status, and; aboriginality-residence.

[5] These cases were: *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, and, *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

[6] Nitya Iyer, *Charter Litigating for Racial Equality, A Paper Prepared for the Court Challenges Program*, (1996), http://www.ccppcj.ca/documents/iyer-en.html.

has not proved to be an effective tool for addressing issues of race and racism in the Canadian legal setting.[7]

While the numbers demonstrate limited constitutional activity in the area of Canadian race equality jurisprudence since the entrenchment of the *Charter*, since 1997, three legal cases – *R.* v. *R.D.S.*[8], *R.* v. *Williams*[9], *Van de Perre* v. *Edwards*[10] - have come before the Supreme Court of Canada, necessitating that the court tackle issues of racism and race equality head-on. Consequently, while the impetus for my research is the past and continuing dearth of race equality jurisprudence at the Supreme Court of Canada, the purpose of my research is to evaluate if the court has, in the wake of this trilogy of race-based cases, developed a theory of substantive racial equality.

For a number of reasons, undertaking an analysis of race equality jurisprudence is particularly difficult within the Canadian context. The current relationship between race and the law is at a crossroads of sorts. On the one hand, Canadian political, social, legal and economic history and thought have been plagued with the assumption that, unlike our American counterparts, Canada is a country that is 'raceless' in that it lacks an explicitly racist past, hence present. The national understanding of Canada as a multicultural mosaic is constructed in opposition to the deeply and overtly racialised politics of the United

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[7] Carol Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999), 131.

[8] *R.* v. *R.D.S.*, [1997] 3 S.C.R. 484 [*R.D.S.*].

[9] *R.* v. *Williams*, [1998] 1 S.C.R. 1128 [*Williams*].

[10] *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 [*Van de Perre*].

States. From this understanding, when racism is 'seen' in Canada, it is perceived of as an aberration. However, as Backhouse articulates, this sense of Canadian racelessness is peculiar because of remarkable evidence to the contrary.[11]

The continual (re)articulation of Canada as raceless[12] has profound consequences for those who experience life in a racially marked body. First, the commitment to an understanding of Canada as raceless, and its corollary liberal prescription of colour-blindness, silences potential and actual serious public analysis or discussion of racism(s) in Canadian society.[13] A commitment to colour-blindness or racelessness erases the *meaning* and *experience* of racial inequality and disadvantage. The erasure of race effectively elevates inequality and disadvantage made on the basis of distinctions of race by denying the meaning of the distinctions in the first place. As articulated by Goldberg, the commitment to a myth of racelessness locks race into a 'contemporary vacuum', impeding our ability to understand historical configurations and conditions that render possible contemporary racial formations.[14]

In the legal realm, the myth of Canadian racelessness stands in stark contrast to the reality of a history of legislation that has articulated racial distinctions, inclusions and exclusions. Moreover, the myth of Canadian

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[11] Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950* (Toronto, Buffalo and London: University of Toronto Press, 1999), 13.

[12] By 'raceless' I am referring to the way in which Canadian political discourse has not acknowledged race as an integral element of its self-definition and politics.

[13] David Theo Goldberg, *The Racial State* (Massachusetts and Oxford: Blackwell Publishers Inc., 2002), 217.

[14] Ibid.

racelessness stands in opposition to the reality of the acts of politicians, policymakers, lawyers, judges and law enforcement personnel who have employed legislated racial constructions when assessing legal rights and responsibilities.[15] Ironically, the myth of Canadian racelessness complicates the task of undertaking a legal analysis because there is no body of jurisprudence recognising race equality that is comparable to that in the United States. Consequently, much of what can be said about race jurisprudence in Canada must emerge from a point of legal silence or omission.

An analysis of Canadian race jurisprudence is further complicated because the understanding of Canada as raceless sits in tension with our national discourse of multiculturalism.[16] Initially built upon a framework of 'tolerance for ethnic diversity', the 'polite' national discourse of multiculturalism neatly transforms the less 'polite' discourse of race and racism to the discourse of the cultural mosaic. In this discursive transformation, 'race' becomes 'culture', and racism becomes a question of 'managing difference'. Underscoring the discursive translation of race and racism to multiculturalism is the erasure of the racial power dynamics that, in fact, inform both discourses.[17]

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[15] Backhouse, *Colour-Coded*, 13.

[16] In 1971, Canada became the first country in the world to adopt an official policy of multiculturalism. See *Canadian Multiculturalism Act*, R.S. 1985 , C. 24 (4th Supp.) [C-18.7] *An Act for the preservation and enhancement of multiculturalism in Canada* [1988, c. 31, assented to 21st July, 1988 [*Canadian Multiculturalism Act*].

[17] As Goldberg states, the commitment to ethnic pluralism, State-sponsored multiculturalism, colour-blindness and/or racelessness represents, "...the neoliberal attempt to go beyond – without fully coming to terms with – racial histories and their accompanying racist inequities and iniquities; to mediate the racially classed and gendered distinctions to which those histories have given rise without reference to the racial terms of those distinctions; to transform, via the negating dialectic of denial and ignoring, racially marked social orders into racially erased ones. See Goldberg, *The Racial State*, 221.

While Canadian historical and contemporary political and legal discourse has tended towards silence on the extent to which race is implicated in Canadian politics and law, progress has been made. The past six years may indicate that we are at a legal crossroads of sorts. There are glimmers that the Supreme Court of Canada is prepared to engage in an explicit discussion of race and racism in the post-*Charter* legal setting. In particular, the Chief Justice of the Supreme Court of Canada, Beverley McLachlin, delivered an address in 2002 that may mark this important judicial awakening. Entitled *Racism and the Law: The Canadian Experience*[18], McLachlin C.J.'s address examined both Canadian judicial utterances and silences on issues of race and racism. McLachlin C.J. tracked the historical development of the Canadian legal perspective on race and racism, asserting that the Supreme Court of Canada's approach to race and the law can be marked by three different interpretive periods.

For the purposes here, it is McLachlin C.J.'s discussion of the third period in Canadian legal history that is of particular interest. McLachlin C.J. asserts that in this contemporary period of race and the law, the Supreme Court of Canada has adopted and refined an understanding of race and racism based on a *substantive* approach to equality. Here, McLachlin C.J. specifies that substantive equality refers to an approach to equality that "...makes a difference in the lives of

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[18] Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, *Racism and the Law: The Canadian Experience* (David B. Goodman Lecture, University of Toronto, Faculty of Law, Toronto: 29 Jan. 2002). For this paper, a copy of McLachlin C.J.'s address was secured through the Supreme Court of Canada's library. McLachlin C.J.'s address was also aired on Canada's Political Channel (CPAC). There are some minor discrepancies between the oral and written versions of McLachlin C.J.'s address. As such, when referring to McLachlin C.J.'s address I will refer to the written version unless otherwise specified.

ordinary men, women and children."[19] Moreover, McLachlin C.J. moves further to assert that the Supreme Court of Canada has developed its "...own unique theory of equality and of racial harmony."[20]

It is not the content of McLachlin C.J.'s address that is particularly groundbreaking. Instead, it is the judicial recognition that law has played, and continues to play, a pivotal role in informing the politics of race that may mark a turning point. Nonetheless, while the mere fact that McLachlin C.J. has delivered an address on this topic may be heartening, McLachlin C.J.'s address also provides an apt moment for us to pause and consider the substance of her talk, as well as the assumptions informing her position. Consequently, this thesis takes McLachlin C.J.'s address as a starting point by which to assess where the Supreme Court of Canada is with respect to race equality jurisprudence. By deconstructing the content and assumptions guiding McLachlin C.J.'s address, I will attempt to locate if, and when, these same assumptions appear in the Supreme Court of Canada's judgements in the trilogy of cases mentioned in the opening of this paper. Moreover, in using McLachlin C.J.'s address as a framework for my analysis, I will be better able to assess whether the judgements rendered in these three cases do indeed represent a theory of substantive racial equality. The rationale for the approach I have chosen is integrally linked to the structure of law itself. Given that law is a field bound by, but not restricted to,

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[19] Ibid., 12.

[20] Right Honourable Beverley McLachlin, *Racism and the Law*, oral address.

precedent, it is imperative that we assess 'where we are now' to give us a suggestion of where race equality jurisprudence in Canada might be heading.

As articulated earlier, the number of litigants advancing race-based equality cases is staggeringly low. By correlation, the number of race equality cases reaching the Supreme Court of Canada is also extremely limited. As such, while *racialised* Canadian jurisprudence is well entrenched in the Canadian legal system, Canadian *race equality* jurisprudence is still in its infancy. Consequently, the more ambitious aim of this research is to piece together the *theoretical* reasons why race equality cases may be especially difficult to advance in the post-*Charter* legal context.

1.1 Methodology

Much in the same vein as Walker's *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies*[21], I have chosen to use a case-study approach. In many ways, my methodology is informed by the approaches taken by both Backhouse[22] and Walker. However, my project differs most fundamentally from the aforementioned in terms of the temporal period – post-*Charter* – I am covering. Unlike Walker and Backhouse's works, the cases studied here are already embedded in a *Charter*-based equality discourse. Consequently, while the focus of Backhouse and Walker's works was on,

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[21] James Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (Canada: Wilfred Laurier University Press, 1997).

[22] Backhouse, *Colour-Coded.*

primarily, *racist* and/or *racialised* jurisprudence, my primary focus is on *race equality* jurisprudence.[23]

As demonstrated in Backhouse and Walker's works, the case-study approach brings with it a number of analytic benefits. First, legal precedents settle specific disputes, establish and constrain the administration of law, establish and constrain legal principles themselves, set rules for future conduct, and establish norms by which a population measures its behaviour.[24] Given that race equality jurisprudence *is* in its formative stage, and given the recent trilogy of legal cases explicitly addressing issues of race and racism, it is timely to assess where the legal doctrine of precedent may be taking us.

Second, a case-study approach is beneficial in that it not only clarifies the legal dynamics of race-relations, but it also illuminates efforts to change those dynamics.[25] As explained by Piven and Cloward, popular struggles reflect *and* challenge institutionally determined logic.[26] Given that post-*Charter* race equality jurisprudence is still in its infancy, these three cases are important in that they provide room to examine the receptivity of the courts to social actors attempting

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[23] While this distinction is important, it is critical to note that the boundaries between racist/racialised jurisprudence and race equality jurisprudence are not necessarily clearly defined. Racialised constructions inform race equality jurisprudence. Moreover, race equality jurisprudence may perpetuate racist assumptions. Nonetheless, when referring to race equality jurisprudence I am speaking of a type equality jurisprudence in the post-*Charter* period that is forward-looking and concerned with establishing a coherent and consistent equality approach to issues of race and racism.

[24] Walker, 5-6.

[25] Ibid., 6.

[26] As cited in Kimberle Crenshaw, "Race, Reform and Retrenchment," in *Critical Race Theory: The Key Writings that Formed the Movement*, ed. Kimberle Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (New York: The New York Press, 1995), 111.

to foster dialogue on race and racism in the courts. In each of the three cases examined in this paper, social movement actors, acting as intervenors, were involved in strategizing change within the legal realm. By examining the dialogue between these intervenors and the Supreme Court of Canada, this work provides a starting point to look at strategies for change, and how receptive the court is to these strategies.

1.1.1 Limitations to the Case Study Approach

Inevitably, as with any methodological approach, my choice to engage in a case-study approach poses limitations to the scope of my discussion. First, as articulated by Backhouse, the act of choosing cases, or prioritizing some cases over others, is an exercise in "risk-taking".[27] Given that the scope of this research must be limited, I have employed five criteria by which I have restricted the cases I will be examining. First, the three cases I have chosen have all come before the Supreme Court of Canada after the entrenchment of the *Charter*. Second, each of the cases chosen demanded that the Supreme Court of Canada *explicitly* address some aspect of race and/or racism.[28] Third, each of these cases illustrates the complexity of addressing race under Canadian law. These cases demonstrate that race permeates a variety of areas in the law, be it criminal law, family law or laws that govern the judiciary itself. Fourth, these cases have been

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[27] Backhouse, *Colour-Coded*, 16.

[28] This is in contrast to those cases where race may be an undercurrent, or where race is of pivotal importance but the court has not chosen to frame the case in such a way. See, for example, cases dealing with aboriginal rights and the *Indian Act*. More often than not, the court frames cases dealing with aboriginal rights as issues relating to 'culture' and not race. While the

chosen because they have held or hold potential to be significant in terms of judicial precedent. Finally, two of these cases were chosen because they were explicitly mentioned in McLachlin C.J.'s address.[29]

Despite the criteria I have used to delimit my scope of inquiry, I remain uneasy about those areas of law and those cases I have chosen to leave out of this analysis. In making the claim that there is a dearth of s.15 race equality cases, I am speaking specifically of cases that are legally framed as being centrally concerned with race. Moreover, in referring to cases advanced on the basis of race equality, I am acutely aware of the extensive body of racialised case law dealing with aboriginal rights. While this body of case law is imbued with the politics of race, given the particular historical link between colonialism and aboriginal peoples in Canada, I am, with hesitation, treating this area of case law as beyond the scope of this thesis.

By choosing to address only those cases where race figures *explicitly*, I am aware that I am, in some ways, perpetuating a silencing of the complex ways in which race figures into law. Specifically, I am keenly aware that race, as well as gender and class, is implicated in cases where the terminology of race is not even present. In some cases, race may only be an undercurrent. In other cases,

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distinction between culture and race is difficult to defend in light of the culturalization of racism and the racialisation of culture, I am choosing to exclude these cases from my analysis.

[29] In her televised address, McLachlin C.J. states that there are three cases that are representative of the Supreme Court of Canada's theory of substantive racial equality. However, McLachlin C.J. only goes on to specify two cases – *R.D.S.* and *Williams*. In the written version of her address, there is no such mention of three legal cases. Given the close proximity between the Supreme Court of Canada's decision in *Van de* Perre and the date of McLachlin C.J.'s address, there is a high probability that *Van de Perre* may have been this third case that the Chief Justice alluded to.

however, race may figure centrally, but the parties involved in the dispute, or the court itself, may choose to frame the case as one not pivoting on the issue of race.[30] The extent to which race figures into legal cases may vary according to both framing and intensity. Consequently, those areas of law I have left unexplored could be, and should be, examined with more nuance in future projects that are more broad in scope.

Second, in choosing to address only those cases that *explicitly* engage with the issues of race and racism, I am aware of a large body of case law that may have been lost in the 'racelessness' of the Canadian legal record. Marginalised and racialised groups have neither been the authors, nor the focus of Canadian historical writing in general, or Canadian historical legal records in particular. Consequently, racialised legal actors often disappear in the text of written judgements. With most individuals and groups described in Canadian historical legal records not identified by race or ethnicity, there is an entire body of case law that may be lost to all those looking to understand the intersection of race and the law.[31]

The third 'risk' in choosing to examine only those cases that *explicitly* address race is that of reifying race as an immutable personal characteristic, rather than a product of social formation. Fourth, the cases I have chosen to study deal only with aboriginal and black racialised legal actors. Given that race

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[30] One excellent example of this is the series of hate propaganda cases that have come before the Supreme Court of Canada: *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, and; *R. v. Zundel*, [1992] 2 S.C.R. 831. In these cases, the legal issues are defined as pivoting around the *Charter*'s s.2(b) freedom of expression guarantees.

and racism operate contingently, this factor limits the scope of applicability of my analysis. While the cases I am studying may be useful in understanding the state of race equality jurisprudence, this research is premised on the assumption that the social formation of racialised groups is diverse in both construction, and the consequences springing forth from membership in a particular racialised group. The experience of one racialised group cannot be treated as analogous to another. For that reason, future research should examine the specifics of race, racism, culture and the law with respect to racialised groups other than Canadian black and aboriginal people.[32]

1.2 Theoretical Framework

As will be made more explicit during the course of my research, the study of race and racism is explicitly political. Consequently, the act of choosing a theoretical approach with which to study race and racism is similarly a political gesture. My choice of theoretical framework reflects not only my position as a racialised female student, but also my desire to employ a framework that both recognises the politics of race, while at the same time critically engages with the power dynamics that inform political discourses of race. For my purposes, critical

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[31] Backhouse, *Colour-Coded*, 12.

[32] As compared to Walker and Backhouse's works, the research here is also limited in that I will not be providing follow-up on how the cases examined have been used as precedents. Useful future research could involve an analysis of how these cases are interpreted as precedents, how the issue of race is framed when these cases are used as precedents, and how faithful the lower courts have been in interpreting the spirit and intent of the judgments rendered by the Supreme Court of Canada. Moreover, in focusing this analysis specifically on theory developed by the court, I am treating arguments put forth by intervening parties as secondary to my primary analysis. Fruitful research could be done with social movement organizations, the respondents, and the appellants to examine those issues left out of the court record and how social movement organizations perceived the success of their interventions.

race studies has proven to be the most effective approach in terms of both deconstructing legal discourses of race, and reconstructing theories of legal racial equality. Namely, critical race theory has proven to me to be the most fruitful approach that engages with the issues surrounding race on a *substantive* level.[33]

1.2.1 Critical Race Studies

Formalised in Canada in the 1980s, critical race theory can be traced back to a group of racialised scholars who attended the tenth National Critical Legal Studies (CLS) Conference in 1986 in Los Angeles.[34] CLS itself can be traced back to 1977 in the United States when a group of radical legal scholars, who were generally left-leaning White male professors, began to attack the tenets of liberal legalism.[35] Broadly, these CLS scholars understood and analysed legal ideology and discourse as social artefacts functioning to recreate and legitimate American society.[36] Criticising five basic tenets of liberal legalism – the rule of law, formalism, neutrality, abstraction, and individual rights – CLS scholars deconstruct legal doctrine to reveal its internal and external inconsistencies.[37]

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[33] As with any theoretical framework, critical race theory is diverse. With this in mind, at the macro-level, my theoretical approach can be termed 'critical race'. However, my understanding of critical race theory is also informed by CLS, feminist theory and post-modern discourse analysis.

[34] Aylward, *Canadian Critical Race Theory*, 27.

[35] Ibid., 19.

[36] Crenshaw,108.

[37] Aylward, *Canadian Critical Race Theory*, 19-21.

Alienated from liberal legal discourse, many racialised scholars were initially drawn to the largely white, male-dominated CLS movement.[38] CLS appealed to racialised scholars because the approach challenged the objectivity and neutrality of legal discourse, a discourse that had been central to the marginalisation of racialised communities.[39] Yet, for many racialised scholars, CLS was an incomplete and flawed critical approach on two fundamental counts.

First, critical race theorists rejected CLS because of its refusal, or inability, to recognise the centrality of race and racism in historical and contemporary legal configurations. Instead, understanding law as both product and promoter of racism, critical race theorists called for the positioning of race as central in critical legal analysis. The prime difference here is that critical race theorists view race and racism as a *distinct* phenomenon infiltrating legal and non-legal history.[40]

Second, critical race theorists asserted that CLS seemed to ignore the realities of racialised communities in that it "...'portrayed those who used legal doctrine, legal principles, and liberal theory for positive social ends as either co-opted fools or cynical instrumentalists.'"[41] While CLS scholars conceptualised law as an inappropriate and ineffective venue for socio-political change, critical race theorists approached law as both a field of deconstruction and reconstruction.

Central to the split between CLS scholars and critical race studies scholars was the issue of rights. For CLS scholars, rights discourse was viewed as a

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[38] Ibid., 27.

[39] Ibid.

[40] Ibid., 31.

doctrine that legitimated and maintained inequitable power relations. Consequently, CLS scholars called for the abandonment of the rights discourse. For many racialised scholars for whom the Civil Rights movement was perceived of, and experienced as an empowering political moment, rights were perceived of as "...invigorating cloaks of safety that united us in a common bond."[42] As articulated by Williams, many critical race scholars felt that CLS did not take into account that experiences of the same circumstances – legal and political rights – could be very different depending on the status and position of a given Subject.[43] Specifically, the same symbol – legal and political rights – may mean different things to racialised and non-racialised actors.[44]

In this sense, the CLS scholars' assertion of rights' actual disutility in political advancement[45] effectively erased and invalidated one of the most "...effective of the insurrectionist discourses utilized in the struggles of peoples of color."[46] As Williams articulates, CLS' attacks on rights discourse "...demonstrate the perils of a disengaged theoretical stance toward discourse unmediated by

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[41] Ibid., 26-27.

[42] Ibid., 29.

[43] Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" *Harvard Civil Rights – Civil Liberties Law Review* 22 (1987): 409.

[44] Ibid.

[45] Ibid.

[46] Robert Williams, "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Colour" *Law and Inequality* 5 (1987): 104. This is not to say that critical race theorists embrace rights as wholly productive, effective or ideal. There is still within the critical race theory movement a perception that rights are indeterminate. Moreover, critical race theorists will undoubtedly vary in terms of their perception of the possibilities of rights discourse. As R. Williams articulates, part of the problem with the CLS perception of rights is that CLS theorists

historical appreciation of the tradition from which a discursive practice is projected."[47]

While critical race theory did reject some of the ontological assumptions guiding CLS, critical race theory cannot be characterised as either wholly reactionary or solely deconstructive. Instead, critical race theory builds on the insights of CLS, feminism, and Black Power and Chicano movements of the 1960s and 1970s.[48] While critical race theory can be said to accord ontological priority to race, critical race theory is broad in that it questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.[49]

1.2.2 Tenets of Critical Race Theory

In all of its variety, critical race theory will provide the theoretical backdrop upon which I will base my analysis. As such, my research will be guided by a number of fundamental assumptions that characterise many critical race approaches. First, in this research, racial identity is given ontological priority. Second, race and racism will be understood as 'ordinary' in that they are implicated on a daily basis at every level in all socio-political and economic interactions. Third, this research is premised on the understanding that 'races' are

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view rights as *concepts*. R. Williams asserts that critical race theorists may be more inclined to view rights as a *phenomenon*.

[47] Ibid., 121.

[48] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York and London: New York University Press, 2001), 4.

[49] Ibid., 3.

social constructions. Through the process of racialisation, categories of race are socially defined. In this sense, race is not objective, biologically inherent or immutable.

The fourth assumption guiding this research is that of differential racialisation. Different minority groups are racialised by dominant society at different times and in response to shifting needs such as the labour market.[50] Consequently, experiences of race and racism are not necessarily coherent or consistent. Fifth, just as the differential racialisation thesis counters essentialized understandings of experiences of race and racism across differently racialised groups, this paper is premised on a commitment to intersectionality. No person has one, static, unitary identity, uncomplicated by the intersections of race, class, gender, ability and sexual orientation. As such, while I do, for the purposes here, ontologically prioritise race, my analysis is also concerned with issues of gender, class, sexual orientation and ability. Sixth, despite my commitment to anti-essentialism, this research is guided by the assumption that status as a racialised minority brings with it a presumed competence to speak about race and racism.[51] This is not to say that there is a unitary, unique voice of colour. Instead, 'presumed competence' assumes that racialised minorities may be able to communicate certain experiences and issues that the dominant group may not know of, or may not have experienced at a visceral level.

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[50] Ibid., 8.

[51] Ibid., 9.

The critical race approach adopted here is also based on a number of propositions regarding the intersection of race and the law. First, while I am not advocating a rejection of the rights discourse, I am asserting the need to move beyond existing liberal legal rights analysis. Second, this paper is based on the rejection of a colour-blind approach to law. Colour-blind approaches erase the reality that racialised groups have never been, and are not similarly situated in legal practice, doctrine, rules and principles.[52] Third, this paper advocates a colour-conscious approach to law. A colour-blind approach to law, and its legal corollary of formal equality, can remedy only the most blatant forms of discrimination. Consequently, I am adopting a contextual approach that positions the experiences of marginalised groups at its centre.[53] This approach can be characterised as one concerned with issues of substantive racial equality. Finally, this research is guided by critical race theory's aim to both deconstruct and reconstruct law. At the level of deconstruction, I am questioning how legal doctrines, rules, and theories subordinate particular racialised groups. At the level of reconstruction, I am attempting to illuminate how, where and when law can be used in a transformative sense.

1.3 Structure

This thesis demonstrates that McLachlin C.J.'s assertion that the Supreme Court of Canada has developed a theory of substantive racial equality is premature. While the court succeeds in 'speaking' the language of substantive

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[52] Aylward, *Canadian Critical Race Theory*, 34.

equality, the court does not succeed in applying said approach. The Supreme Court of Canada has not 'thought through' substantive racial equality in that it has not tackled the fundamentals of race and racism. Moreover, the court's enduring commitment to liberal legalism and liberal individualism has compromised its ability to move beyond a formalist approach, to define and refine a consistent and coherent vision of substantive racial equality. As it does with its treatment of race, the Supreme Court demonstrates a consistent tendency to treat substantive equality as though it 'emanates from nowhere'. Without a strong theoretical base from which to depart, the court is ill-equipped to make the choices necessary to define the context of a given case. Consequently, the court is ill-equipped to apply the contextual judging mandated by an ethic of substantive equality. Advocates are faced with the task of leading the court through the process of 'thinking through' substantive equality. This paper is structured to reflect the process of thought I am encouraging that advocates seek to entrench in the Supreme Court of Canada.

This thesis will be divided into four main sections. First, I begin with a summary and analysis of McLachlin C.J.'s address *Racism and the Law: the Canadian Experience*. The content of her address, and my subsequent analysis of her work will act as a framework underlying my entire thesis. McLachlin C.J.'s address will be examined and assessed in three key ways. First, I will assess how McLachlin C.J. characterises the development of race equality jurisprudence by the Supreme Court of Canada. Here I am concerned with McLachlin C.J.'s

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[53] Ibid.

perception of the status of Canadian race equality jurisprudence. Second, I will analyse McLachlin C.J.'s address from a critical race perspective, paying particular attention to her understanding of race, racism and their intersection. In addition, the content of McLachlin C.J.'s address will be assessed to determine her conceptualisation of the link between racism, liberalism, the State and liberal legal discourse. Third, I will examine McLachlin C.J.'s key assertion that the Supreme Court of Canada has developed a theory of substantive racial equality. I will outline the specifics of McLachlin C.J.'s understanding of substantive equality, and lay the theoretical basis for their interrogation. The overall intent of this section is to lay a backdrop upon which actual Supreme Court of Canada judgements can be assessed.

The second section of this project forms the body of my work. The subsequent three chapters will be structured as case analyses of each of the three legal cases mentioned previously in this introduction. The structure of my case analysis is modelled strongly after Walker's *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies*. Each chapter begins with a description of the event that ultimately led to the particular Supreme Court of Canada decision. Second, I will briefly flesh-out the legal and political issues at stake in the case at bar. Third, my case analyses will proceed through the lower-court decisions to the Supreme Court of Canada. While I am focussing on the judgement rendered by the Supreme Court of Canada, I am stressing that a dialogue exists between the upper and lower courts. In examining the interaction between the Supreme Court and the lower courts, I am interested in noting what issues made it to the Supreme Court of Canada, how the legal cases were

framed at the lower court level as opposed to the Supreme Court level, and what lower court assumptions the Supreme Court of Canada leaves untested and unchallenged. Fourth, after outlining the judgement rendered by the Supreme Court of Canada, I will proceed to critique and analyse the decisions themselves. The critique will be from a critical race perspective, and where relevant, each case will be assessed according to the same criteria by which McLachlin C.J.'s address was analysed. The ultimate aim here is to isolate what the court has developed, or is developing in terms of a theory of substantive racial equality.

The final section of my research involves the integration of my comments and conclusions of each of the legal cases studied. This integration will serve to assess whether the Supreme Court of Canada has developed, or is starting to develop, a theory of substantive race equality. My conclusions regarding the Supreme Court's judgements will then be assessed on two levels. First, the judgements will be weighed against the claims made by McLachlin C.J. in her address. Second, I will see whether the problems I have identified in McLachlin C.J.'s address reappear in the Supreme Court judgements. If the most basic attempt here is to locate the Supreme Court of Canada's theory of substantive racial equality, the more ambitious aim of my project is to isolate any theoretical limitations that hinder the advancement of race equality cases, and to offer suggestions on where race equality seekers should go from here.

CHAPTER TWO - THE ADDRESS OF CHIEF JUSTICE BEVERLEY MCLACHLIN

On January 29, 2002, Chief Justice Beverley McLachlin delivered an address entitled *Racism and the Law: The Canadian Experience* to the Faculty of Law at the University of Toronto. In tandem with the three legal cases – *R.D.S.*, *Williams*, and *Van de Perre* – to be assessed in remaining chapters, McLachlin C.J.'s address *may* represent a crossroads in Canadian legal history in that the court may finally be prepared to engage in an explicit discussion of race and racism in the post-*Charter* legal setting. While McLachlin C.J.'s choice of topic provides an apt moment for commentary, the assumptions underscoring her claims must be subject to interrogation. The intent here, however, is not to examine McLachlin C.J.'s address in isolation. Instead, my analysis of McLachlin C.J.'s speech is only the first in a three-step process. After summarizing the content of her address, I will interrogate the assumptions that inform her position. Here I will question her understanding of the fundamentals such as race and racism, as well as her understanding of the intersection of racism, law, the State and the *Charter*. Second, I will examine McLachlin C.J.'s perception of the state of race equality jurisprudence, and the specifics of how she conceptualises substantive racial equality.

Third, after I have clarified the content of McLachlin C.J.'s address, located the assumptions underscoring her claims, and isolated any theoretical problems that may constrain a legal dialogue on race and racism, I will extend my analysis beyond the confines of her address. In subsequent chapters, McLachlin C.J.'s address will be tested against contemporary race equality case law with the aim

of answering the following: Is McLachlin C.J.'s position representative of the Supreme Court of Canada's position on race, racism and the law? Do the assumptions embedded in McLachlin C.J.'s address appear in current race equality case law? Do the theoretical problems that emerge in McLachlin C.J.'s address also appear in the case law? How might these assumptions be leading race equality jurisprudence in a certain direction? In what direction is race equality jurisprudence heading? And, most importantly, do the three legal cases – *R.D.S.*, *Williams*, and *Van de Perre* – confirm McLachlin C.J.'s assertion that the current period of race and the law is one characterised by a commitment to substantive racial equality?

2.1 Summary

In *Racism and the Law: The Canadian Experience*, McLachlin C.J. tracks the historical development of the Canadian legal perspective on race and culture, asserting that the Supreme Court of Canada's approach to racism can be marked by three different interpretative periods. At the outset, McLachlin C.J. concedes that the progress made by Canadian law in dealing with racial conflicts and tensions is not yet complete.[54] Nonetheless, McLachlin C.J. asserts that to guarantee continued progress in the mediation of racial and cultural tensions, legal actors must "...address these issues openly, with compassion, intelligence and *a firm understanding of our own history, legal traditions, and the pitfalls of the*

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[54] Right Honourable Beverley McLachlin, *Racism and the Law*, 2.

politics of exclusion."[55] By virtue of this assertion, McLachlin C.J. articulates a high standard by which we can assess the content of her address.

2.1.1 Racism According to McLachlin C.J.

Underscoring McLachlin C.J.'s address is a very particular understanding of the dynamics of racial and cultural differentiation. Drawing from sociobiologist Robert Ardrey's *The Territorial Imperative: a Personal Inquiry into the Animal Origins of Property and Nations*[56], McLachlin C.J. begins by observing that human beings are social in that they organise themselves into distinct social groups.[57] This differentiation of individuals into social groups is enabled by the adoption of a variety of "rules, conventions and traditions" that define the parameters of group membership.[58] The formalisation of these norms creates the Self and the Other.[59]

While this initial establishment of group boundaries may seem benign, McLachlin C.J. addresses antagonistic distinctions of the Self and the Other by employing the concept of the *territorial imperative*. The territorial encroachment of the Other – the territorial imperative – provokes the feelings of "resentment, fear, exclusion and aggression" upon which racism is based.[60] These 'intuitive' feelings then give rise to "...more complex expression in religious and cultural

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[55] Ibid. – emphasis added.

[56] Robert Ardrey, *The Territorial Imperative: a Personal Inquiry into the Animal Origins of Property and Nations* (New York: Atheneum, 1966).

[57] Right Honourable Beverley McLachlin, *Racism and the Law*, 2.

[58] Ibid.

[59] Ibid.

[60] Ibid., 3.

values."[61] According to McLachlin C.J., the racist response to the territorial imperative is a reaction to both "social realities" and "perceived threats".[62]

Within the context of the multi-racial modern nation-State, McLachlin C.J. asserts that exclusion and expulsion of the Other "...are *often* destructive forces."[63] Racism, discrimination, adverse treatment and disadvantage destroy "...human dignity, social order and, ultimately society itself."[64] However, liberal individualism can counteract the destructive potential of racism. McLachlin C.J. asserts that, "Inclusion and empowerment of individuals and groups promote a richer society and ensure the preservation of the distinct features that define them."[65] Moreover, modern democracy "...depends on respect for every individual."[66] In addition, modern progress requires that "...each person [feels] part of the whole and confident and empowered to play a role in it."[67] For McLachlin C.J., it is in the "collective interest" of liberal democracies to curb "discriminatory *impulses*"[68] and any "*tendency* toward exclusion".[69]

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[61] Ibid.

[62] Ibid.

[63] Ibid. – emphasis added.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid. – emphasis added.

[69] Ibid. – emphasis added.

2.1.2 The Role of Law According to McLachlin C.J.

The law is one instrument that can be used to curb "discriminatory impulses".[70] Law can "...promote the object of encouraging and allowing each citizen, regardless of race or culture, to realize his or her maximum potential."[71] Drawing a distinction between Canadian (mosaic) and American (melting-pot) approaches to racial and cultural differentiation, McLachlin C.J. firmly asserts that law plays an important role in "...achieving the kind of society we want to have."[72]

McLachlin C.J. asserts that the legal *response* to Canada's "multicultural reality" has moved through three general phases or interpretive periods. In the first period, from the colonial era to the mid-20th century, law actively maintained racial exclusion and subordination.[73] In this period, law reinforced racism by deeming racially discriminatory treatment to be a matter of personal choice.[74] The court was not prepared to prohibit discrimination because the choice to engage in discriminatory behaviour was the right of 'racially relevant' legal subjects. The case law during this period also rested on an ethic of passive tolerance of inequality.[75]

The second legal interpretative period extends from the mid-20th century to the entrenchment of the *Charter*. Here, the Supreme Court of Canada's

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[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] In this section of her address, McLachlin C.J. draws quite heavily from Walker's, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies*.

[74] Right Honourable Beverley McLachlin, *Racism and the Law*, 8.

conceptualization of race equality was based on the liberal doctrine of formal equality of opportunity. As per McLachlin C.J., the ethic of equal opportunity means that, "Everyone, regardless of race, gender or other such personal characteristics, should enjoy an equal opportunity to achieve their inherent potential."[76] The ethic of equal opportunity was founded on humanitarian principles that included political, economic and social elements; these elements were all bound within a negative-rights framework.[77] Firmly situated within a liberal point of view, the ethic of equal opportunity could move from theory to practice with the removal of discriminatory legal and institutional barriers.[78]

While the ethic of equal opportunity succeeded in breaking down barriers, erasing overt discrimination on the face of the law, and changing public common-sense regarding discrimination, the ethic ultimately proved insufficient. The failure of the *Bill of Rights*[79] resulted in the perception that[80]:

> More...was required, if true equality in the broader social sense was to be realized. Human rights codes were seemingly inadequate to the task of fighting deeply ingrained stereotypes. Many argued that more aggressive measures, like affirmative action and pay equity, were necessary to achieve concrete results. This time, it was argued, the law should be used positively to create substantive equality in our social and economic institutions. The equal opportunity model of equality gave birth to the idea of substantive

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[75] Ibid.

[76] Ibid., 9.

[77] Ibid., 10.

[78] Ibid.

[79] *Canadian Bill of Rights*, S.C. 1960, c. 44 [*Bill of Rights*].

[80] See for example, *Bliss v. Canada (Attorney General)*, [1979] 1 S.C.R. 183 and *Lavell v. A.G. Canada*, [1974] S.C.R. 1349.

equality.[81]

For the purposes here, McLachlin C.J.'s discussion of the third interpretative period in Canadian legal history is of particular interest. McLachlin C.J. asserts that in this contemporary period of race and the law, the Supreme Court has adopted and refined an understanding of race based on this new ethic of substantive equality. McLachlin C.J. specifies that substantive equality "...connotes actual, real equality – equality that makes a difference in the lives of men, women and children."[82]

McLachlin C.J. isolates three mechanisms – affirmative action, government policy and legislation, and the *Charter* – which have been employed, with varying degrees of success, to realize the ethic of substantive equality. Speaking specifically to the legal arena, McLachlin C.J. sees substantive equality as the foundational premise underlying the *Charter*'s guarantees. In fact, she asserts that, "...the *Charter* may be seen as formally signalling the judicial advent of substantive equality."[83]

For McLachlin C.J., there are two Supreme Court of Canada cases that capture the essence of substantive equality. First, in *Andrews*[84], McLachlin C.J. asserts that the Court "...pointed out the vacuity of formalistic concepts of equality and emphasized the need to look at the reality of how differential treatment

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[81] Right Honourable Beverley McLachlin, *Racism and the Law*, 12.

[82] Ibid., 4.

[83] Ibid., 14.

[84] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 497 [*Andrews*].

impacts on the lives of members of stigmatized and disadvantaged groups."[85] The court asserted that, "The purpose of the *Charter*'s guarantee was…to tangibly better the situation of members of subordinated and disadvantaged groups and to combat disadvantage and discrimination."[86] She reiterates that "Equality was not merely about treating likes alike, nor even about providing equal opportunities, but most fundamentally about the attainment of true *substantive* equality – equality that made an actual difference in the lives of the marginalized and downtrodden."[87]

McLachlin C.J. states that the ethic of substantive equality underscoring the *Andrews* decision was reinforced ten years later in *Law*[88] where the court clarified that human dignity is the concept that underlies the ethic of substantive equality.[89] Conceding that these cases have not wholly eliminated unequal treatment, McLachlin C.J. simultaneously argues that the animus of substantive equality underscoring these cases "…has made a difference in the lives of many disadvantaged people."[90]

For McLachlin C.J., post-*Charter* equality is premised on a contextually oriented approach to equality; this approach to equality is based on human

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[85] Right Honourable Beverley McLachlin, *Racism and the Law*, 14.

[86] Ibid.

[87] Ibid., – emphasis added.

[88] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*].

[89] Right Honourable Beverley McLachlin, *Racism and the Law*, 14.

[90] Ibid., 14-15.

dignity.[91] With respect to racism and racial discrimination, substantive equality necessitates the recognition of "...the context of historic racial and ethnic inequality and the myths and stereotypes that this context has produced."[92] Moreover, application of an ethic of substantive equality entails a three-step process. First, we must "...disabuse ourselves of [racial and ethnic myths and stereotypes]," and second, we must "...understand the *reality* of the disadvantaged group...".[93] Finally, on the basis of this new understanding of the reality of the disadvantaged group, we must "...examine the claim of unequal treatment afresh...".[94]

The body of McLachlin C.J.'s discussion of this third legal interpretive period is premised on the assertion that while post-*Charter* race jurisprudence is still in its infancy, its impact is most clearly visible in aboriginal and criminal law.[95] Dealing quite briefly with the arena of aboriginal law, McLachlin C.J. articulates that while section 35 of the *Constitution Act*, 1982[96] is not explicitly an equality provision, "...the constitutional entrenchment of aboriginal and treaty rights implicitly recognizes the historical practices that resulted in discrimination and

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91 Ibid., 15.

92 Ibid.

93 Ibid. – emphasis added.

94 Ibid.

95 Ibid.

96 *Constitution Act* 1982 (Schedule B of the *Canada Act* 1982 (U.K.)). Section 35 reads as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

devaluation of the rights of Canada's aboriginal peoples."[97] While she does not delve into case law, she asserts that s.35 can be seen as a "powerful weapon" and a "powerful tool" to advance substantive equality for aboriginal peoples.[98]

McLachlin C.J. spends more time addressing the *Charter*'s impact in the area of "racism in the criminal law", briefly examining two cases to be discussed in latter portions of this paper. First, in *R.D.S.*, a criminal law case that ultimately dealt with questions of judicial impartiality and racism, McLachlin C.J. asserts that the Supreme Court of Canada delivered a judgement based on substantive equality in that it "...affirmed the importance of diversity in the judiciary and of adapting the law to combat the problem of widespread racism in society."[99]

Second, *Williams*[100] was pivotal in that it recognised that "...widespread racism exists against aboriginals; that this racism includes stereotypes that relate to credibility, worthiness and criminal propensity; and that not to allow Mr. Williams to challenge prospective jurors for racial bias would undermine his right to a fair trial by an impartial jury."[101] The decision in *Williams* also embraced the ethic of substantive racial equality in that it represented a departure from a non-interference, hands-off approach by the courts, to "...the recognition that courts

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[97] Right Honourable Beverley McLachlin, *Racism and the Law*, 15.

[98] Ibid.

[99] Ibid., 16.

[100] Ibid. *Williams* was a jury selection case in which the Supreme Court of Canada unanimously held that Williams, an aboriginal man, was entitled to challenge jurors for cause based on possible racial bias.

[101] Ibid.

can and should take proactive steps to recognize racism and prevent it from marring trials and scarring the justice system."[102]

McLachlin C.J. concludes her address by reaffirming that, "...Canadian attitudes on how the law should deal with racial and cultural differences has undergone an important evolution."[103] Law has moved from being a tool that perpetuates inequality to a tool to "...combat inequality and enhance substantive equality."[104] Reinforcing the national discourse of multiculturalism, McLachlin C.J. asserts that Canada's path to equality is as a "mosaic" that recognises and respects differences and the "...innate dignity of every individual...regardless of race or ethnicity."[105] For McLachlin C.J., the mosaic model of respect and recognition of difference is taken as a given. Our history of two founding nations, set in the pre-existing context of aboriginal cultures has, "...forced the mosaic model of recognition and respect on us."[106] This history has resulted in a constitution "...that gives special rights to people on the basis of the groups to which they belong – rights of religion and language to English and French minorities, more recently historic rights to *our people* of aboriginal heritage."[107]

McLachlin C.J. concludes by asserting that Canadian law has been used to "...check the natural tendency to exacerbate inequalities and to put in their

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[102] Ibid.

[103] Ibid., 17.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid. – emphasis added.

place structures that respect and protect differences and encourage peaceful reconciliation of differences through consultation and negotiation."[108] For McLachlin C.J., "...we are on the right road and we have made progress in our quest for a country in which all peoples may live in dignity and respect."[109]

2.2 Analysis

The content of McLachlin C.J.'s address is not groundbreaking. McLachlin C.J. has not presented anything 'new' with respect to the complexities of race, racism and Canadian law. In fact, McLachlin C.J. draws quite heavily from Walker's book, but doing so at a superficial level, omits many of the analytic nuances of Walker's important work. Nonetheless, McLachlin C.J.'s inclusions and exclusions provide much food for thought, and may also serve as a strong parallel to what has been said, or left unsaid, by the law with respect to race and racism.

For the purposes here, McLachlin C.J. makes six fundamental claims during the course of her address. First, McLachlin C.J. asserts that law is a tool that can perpetuate inequality or be used proactively to ensure equality. The important distinction to make here is that race and racism are not seen as constitutive of law and the legal system. Second, McLachlin C.J. claims that Canadian legal history is marked by a substantive shift wherein law has moved from being a tool that perpetuates inequality, to a tool that combats inequality. Third, according to McLachlin C.J., liberal democracies with rights-based

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[108] Ibid., 18.

constitutional regimes can counteract a society's 'natural tendency' towards racist behaviour. Fourth, Canadian law's current interpretive period can be characterised as being premised on an ethic of substantive equality. Fifth, recent case law on race is based on an ethic of substantive equality. Finally, the approach to race equality jurisprudence being developed by the Supreme Court of Canada is leading us in the 'right' direction.

The purpose of this analysis is to problematize McLachlin C.J.'s aforementioned claims by focussing on four thematic areas. First, I will start with the fundamentals by examining how McLachlin C.J. understands race and racism. Second, I will examine McLachlin C.J.'s commitment to liberalism, paying particular attention to her understanding of the relationship between the State, law and race. In addition, I will problematize the non-racialised reality McLachlin C.J. believes legal substantive equality can, and should, promise. Third, I will problematize McLachlin C.J.'s vision of the promises of the *Charter* by specifying the parameters within which legal talk about race must occur within the *Charter* discourse. Finally, I will summarize McLachlin C.J.'s position on the promises of legal substantive racial equality, paying particular attention to her proposed legal prescriptions.

In examining McLachlin C.J.'s address in these four key ways, I am laying a backdrop upon which to engage in a critical race reading of the Supreme Court of Canada's decisions in *R.D.S.*, *Williams* and *Van de Perre*. By locating conceptual errors and limitations in McLachlin C.J.'s schema, I can attempt to

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[109] Ibid.

discern if parallel limitations appear in the case law judgements. If this is the case, we have grounds to challenge the claims offered up in McLachlin C.J.'s address. Moreover, if the limitations in McLachlin C.J.'s address reappear in Supreme Court of Canada judgements, we have cause to re-evaluate the promises and perils of engaging with the law when seeking racial equality.

Consequently, McLachlin C.J.'s address will be analysed to ultimately answer the following: What is substantive racial equality? Does the Supreme Court of Canada's interpretation in recent case law support an ethic of substantive racial equality? If not a theory of substantive racial equality, what theory has, or is, the court developing? Finally, based on the type of theoretical approach the Supreme Court of Canada is developing, where might we expect race equality jurisprudence to go from here?

2.2.1 Understanding Race

For an address on the subject of racism and the law, it is curious that McLachlin C.J. spends no time whatsoever addressing the thorny issue of 'race' as a conceptual category. Nonetheless, upon reading McLachlin C.J.'s address, one is left with the impression that McLachlin C.J. perceives race as an *intrinsic personal* characteristic that differentiates people into various social groupings. With no deeper explanation, McLachlin C.J. refers to Canada as a "multi-racial, multicultural country", a "tapestry of different cultural traditions", varying from First Nations people, Europeans and "peoples of diverse Asian and African *stocks*."[110]

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[110] Ibid., 2 – emphasis added.

For McLachlin C.J., "it is fact" that countries are "composites of people of differences races and cultural groups."[111]

McLachlin C.J.'s address leaves one with the distinct impression that racial and cultural 'differences' emanate from nowhere. McLachlin C.J.'s specific choice of racial terminology naturalizes racial distinctions, stripping them of the power relations that inform them. While McLachlin C.J. is restricted in terms of what she can or cannot cover during the course of her address, McLachlin CJ.. shows no recognition that *how* one conceptualises race has profound consequences in terms of how one defines legal, political and social prescriptions for racial inequality. More critically, if McLachlin C.J.'s inability, or choice not to analytically engage with the concept of race is reproduced in case law, and if McLachlin C.J.'s implied understanding of race is similarly adopted in case law, we may have cause to question whether we are on the right path to substantive legal change in the area of racial equality.

McLachlin C.J.'s implicit understanding of race is indicative of a larger debate on the subject of race. When examining race as a concept, two key analytic positions generally emerge; the first posits race as an essence, and the second posits race as a social construct. The essentialist perspective constructs race as an objective category of intrinsic difference. Races exist independently of our perception of them. From this perspective, race is treated as a biological grouping, a "natural kind" or an immutable category.[112] Here, the use of racial

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[111] Ibid.

[112] David Theo Goldberg, *Racist Culture: Philosophy and the Politics of Meaning* (Oxford and Cambridge: Blackwell, 1993), 69.

categories presumes that, at some time, 'pure' races existed. Accordingly, racial categorization becomes the treatment of race as a fixed trait.[113] Extrapolating from the primary position that race is biological, race also becomes immutable neutral, objective, and apolitical. This conception of race, termed 'formal race' by Gotanda, has specific political ramifications. If racial designations such as 'black' and 'white' are conceived of as apolitical descriptors referring simply to physiognomy or region of ancestral origin, the act of naming race bears with it no moral culpability or political meaning.[114] Consequently, formal race is an intrinsically individuated way of understanding race.

However, as theorists such as Backhouse and Goldberg have explained, the meaning of race – how races are defined as races – has changed substantially over the past several centuries. Goldberg clarifies that while the explicit emergence of race consciousness can be located in sixteenth century art, and political, philosophical and economic debates, what the term race refers to, or the origin and basis of racial differences, has been in continual flux.[115] For example, in tracking the historical understanding of race in Canadian legal and legislative history, Backhouse notes that legal actors employed a broad medley of criteria, extending beyond biology or physiognomy, to define the boundaries of racial groups. Backhouse describes how attire, linguistic facility, skin colour, the

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[113] Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" *Stanford Law Review* 44 (1991-992): 4.

[114] Ibid., 7.

[115] Lucius Outlaw, "Toward a Critical Theory of Race," in *Anatomy of Racism*, ed. David Theo Goldberg (Minneapolis: University of Minnesota Press, 1990), 62. Also see Backhouse, *Colour-Coded* 5, and Goldberg, *Racist Culture* 24.

company one kept, employment history, demeanour, tax history, lifestyle, etc... were all, at one point, and in various combinations, used to pronounce on the racial background of a given person.[116]

Backhouse and Goldberg illustrate that the 'reality' of race is subject to interpretation. Cultural interpretation, or more broadly the 'social', determines what sets of differences are important in terms of distinguishing between groups of individuals, as well as what those differences mean. While the distinction between races *could* be benign, it rarely is because, "People determine what the [racial] categories will be, fill them up with human beings, and attach consequences to membership in those categories."[117] As Goldberg suggests, race becomes political because, "...race is imposed upon otherness, the attempt to account for it, to know it, to control it."[118]

Consequently, the social construction approach to race reorients our focus quite dramatically from the formalistic approach. From a social construction perspective, the act of designating race is best described as a process of racialisation. As Miles explains, racialisation is a "...process of categorization through which social relations between people [are] structured by the signification of human biological characteristics in such a way as to define and construct

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[116] Constance Backhouse. *The Historical Construction of Racial Identity and Implications for Reconciliation* (Halifax: Department of Canadian Heritage, 2001), 5-6, http://canada.metropolis.net/events/ethnocultural/publications/historical.pdf.

[117] Stephen Cornell and Douglas Hartmann, *Ethnicity and Race: Making Identities in a Changing World* (Thousand Oaks: Pine Forge Press, 1998), 223.

[118] Goldberg, *The Racial State*, 23.

differentiated social collectivities."[119] Consequently, racial categories are fluid in that they are directly responsive to political needs.[120] As Outlaw asserts, "The biological aspects of 'race' are conscripted into projects of cultural, political and social construction; race is a *social* formation."[121] Further elaborated on by Goldberg, race has been employed to set scientific and political agendas, "...to contain the content and applicability of Reason, to define who may be excluded and to confine the terms of social inclusion and cohesion."[122]

Significantly, the formal race perspective and the social construction thesis lead us to two very different political projects. The ontological prioritization of the individual in a formal race approach logically extends into an individualized understanding of racism. Moreover, ontologically prioritizing the individual leads one to seek individualized prescriptions when combating racism. Here, race is a characteristic that is intrinsic to the individual. By correlation, racism becomes a pattern of behaviours expressed by the individual. These behaviours may include stereotypes and discrimination, but these stereotypes and forms of discrimination are enacted on a person-to-person basis. Consequently, prescriptions for racism based on a formal race perspective will focus on *individual* transformation of racist behaviours and/or attitudes.

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[119] Kiran Mirchandani and Wendy Chan, "From Race and Crime to Racialization and Criminalization," in *Crimes of Colour: Racialization and the Criminal Justice System in Canada*, ed. Wendy Chan and Kiran Mirchandani (Toronto: Broadview Press, 2002) 12.

[120] Cornell and Hartmann, 24.

[121] Outlaw, 68 – emphasis in original.

[122] Goldberg, *Racist Culture*, 4.

While the formal race position can be said to examine the 'state' being constructed, the social construction thesis examines who is doing the constructing, and for what purpose.[123] Consequently, from a social construction position, race is created, reproduced and maintained by the social. By correlation, racism is understood as being created, reproduced and maintained at the level of the individual, at the level of institutions, at the systemic level and at a cultural level. Social construction prescriptions for racial inequality will focus on the complex multi-layered power structure that acts to reinforce and sustain a racial State.[124]

In this light, McLachlin C.J.'s formalist approach to race leaves many doors closed in terms of where formal race equality jurisprudence can take us. If, as McLachlin C.J. suggests, an ethic of substantive equality demands a "contextually oriented approach", rejection of the social construction thesis is also a rejection of an approach that may provide greater contextual analytic rigour when assessing claims for legal racial equality. For example, a focus on racialisation allows room to consider the ways in which individuals and groups are racialised relationally. A legal approach based on the social construction thesis enables a level of specificity that takes account of the different experiences of inequality among

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[123] Cornell and Hartmann, 223.

[124] In terms of remedies, while monetary compensation may be the most obvious, it may, in some senses, be the most short-lived. Other remedies or prescriptions might include active enforcement, encouragement and entrenchment of affirmative action policies and the human rights principle of the duty to provide. See Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims – Discussion Paper* (Ontario Human Rights Commission, Policy and Education Branch, 2001). Social construction prescriptions might also include organizational change initiatives, internal and external surveying, and mandatory education, training and development initiatives. See Ontario Human Rights Commission, *Policy Guidelines on Racism and Racial Discrimination* (2005).

various racialised groups. [125] Moreover, the contextual analysis enabled by a racialisation approach furnishes specificity in that it allows for study of how "...privilege and oppression are often not absolute categories but, rather, shift in relation to different axes of power and powerlessness."[126]

2.2.2 Understanding Racism

In examining McLachlin C.J.'s understanding of racism, my claim that McLachlin C.J. adheres to a formalist position is further confirmed. McLachlin C.J.'s use of Ardrey's territorial imperative to understand racism is unsettling, incomplete and, in effect, a perversion of history. McLachlin C.J. fails to address the power dynamics involved in the creation of the Self and the Other, rendering benign not only group differentiation, but *how* the encroachment of the Other develops into racism. Ardrey's fundamental contention is that territoriality forces human beings to behave in certain instinctual ways. The Subject in Ardrey's work is not liberal theory's economic 'man'. Ardrey's Hobbesian Subject's behaviour is dictated by instinctual need; this Subject is not characterised by 'his' capacity to 'choose'.

Renowned for his socio-biological approach that turns on the inevitability of private property, patriarchy and hierarchy, Ardrey is a troubling source to draw upon when speaking of the dynamics of race and racism. Specifically, McLachlin C.J.'s employment of the territorial imperative similarly seems to turn on the inevitability of racism. It is McLachlin C.J.'s naturalisation of racism as a 'natural

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[125] Mirchandani and Chan, 13.

tendency' or a 'discriminatory impulse' that, with one sweep, erases the structures of power that actively serve to reinforce and sustain racist organisation. If the racist response is one that is 'intuitive' or 'natural', how do moral culpability and power figure in? In addition, in the context of colonial projects that are both product and producer of racism, McLachlin C.J. does not clarify who is encroaching upon whom. Do all cultures respond to the territorial imperative in the same manner? Why or why not? In the North American context, it was the European 'Other' that displayed the resentment, fear, exclusion and aggression *as they encroached upon* the First Nations people. Consequently, at the very least, in the case of Canada, McLachlin C.J.'s adherence to the territorial imperative is a great perversion of history.

While there are many ways to define and understand racism, the purpose here is to isolate which understanding of racism best leads us to our goal of substantive racial equality. In the legal realm, racial discrimination is perhaps most comprehensively defined in the 1965 *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*. Here, racial discrimination is defined as:

> A distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[127]

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[126] Ibid.

[127] International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), Article 1.

At a more fundamental level, Banton defines racism as "...the doctrine that a man's behaviour is determined by stable inherited characteristics deriving from separate racial stocks, having distinctive attributes and usually considered to stand to one another in relations of superiority and inferiority."[128] Similarly, Miles refers to racism as "...ideas that delineate group boundaries by reference to race or to real or alleged biological characteristics."[129] Notably, as Goldberg articulates, ascriptions of racial characteristics do *not*, in and of themselves constitute racism. For racial ascriptions to be considered *racist*, they must "...assign racial preferences, or explain racial differences as natural, inevitable and therefore unchangeable, or express desired, intended, or actual inclusions or exclusions, entitlements, or restrictions."[130]

Drawing from the above definitions, a number of fundamentals can be identified when speaking about racism. First, racism involves both an assignment of difference, and differential valuation of the constructed categories of difference. Second, racist behaviour may be deemed racist solely on the basis of its outcomes; express intent is not required. For example, in a system of institutionalised racism, a racist act may not be explicitly racist in intent, but may result in a racist effect. Third, racist discourse is effective only when racial differences are perceived of as *natural*. Namely, the naturalisation and

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[128] W.S. Tarnopolsky, "The Control of Racial Discrimination," in *Racism in Canada*, ed. Ormond McKague (Saskatoon: Fifth House Publishers, 1991), 179.

[129] Sanjeev Anand, "Expression of Racial Hatred and Racism in Canada: An Historical Perspective," *The Canadian Bar Review* 77 (1998): 182.

[130] David Theo Goldberg, "Racism and Rationality: The Need for a New Critique," in *Racism (Key Concepts in Critical Theory)*, ed. Leonard Harris (Amherst: Humanity Books, 1999), 370.

normalisation of racial categories as intrinsically 'real' erases the complicity of the Subject who is doing the racial defining. This naturalisation allows racist behaviour to be enacted on the basis of 'fact'.

McLachlin C.J. sees race as an attribute of individuality, an attribute that is fundamentally unconnected to social relations. As demonstrated vividly by her address, the individuated focus of formal race is closely linked to an individuated understanding of racism and its prescriptions. For example, McLachlin C.J. continually refers to racism as an intuitive individual reaction or as an expression of human impulse and tendency. Law is an instrument to be used to "curb discriminatory impulses."[131], and "...to check the *natural* tendency to exacerbate inequalities...".[132] McLachlin C.J.'s analysis lacks recognition that racism, racist acts, and racist organisation are not simply intuitive reactions to a concept like the territorial imperative. People have a vested interest in maintaining a racial power structure, and active support goes into maintaining this advantageous distribution of power.[133]

McLachlin C.J.'s focus on the individual is also apparent in her association of racism with individualistic discriminatory stereotypes or attitudinal problems. McLachlin C.J. states that the discrimination animating the judicial rulings in the

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[131] Honourable Beverley McLachlin, *Racism and the Law*, 3.

[132] Ibid., 18 – emphasis added.

[133] While beyond the scope of my discussion here, McLachlin C.J.'s analysis also underestimates the potency and depth of racism in that she fails to treat racism as a well-defined field of discourse unto itself. For an excellent discussion on the consequences of this failure, see Goldberg, *Racist Culture*, 47.

colonial period to the middle of the 20th century was primarily attitudinal.[134] A more substantive analysis might look at how those in power had a vested interest in maintaining a power structure divided along racial lines. Moreover, a more substantive analysis might examine how racism and racist organisation were integral to the physical, economic, and social construction of Canada as a 'Nation'.

Given the above, the link between McLachlin C.J.'s formal understanding of race and her individuated understanding of racism becomes more apparent. The racism that McLachlin C.J. speaks of is *not* one that is fundamentally embedded in the State; it is primarily individual in its scope and reach. Drawing on Ardrey's territorial imperative, McLachlin C.J. understands racism as emanating from individual intuitive feelings of fear and aggression. Extrapolating from this, racism becomes an attitude of the irrational individual. This kind of formal race limits the concept of racism, and the label racist, to those individuals who maintain irrational personal prejudices against persons who 'happen' to be in the suspect racial category.[135] Consequently, McLachlin C.J. underestimates the potency and depth of the racist project by neglecting racism's institutional, systemic and cultural dimensions.[136]

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[134] Honourable Beverley McLachlin, *Racism and the Law*, 8.

[135] Gotanda, 4.

[136] This individuated approach to race and racism is particularly troubling within the context of the *Charter*, given that the *Charter* deals with *government* action. Moreover, because of the *Charter* all government legislative acts and laws must, at the very least be *facially neutral*. In this sense, racial equality claims that may reside in a systemically racist setting will be difficult, if not impossible, to prove within a legal setting in the post-*Charter* period.

2.2.3 The Liberal Panacea – McLachlin C.J.'s Liberal Attachment

Without a doubt, the theoretical approach that McLachlin C.J. adheres to is that of liberal individualism. McLachlin C.J. asserts that, "Inclusion and empowerment of *individuals and groups* promote a richer society and ensure the preservation of the distinct features that define them. Modern democracy depends on *respect for every individual.* Modern progress depends on *each person feeling part of the whole* and confident and empowered to play a role in it."[137] She further remarks that we must "...seek to curb discriminatory impulses and promote the object of encouraging and *allowing each citizen, regardless of race or culture, to realize his or her maximum potential.*"[138] Moreover, Canada's road to equality, the mosaic, is based on a "...recognition of our differences and respect for our various traditions and the *innate dignity of every individual and* [sic] *regardless of race or ethnicity.*"[139]

Clearly, as with all political theories, liberal theoretical approaches are not all unified.[140] However, liberal theories *are* united by the following core set of general ideas. First, liberalism is premised ontologically on the individual. Second, liberalism is premised on the assumption that there are certain universal

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[137] Honourable Beverley McLachlin, *Racism and the Law*, 3 – emphasis added.

[138] Ibid. – emphasis added.

[139] Ibid., 17 – emphasis added.

[140] There is an almost endless array of competing/co-existing conceptions of liberalism – democratic liberalism, libertarianism, deliberative democracies, neo-Hobbesianism, Rawlsian political liberalism, pluralism, feminist liberalism, etc... Generally, these theories vary as to their understanding of basic liberty and which institutions are best equipped to protect it.

principles equally applicable to all human Subjects."[141] This commitment to universality entails some degree of commitment to the transcending of difference.[142] Third, in its commitment to the individual, liberalism is also committed to the Subject that is "...abstract and atomistic, general and universal, divorced from the contingencies of historicity as it is from the particularities of social and political relations and identities."[143] Fourth, while the Subject is considered rational, abstract, universal and committed to the maximization of utility, the State is considered impartial and neutral, or capable of mediating conflicts and tensions in the domains of morality, market, politics and law.[144]

United by the aforementioned core set of general principles, when it comes to 'difference', the theory of liberal individualism brings with it both theoretical and practical inconsistencies. As Goldberg articulates, "The more abstract modernity's universal identity, the more it has to be insisted upon, the more it needs to be *imposed.*"[145] This becomes the central paradox of liberal modernity: "...the more explicitly universal modernity's commitments, the more open it is to and the more determined it is by the likes of racial specificity and racial exclusivity."[146]

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[141] Goldberg, *Racist Culture*, 5.

[142] Ibid.

[143] Ibid., 4.

[144] Ibid.

[145] Ibid., 6 – emphasis in original.

[146] Ibid., 4.

This paradox surfaces clearly in McLachlin C.J.'s strain of liberal individualism. In fact, McLachlin C.J.'s commitment to liberal legal individualism as a means to assess and evaluate race and racism leads to a number of contradictions in her address that call into question several of McLachlin C.J.'s fundamental assertions and proposed prescriptions. For example, the liberal understanding of the atomistic abstract individual, "...dismisses the possibility that group membership alters and limits individual choices, opportunities and rights."[147] Consequently, to assert that an individual is disadvantaged because of his or her group membership runs contrary to liberal orthodoxy.

Based on the above premise, many contemporary liberal ethicists have asserted that race is a morally irrelevant category.[148] However, if race is a morally irrelevant difference, it is a difference for which no one can be held accountable. In effect, liberalism's commitment to universality, its denial of difference, or, in this case, its search for colour-blindness, has the practical effect of erasing race, but leaving fundamentally untouched the reality of race to those occupying racialised bodies.

Goldberg has suggested that despite its many variations, liberal theory and liberal modernity seem prepared to respond to race and racism in one of two ways. In the first case, liberalism denies 'otherness' or denies its relevance.[149] In the second case, liberalism recognises otherness or difference, but does so

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[147] Frances Henry, Carol Tator, Winston Mattis and Tim Rees, *The Colour of Democracy: Racism in Canadian Society*, 2nd ed. (Toronto: Harcourt Brace, 2000), 149.

[148] Goldberg, *Racist Culture*, 6.

[149] Ibid., 7.

through the guise of 'tolerance' and containment.[150] In this case, to recognise difference as something to be tolerated presupposes that the difference to be tolerated is "morally repugnant" or in need of alteration.[151] While in this address, McLachlin C.J. does not engage in the discourse of tolerance, she does not move beyond these two liberal responses.

To be clear, as a liberal, McLachlin C.J. does believe that race is a real category of difference that marginalises people. Moreover, McLachlin C.J. takes the stance that membership in a particular racial group can bring with it negative consequences. Despite this, the future McLachlin C.J. envisions is one based on the liberal commitment to colour-blindness. She articulates that we "...must have governmental and legal structures that recognise our diversity and allow us to live together in harmony and in a way that promotes the fullest possible contribution from all our citizens, *regardless* of their race or background."[152] She further asserts that equality of recognition and respect entails a "...recognition of our differences and respect for our various traditions and the innate dignity of every individual...*regardless* of race or ethnicity."[153] With this in mind, it warrants questioning if an ethic of substantive equality can be based on a commitment to colour-blindness. If colour-blindness is premised on observing but not considering race, surely an ethic of substantive equality would entail both a recognition *and* a consideration of race.

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[150] Ibid.

[151] Ibid.

[152] Honourable Beverley McLachlin, *Racism and the Law*, 17 – emphasis added.

McLachlin C.J.'s claimed commitment is to an ethic of substantive equality, an equality necessitating both positive and negative rights and obligations. Yet, McLachlin C.J.'s commitment to liberal individualism reinforces the passivity of a liberal, negative-rights framework. She articulates that law must "encourage and allow" citizens to realise their maximum potential, that we must have governmental and legal structures that "recognize our diversity", based on "recognition of our differences and respect for our various traditions".[154] She further asserts that we must put into place structures that "respect and protect differences and encourage peaceful reconciliation of differences through consultation and negotiation."[155] For an address about the promises of substantive equality, McLachlin C.J.'s language is resoundingly passive. Never once does McLachlin C.J. elaborate on how law can facilitate *and* enable racialised groups to move beyond their status as marginalised.[156]

McLachlin C.J. cements her commitment to liberal individualism by sustaining an understanding of the State as neutral. McLachlin C.J.'s State is simply an arbiter of competing interests, and as such, the State *reacts* to racial and cultural 'realities'. By asserting that a multicultural model of respect and recognition is constitutive of the Canadian State, McLachlin C.J. severely

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[153] Ibid. – emphasis added.

[154] Ibid., 18.

[155] Ibid.

[156] The limitations and contradictions posed by McLachlin C.J.'s liberal individualism are more pronounced when her address is positioned with the larger context of her past legal judgments. Specifically, the constraining power of McLachlin C.J.'s liberal individualism on an ethic of substantive racial equality is made pointedly clear in a series of hate propaganda cases that

constrains how racism in Canada is characterised. Divorced from Canada's historical roots, racism can be comfortably pegged as a collection of attitudes and expressions of diverse individuals within the State.

Just as she views the State as neutral, McLachlin C.J. also views law as essentially neutral. Where law does engage with race, it is as a reaction to the 'outside realities of race'. Law is neither constituted by race, nor is it constitutive of race. Instead, when racism is evident within the legal realm, it is characterised as behavioural in that it is an expression of individuals. For example, McLachlin C.J. asserts that the "...*legal response* to Canada's multi-cultural reality can be seen as having moved thus far through three general phases."[157] She further remarks that, "...*Williams* represents a major shift from the second stage of 'hands off' non-interference by the courts, to the recognition that *courts can and should take proactive steps to recognise racism and prevent it from marring trials and scarring the justice system*."[158] Furthermore, in summarising the three interpretive periods of law, McLachlin C.J. asserts that we, "...have moved from the initial stance of *allowing the law to perpetuate inequality*, through a transition period of equal opportunity, to a third period in which we see the law as a tool to combat inequality and enhance substantive equality."[159] The primary assumption

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McLachlin C.J. curiously chose not to address in her lecture. See for example, *R. v. Keegstra*, [1990] 3 S.C.R. 697, and *Canada[Human Rights Commission] v. Taylor*, [1990] 3 S.C.R. 892.

[157] Honourable Beverley McLachlin, *Racism and the Law*, 3 – emphasis added.

[158] Ibid., 16 – emphasis added.

[159] Ibid., 17 – emphasis added.

here is that racial politics or racial 'realities' exist independently of the justice system; law reacts to race politics that occur outside the legal realm.

However, as an institution of the State, law is predicated upon instituting, operating and reproducing homogeneity.[160] The primary functions of institutions of the State include the maintenance, support and reproduction of State authority. Consequently, how we conceptualise the State is inextricably linked to how we understand law. If we understand the State as a neutral arbiter of competing interests, our understanding of the law will be premised on the assumption that institutions of the State are similarly neutral. Yet, if we understand the State as inherently racial in its constitution, or if we can entertain the thought of the 'racial State', our understanding of what type of homogeneity the law reproduces will vary dramatically from those who approach the subject from McLachlin C.J.'s perspective.[161] Regardless of our position on the racial State, the connection between the State and law is clear. As the author of law, the State seeks its own

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[160] Goldberg, *The Racial State*, 30.

[161] Goldberg describes the racial State as follows: "...the racial state is racial not *merely* or reductively because of the racial composition of its personnel or the racial implications of its policies....States are racial more deeply because of the structural position they occupy in producing and reproducing, constituting and effecting racially shaped spaces and places, groups and events, life worlds and possibilities, accesses and restrictions, inclusions and exclusions, conceptions and modes of representations. They are *racial*, in short, in virtue of their modes of population definition, determination, and structuration." See Ibid., 104. Kobayashi clarifies that legal culpability in the racial State can be isolated in the following ways: "...the law has been used through direct action, interpretation, silence and complicity. The law has been wielded as an instrument to create common sense justification of racial differences, to reinforce common sense notions already deeply embedded within a cultural system of values." See Henry, et al., 148.

legitimation through law's claim to justification.[162] Modern State rationality depends on law's productive, constitutive, sanctioning and restrictive powers.[163]

The subject of McLachlin C.J.'s address is not ambiguous. McLachlin C.J. is attempting to clarify what role Canadian law has played in the development of racial politics and race relations in Canada. Underscoring this primary purpose is McLachlin C.J.'s commitment to address this topic "...openly, with compassion, intelligence and a firm understanding of our history, legal traditions, and the pitfalls of the politics of exclusion."[164] Given the above, the minimal requirements that McLachlin C.J. has set out for herself include an interrogation of race and racism, an interrogation of Canadian legal traditions, and an interrogation of how race, racism and the law intersect.

As such, McLachlin C.J.'s liberal legalist perspective that law and race politics are separate warrants interrogation. The legal system in Canada has never been race-neutral. Just as liberal discourse emerged within a European, Judeo-Christian framework, the legal system similarly emerged within this framework, and the law reflects the values and perspectives of the community it was meant to serve.[165] In all of its manifestations, law has been, and continues to

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[162] Ibid.

[163] Ibid., 145.

[164] Honourable Beverley McLachlin, *Racism and the Law*, 2.

[165] Joanne St. Lewis, "Beyond the Confinement of Gender: Locating the Space of Legal Existence for Racialized Women," in *Women's Legal Strategies in Canada*, ed. Radha Jhappan (Toronto: University of Toronto Press, 2002), 301.

be an institution that contributes to and maintains racial inequalities, divisions and tensions.[166]

Certainly, McLachlin C.J. is not denying that there is a link between racism and the law. But, the link that McLachlin C.J. is drawing is quite particular. According to McLachlin C.J., legal frameworks *respond* to the realities of race, the law *responds* to Canada's multicultural reality, the law has sometimes been used to *reinforce* inequality, the law *reflects* the paradigm of Aristotelian thinking, and the justice system must be protected from the realities of race and racism.

McLachlin C.J.'s liberal legalist perspective lacks the analytic sophistication to account for the extent to which law has been, and continues to be pivotal in formalising and embedding racial categorisation in the institutional and administrative realms of the State. Legal discourse is a particularly powerful mode of rationalisation in the modern State because law "...pretends to be able to allocate burdens of proof because of natural facts."[167] Consequently, when speaking of, and through issues of race and racism, the discourse of law occupies a particularly precarious position. Law's ability to allocate burdens of proof based on natural facts also extends into law's ability to reify race as a natural kind.

The critical point here is that the tendency towards the reification of race as a natural kind extends into the tendency to characterise racism as individualised, reactionary, behavioural and attitudinal. Moreover, this characterisation of racism

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[166] Aylward, *Canadian Critical Race Theory*, 16.

[167] Cornell and Hartmann, 231.

leads to individualised prescriptions for racism. Consequently, in starting with a formal race position, law becomes inhospitable to claims of systemic discrimination.[168] As Iyer explains, current judicial interpretation of the meaning of 'race' is based on a formal understanding, where the law must explicitly say 'race' on its face to warrant a ruling of discrimination. Because mechanisms such as the *Charter* have effectively dealt with textual discrimination, most race discrimination cases will have to be framed as adverse effects cases.[169] These cases prove to be extremely difficult to win within the legal arena, because the complainant must prove the disproportionately adverse effects on the group of the law in dispute, as well as prove that this generally adverse impact was operative in her or his case.[170]

The primary concern here is that if we were to embrace the liberal legalist perspective that McLachlin C.J. adopts, we would simultaneously be restricting how we define prescriptions for racism in the realm of the law. As Iyer asserts, the formal race approach means that much gets written out of the category 'race'.[171] For example, language discrimination cannot be understood as race discrimination, nor can the adverse treatment of immigrants be characterised as racist.[172] In the case of immigration policy, the effacement of the word 'race'

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[168] Iyer, *Charter Litigating*.

[169] Ibid.

[170] Ibid.

[171] Ibid.

[172] Ibid.

erases the *implications* of the policy on ethnocultural minority groups.[173] In approaching racism from a formal race perspective, the court limits the range of experiences of oppression, thereby limiting the range of remedies available for redress.

This analysis is not meant to deny the transformative potential of the law, because the law does "...[open] up and [close] down forms of representation, spaces of accommodation and transformation, possibilities of expression, truth claims and legitimation."[174] More simply, while the law does close off areas to contestation, it simultaneously opens up areas to subversion as well.[175] Consequently, the critical point is to emphasise the necessity of understanding law's complicity in the racial State, before moving on to examine how and if the law can be an effective guarantor of substantive racial legal equality. As McLachlin C.J. has not taken the primary step of interrogating law's complicity in the racial State, McLachlin C.J.'s proposed prescriptions must be scrutinised with caution.

2.2.4 The Promises or Perils of the Charter for Race Equality Jurisprudence

For McLachlin C.J., the critical tool to ensure substantive racial equality in Canada is the *Charter*. McLachlin C.J. asserts that one fundamental benefit of the *Charter* is that, unlike the *Bill of Rights*, the *Charter* is a constitutional

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[173] Ibid.

[174] Goldberg, *The Racist State*, 148.

[175] Ibid.

document, subject to the seldom-used section 33 override clause.[176] She further articulates that the *Charter* includes the "...broad and robust equality provisions..." found in section 15 and that the *Charter* "...acknowledges Canada's multi-cultural heritage..." in its section 27 multiculturalism clause.[177] McLachlin C.J.'s position is quite clear. The *Charter* is a fundamental prescription for racial equality because, "The ethic of real equality – not merely formal equality but substantive equality that makes a difference in peoples lives – runs through the *Charter* and animates its guarantees."[178] She further asserts that the "...new *Charter*-based, human dignity and contextually oriented approach to equality is directly applicable to racial and ethnic discrimination."[179] The *Charter* demands a new three-step approach to judging where judges are required to:

> ...recognize the context of historic racial and ethnic inequality and the myths and stereotypes that this context has produced. It requires [judges] to disabuse [themselves] of these preconceived notions, acknowledged or unacknowledged, to understand the reality of the disadvantaged group, and to examine the claim of unequal treatment afresh on the basis of this understanding.[180]

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[176] Honourable Beverley McLachlin, *Racism and the Law,* 14-15.

[177] Ibid., 14.

[178] Ibid.

[179] Ibid., 15.

[180] Ibid. Since *Andrews*, the court has articulated the need for a contextual inquiry. For example, in *R. v. Turpin*, [1989] 1 S.C.R. 1296, the court discussed the importance of looking beyond the impugned legislation, to the larger social, political and legal context. Most recently, the court reaffirmed its commitment to the contextual approach in *Law*. The court asserted that contextual factors that determine if a law demeans a claimant's dignity should be evaluated from the perspective of the claimant, and from the perspective of a reasonable person in circumstances similar to the claimant's, who has taken into account those contextual factors.

To be clear, the purpose of this section is not to challenge the *Charter* as a wholly effective or ineffective tool in the drive towards legal substantive racial equality. Instead, the purpose here is to complicate McLachlin C.J.'s perhaps overly enthusiastic championing of where the *Charter* has taken us, and where the *Charter* can take us with respect to racial substantive equality. Undoubtedly, the constitutional entrenchment of the equality clause creates a societal, political and legal climate that, to use McLachlin C.J.'s terminology, "makes a difference in peoples lives". And certainly, even some of the *Charter*'s most virulent critics would cringe at the prospect of having their *Charter* rights taken away from them. Yet, as Crenshaw articulates, when you accept the worldview implicit in the law, or in this case the *Charter*, you are also bound by its conceptual limitations.[181] For McLachlin C.J., there seems to be no conceptual limitation when it comes to using the *Charter* as a primary means to 'find' substantive racial equality. In fact, McLachlin C.J. perceives the *Charter* as being the embodiment of substantive equality.

However, legal subjects are constrained in terms of how they must present themselves to the courts in order to make and win a *Charter*-based legal claim. As explained most clearly by Iyer, in order to succeed in making an equality claim, an individual or group must convince the court that s/he fits into one of the enumerated pockets of difference defined by section 15 of the *Charter*.[182] Because the meaning of these pockets of difference is most often defined by the

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[181] Crenshaw, 108.

[182] Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," *Queen's Law Journal* 19 (1993): 192.

dominant social identity, the constructed category of difference may often hold little to no relevance to the material conditions of inequality that a claimant may experience. Consequently, as Iyer explains, the embedded meanings within these categories encapsulates legal subjects as over-simplified, caricatures of these identities.

Consequently, the *Charter*'s categorical approach to difference is ill-equipped to understand complex social identities subject to multiple forms of inequality. A claimant must fragment his/her 'experience' so that their equality claim can fit into one of these distinct pockets of identity. For the racially marked body, the legal point of entry available becomes the category race. However, for a claimant who may be experiencing discrimination on the basis of her gender *and* race, law demands that the claimant 'pick' a category and make her claim 'fit'. Since many issues of racial inequality are intertwined with gender, and issues of poverty and economic status, 'fitting' into the delineated *Charter* grounds poses a significant hurdle for those litigating for racial equality.[183]

Certainly, categorising difference is a necessity in our modern world. However, categorical thinking, especially in a legal context, tends to be rigid, making the revision of categories and their content a rare occurrence.[184] Consequently, while the categories of difference delineated by the *Charter* are not, in and of themselves, problematic, it is the perspective that these categories of difference are innate, static, insular and intrinsically real that poses

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[183] Iyer, *Charter Litigating*.

[184] Iyer, *Categorical Denials*, 182.

fundamental limitations to legal substantive race equality. McLachlin C.J. tends to treat 'racial' difference as though it emanates from nowhere. If this type of analysis is encouraged by the *Charter*'s categorical approach, caution must be exercised.

If McLachlin C.J.'s interpretation of the *Charter* is the same as that of the Supreme Court of Canada, we have cause to question if the *Charter* is encouraging the development of substantive racial equality. If *Charter* interpretation is based on the fundamental recognition that differences are neither natural, nor immutable, or if *Charter* interpretation is rooted in the theory of racialisation, the *Charter* could be useful in defining and moving towards a theory of substantive racial equality. If we treat racial categories as stable, immutable and natural, constitutional discourse runs the risk of concealing the subordination that is fundamental to naming and maintaining a racial power structure. Put more bluntly, the treatment of racial categories as functionally objective devalues the socio-economic and political history of those placed within them.[185] If our ultimate goal is to secure the development of a theory of substantive racial equality, the precondition for redressing both particular rights violations and for succeeding with the larger project of social reform must be a commitment to a discourse that can accurately describe relationships of inequality.[186]

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[185] Gotanda, 4.

[186] Iyer, *Categorical Denials*, 181.

2.3 Conclusion

From a critical race perspective, McLachlin C.J.'s formalist approach to race and racism, her liberal individualist approach to the State and law, and her excessively optimistic view of the *Charter* all illustrate an equality approach inconsistent with an ethic of substantive equality. However, upon final analysis, the most glaring limitation of McLachlin C.J.'s address is precisely her articulation, or lack thereof, of substantive racial equality. McLachlin C.J. asserts that substantive equality is "the positive enhancement of the equality and dignity of every individual".[187] She further remarks repeatedly that substantive equality "...connotes actual, real equality – equality that makes a difference in the lives of ordinary men, women and children."[188] McLachlin C.J. also contends that Supreme Court judgements in *R.D.S.* and *Williams* were animated by the ethic of substantive equality in that the former "...affirmed the importance of diversity in the judiciary and of adapting the law to combat the problem of widespread racism in society.", and that the latter recognised that "...courts can and should take proactive steps to recognize racism and prevent it from marring trials and scarring the justice system."[189] She concludes by asserting that substantive equality is "...an equality of recognition and respect – recognition of our differences and

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[187] Honourable Beverley McLachlin, *Racism and the Law*, 3.

[188] Ibid., 12.

[189] Ibid., 15-16.

respect for our various traditions and the innate dignity of every individual regardless of race or ethnicity."[190]

Consequently, according to McLachlin C.J.'s address, substantive equality makes a difference in the lives of ordinary people, is based on respect, dignity, and recognition, and demands some level of positive action on the part of the judiciary. While it is certainly very difficult, if not impossible, to exhaustively define what substantive racial equality is and hence entails, McLachlin C.J.'s definition of substantive equality lacks clarity and direction. McLachlin C.J. continually rearticulates that, as opposed to formal equality, substantive equality makes a difference in the lives of ordinary people. Yet, does this definition provide enough direction for her to assert that the Supreme Court of Canada is on the 'right path' when it comes to securing substantive equality? Is it not true that all ethics of equality make some time of difference in the lives of ordinary people? Should we rather be specifying the *quality* of change that substantive equality should strive towards?

Certainly as Crenshaw articulates, there is no self-evident interpretation of equality rights inherent in the terms themselves. Instead, specific interpretations of equality rights proceed largely from the worldview of the interpreter.[191] Yet, at a very basic level, it is possible and necessary, to specify some fundamental characteristics of substantive equality, particularly if the concept is to be set up as

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[190] Ibid., 17.

[191] Crenshaw, 105.

a judicial standard. For example, the Department of Justice in Canada offers the following standardized definition:

> ...[substantive equality] requires that differences among social groups be acknowledged and accommodated in laws, policies and practices to avoid adverse impacts on individual members of the group. A substantive approach to equality evaluates the fairness of apparently neutral laws, policies and programs in light of the larger social context of inequality, and emphasizes the importance of equal outcomes which sometimes required equal treatment and sometimes different treatment.[192]

Even from this more standard definition, a number of specific attributes of substantive equality can be isolated. First, substantive equality entails some recognition of identity. The term equality necessitates an acknowledgement that a set group of people are the 'same', therefore they should be treated the 'same'.[193] Second, substantive equality entails a simultaneous commitment to *equivalence*. Equivalence does not prescribe identical treatment, but instead recognises that treatment may vary according to a Subject's particularity.[194] Third, substantive equality demands a commitment to equality of opportunity, as well as an obligation of means. Fourth, substantive equality demands a simultaneous commitment to equality of results. Fifth, substantive equality recognises that the application of facially neutral legislation can have a disproportionately harmful impact on individuals on the basis of their group membership. Sixth, substantive equality recognises that patterns of disadvantage and oppression exist in society.

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[192] Retrieved 03/23/2003 at http://canada.justice.gc.ca/en/dept/pub/guide/appendix_C.htm

[193] Gerald Torres, "Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice – Some Observations and Questions of an Emerging Phenomenon," in *Key Concepts in Critical Theory Racism*, ed. Leonard Harris (Amherst: New York, 1999), 361.

While the above characteristics are useful in defining some direction for substantive equality, there is one further characteristic of substantive equality that may more clearly illustrate why McLachlin C.J.'s approach is lacking. Substantive equality demands that we begin with a conceptually sound understanding of what, or why differences exist. In this sense, substantive racial equality must begin with an interrogation of the fundamentals such as race, racism, racist discourse, the State and law. Because of its commitment to colour-blindness, liberal discourse hinders, not helps, in the task. And, without establishing the fundamentals, we will not be equipped to apply the contextual analysis mandated by a substantive equality approach. As demonstrated in this chapter, it is this initial step that McLachlin C.J. fails to take.

With the above in mind, the intent of this analysis has been to lay a backdrop upon which to engage in a critical race reading of the Supreme Court of Canada's decisions in *R.D.S.*, *Williams* and *Van de Perre*. By locating conceptual errors and limitations in McLachlin C.J.'s approach, I can now discern if parallel limitations appear in the case law judgements. If this is the case, we have further grounds to challenge the claims offered up in McLachlin C.J.'s address. Moreover, if the limitations in McLachlin C.J.'s address reappear in Supreme Court of Canada judgements, we have cause to re-evaluate how we choose to advance race equality cases in the legal domain.

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[194] Ibid., 362.

CHAPTER THREE - THE CASE OF R.D.S.

On October 17, 1993, R.D.S., a Black youth, was riding his bicycle home when he happened upon his cousin, N.R., who was being arrested by Constable Stienburg, a White male police officer. Constable Stienburg alleged that R.D.S. ran into him with his bicycle, pushed him and yelled at him. Consequently, Constable Stienburg proceeded to arrest and charge R.D.S. with three counts under the *Criminal Code*: unlawful assault against a peace officer engaged in the execution of his duty, unlawful assault against a peace officer with the intent to prevent the lawful arrest of another, and unlawfully resisting arrest by a peace officer engaged in the lawful execution of his duty. Approximately two months later, R.D.S. appeared in Nova Scotia youth court before Justice Corrine Sparks. In a seemingly innocuous decision, Sparks J. reviewed the evidence, ruled that the Crown had failed to prove its case beyond a reasonable doubt, and acquitted R.D.S. of all three charges.

On paper, the facts leading up to the *R.D.S.* case were unexceptional. Consequently, the case's progression from Nova Scotia Youth court, through the Supreme Court of Nova Scotia, and the Nova Scotia Court of Appeal, to the Supreme Court of Canada is worthy of elaboration. There are three main reasons why the *R.D.S.* case is important. First, the Crown appealed Sparks J.'s decision on the ground that her judgement exhibited *actual* bias against Constable Stienburg. In a legal context where judges are granted a high presumption of judicial impartiality, the Crown's allegation of *actual* bias was exceptional. In addition, the case is exceptional because both the Supreme Court

of Nova Scotia and the Nova Scotia Court of Appeal found that Sparks J.'s judgement did constitute a reasonable apprehension of bias.

Second, *R.D.S.* is exceptional because the allegation of *actual* judicial bias was an allegation that a black, female judge exhibited racial bias against a white, male police officer.[195] Third, *R.D.S.* is exceptional because the allegation of racial bias concerned Sparks J.'s acknowledgement, in the absence of explicit evidence, of systemic racism. The Crown alleged that Sparks J.'s acknowledgement of racism in policing was equal to the employment of *racist* reasoning. Consequently, the seemingly innocuous altercation between a young boy and a police officer evolved into a precedent-setting opportunity for the Supreme Court of Canada to make a number of definitive statements on race, racism, and race equality in Canada.

3.1 Procedural and Legal Context

Traditionally, there are two broad schools of thought regarding the appropriate role of a judge: the formalists and the realists.[196] Moreover, each of these schools is informed by a particular vision of equality. The formalist conception of impartiality is premised upon a formal conception of equality. Judges are expected to divest themselves of all preconceptions and identifications, discover and apply the relevant law, and treat everyone *equally*,

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[195] Aylward, *Canadian Critical Race Theory*, 85. In fact, at the time of R.D.S.' trial, Sparks J. was not only the only Black judge in Nova Scotia, but the first Black judicial appointment in Canada. The trial of *R.D.S.* was also 'unusual' because in court was not only a Black female judge, but a Black male lawyer, a Black court-reporter and the Black accused.

[196] Richard F. Devlin, "We Can't go on Together with Suspicious Minds: Judicial Bias and Racialized Perspectives in *R.* v. *R..D.S.*," *Dalhousie Law Journal* 18, no. 2 (1995): 434.

regardless of race, class, gender or other such identities.[197] Consequently, formalists incline towards a colour-blind approach, assuming that racial identity is an irrelevant consideration unless its specific relevance can be demonstrated in a particular case.[198]

In contrast, the realist approach to impartiality is informed by substantive equality. Judges must recognise that they and those who appear before them are situated within contexts, and have experiences/identities that inform their understandings and their conduct.[199] The realist approach to judging calls for impartiality, not neutrality. Moreover, realists assume that race matters; racialisation is a relevant social reality, and judicial decision makers should *always* be sensitive to the possibility that race is a variable.[200]

From a critical race perspective, the formalist position is flawed and/or undesirable for two fundamental reasons. First, the ideal discounts the identities of political and legal actors, as well as the implications of how we experience our identities. By correlation, the ideal fails to accurately account for the ways in which the law interacts differently with different legal subjects. Consequently, the critical race approach challenges traditional concepts of judicial neutrality by recognising that there is no neutral starting point for judges, and that all legal subjects are not equally positioned before the law.

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[197] Ibid., 435.

[198] Ibid.

[199] Ibid.

[200] Ibid.

Second, the ideal of judicial objectivity is undesirable because it ultimately conflates the epistemological perspective of the powerful with the stance of objectivity. As with other settler societies, Canada is stratified along axes of race, class, gender, ethnicity, ability, and sexual orientation. And, as with other societies, occupations of privilege tend to be stratified along these same axes. Consequently, the ideal of judicial objectivity sustains the Anglo-European legal tradition of the white, male, heterosexual, able-bodied, upper-class male as the ultimate objective arbiter of 'Truth'.

Certainly, the ideals of judicial neutrality and objectivity serve utilitarian goals. Ideally, judicial neutrality and objectivity promote accuracy in decision-making, consistency in legal result, greater public acceptance of legal decisions, more legal legitimacy, and hence the ultimate reduction of legal enforcement costs.[201] By consequence, the common law principle against judicial bias has traditionally been seen to serve two connected, but discrete functions. On the level of the individual, the principle against judicial bias aims to ensure that parties receive a fair trial.[202] On a societal level, the principle is designed to promote public confidence in the judiciary, and hence to reinforce the integrity of the legal system.[203]

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[201] Keith Mason, *Unconscious Judicial Prejudice*, Supreme and Federal Courts Judges' Conference (2001) http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_010101.

[202] Devlin, *We Can't go on Together*, 442.

[203] Ibid.

When cases of judicial bias arise in Canada, the case law almost always invokes the standard outlined by de Grandpré J. in his dissenting reasons from *Committee for Justice and Liberty v. National Energy Board*[204]. Here, de Grandpré J. states that:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.'[205]

Conventionally, there are two possible grounds for judicial bias claims: real or actual bias, or situations giving rise to a reasonable apprehension of bias.[206] Because determinations of actual or apprehended bias are done on a case-by-case basis, the law on judicial bias is both indeterminate and underdeveloped.[207] However, the high presumption of judicial integrity traditionally granted to Canadian judges has led to a definite trend in judicial bias law: actual bias, the kind alleged in *R.D.S.*, is very rarely argued and almost never succeeds.[208] Even more interesting is the fact that, in the vast majority of cases, concerns about an apprehension of judicial bias are also dismissed.[209]

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[204] *Committee for Justice and Liberty v. National Energy Board*, [1979] 1 S.C.R. 369.

[205] Ibid., 394-395.

[206] Devlin, *We Can't go on Together*, 416.

[207] Ibid.

[208] Ibid.

[209] Ibid., 417.

Devlin explains that the high dismissal rate of judicial bias allegations is attributed to five key factors. First, bias allegations are regularly dismissed because of the legal "presumption of regularity", based on the maxim *omnia praesumuntur rite esse acta.*[210] Second, bias allegations are more often dismissed because of the legal presumption of good faith and impartiality on the part of judges.[211] Third, given that allegations of actual or apprehended bias are frequently not well received by either the judge in question or the appellate court, lawyers are cautious of advancing such a charge.[212] Fourth, the burden of proof for actual or apprehended bias lies with the party alleging the bias.[213] Finally, the standard of proof upon the party alleging the bias is high.[214]

Given the above, a number of conclusions can be made regarding the law on judicial bias in Canada. First, the standard outlined by de Grandpré J. is indeterminate and vague. Rulings on judicial bias are dependent on the attributes and identity of the 'reasonable person'. Consequently, rulings on judicial bias may vary dramatically with the type of equality theory informing the decision. Second, due, in part, to the high presumption of judicial integrity, judgements

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[210] Ibid. The presumption of regularity is similar to the presumption of good faith. While it does not mean that a public official can never be accused of acting unlawfully, it is assumed that public officials are competent, lawful and acting in good faith.

[211] Ibid.

[212] Ibid., 418.

[213] Ibid.

[214] Ibid.

found to exhibit judicial bias, actual or apprehended, are extremely rare.[215] As Devlin explains, two explanations can be offered to account for the lack of judicial bias findings:

> First, it could be suggested that in the several hundred years that White people have been in what is now called Canada, judges have been extremely sensitive to issues of racial inequality and that, unlike many Canadians, they have risen above racial prejudice.[216] Alternatively, it might be argued that non-white groups have been either so subordinated to, or marginalised from the Canadian legal system that it has been unreceptive to their experiences, perceptions, concerns or complaints.[217]

Clearly, given both the relatively homogeneous demographic pool from which judges are drawn, and the history of racism within the Canadian legal system, Devlin's latter explanation seems more plausible. As such, *R.D.S.* is exceptionally important in that the first finding of a racially grounded judicial bias was made against Canada's first black, female judge.

3.2 *R.D.S.* Case Facts

R.D.S. appeared before Sparks J. at Nova Scotia Youth Court on December 2nd, 1994.[218] At trial, the Crown and defence each called only one

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[215] Ibid., 422. In a comprehensive analysis of Canadian case law, Devlin was not able to locate one decision where a racially grounded judicial bias was found. However, finding of an apprehension of bias against Canada's first African-Canadian female judge is not anomalous in circles outside of the provincial and federal court circuit. For example, an all-white bench of the Ontario Divisional Court removed African-Canadian adjudicator Frederica Douglas from a tri-partite Ontario Police Complaints Board in 1994 on the basis of a reasonable apprehension of bias. See Constance Backhouse, "Bias in Canadian Law: A Lopsided Precipice," *Canadian Journal of Women and the Law* 10 (1998): 178.

[216] Ibid.

[217] Ibid., 422-423.

[218] *R. v. R.D.S.*, [1994] N.S.J. 629 [*R.D.S.* 1994].

witness: the arresting officer, Constable Stienburg, for the Crown, and the accused, R.D.S., in his own defence. Both witnesses recounted diametrically opposed versions of the events leading up to the charges.

Constable Stienburg testified that he had detained another youth, N.R., when R.D.S. arrived on the scene on a bicycle, ran into his legs, and then began yelling at him and pushing him. Constable Stienburg proceeded to arrest R.D.S., and restrain both N.R. and R.D.S. in a 'choke-hold'. Subsequently, R.D.S. was taken to the police station, read his rights and charged with the three aforementioned offences.

In contrast, R.D.S. testified that he was riding his bicycle home when he saw the police car and a crowd surrounding it. R.D.S. was informed by a member of the crowd that his cousin, N.R., was being arrested. The crowd member advised R.D.S. to ask N.R. whether or not N.R.'s mother should be contacted. R.D.S. testified that as he was trying to speak with his cousin, Constable Stienburg warned him to shut up or he would be arrested. When R.D.S. continued speaking to his cousin, Constable Stienburg arrested him, and placed him and N.R. in a choke-hold. Contrary to Constable Stienburg's testimony, R.D.S. stated that while he was straddling his bicycle, he spoke only to his cousin and only asked him what happened.[219] R.D.S. denied touching Constable Stienburg with either his hands or his bicycle, nor did he tell the constable to let his cousin go.[220]

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[219] Aylward, *Canadian Critical Race Theory*, 83.

[220] Ibid.

Sparks J. reviewed the evidence of the two witnesses, and basing her decision on a finding of credibility, ruled that she preferred the testimony of R.D.S. over that of Constable Stienburg. Sparks J. outlined a number of reasons why Constable Stienburg's testimony seemed less credible than that of R.D.S.. First, Sparks J. remarked that on cross-examination by defence counsel, Constable Stienburg admitted that his police department routinely referred to African-Canadian persons as 'non-white'.[221] The line of questioning pursued by defence counsel was that the label 'non-white' was a pejorative categorisation of African Canadians. Sparks J. asserted that at this point, Constable Stienburg became 'ruffled and tense'.[222] Sparks J. noted that, "It was not unnoticed by the Court that this may have been due to the racial configuration in the court which consisted of the accused, the defence counsel, the court reporter and the judge all being of African-Canadian ancestry."[223]

Second, Sparks J. noted that Constable Stienburg could frequently not recall certain events while testifying on cross-examination. Namely, Constable Stienburg left the court with the incorrect impression that N.R. was unrestrained when R.D.S. approached the scene.[224] In contrast, R.D.S. seemed to have clear

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[221] *R.D.S.* 1994, at 6.

[222] Ibid., at 14.

[223] Ibid., at 6.

[224] Ibid., at 9.

recall of the incident and even pointed out that the weather was overcast and misty on the day in question.[225]

Consequently, Sparks J. asserted:

> In my view, in accepting the evidence, and I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind, and therefore, based upon the evidentiary burden which is squarely placed upon the Crown, that they must prove all the elements of the offence beyond a reasonable doubt, I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th.[226]

Sparks J. clarified that it was not for the court to reconcile evidentiary differences. It was not, as the Crown had submitted, a question of accepting one version of the events over the other.[227] The question before the court was whether the Crown had proven all of the elements of the offence beyond a reasonable doubt.[228] Sparks J. found that the Crown had not satisfied its evidentiary burden, and rendered an acquittal for R.D.S..

While normally the case would have ended here, the Crown pursued an appeal based on the following exchange. After Sparks J. reviewed the evidence, assessed the credibility of the witnesses, and rendered her judgement, the Crown questioned Sparks J.'s finding of credibility in favour of R.D.S. by stating that

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[225] Ibid. Sparks J. also questioned the necessity of choke-holding a young person of a slight and slender build.

[226] As cited in Aylward, *Canadian Critical Race Theory*, 94.

[227] *R.D.S.* 1994, at 16.

[228] Ibid., at 13.

"there's absolutely no reason to attack the credibility of the officer."[229] In response, Sparks J. said:

> The Crown says, well, why would the officer say that the events occurred in the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [S.(R.D.)] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.[230]

Sparks J. stated that, based upon her comments and based upon the evidence before the court, she had no other choice but to acquit. Based on the above statement of Sparks J., the Crown appealed Sparks J.'s decision on the basis that her remarks constituted judicial racial bias for the accused.[231]

3.3 Lower Court Judgements

3.3.1 Nova Scotia Supreme Court

Chief Justice Constance Glube of the Supreme Court of Nova Scotia heard the Crown appeal of the acquittal of R.D.S. on the ground of an *actual* racial bias

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[229] Aylward, *Canadian Critical Race Theory*, 94.

[230] As cited in Carol Aylward, "'Take the long way home' *R.D.S.* v. *R* The Journey," *University of New Brunswick Law Journal* 47 (1998): 275.

[231] After rendering her judgement, and after the appeal to the Nova Scotia Supreme Court had been filed by the Crown, Sparks J. issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The supplementary reasons were not deemed admissible in the appeal.

on the part of Sparks J. on April 18, 1995.[232] The appellant set out three grounds of appeal. First, Sparks J. based her decision on matters which were not supported by the evidence.[233] Second, Sparks J. made findings of credibility based on matters not based upon, or supported by the evidence.[234] Third, Sparks J. erred in ruling certain relevant and probative evidence to be inadmissible.[235]

Essentially, the Crown's argument was that Sparks J.'s judgement flowed from her own preconceptions regarding the attitude of the police towards minorities.[236] Consequently, Sparks J.'s conclusions on credibility demonstrated a racially-based bias against the police. According to the Crown, Sparks J.'s racial bias created an appearance of unfairness, hence the exhibition of real bias.[237]

Glube C.J.S.C. found nothing in the trial transcript that suggested that Sparks J. was racially biased. Glube C.J.S.C. stated that had Sparks J. ended her reasons with her conclusion that the Crown had not satisfied its burden of proof, there would have been no basis for the appeal.[238] Nonetheless, Glube C.J.S.C. found that the comments made in response to the Crown's assertion that

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[232] *R. v. R.D.S.*, [1995] N.S.J. 184 [*R.D.S.* 1995].

[233] Ibid., at 6.

[234] Ibid.

[235] Ibid.

[236] Ibid., at 15.

[237] Ibid.

[238] *R.D.S.*, at 78.

Sparks J. had no cause to attack the credibility of the officer did constitute a reasonable apprehension of racial bias.[239]

Glube C.J.S.C. clarified that the apprehension of bias test must ask whether a, "...reasonable right-minded person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned."[240] Accordingly, Glube C.J.S.C. stated that despite Sparks J.'s thorough review of the facts and her finding of credibility, the final two paragraphs in Sparks J.'s decision did constitute a reasonable apprehension of bias.[241]

3.3.2 Nova Scotia Court of Appeal

R.D.S. appealed Glube C.J.S.C.'s decision on three grounds. First, Glube C.J.S.C. had erred in the law by interfering with a determination of credibility made by a trial court judge.[242] Second, Glube C.J.S.C. had relied upon an inappropriate standard in articulating and applying the reasonable apprehension of bias test.[243] Third, in interpreting the reasonable apprehension of bias test, Glube C.J.S.C. adopted a formal equality approach rather than the substantive equality approach mandated by ss.15, 11(d) and 7 of the *Charter*.[244]

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[239] Aylward, *Canadian Critical Race Theory*, 95.

[240] *R.D.S.* 1995, at 26.

[241] Ibid.

[242] *R. v. R.D.S.*, [1995] 145 N.S.R. (2d) 284 [*R.D.S.* Appeal], at 18.

[243] Ibid.

[244] Ibid.

The majority decision of the Nova Scotia Court of Appeal was written by Flinn J.A. and concurred in by Pugsley J.A.. The majority rejected all three arguments, thereby upholding Glube C.J.S.C.'s finding of a reasonable apprehension of bias. First, Flinn J.A. rejected the argument that Glube C.J.S.C. had improperly re-examined and re-determined issues of credibility, stating that Glube C.J.S.C.'s decision was based solely on the issue of apprehension of bias, and not upon a re-examination and determination of issues of credibility.[245]

Second, Flinn J.A. stated that Glube C.J.S.C. had relied upon an appropriate standard in articulating and applying the reasonable apprehension of bias test. In applying the test, Glube C.J.S.C. correctly considered it necessary that there be an objective standard with both the apprehension of bias itself, and the person who perceives the alleged bias.[246] According to Flinn J.A., Sparks J.'s "unfortunate use of generalizations" would "...lead a reasonable person, fully informed of the facts, to reasonably conclude that the Youth Court judge would consider the important issue of credibility in this case, at least in part, on the basis of matters not in evidence; and, hence, unfairly."[247]

Finally, Flinn J.A. dismissed the final ground of appeal that Glube C.J.S.C. had incorrectly adhered to a formal equality approach contrary to the demands of the *Charter*. Flinn J.A. rejected this ground on the basis that it was not proper

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[245] Ibid., at 19.

[246] Ibid., at 33.

[247] Ibid., at 42.

issue because it was not raised before the appeal court judge.[248] This was, however, an odd ground upon which to reject the appeal given that the *Charter* concerns arose only *after* Glube C.J.S.C. had rendered her decision. Nonetheless, after stating that *Charter* issues were not relevant to the present appeal, Flinn J.A. did assert, without any analysis, that Glube C.J.S.C. had applied an appropriate equality approach in her consideration of the apprehended bias.[249]

3.4 Supreme Court of Canada Decision

On March 10, 1997, in a 6-3 majority, the Supreme Court of Canada set aside both lower court judgements, restored the decision of Sparks J., and found that Sparks J.'s comments did not give rise to a reasonable apprehension of bias. From a critical race position, the disposition in *R.D.S.* is undeniably favourable. However, the *R.D.S.* case is complicated in that the majority decision is not unanimous. Three different sets of opinions were rendered in *R.D.S.*. The majority opinion was written by L'Heureux-Dubé and McLachlin JJ., and concurred in by La Forest and Gonthier JJ.. Cory and Iacobucci JJ. were also members of the six-member majority, but submitted a separate judgement from that of L'Heureux-Dubé and McLachlin JJ.. The dissenting judgement was written by Major J., and concurred in by Lamer C.J. and Sopinka J..

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[248] Aylward, *Take the long way home*, 281.

[249] Ibid., 281. Freeman J.A. was the lone dissenting judge, stating that *R.D.S.* was a racially charged case. While Freeman J.A. agreed with the majority's articulation of the law on bias, Freeman J.A. stated that it was perfectly proper for Sparks J. to consider the dynamics of race.

Despite the three written judgements, there are four key areas on which all six members of the majority concurred. First, all six members of the majority, as well as the three dissenting justices, agreed that the appropriate test for bias is that set out by de Grandpré J.. Second, all six members of the majority agreed with Cory J.'s comments on judging in a multicultural society.[250] Third, all members of the majority agreed that judges are granted a high presumption of judicial integrity.[251] Despite this high presumption, all members of the majority conceded that "...the presumption can be displaced with 'cogent evidence'".[252] Consequently, the onus of demonstrating bias lies with the person alleging its existence, the grounds for an apprehension of bias must be substantial, and the threshold for a finding of real or perceived bias must be high.[253] This high standard must be applied because allegations of bias call into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.[254]

Fourth, all members of the majority endorsed the statements of the Canadian Judicial Council that the judicial duty to be impartial does not mean that a judge "'...does not, or cannot bring to the bench many existing sympathies,

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[250] Cory J. clarifies that Canada is not an insular or homogeneous society, and that the multicultural nature of Canadian society is recognised constitutionally in section 27 of the *Charter*. Given the multicultural nature of Canadian society, judges must be particularly careful to be and appear to be fair to all Canadians of every race, religion, nationality and ethnic origin. See *R.D.S.*, at 95.

[251] Ibid., at 116.

[252] Ibid., at 117.

[253] Ibid., at 114.

[254] Ibid., at 113.

antipathies or attitudes.'"[255] True judicial impartiality, "'...does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.'"[256] By correlation, all members of the majority reaffirmed that the, "...sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging."[257]

Despite the agreement of the six justices on the four aforementioned issues, the three judgements rendered by the court amount to three different statements. First, the dissenting opinion penned by Major J. states that Sparks J. was wrong to have made the impugned comments. [258] Second, the opinion penned by Cory J. states that while Sparks J. did not err in making the impugned comments, she should not have made them.[259] Third, the opinion of the majority penned by L'Heureux-Dubé and McLachlin JJ. states that Sparks J. was justified in making the comments.[260] Ultimately, minor differences in their approaches to impartiality and neutrality, as well as their approach to the relevance and

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[255] Ibid., at 119.

[256] Ibid.

[257] Ibid.

[258] Stephen Coughlan, "Developments in Criminal Procedure: the 1997-98 Term," *The Supreme Court Law Review* 10 (1999): 278.

[259] Ibid.

[260] Ibid.

appropriate treatment of social context, explain the variations between the Cory J. judgement, and the L'Heureux-Dubé and McLachlin JJ. judgement.[261]

3.4.1 Judgement of L'Heureux-Dubé and McLachlin JJ., concurred in by La Forest and Gonthier JJ.

The majority judgement stated that Sparks J. was entitled and correct to make the comments that were subject of the appeal. While the majority endorsed Cory J.'s articulation of the test for bias, L'Heureux-Dubé and McLachlin JJ. distinguished their approach from that of Cory J. with respect to their understanding of neutrality and impartiality. The majority clarified that the reasonable apprehension of bias test must reflect the reality that judges can never be neutral, in the sense of being purely objective.[262] Instead, judges can, and must, strive for impartiality.[263]

Neutrality is impossible because judges operate from their own perspectives.[264] Judges must use their differing experiences to assist them in their decision-making process, so long as those experiences are relevant to the case, and are not based on inappropriate stereotypes.[265] Consequently, impartiality does not require that judges have no sympathies or opinions.[266]

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[261] Richard Devlin and Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role of *R.* v. *R.D.S*," *Ottawa Law Review/Revue de droit d'Ottawa* 31 (1999-2000): 9.

[262] *R.D.S.*, at 29.

[263] Ibid.

[264] Ibid., at 35.

[265] Ibid., at 29.

[266] Ibid., at 35.

This approach to impartiality is particularly relevant in a bilingual, multiracial and multicultural society.[267] In this context, the reasonable person will recognise that judicial neutrality is impossible[268], will support the fundamental principles entrenched in the *Charter*,[269] and will be aware of the history of discrimination faced by disadvantaged groups in Canadian society.[270] By correlation, the reasonable person will recognise that a history of discrimination is a matter of which judicial notice may be taken.[271] In the context of *R.D.S.*, the reasonable person must be taken to, "...possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues."[272]

L'Heureux-Dubé and McLachlin JJ. state that a contextual approach to judging is the accepted and appropriate approach to impartiality.[273] Judges may engage in contextualised judging by drawing upon testimony from expert witnesses, from academic studies properly placed before the Court, and from a judge's personal understanding and experience of the society in which he or she

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[267] Ibid.

[268] Ibid., at 46.

[269] Ibid.

[270] Ibid., at 48.

[271] Ibid.

[272] Ibid., at 46-47.

[273] Ibid., at 42.

lives and works.[274] This process of 'enlargement' is consistent with, and the essential precondition to, impartiality.[275]

Applying their approach to the facts of the case, L'Heureux-Dubé and McLachlin JJ. assert that the reasons of Sparks J. must be considered in their entirety. Sparks J. did not state that the probable overreaction of Constable Stienburg was motivated by racism.[276] However, L'Heureux-Dubé and McLachlin JJ. assert that even if Sparks J. had linked Constable Stienburg's probable overreaction to the race of R.D.S., "she would not necessarily have erred".[277]

As opposed to exhibiting bias, Sparks J.'s reasons showed that she approached the case with an open mind, applied the principles of proof beyond a reasonable doubt, and used her experience as a means to understand the context of the case.[278] Sparks J. was engaged in the process of contextualised judging, hence Sparks J.'s comments were not evidence of apprehended bias.

3.4.2 Judgement of Cory J., concurred in by Iacobucci J.

The decision of Cory and Iacobucci JJ. represents the middle-ground of the judgements: Sparks J. was not wrong to make the comments, but she should not have made them. There are three main questions that Cory J. addresses in

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[274] Ibid., at 44.

[275] Ibid.

[276] Ibid., at 54.

[277] Coughlan, 287.

[278] *R.D.S.*, at 59.

the judgement: 1) In the context of the reasonable apprehension of bias test, what do bias and impartiality mean?; 2) What is the proper articulation of the test for bias, and what are the attributes of the reasonable person?, and; 3) How does the law apply to Sparks J.'s decision?

First, Cory J. describes bias as "...a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."[279] Bias, or partiality, has both an attitudinal and behavioural component. Consequently, proof of bias, or proof of partiality requires more than showing that a trier of fact holds "...certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror from setting aside any preconceptions and coming to a decision on the basis of the evidence."[280] Judges must make every effort to achieve neutrality and fairness when carrying out their duties.[281] While the "requirement for neutrality" does not mandate that judges discount their life experiences[282], it does require that judges avoid deciding cases on generalities rather than on facts in evidence.[283]

Second, in clarifying the nature of the test for bias, Cory J. asserts that the grounds and the threshold for a finding of real or perceived bias are high or substantial. The test must be applied equally to all judges, regardless of their

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[279] Coughlan, 280.

[280] Ibid.

[281] *R.D.S.*, at 117.

[282] Ibid., 118.

[283] Coughlan, 279.

gender, race, ethnic origin, or any other such characteristic.[284] In the words of Cory J., "A judge who happens to be black is no more likely to be biased in dealing with black litigants than a white judge is likely to be biased in favour of white litigants."[285]

Cory J. also remarks upon the attributes of the reasonable person. In the context of the test, the reasonable person must be an "informed person", knowledgeable of all the relevant circumstances, including "'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges were to uphold.'"[286] The reasonable person must also be aware of the social context forming the background of a particular case.[287] This context may include the recognition or acknowledgement of the prevalence of racism or gender bias in a particular community.[288]

Finally, in applying the law to the facts in *R.D.S.*, Cory J. asserts that a reasonable person would see that before Sparks J. made the impugned comments, she had a reasonable doubt as to the veracity of Constable Stienburg's testimony and had already found R.D.S. to be a more credible witness.[289] Sparks J. was aware that it was the burden of the Crown to prove all

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[284] *R.D.S.*, at 115.

[285] Ibid.

[286] Ibid., at 111.

[287] Ibid.

[288] Ibid.

[289] Ibid., 146.

the elements of the offence beyond a reasonable doubt.[290] After having already handed down an acceptable decision, Sparks J.'s impugned comments were made in rebuttal to the, "...unfounded suggestion of the Crown that a police officer by virtue of his occupation should be more readily believed than the accused."[291]

However, Cory J. cautioned that while Sparks J.'s reference to the fact that police officers may overreact in dealing with non-white groups may be perfectly supportable, it was "unfortunate" because of its potential to associate Sparks J.'s finding with generalisations, rather than specific evidence.[292] The individualistic nature of determinations of credibility requires judges to be extremely careful "to be and appear to be neutral."[293] Consequently, when making findings of credibility, judges must avoid making comments that "might suggest" that the ruling is based on generalisations, and not on "specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial."[294]

Standing alone, Sparks J.'s comments came very close to indicating that Sparks J. had predetermined the issue of credibility.[295] Accordingly, Sparks J.'s

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[290] Ibid.

[291] Coughlan, 279.

[292] *R.D.S.*, at 150.

[293] Ibid., at 129.

[294] Ibid., at 130.

[295] Ibid., at 151-152.

comments were "worrisome and close to the line".[296] Nonetheless, because the comments were not made in isolation, the reasonable person would recognise that Sparks J. had not concluded that Constable Stienburg had overreacted on the basis of race.[297] The reasonable person would recognise that it was the onus of the Crown to prove the offence beyond a reasonable doubt.[298] Instead, Sparks J.'s comments could be taken to demonstrate her recognition that the Crown, not being entitled to use presumptions of credibility to satisfy its obligation, was required to prove its case.[299]

3.4.3 The Judgement of Major J., concurred in by Lamer C.J. and Sopinka J.

The dissenting judgement, written by Major J. and concurred in by Lamer C.J. and Sopinka J., asserted that Sparks J.'s comments were inappropriate and that she did exhibit bias in rendering her decision. According to Major J., *R.D.S.* raised two questions. First, did Sparks J. properly instruct herself on the evidence? Second, did Sparks J.'s comments constitute a reasonable apprehension of bias? In answering the first question, Major J. did not, in the course of his judgement, specifically consider the evidence in the trial, nor what use Sparks J. made of the evidence.[300] With respect to the second question, Major J. asserted that Sparks J. ultimately said, "Sometimes police lie and

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[296] Ibid.

[297] Ibid., at 154.

[298] Ibid., at 155.

[299] Ibid.

[300] Coughlan, 288.

overreact when dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused."[301] Sparks J.'s comments stereotyped Constable Stienburg and all other police officers as liars and racists.[302]

The dissenting justices explained that Canadian courts have criticised the use of any stereotypical reasoning. Consequently, Sparks J.'s stereotype of police officers is equally as offensive as stereotypes applied to prostitutes who are the victims of sexual assault. Neither of these presumptions have any place in a system of justice that treats all witnesses equally.[303] Stereotypical reasoning of police officers, is "...no more legitimate than the stereotyping of women, children or minorities."[304]

In summary, Major J. stated that judges "...cannot judge credibility based on irrelevant witness characteristics; all witnesses must be placed on equal footing before the court."[305] From the perspective of the dissenting justices, Sparks J. did not reach her conclusions based on any facts in evidence, hence her comments did constitute a reasonable apprehension of bias.[306]

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[301] *R.D.S.*, at 6.

[302] Ibid., at 6.

[303] Ibid., at 16.

[304] Ibid., at 18.

[305] Ibid., at 20.

[306] Ibid., at 21.

3.5 Analysis of the Supreme Court of Canada Decision

From a critical race perspective, the disposition of *R.D.S.* is, in many ways, a victory. A majority of Canada's highest court found that Sparks J.'s consideration of racial context did not constitute a reasonable apprehension of bias. In doing so, a majority of the Supreme Court overturned two lower court decisions that were firmly rooted in a formalistic and colour-blind frame of reference.

While the court's decision does represent some movement away from formal theories of race equality, the decision should be greeted with caution. The Supreme Court did not present a unified front with respect to critical issues raised in the case. The three dissenting justices – Lamer C.J. and Sopinka and Major JJ. – rendered a judgement antithetical to a substantive equality approach. In addition, while Cory and Iacobucci JJ. agreed in result with the four members of the majority, Cory and Iacobucci JJ. reserved active endorsement of Sparks J.'s comments. Consequently, five of nine judges (Cory and Iacobucci JJ., Lamer C.J., and Sopinka and Major JJ.), the majority of the court, did *not* support Sparks J.'s application of contextualised judging. In addition, while the majority judgement of L'Heureux-Dubé and McLachlin JJ. did get us to the 'right' result, a number of theoretical inconsistencies can be isolated in their decision that ultimately compromise the development of a coherent theory of substantive racial equality. Consequently, *R.D.S.* seems less a victory for substantive equality than a demonstration that a favourable disposition in a race case cannot guarantee that a legal decision is premised on a coherent or consistent theory of substantive racial equality.

3.5.1 Confronting and Embracing a Formal Understanding of Race and Racism

While neither the Nova Scotia Supreme Court nor the Nova Scotia Court of Appeal explicitly addressed theories of race and/or racism, the judgements of both courts fall within the formalist perspective. In their commitment to colour-blindness, and their implicit assertion that the racial designations of Sparks J., R.D.S. and Constable Stienburg were irrelevant to the initial trial and subsequent appeal, the lower courts chose to construct a colour-blind legal reality, embrace a classical model of adjudication, and erase the racial dynamics underscoring both the trial and the appeal.[307] In adopting a formalist position, both lower courts were asserting that there was no reason to assume that R.D.S.' case would have unfolded any differently had R.D.S. been a sixty-year old white woman, riding her bicycle in an affluent and predominantly white neighbourhood in Halifax.[308]

Read as a response to the lower court judgements, the reasons of Cory J. and L'Heureux-Dubé and McLachlin JJ. indicate movement towards a social construction approach that understands that variations in racial designation can and do make an enormous difference in terms of how events unfold.[309] The majority chose to acknowledge that race was implicated in the courtroom at R.D.S.' trial, and, at the very least, that race *may* have been implicated in the

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[307] The decision of Glube C.J.S.C. and Flinn J.A. are effectively devoid of any mention of race. It was only in the dissenting opinion of Freeman J.A. that the issue of race was acknowledged at the Nova Scotia Court of Appeal.

[308] Devlin and Pothier, 14. As Backhouse explains, counsel have traditionally diplomatically phrased their objections to a sitting judge or adjudicator as an *apprehension* of bias. In *R.D.S.*, the Crown alleged real, not just perceived bias. Moreover, as Devlin explains, the Crown's factum can be described as "extremely adversarial, even hostile, to Sparks J., unabashedly accusing her of 'racial bias' and 'strong bias' against the police." See Backhouse, *Bias in Canadian Law*, 182.

[309] Ibid.

arrest of R.D.S. by Constable Stienburg. The majority was also alive to the possibility that the racial context of Nova Scotia was relevant.

However, a theory of substantive racial equality must be able to accurately isolate and identify racism in socio-political and economic settings. While Cory J., and L'Heureux-Dubé and McLachlin JJ. do a far better job than the lower courts in recognising that race was at play in the initial arrest of R.D.S., his initial trial, and the subsequent appeals, all of the Supreme Court justices make a fundamental error in isolating and identifying *how* race and racism were implicated in *R.D.S.*. As Backhouse contends, a major issue left unaddressed by the Supreme Court of Canada was the tendency to treat two completely distinct phenomena - racism and anti-racism – in an identical fashion.[310]

The first case involves a bias complaint brought against a judge because he or she is *racist*. A racist judgement is indefensible because it condones, replicates, and encourages discrimination.[311] The second case involves a bias complaint brought against a judge because he or she is *anti-racist*. This type of judgement attempts to foster a more fair and egalitarian justice system. Consequently anti-racism is consistent with theories of substantive racial equality.[312] Sparks J. evaluated the testimony of R.D.S. and Constable Stienburg based, in part, upon her concern about, and familiarity with, racist police

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[310] Backhouse, *Bias in Canadian Law*, 174.

[311] Ibid., 175.

[312] Ibid.

responses in Nova Scotia.[313] This approach is distinct from a case in which a judge evaluates the evidence of witnesses based on his or her concern that black youths are more likely to commit crime than white youths.[314]

This flaw in judicial reasoning is demonstrated vividly in the dissenting judgement of Major J., which posits a false symmetry between the reasoning employed by Sparks J. and stereotypical reasoning applied to prostitutes and children who have been victims of sexual assault. In drawing this parallel, the dissenting justices fail to recognise the fundamental difference between an egalitarian perspective and a perspective that reflects the racial and gender dominance of white males.[315] Even the decision of Cory J. fails to differentiate between racism and anti-racism when Cory J. refers to Sparks J.'s comments as "worrisome"[316], "very close to the line"[317], and "inappropriate."[318]

The decision of L'Heureux-Dubé and McLachlin JJ. comes closest to recognising the distinction when the justices clarify that the reasonable person charged with ascertaining the apprehension of bias must be aware of historical

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[313] Ibid.

[314] Ibid.

[315] Ibid.

[316] *R.D.S.*, at 152.

[317] Ibid.

[318] Ibid., at 153. Cory J. employs equally suspect reasoning when he states that, "...it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused persons solely because of the history of sexual violence by men against women." See *R.D.S.*, at 132.

discrimination, and must also support the principles entrenched in the *Charter*.[319] Moreover, L'Heureux-Dubé and McLachlin JJ. assertively state that in alerting herself to the racial dynamics in the case, Sparks J. was simply engaged in the process of contextualised judging, a form of judging mandated by a substantive equality approach.[320] Unfortunately, L'Heureux-Dubé and McLachlin JJ. do not explicitly draw a line between anti-racism and racism, leaving the assumptions of the other five justices intact.

Given substantive equality's emphasis on negative *and* positive rights, a substantive equality approach *must* be grounded on a sound understanding of the differences between racism and anti-racism. Unfortunately, in the case of *R.D.S.*, a majority of the Supreme Court drew a false parallel between these two forms of bias complaints, striking a fundamental blow to the development of a coherent theory of substantive racial equality.

3.5.2 Confronting and Embracing Liberal Individualism and Liberal Legalism

The lower courts' strong commitment to liberal individualism and liberal legalism resulted in three theoretical consequences. First, the liberal commitment to the atomistic abstract individual, "...dismisses the possibility that group membership alters and limits individual choices, opportunities and rights."[321] It runs contrary to liberal orthodoxy to assert that an individual is disadvantaged because of his or her group membership. Second, in its commitment to

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[319] Ibid., at 46 and Backhouse, *Bias in Canadian* Law, 175.

[320] *R.D.S.*, at 59.

[321] Henry et al., 149.

universality, liberalism constructs race as a morally irrelevant category.[322] This commitment to universality depoliticizes race.[323] Third, the liberal legalist characterisation of law as a 'site beyond' the politics of race masks the reality that race affects who is granted authoritative legitimacy within the law.[324]

The majority decision of the Supreme Court of Canada is commendable because it does resist these three theoretical consequences. The majority is clear that disadvantage is linked to group membership, going so far as to say that judicial notice may be taken of the history of discrimination faced by certain marginalised communities.[325] L'Heureux-Dubé and McLachlin JJ. also reject the depoliticization of race that is consequential to a commitment to colour-blindness. They confirm that in a bilingual, multiracial and multicultural, society, racial identity is implicated in judicial decision-making[326], and that cognisance of the racial dynamics of a community is an attribute of the reasonable person.[327] Finally, the majority does counter, in some ways, the liberal legalist presumption that law is raceless and traditionally 'neutral'. L'Heureux-Dubé and McLachlin JJ. discuss the "fallacy" of judicial neutrality, distinguishing undesirable 'neutrality'

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[322] Goldberg, David Theo. "The Social Formation of Racist Discourse," in *Anatomy of Racism*, ed. David Theo Goldberg (Minneapolis, London: University of Minnesota Press, 1990), 301

[323] Henry et. al., 27.

[324] Backhouse, *Bias in Canadian Law*, 179. As Derrick Bell suggests, there is a "...widespread assumption that blacks, unlike whites, cannot be objective on racial issues and will favour their own no matter what."

[325] *R.D.S.*, at 46.

[326] Ibid., at 38.

[327] Ibid, at 49.

from the more desirable judicial impartiality.[328] Accordingly, the majority state that the reasonable person would see that in alerting herself to the racial dynamics in the case, Sparks J. was simply engaged in the process of contextualised judging, a form of judging that draws upon Sparks J.'s experience and knowledge of the community.[329]

Despite these positive attributes of the majority decision, the judgements of all nine justices still exhibit a strong liberal individualist attachment. First, while the decisions of Cory J. and L'Heureux-Dubé and McLachlin JJ. do acknowledge that certain dimensions of race were implicated in *R.D.S.*, they fail in *their application* of colour-conscious judging. Specifically, the majority of the judges treat the racial designation of Sparks J. as largely irrelevant. And, certainly, in some senses, Sparks J.'s racial designation is, or should be, immaterial. However, the reality of the context of *R.D.S.* is that the framing of bias challenges varies depending upon who is alleged to lack impartiality.[330] Sparks J. is not the first judge to have ever acknowledged a context of racialisation.[331] She is, however, the first to be charged with, and be found to have exhibited judicial racial bias.

By admitting context and racialised experience into her judgement, Sparks J. opened herself up to the charge that she was 'unfit' to adjudicate on the facts

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[328] Aylward, *Critical Race Theory*, 105.

[329] *R.D.S.*, at 59.

[330] Backhouse, *Bias in Canadian Law*, 182.

[331] As Devlin explains, other white, male judges have made comments similar to that of Sparks J., but without censure. See Devlin, *We Can't go on Together*, 434-444.

before her. However, in *R.D.S.*, what initially marked Sparks J. as an illegitimate legal Subject was her racialised body, a body that warranted excess legal scrutiny and surveillance. Ultimately, in *R.D.S.* the Supreme Court failed to address the ultimate question underscoring the entire charge of bias: Why was the first black, female judge also the first to be charged with a reasonable apprehension of bias? In this fundamental way, all members of the Supreme Court of Canada kept intact the liberal legal commitment to colour-blindness.

Second, while Cory J. and L'Heureux-Dubé and McLachlin JJ. try to rework the traditional orthodoxy on judicial neutrality, both judgements fall slightly short. For example, while Cory J. ultimately rules that Sparks J.'s comments did not give rise to a reasonable apprehension of bias, Cory J.'s judgement is very ambiguous regarding the differences between impartiality and neutrality. Cory J. endorses the Canadian Judicial Council's comments that true judicial impartiality does not demand pure objectivity. However, Cory J.'s use of terminology is inconsistent. Cory J. asserts that, "Judges must...make every effort to achieve *neutrality* and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct."[332] Cory J. also asserts that, "...it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful *to be and to appear to be neutral.*"[333]

Despite statements to the contrary, the reasoning employed by Cory J. seems to indicate some degree of commitment to traditional notions of judicial

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[332] *R.D.S.*, at 118 -– emphasis added.

[333] Ibid., at 129 – emphasis added.

neutrality.[334] Seeing Sparks J.'s comments as unfortunate, worrisome and 'close to the line', Cory J. would prefer that:

> When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial.[335]

Cory J.'s position is problematic because he is implicitly assuming that the non-articulation of generalisations is by definition neutral. However, by virtue of his own words, Cory J. recognises that determinations of credibility are highly dependent on intangibles such as demeanour and the manner of testifying.[336]

Because Cory J. lacks a theory of race and race equality to draw upon, Cory J. provides us with no guidance as to what kinds of generalizations are acceptable when making determinations of credibility. Cory J.'s preference for the non-articulation of generalisations is, in fact, a critical error with respect to developing a theory of substantive racial equality. As Devlin asserts, in the context of *R.D.S.*, "...putting race on the table is no more worrisome than, and in the context probably even less worrisome than, assuming a priori that race is not a factor."[337] To talk about race assumes that race may be a factor, but to not talk about race assumes that it is not a factor.[338] Consequently, the more nuanced and

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[334] Ibid., at 119.

[335] Ibid., at 130.

[336] Ibid., at 128.

[337] Devlin and Pothier, 35.

[338] Ibid.

careful approach would be colour-conscious, because a colour-conscious approach only raises possibilities.[339] The colour-blind approach, however, involves the categoric conclusion that race is irrelevant.[340]

Even more troubling is the fact that Cory J.'s preference for the non-articulation of generalisations runs contrary to section 15 of the *Charter* which requires that judges articulate all non-legal assumptions upon which they have based their decisions.[341] Transparency in judicial decision-making would facilitate judicial review, and allow for a level of specificity that can differentiate between racist and anti-racist reasoning.[342] In asserting that it is preferable that judges remain silent about their unavoidable use of generalisations, Cory J. is hampering both the critical race agenda and the development of substantive racial equality.[343] Cory J.'s preference for judicial silence is further troubling because if one does not have to articulate the basis for one's opinions, then one is not accountable for those opinions.

While the majority decision of L'Heureux-Dubé and McLachlin JJ. does not engage in the discourse of neutrality, the members of the majority do not clearly outline the parameters of objectivity, neutrality and impartiality. L'Heureux-Dubé and McLachlin JJ. assertively jettison objectivity and neutrality in favour of impartiality. Yet, in doing so, the majority judges seem to assume that expert

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[339] Ibid.

[340] Ibid.

[341] Aylward, *Take the long way home*, 308.

[342] Ibid., 308.

[343] Ibid., 309.

testimony and academic studies properly placed before the court can, and will, provide the necessary 'contextualising Truths' to ground contextual judicial decision-making.[344] The members of the majority do not, however, address the fact that when it comes to issues of social inequality, experts and scholars are frequently divided.[345] L'Heureux-Dubé and McLachlin JJ. do not provide guidance on how to reconcile the validity of different types of expert evidence in the context of a race-based trial.[346]

L'Heureux-Dubé and McLachlin JJ. also suggest that triers of fact may refer to "common sense" as a means of assessing whether evidence is credible and in deciding what use, if any, to make of it.[347] Again, however, L'Heureux-Dubé and McLachlin JJ. provide no guidance on the parameters of acceptable and unacceptable common sense knowledge. As Devlin explains, resorting to common sense is seriously problematic because, historically, analyses make clear that yesterday's common sense, is, with hindsight, blatant racism.[348] Perhaps the members of the majority do not feel the need to elaborate on the boundaries of common-sense knowledge because they have recourse to the rationalizing trope of the reasonable person.[349] However, to invoke the reasonable person as some objective benchmark of Truth and Knowledge, "...is

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[344] Devlin and Pothier, 18.

[345] Ibid.

[346] Ibid.

[347] Ibid., 21.

[348] Ibid.

[349] Devlin and Pothier, 20.

not only to contradict the basic patterns of their perspectivist analysis, it is to mask and devalue their own commitment to egalitarian judicial practices."[350]

3.5.3 Confronting and Embracing Formal Equality

Clearly, the decisions of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal are firmly rooted in a formalist understanding of the role of the judge. Both courts rejected the contextual legal method, and the decisions of both courts were premised upon formalistic conceptions of equality and the judicial function.[351] The majority judgement of the Supreme Court of Canada does tentatively reject some elements of the formalist approach, endorsing instead the substantive equality position that Sparks J. was simply applying the contextual legal method.[352]

The contextual inquiry endorsed by L'Heureux-Dubé and McLachlin JJ. is best understood in contradistinction to the abstractionism adhered to by formalists. Abstractionism refers to the idea that legal rules have universal qualities and are universally applicable. Consequently, legal rules need not vary according to the context in which they are applied.[353] In contrast, contextualism acknowledges the inherent indeterminacy of legal rules, because the meaning of laws may change vis-à-vis context.[354] The contextual approach mandated by a

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[350] Ibid., 21.

[351] Devlin, *We Can't go on Together*, 438.

[352] Ibid., 429.

[353] Ibid., fn 112.

[354] Ibid.

realist or substantive equality ethic encourages judges to consider the broader social context as they apply and interpret legal rules.[355] In addition, the contextual approach encourages judges to understand and account for the diversity of people's experiences.[356]

In so far as L'Heureux-Dubé and McLachlin JJ. challenge traditional notions of neutrality by endorsing the contextual approach adhered to by Sparks J., L'Heureux-Dubé and McLachlin JJ. do advance the cause of substantive racial equality. However, the Supreme Court's greatest limitation to the development of and commitment to an ethic of substantive racial equality is the court's failure to *apply* the contextual analysis mandated by a substantive equality approach.

The test for a reasonable apprehension of bias generally follows one of two lines of authority. The first approach, the 'possibility test', creates a low threshold, and requires that only a 'hint', or a 'suspicion' of bias be found in order to satisfy the test. The second approach, the 'probability test', creates a relatively high threshold that ultimately requires a determination based on a real likelihood of bias.[357]

Both Glube C.J.S.C. and Flinn J.A. opted for the lower threshold, 'possibility test'. In contrast, all nine of the Supreme Court of Canada justices opted for the 'probability test', maintaining a high presumption of judicial impartiality and integrity. All nine of the justices agreed that the 'probability'

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[355] Ibid.

[356] Claire L'Heureux-Dubé, "Lecture: Conversations on Equality," *Manitoba Law Journal* 25, n. 3 (1997) at 18.

standard should be maintained based on "traditions of integrity and impartiality", the judicial oath, the "fundamental duty to be and appear to be impartial", and the "presumption of judicial integrity."[358]

While the Supreme Court's adoption of the 'probability' standard yielded a positive disposition by five of the nine justices, the adoption of the probability test is troublesome. As Devlin and Pothier suggest, the effect of the probability standard is to make it more difficult for aggrieved citizens to challenge judges on the basis of a reasonable apprehension of bias. In effect, the probability standard insulates judges from effective review and/or criticism. Most judges do not come from marginalized communities, and there is a significant history of systemic bias on the bench.[359] By virtue of her racial and gender designation, and by virtue of the nature of her anti-racist comments, the case of Sparks J. is *not* representative of the intent and purpose behind the law on bias.

While the disposition of *R.D.S.* was favourable, the Supreme Court judges 'skipped' one too many steps. First, and most fundamentally, the court failed to identify the difference between racist and anti-racist reasoning. Second, the court failed to address the political meaning of the charge of bias against a Black, female judge. Third, the court failed to commit to one theory of impartiality. Fourth, the court was unwilling to acknowledge how racial politics are implicated in the law in general, and the judiciary in particular. Fifth, in failing to complete

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[357] Devlin and Pothier, 26. Contrary to established jurisprudence, both lower courts applied an extremely low threshold and adhered to the 'possibility test'.

[358] Ibid.

[359] Ibid., 27.

the previous steps, the court failed in its application of contextualised judging. A contextual analysis of the *R.D.S.* case would have, from the outset, distinguished between racist and anti-racist reasoning. In doing so, the court would have been able to adopt the lower threshold 'possibility test', but still arrive at the correct conclusion. More importantly, the court would have been able to lay the groundwork for a more progressive interpretation of the law on bias, given the racially inequitable context of the judiciary itself.

3.6 Conclusion

From a critical race perspective, the desired outcome of the *R.D.S.* case was that Sparks J.'s comment would not be found to have constituted a reasonable apprehension of bias. And, five out of nine Supreme Court justices delivered by ruling just that. Consequently, for a number of reasons, a number of theorists have suggested that *R.D.S.* should be considered a victory. Theorists have applauded the court for expanding the reasonable person standard[360], and for challenging the assumption that judges are supposed to be 'race-neutral'. Moreover, others have suggested that the court's articulation of a high standard for a finding of a reasonable apprehension of bias furthers the agenda of critical race theorists and practitioners.[361] From this perspective, the adoption of a high standard is:

> ...a move away from the historical denial of the existence of racism in Canadian society and a recognition that the doctrine of 'neutrality' and 'objectivity' in judicial decision

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[360] Aylward, *Canadian Critical Race Theory*, 132.

[361] Ibid., 105.

> -making is a myth. It is also a further recognition that the 'reasonable person' in Canadian society is not unaware of the social reality of racism.[362]

However, the argument here is that the positions adopted by Cory J., and L'Heureux-Dubé and McLachlin JJ. get us to the right result, but perhaps too easily. None of the nine judges grappled with the double standard that appears to have emerged in the area of judicial bias.[363] None of the nine judges adequately dealt with the differences between racist and anti-racist judicial reasoning. None of the nine judges actually applied the contextual judging mandated by a substantive equality approach. Moreover, given that three different judgements were rendered in this case, the court is clearly and deeply split methodologically and substantively on how to proceed in this area of the law.[364] *R.D.S.* seems less a victory for substantive equality than a demonstration that a favourable disposition in a race case cannot guarantee that a legal decision is premised on a coherent or consistent theory of substantive racial equality. In this sense, *R.D.S.* is not nearly as significant a case as it could, or should have been.

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[362] Aylward, *Take the long way home,* 304.

[363] Backhouse, *Bias in Canadian Law*, 181.

[364] Devlin and Pothier, 36.

CHAPTER 4 - THE CASE OF WILLIAMS

Less than one year after the Supreme Court of Canada rendered its judgement in *R.D.S.*, the court released its decision in the precedent setting *R.* v. *Williams*. Victor Williams, an aboriginal man was charged with the robbery of a Victoria pizza parlour in October, 1993. Williams pleaded not guilty and elected to have a trial by judge and jury. Williams' defence was that the robbery had been committed by someone other than himself. At his first trial, Williams applied to question potential jurors for racial bias under section 638 of the *Criminal Code*.[365] Williams' application was approved; however, after jury selection, the Crown applied for a mistrial on the basis of procedural errors. At his second trial, Williams' renewed motion for an order permitting him to challenge jurors for cause was rejected by Esson C.J. The issue facing the Supreme Court of Canada was whether Williams had the right to challenge for cause potential jurors to determine whether their impartiality was compromised because of prejudice against aboriginal peoples.

As with *R.D.S.*, the *Williams* case dealt with issues of race and racism, impartiality in legal decision-making, equality rights, the issue of when and how race should be considered in legal cases, as well as questions pertaining to the integrity of the judicial system itself. However, the issues arising from *Williams* were different from those in *R.D.S.* in two important respects. First, the *R.D.S.* case dealt with the highest level of judicial decision-making – the justices

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[365] *Criminal Code*, R.S.C. , 1985, c. C-46 [*Code*]. Section 638 of the *Code* States that "(1) A prosecutor or an accused is entitled to any number of challenges on the ground that ... (b) a juror is not indifferent between the Queen and the accused..."

themselves. *Williams* was concerned with the impartiality of regular citizens. Second, the court in *Williams* benefited from a lower court decision already delivered by the Ontario Court of Appeal in *R.* v. *Parks*.[366] Decided five years prior, this case dealt with the exact same issues to be faced by the Supreme Court of Canada in *Williams*.[367]

In *Williams* the Supreme Court was presented with a critical opportunity to clarify the meaning of race and racism in the context of one of the most sacred institutions in the Canadian criminal justice system: the jury. Given that one of the pressing issues for critical race theorists has been the use of predominantly or all-white juries to try racialised persons, or the exoneration by all-white or predominantly white juries of those accused of crimes of violence against racialised victims, *Williams* held great potential for race equality jurisprudence.[368] As with the disposition in *R.D.S.*, the Supreme Court's ruling in *Williams* was technically favourable from a critical race perspective. The court did assert that Williams was entitled to challenge jurors for cause. However, as with the decision in *R.D.S.*, it is not clear that the court has made the decision on the basis of a coherent and consistent theory of substantive equality.

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[366] *R. v. Parks*, [1993] 84 C.C.C. (3d) 353 [*Parks*].

[367] Curiously, the grounds of appeal to the Supreme Court of Canada for both *Parks* and *Williams* were the same. The Supreme Court, however, denied leave to appeal in *Parks*.

[368] Aylward, *Take the long way home*, 112.

4.1 Procedural and Legal Context

Long considered one of the most sacred institutions in the Canadian criminal justice system, the jury occupies a position of particular significance within criminal procedures. Accused persons are guaranteed the right to elect to have a trial by jury for most indictable offences under the *Criminal Code*[369], and s.11(f) of the *Charter* elevates the right to trial by jury to a constitutional imperative.[370]

As the Supreme Court of Canada explained in *R. v. Sherratt*[371], our continued reliance on the institution of the jury is based on a number of policy rationales:

> The jury, through its collective decision making, is an excellent fact finder; due to its representative character, it acts as the conscience of the community; the jury can act as the final bulwark against oppressive laws or their enforcement; it provides a means whereby the public increases its knowledge of the criminal justice system and it increases, through the involvement of the public, societal trust in the system as a whole.[372]

In addition, the integrity of the jury system is based on the presumption that juries will be both impartial, and representative of the community in which the alleged

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[369] Section 471 of the *Code* reads as follows: "Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury." Criminal offences are classified as either indictable or summary conviction. Indictable offences have higher maximum penalties and more serious consequences than summary convictions.

[370] Section 11(f) of the *Charter* reads as follows: "Any person charged with an offence has the right ... except in case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment."

[371] *R. v. Sherratt*, [1991] 1 S.C.R. 509 [*Sherratt*].

[372] Ibid, 523-524.

crime took place.[373] In fact, the requirement of representativeness is presumed to be one of the primary guarantors of jury impartiality.[374] Given the policy rationales for the maintenance of the jury system, the juror selection process implicates not only the accused's right to a fair trial, but also the rights of potential jurors to participate in the justice system under which they must live.[375]

Procedurally, the juror selection process involves four stages. The first three occur outside the court and are within the purview of the province or the territory, while the last stage occurs in court, and is governed federally by the *Criminal Code*.[376] In the first stage, a *source list* of persons who may be qualified, under provincial or territorial law, to serve as jurors is assembled. Second, persons on the source list are deemed qualified to serve as jurors, or are exempted or disqualified from jury service as per the guidelines of the various provincial and territorial Juries Acts. Third, a *jury panel* is assembled from those persons on the source list that have been deemed qualified to serve. Persons named on the jury panel are then summoned to appear in court for the final stage in the jury selection process.[377]

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[373] Ibid., 525.

[374] It is important to remember that lawyers justify the exclusion of certain jurors by claiming that their intention is to secure a fair and impartial trial. In fact, lawyers really want juror partiality weighed in favour of their client.

[375] The juror selection process also implicates the rights of victims to a fair legal resolution of the crime perpetrated against them.

[376] David Pomerant, *Multiculturalism, Representation and the Jury Selection Process in Canadian Criminal Cases*, Working Document (Ottawa: Justice Canada, 1994), 15.

[377] Ibid.

While the integrity of the jury system is premised on the presumption that the jury will be both impartial and representative, the first three stages in the jury selection process typically result in a jury panel with skewed representation. Procedural problems in the selection process lead to the over-representation of property-owning White Canadians on source lists, jury panels, and ultimately the jury itself.

For example, the provincial and territorial Juries Acts that govern the source lists from which potential jurors are selected are intended to guarantee representativeness in the initial array of potential jurors to be drawn from.[378] The statutes authorize the annual preparation of a *jury roll* by an official – the sheriff – in each judicial district.[379] The names appearing on the jury roll are generated randomly from other pre-existing lists.[380] As Peterson suggests, the selection of these pre-existing lists often constitutes the first stage in the systemic elimination of prospective Aboriginal, Asian, Arab, Black, and Hispanic jurors.[381] Sheriffs are generally authorized to exercise their discretion when selecting the lists from which the jury rolls are generated. Often, sheriffs choose provincial and municipal electoral lists, and municipal assessment rolls as sources for the jury roll. However, the enumeration process for these lists often results in the under-

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[378] Aylward, *Canadian Critical Race Theory*, 112. The fundamental premise governing the requirement of representativeness is that accused persons are tried in, and juries are drawn from, the county, district or judicial district where the alleged offence has been committed. As such, determinations of jury representativeness are also linked to definitions of community. See Pomerant, 14.

[379] Cynthia Peterson, "Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process," *McGill Law Journal* 38 (1993): 151.

[380] Ibid.

representation of particular segments of the population.[382] For example, because municipal assessment rolls include only the names of property owners, members of lower income groups do not appear on the roll. If municipal assessment rolls are used to generate the jury roll, people of colour, who are already over-represented among the poor and working class, will not have the equal opportunity to participate in juries.

The representativeness of the jury is further compromised in the second and third stages of the jury selection process. To assemble the jury panel, names are drawn randomly from the already skewed source list. After the names are drawn, the persons appearing on the panel list are delivered summonses by registered mail.[383] Recipients of the summonses are requested to contact the sheriff by telephone. If, upon contacting the sheriff, they are not exempted or disqualified by the sheriff, they are requested to appear in court on a specific date.[384]

In Canada, this stage of the process results in the significant under-representation of Aboriginal people on jury panels. For example, the *Report of the Aboriginal Justice Inquiry of Manitoba*[385] explains that because Aboriginal people often live in communities with poorer mail and telephone service than those living in non-Aboriginal communities, there is often a delay in the delivery

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[381] Ibid.

[382] Ibid.

[383] Ibid., 152.

[384] Ibid.

[385] Paul L.A.H. Chartrand and Wendy Whitecloud, *Final Report of the Aboriginal Justice Implementation Commission* (Winnipeg: Aboriginal Justice Implementation Commission, 2001).

of, and responses to, juror summonses.[386] More broadly, the summoning procedure skews the representativeness of the jury by favouring property owners over renters.[387] People who rent are more likely to change addresses than property owners. Consequently, people who rent are less likely to receive their summonses, even if their name was generated for the jury panel list. This again contributes to the systemic overrepresentation of the property-owning middle-class on juries.[388] Moreover, this leads to the over-representation of White people on juries, because they are already over-represented within the aforementioned economic class.[389]

The exemption and disqualification procedures governing the selection of the jury panel also have a differential and adverse impact upon minority communities.[390] Disqualification on the basis of language competency presents an additional obstacle for many persons whose first language is neither English

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[386] Peterson, 153. For a more historical perspective on the reasons for the under-representation of Aboriginal people juries, see Chartrand and Whitecloud.

[387] Ibid.

[388] Ibid.

[389] Ibid.

[390] The main qualifications for jury duty under the various provincial and territorial Juries Acts are: 1) Canadian citizenship; 2) residency of the Province; 3) age of majority; 4) not eligible if, a member of Parliament or Legislature; a judge; a lawyer; a court official, sheriff, police officer, corrections officer; employee of the Attorney General Department, Minister of Justice or Solicitor General; convicted of an offence within past 5 years punishable by fine of 2000 dollars or one year imprisonment (anyone convicted of an offence and sentenced to more than one year imprisonment is ineligible for jury duty under s.638(1)(c) of the Code); currently charged with an offence; blind, deaf, and mentally or physically infirm (this has recently been abolished in some provinces); unable to understand, speak or read the language in which the trial will be held; persons over age 65 may apply for exemption, and; 5) property ownership is no longer a qualification in most provinces.

nor French.[391] Yet, even if a potential juror has an adequate mastery of English or French, people of colour are more likely to be exempt from the jury panel due to accent discrimination.[392] Moreover, if a member of a minority group is selected, but is then exempt from the jury panel, there is no requirement in any province or territory that his or her replacement be from the same minority group.[393]

The skewed jury panel appears in court for the final stage of the jury selection process. At this point, members of the final jury are selected from the jury panel. As per s.631 of the *Criminal Code*, members of the jury panel are selected at random to come forward. The individuals may then be subject to two types of challenges[394] – peremptory challenges and challenges for cause - by the Crown and/or the Defence.[395]

The peremptory challenge permits the exclusion of a juror with no justification or explanation for the objection.[396] The Crown and the defence are

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[391] Peterson, 154.

[392] Ibid. For example, many Black people are perceived to be illiterate and/or inarticulate in English or French despite the fact that their accents may not be indicative of another mother tongue (i.e. Jamaican and Haitian accents). See Peterson, 155.

[393] Ibid., 154.

[394] Without providing any reason, the Crown may also ask a prospective juror who is called forward from the panel to be stood aside. The Crown is allowed to ask 48 jurors to stand aside. The effect of this practice is to enable the Crown to reserve its decision as to whether to challenge a potential juror. This practice also enables the Crown to see the types of challenges advanced by the defence.

[395] Pomerant, 16.

[396] David Tanovich, David M. Paciocco and Steven Skurka, *Jury Selection in Criminal Trials: Skills, Silence and the Law* (Concord, Ontario: Irwin Law, 1997), 27. Peremptory challenges have often been used to limit the number of Black persons on juries. See Miriam Henry and Frances Henry, "A Challenge to Discriminatory Justice: The *Parks* Decision in Perspective," *Criminal Law Quarterly* 38 (1996): 337-339.

entitled to a limited number of peremptory challenges. However, a person who has been challenged peremptorily is automatically excluded from the jury. A challenge for cause, however, requires the articulation of a justification for the exclusion of a prospective juror.[397] Subsection 638(1) of the *Criminal Code* specifies six grounds upon which counsel may seek to make an application to challenge for cause.[398] For the purposes here, *Williams* is concerned with subsection 638(1)(f) of the *Code* which States that: "A prosecutor or an accused is entitled to any number of challenges on the ground that ... a juror is not indifferent between the Queen and the accused."

Given my cursory overview of the extent to which jury selection procedures can, and do, skew the representativeness of juries, an accused's ability to make use of the challenge for cause procedure can be critical to ensure an accused's right to a fair trial. Put more boldly, systemic racism in the jury selection process results in the prevalence of predominantly white juries in the Canadian criminal

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[397] Tanovich, et. al., 337-339. The challenge for cause involves appointing two triers of fact who will act as a mini-jury to decide whether the challenge for cause is true or not. Both the accused and the Crown are entitled to an unlimited number of challenges for cause. See Peterson, 170 and 175.

[398] These grounds include: (*a*) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to; (*b*) a juror is not indifferent between the Queen and the accused; (*c*) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months; (*d*) a juror is an alien; (*e*) a juror, even with the aid of technical, personal, interpretative or other support services provided to the juror under section 627, is physically unable to perform properly the duties of a juror; or (*f*) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

justice system.[399] In addition to compromising the equality and fair-trial rights of the accused, the circumscribed participation of racial minority citizens in the jury system thwarts the ability of these same citizens to influence or structure the laws that they must be governed by.[400]

While the challenge for cause procedure cannot correct the systemic under-representation of racial minority groups in juries, the challenge for cause is indispensable for two predominant reasons. First, the challenge for cause procedure may help to temper the effects of systemic racism within the jury selection process.[401] The challenge for cause constitutes one legal mechanism that can be used to isolate and screen out prejudicial attitudes that may be held by members of the jury panel.[402] Second, the challenge for cause permits dialogue on, and recognition of, the ways in which racism influences one realm of legal decision-making. In addition, the challenge for cause enables discussion of the ways in which jurors, as legal decision-makers, can and do perpetuate racism.[403]

The Canadian approach to challenges for cause has historically been quite restricted.[404] As opposed to the more 'liberal' American legal approach to jury

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[399] Henry and Henry, 338.

[400] Ibid.

[401] Ibid., 334.

[402] Ibid., 335.

[403] Ibid., 334.

[404] Coughlan, 294. See also R. Blake Brown, "Challenges for Cause, Stand-Asides and Peremptory Challenges in the Nineteenth Century," *Osgoode Hall Law Journal* 38 (2000): 460.

selection, the Canadian approach to jury selection is premised on the presumption that:

> ...a juror who is properly sworn is able to, and will, follow the direction of the Judge that he is to determine the guilt or innocence of the accused solely on the evidence which he has heard in Court free from extraneous considerations, and free from either prejudice against, or favour for the accused.[405]

However, in 1993, when the Ontario Court of Appeal ruled in *R.* v. *Parks* that a Black accused was entitled to challenge jurors for cause based on possible juror racism, the challenge for cause procedure re-emerged as a potential tool for those striving towards substantive racial equality. While the *Parks* decision is not the central case I am analysing, it does provide important background to the *Williams* case for three main reasons. First, both *Parks* and *Williams* dealt with the question of whether a trial judge should allow prospective jurors to be asked questions to establish a basis for a challenge for cause.[406] Second, both cases dealt with the *Criminal Code's* ground of indifference, and sought to clarify whether prospective jurors that harboured racist prejudices against a racial minority, would act on these prejudices when deciding the guilt or innocence of the accused.[407] Finally, the *Parks* decision is relevant to the analysis of *Williams* because the Ontario Court of Appeal judgement in *Parks* was a major departure from the conventional conservative legal approach to challenges for cause.

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[405] *R. v. Hubbert*, [1975] 29 C.C.C. (2d) 279 [*Hubbert*], at 52. Canadian courts have continually rearticulated that the challenge for cause cannot be used to find out what kind of juror a person is likely to be; the challenge for cause cannot be used as a "fishing expedition".

[406] Kent Roach, "Challenges for Cause and Racial Discrimination," *Criminal Law Quarterly* 37 (1995): 412.

Notably, leave to appeal in *Parks* was denied by the Supreme Court of Canada. Given the similarities between *Parks* and *Williams*, the decision of the Supreme Court of Canada in *Williams* can be considered, in some respects, a resolution of the Ontario Court of Appeal's pivotal judgement in *Parks*.

4.2 The *Parks* Decision

In *R. v. Parks*, Carlton Parks, a Black man, was charged with the second-degree murder of a White victim. At trial, Parks was convicted of manslaughter, and sentenced to seven years in prison. Parks appealed his conviction and sentence on the grounds that the trial judge had refused to permit his counsel to ask prospective jurors the following two questions in the course of challenging those jurors for cause:

> 1) Would your ability to judge witnesses without bias, prejudice or partiality be affected by the fact that there are people involved in cocaine and other drugs?
> 2) Would your ability to judge witnesses without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?[408]

The Ontario Court of Appeal rejected Parks' application to pose the first question to prospective jurors.[409] However, on the matter of the second question, the court ruled that Parks was entitled to challenge jurors for cause because the overwhelming evidence of anti-black racism in Metropolitan Toronto and Canada

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[407] Ibid., 413.

[408] *Parks*, at 16.

[409] The Court of Appeal had rejected the Parks' application to pose the first question because the court felt that involvement in the drug trade, and/or personal use of illicit drugs may be considered by the jury in assessing credibility. Ibid., at 17.

created a realistic possibility of partiality on the part of potential jurors on the grounds of apprehended racial bias.[410] Significantly, Parks' legal team presented no evidence to establish that prospective jurors might not be indifferent on the ground of racial prejudice. Consequently, the Ontario Court of Appeal decision was significant because the court took judicial notice of the prevalence of anti-black racism in Metropolitan Toronto, and then based its judgement on its recognition of the prevalence of this type of racism.

The judgement, delivered by Doherty J.A., addressed four key questions: 1) What is the nature of the accused's right to challenge for cause?; 2) In the context of challenges for cause, what do partiality and bias mean?; 3) What is the appropriate threshold to be applied when assessing the validity of applications to challenge for cause, and; 4) How can possible racial partiality be *proven*, through evidence, in applications to challenge for cause?

On the first issue, Doherty J.A. clarified that an unduly conservative approach to the challenge for cause procedure would violate the accused's constitutional right to a fair trial by an impartial jury. Second, Doherty J.A. defined partiality as referring to "...one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases."[411] Similar to Cory J.'s two-prong definition of judicial partiality in *R.D.S.*, Doherty J.A. specified that successful and relevant applications to challenge for cause will address both the attitudes and

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[410] Aylward, *Take the long way home*, 283.

[411] *Parks*, at 35.

the behaviours of potential jurors.[412] Specifically, when ruling on the validity of an application to challenge for cause, the judge must not ask whether a particular potential juror is biased against blacks, "...but whether if that prejudice existed, it would cause that juror to discriminate against the black accused in arriving at his or her verdict."[413]

Third, Doherty J.A. cautioned that while successful applications to challenge for cause must have an "air of reality", an application need not be an extreme case to be successful.[414] Citing the reasons of the Supreme Court of Canada in *Sherratt*, Doherty J.A. specified that the threshold question is not whether the ground of alleged partiality will create partiality, but whether there is a "...realistic possibility that one or more prospective jurors would, because of racial prejudice, not be impartial...".[415]

Finally, Doherty J.A. spent some time clarifying what 'proof' is necessary for a successful challenge for cause. Significantly, Doherty J.A. asserted that given that racism is manifest overtly and covertly, as well as individually, institutionally and systemically, proof of racial partiality or racism cannot necessarily be established in a manner normally associated with the proof of

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[412] Ibid.

[413] Ibid., at 37.

[414] Ibid., at 31.

[415] Ibid., at 39 – emphasis added. The threshold test mandates a two-prong question that addresses both of these components: Is there a realistic possibility that a potential juror would be biased against a black accused charged with murdering a white person? Second, is there a realistic possibility that a prospective juror would be influenced in the performance of his or her judicial duties by racial bias?

adjudicative facts.[416] Consequently, an inability to produce quantitative data that definitively proves possible racial partiality should not necessarily lead to a rejected application to challenge for cause.

4.2.1 Issues Raised by the Parks Decision

Given the similarities between the *Parks* and *Williams'* cases, this cursory analysis of the *Parks* judgement is useful in laying a backdrop upon which to assess the Supreme Court of Canada's judgement in *Williams*. From a critical race perspective, the judgement in *Parks* is commendable for a number of reasons. Most broadly, Doherty J.A.'s decision recognizes that widespread attitudinal, institutional, and systemic racism exists in Canadian society, Canadian institutions and, more specifically, in the Canadian criminal justice system.[417] Second, Doherty J.A.'s judgement recognises that despite the tradition of granting a high presumption of impartiality to duly sworn in jurors, racial biases and prejudices can and do impede the ability of individuals to be impartial jurors, because these biases affect how evidence, character, and criminality are interpreted, remembered and assessed.[418] Third, Doherty J.A.'s judgement recognises that if racial prejudices and biases cannot be screened out of jury decision-making, the integrity of the criminal trial system itself is compromised.[419] Finally, the judgement in *Parks* is commendable because it represents an attempt

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[416] Ibid., at 42.

[417] Ibid., at 54.

[418] Henry and Henry, 334.

[419] Ibid.

to move away from formal conceptions of race that posit racism as individualised, overt, and motive-based. In *Parks*, the Crown had argued that because there was no racial motivation in the murder committed by Parks, there was no racial element to the case. Consequently, the Crown argued that challenging jurors for cause based on possible racial partiality would improperly inject racial overtones into the case. In adopting a substantive equality approach, Doherty J.A. inverted this position, rejected the Crown's argument, and stated that: "A question directed at revealing those whose bias renders them partial does not 'inject' racism into the trial, but seeks to prevent that bias from destroying the impartiality of the jury's deliberations."[420]

Despite these important contributions, from a critical race perspective, the *Parks* decision is not without problems. First, Doherty J.A.'s decision is extremely narrow in focus in that it permits a very limited inquiry on a challenge for cause. Doherty J.A. expressly reiterates that his approval of the second question is based on the race-neutral quality of the proposed questioning[421], and that the "...proposed inquiry involved a single question focused on a specific issue."[422] However, the one basic question approved of in *Parks* is of limited usefulness in ferreting out racism's more complex and nuanced incarnations.[423] Here, Doherty J.A.'s judgement demonstrates theoretical inconsistencies and begins to unravel.

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[420] *Parks*, at 26.

[421] Ibid., at 23.

[422] Ibid., at 25.

[423] Henry and Henry, 348.

For example, Doherty J.A. comments on the complexity of racism in Canadian society, stating that racism operates at multiple levels – individual, institutional, and systemic. He moves further and explains that racism is multifaceted in that it functions consciously and subconsciously, overtly and covertly. However, Doherty J.A.'s express endorsement of the narrow, single question approach to the challenge for cause betrays his nuanced and substantive understanding of racism. In fact, the limited inquiry approved of by Doherty J.A. can only be endorsed if one subscribes to the formal view of racism as mainly individual, attitudinal and overt. Doherty J.A.'s acceptance that one question will be sufficient to isolate racial partiality in potential jurors is based on the faulty assumption that racists can and will volunteer information about their own biases[424], and that individuals are necessarily capable of accurately evaluating themselves for racial bias.[425]

Doherty J.A.'s judgement demonstrates further theoretical inconsistencies with respect to his treatment and understanding of partiality. From a critical race perspective, one major strength of the *Parks* decision was that Doherty J.A. recognised that the "...existence and the extent of racial bias are not issues which can be established in the manner normally associated with the proof of

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[424] Ibid., 346. Prejudiced individuals are often unaware of their biases and, if asked, would attribute their behaviour to reasons other than prejudice.

[425] Ibid., 347. This inquiry depends on individuals evaluating themselves for racial bias. These assessments will most likely be inaccurate because people are more often not willing to admit to have prejudicial attitudes. See Henry and Henry, 348. The authors explain that a series of relevant questions leading to a "punch line" question would be more effective to accurately gauging a potential jurors' feelings.

adjudicative facts."[426] Contrary to a formalist approach, Doherty J.A. clarified that racism operates directly and indirectly, and that 'proof' of racism is not always quantifiable. Consequently, demands for quantitative proof of racial partiality could lead to an unduly high evidentiary threshold, thereby compromising an accused's statutory right to challenge for cause.

However, Doherty J.A.'s treatment of partiality and his clarification of the threshold test compromise his important statement on proof and evidence of racial partiality. Doherty J.A. states that partiality has both an attitudinal and behavioural component. Consequently, successful applications to challenge for cause must establish, not only that prospective jurors may possibly be racially partial, but that jurors demonstrate a 'reasonable *possibility*' to act on these prejudices. Doherty J.A.'s two-prong understanding of partiality may ultimately require that a successful application to challenge for cause demonstrate a causal link between racist attitudes and racist behaviours. This demand for a demonstrated causal link would endorse a formal, not substantive, understanding of racism.

The Supreme Court of Canada denied leave to appeal in the *Parks* case. Consequently, the appearance of the *Williams* case on the Supreme Court of Canada docket four years later represented an important opportunity for critical race legal strategists. The willingness of the Supreme Court to hear the *Williams* case provided the court with an opportunity to deal with the theoretical

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[426] *Parks*, at 42.

inconsistencies in the *Parks* decision, as well as an opportunity to begin to develop a more consistent and coherent theory of substantive racial equality.

4.3 *Williams* Case Facts

Victor Williams, an Aboriginal man, was charged with the October 4, 1993 robbery of a pizza parlour in Victoria. While his cousin stood lookout, Williams was accused of threatening the white manager of the restaurant with a BB pistol, and stealing approximately nine hundred dollars. Subsequent to the robbery, Williams and his cousin were said to have used the money to purchase alcohol. Soon after the alleged incident, police made contact with Williams' cousin. Williams fled the Victoria area, but was later arrested in Campbell River and charged with robbery. At Williams' trial, the only issue facing the jury was the identity of Williams as the person who robbed the restaurant on the night in question.

Prior to his trial, Williams applied to challenge potential jurors for cause based on the possible inability of jurors to set aside any preconceptions they might have based on race.[427] After reviewing the application, the trial judge, Hutchison J., ruled that Williams' application had met the *Sherratt* threshold test[428], and allowed the following two questions to be posed to potential jurors: 1) Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian?, and; 2)

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[427] Coughlan, 291.

[428] *Sherratt* establishes that when determining whether to exercise discretion and allow challenges for cause, the trial judge should apply the "realistic potential of partiality" test.

Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is an Indian and the complainant is white?[429]

At the challenge for cause proceeding, forty-three panel members were questioned, and twelve were dismissed on the basis of risk of bias.[430] Subsequent to the disempanelling of the twelve jurors, the Crown sought a mistrial based on procedural errors in the jury selection process, as well as the "unfortunate publicity" surrounding the process.[431] Hutchison J. allowed the Crown's application and declared a mistrial, at which point Williams renewed his application to challenge for cause.

4.4 Lower Court Judgements

4.4.1 British Columbia Supreme Court

Williams' renewed application to challenge for cause was heard and dismissed by Esson C.J.S.C. at the British Columbia Supreme Court on June 2, 1994. In reviewing Williams' application, Esson C.J.S.C. acknowledged that there "...clearly [was] a realistic possibility that a potential juror would be biased against a Native person charged with robbery of a white person."[432] However, Esson C.J.S.C. rejected Williams' application, reasoning that Williams' legal team had

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[429] *Williams*, at 3.

[430] Coughlan, fn 60. Also see *Williams*, at 3.

[431] Ibid. The Crown cited procedural irregularities such as the use of the same two jurors to decide all challenges.

[432] *R.* v. *Williams*, [1994] B.C.J. 1301 [*Williams* 1994], at 33.

not provided evidence that conclusively established that jurors would act upon those prejudices and decide the actual case in a discriminatory manner.

Esson C.J.S.C. asserted that because the crime that Williams was charged with was not racially motivated, there was no 'racial element' to the case. The racial designations of the accused and the victim, and the social science research presented that demonstrated widespread and pervasive racism against Aboriginal people in Canada, did not, according to Esson C.J.S.C., satisfy the 'air of reality' requirement of the *Sherratt* threshold test. Williams' evidence, consisting of commission reports, other writings, and the oral evidence of four witnesses, did establish the pervasive nature of prejudice against Aboriginal people in Canada.[433] However, the evidence did not conclusively determine "...the extent to which the existence of negative or biased attitudes [would] result in partiality on the part of jurors in carrying out their duties."[434] To satisfy the 'air of reality' threshold test, Williams' evidence would have to isolate a causal link between the attitudinal and behavioural components of partiality described by Doherty J.A. in *Parks*.

4.4.2 British Columbia Court of Appeal

Williams appealed Esson C.J.S.C.'s decision to the British Columbia Court of Appeal on the following two grounds:

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[433] Ibid., at 10-11. Williams' witnesses included: Judge Sarich, head of the Cariboo-Chilcotin Justice Inquiry; Mr. Bellegarde, an aboriginal corrections outreach counsellor with experience working with aboriginal persons in difficulty with the law; Mr. Baker, an aboriginal staff lawyer for a tribal council, active in the aboriginal court worker and counselling system for over 20 years, and; Dr. Warburton, a sociologist specializing in the study of race relations.

[434] Ibid., at 12.

1. Was the appellant wrongly denied his right to challenge potential jurors for cause in accordance with s. 638(1)(a) of the *Criminal Code* and the *Charter*?
2. Having regard to the nature and effect of the jury selection process prior to the mistrial, did the subsequent refusal to allow a similar selection process result in a miscarriage of justice?[435]

The judgement, written by Macfarlane J.A., and concurred in by Legg and Newbury J.J.A., upheld the decision of Esson C.J.S.C., and held that the presumption of juror impartiality was not discharged by evidence of general bias in the community against persons of the accused's race.[436] Macfarlane J.A. concurred with Esson C.J.S.C. that, despite the racial designation of the accused and victim, and despite evidence of widespread racial bias against Aboriginal people, there was no racial element to the case.

Both Esson C.J.S.C. and Macfarlane J.A. agreed that the disposition of the *Parks* case was not relevant to the *Williams* case because *Parks* dealt specifically with the "...perception of black persons in Ontario. It [did] not involve a perception of Aboriginal persons."[437] For the Williams' application to have been successful, Williams' legal team would have had to present, "...evidence of a bias against Aboriginal persons which is of a particular nature and extent."[438] Specifically, a successful application would have been supported by, "...evidence

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[435] Respondent's Factum, *R.* v. *Williams* 1996 (B.C.C.A).

[436] *R. v. Williams*, [1996] 106 C.C.C. (3d) 215 [*Williams* 1996], at 33.

[437] Ibid., at 41.

[438] Ibid., at 56.

that racist attitudes against Aboriginal persons have particular significance in the context of a criminal jury trial."[439]

According to Macfarlane J.A., the evidence submitted by Williams established only that biases against Aboriginal persons can be "manifested in the subconscious of non-Aboriginal persons", and that "Aboriginal persons perceive the 'justice system' to be unfair to them."[440] The evidence presented by the Williams team was not relevant to the issue to be decided in the case, and the application to challenge for cause did not satisfy the "air of reality" component of the *Sherratt* test. Put succinctly, the position of the British Columbia Court of Appeal was that: "The fact that there is a larger representation of Aboriginal people in the penal system than other races is of concern. But again the report and studies do not identify lack of impartiality of jurors as the cause."[441]

4.5 Supreme Court of Canada Decision

On June 4, 1998, in a unanimous nine-member panel judgement written by McLachlin J., and concurred in by Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major, Bastarache and Binnie JJ., the Supreme Court of Canada found for Williams, ordered a new trial, and reaffirmed the Ontario Court of Appeal decision in *Parks*. The Supreme Court assertively stated that trial judges should permit challenges for cause when there is "a realistic potential of

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[439] Ibid.

[440] Ibid., at 57.

[441] Ibid., at 86.

juror partiality."[442] The evidence presented by Williams' counsel that established widespread racial prejudice against aboriginal people, did demonstrate a "realistic potential of partiality."[443] The trial judge should have exercised his discretion to allow Williams' challenge for cause.[444]

The judgement in *Williams* is succinct in that the court addressed two basic issues. First, the court clarified the law on jury challenges in Canada, and second, in clarifying the nature of the evidentiary threshold for successful applications to challenge for cause, the court asserted that the lower courts had set the threshold too high.

First, with respect to the law on challenges for cause, the court specified that the terms "lack of indifference", or "partiality", refer to "...the *possibility* that a juror's knowledge or beliefs *may* affect the way he or she discharges the jury function in a way that is improper or unfair to the accused."[445] The court explained that while the Canadian approach to jury challenges is marked by a higher presumption of juror impartiality than the American approach,[446] trial judges cannot effectively curtail an accused's statutory right to challenge for cause.[447]

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[442] *Williams*, at 2.

[443] Ibid.

[444] Ibid.

[445] Ibid., at 9 – emphasis added.

[446] Ibid., at 13.

[447] Ibid., at 14.

Judges must permit challenges for cause when there is a "realistic potential" for the existence of partiality.[448]

Second, with respect to the evidentiary threshold for successful applications to challenge for cause, the Supreme Court asserted that the lower courts had applied too high a threshold. The court identified seven errors made by the lower courts that ultimately led to the incorrect disposition of the *Williams* case.

First, the court asserted that the lower courts' assumption that jurors are able to identify and set aside their racial prejudice is based on a faulty understanding of the nature of racial prejudice and how it can affect the decision-making process.[449] Racial prejudice and racist stereotypes are "insidious", and rest upon "preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals."[450] Because juror prejudice is "[buried] deep within the human psyche"[451], and because racist attitudes are "engrained in an individual's subconscious", partiality on the basis of race will "prove more resistant to judicial cleansing".[452] Consequently, it is better to, "...err on the side of caution and permit prejudices to be examined."[453] The court did, however, reaffirm a separation between the attitudinal and behavioural components of

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[448] Ibid., at 15.

[449] Ibid., at 20.

[450] Ibid., at 21.

[451] Ibid.

[452] Ibid.

[453] Ibid., at 22.

partiality, specifying that even if a juror admits to being racially prejudiced, this would not automatically be grounds for that juror's dismissal. It is for the triers on the challenge for cause to determine whether a juror is "racially prejudiced in a way that could affect his or her partiality", and whether said juror is "capable of setting aside that prejudice."[454]

Second, the court found that Macfarlane J.A.'s contention that evidence of general bias against a racial group is insufficient to warrant a challenge for cause to be unduly restrictive. Instead, the court asserted that, "[e]vidence of widespread racial prejudice may, depending on the nature of the evidence and the circumstances of the case, lead to the conclusion that there is a realistic potential for partiality."[455] The court did not, however, specify what evidence or which circumstances would warrant a challenge for cause. Instead, the court relegated it to the discretion of the trial judge to determine, "...whether widespread racial prejudice in the community, absent specific 'links' to the trial, is sufficient to give an 'air of reality' to the challenge in the particular circumstances of each case."[456]

Third, the court found that the lower courts had incorrectly applied the law with respect to section 638(2) of the *Code*. The court explained that s. 638(2) mandates two inquiries, two decisions and two different tests. The first stage of the inquiry is whether the challenge for cause should be permitted. At this stage,

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[454] Ibid., at 23.

[455] Ibid., at 27.

[456] Ibid., at 30.

the test is whether there is a "realistic potential or possibility for partiality."[457] At this stage, the operative verbs are "may" and "might".[458] Because this initial stage is a preliminary inquiry that may affect the accused's *Charter* rights, "a reasonably generous approach is appropriate."[459]

In contrast, the second stage of the inquiry occurs if the judge permits the challenge. At this stage, the determination involves the actual challenging of potential jurors. Here, the question is whether the candidate in question will be able to act impartially. Demanding "proof" that the juror will not be able to set aside any prejudices is appropriate at this stage.[460] According to the Supreme Court, the lower courts erred by conflating these two stages.

Fourth, the Supreme Court stated that the lower courts' requirement that the accused present 'evidence' that jurors will be unable to set aside their prejudices as a condition of a challenge for cause "...is to set the accused an impossible task."[461] The only possible way to satisfy this standard of proof is to question previous jurors, however, s. 649 of the *Code* expressly prohibits the questioning of actual jurors.[462]

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[457] Ibid., at 32 – emphasis in original.

[458] Ibid.

[459] Ibid. At the first stage, the question "...is not whether anyone in the jury pool will in fact be unable to set aside his or her racial prejudices but whether there is a realistic possibility that this could happen." See *Williams*, at 34.

[460] Ibid., at 33.

[461] Ibid., at 35.

[462] Ibid., at 36.

Fifth, the Supreme Court asserted that the lower courts erred in failing to read s. 638(1)(b) of the *Code* purposively. The object of s. 638(1)(b) is to prevent persons who may not be able to act impartially from sitting as jurors; this objective cannot be achieved if the evidentiary threshold is set too high.[463] Because extreme prejudice is not the only sort of prejudice that could render a juror partial, an evidentiary threshold set too high would only catch the most extreme forms of racial prejudice.[464] Moreover, the court asserted that the, "...exceptional nature of a situation is a poor indicator of whether there is a realistic danger or potential of partiality. Widespread racial prejudice is by definition not exceptional."[465] The court cautioned that membership in a minority group does not automatically imply a realistic potential for partiality[466], however, absent evidence to the contrary, "...where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level."[467]

Sixth, the court found that the lower courts did not interpret s. 638(1)(b) of the *Code* in accordance with the accused's s. 11(d) *Charter* right to a fair trial by an independent and impartial tribunal. According to the court, presumptions of

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[463] Ibid., at 37.

[464] Ibid., at 39.

[465] Ibid., at 40.

[466] Ibid., at 41.

[467] Ibid.

impartiality are not sufficient if *Charter* rights are to be respected.[468] The accused's constitutional right to a fair trial necessitates guarantees of impartiality.

Finally, the court stressed that a conservative approach to the challenge for cause cannot be justified on the ground that challenges would "...render our trial process more complex and more costly, and would represent an invasion of the privacy interests of prospective jurors without commensurate increase in fairness."[469] The court suggested that judges may be able to take judicial notice of established widespread racial prejudice in a given community, thereby limiting the necessity for long inquiries into the existence of widespread racial prejudice in the said community.[470]

The court concluded that in *Williams*, "...there was ample evidence that this widespread prejudice included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity."[471] In a disposition favourable from a critical race perspective, the Supreme Court of Canada ordered a new trial, and ruled that the trial judge should have allowed Victor Williams to challenge prospective jurors for cause.

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[468] Ibid., at 46.

[469] Ibid., at 51.

[470] Ibid., at 54. The court did note that the "...fear that trials will be lengthened and rendered more costly by upholding the right to challenge for cause where widespread racial prejudice is established is belied by the experience in Ontario since the ruling in *Parks*." See *Williams*, at 55.

[471] Ibid., at 58.

4.6 Analysis of the Supreme Court of Canada Decision

4.6.1 Confronting and Embracing a Formal Understanding of Race and Racism

The B.C. Supreme Court and the B.C. Court of Appeal both concluded that there was no realistic risk that jurors would discriminate against an Aboriginal accused after being instructed by the judge on the applicable law. In reaching this conclusion, the lower courts adhered to a formal race position, characterising racism as individualised, attitudinal, motivated and overt.[472] Both Esson C.J.S.C. and Macfarlane J.A. stressed that there was no "racial element" to the robbery, hence no "racial element" to the case itself.[473] Concerned only with the likelihood of conscious and intentional racism, the lower courts suggested that racial prejudice among jurors would only be a danger when jurors were considering cases that involved evidence of racial animus between an accused and a complainant.[474]

The lower courts' commitment to the formalist approach is also manifest in the courts' unrealistically high evidentiary threshold. Esson C.J.S.C. and Macfarlane J.A. asserted that it was theoretically and practically possible *and* necessary for Williams to provide definitive proof that racial bias could, can *and* does interfere with the impartiality of potential jury members. The lower courts were deeply affected by the fact that there were "...no studies mentioned in the evidence which [concluded] that persons in a jury setting may be inclined to find

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[472] Roach, 421.

[473] Ibid.

[474] Ibid.

that an Aboriginal person is more likely to have committed a crime than a non-aboriginal person."[475] General statistics about the over-representation of Aboriginal people in the criminal justice system were not relevant to the *Williams* case.[476] This over-representation was only relevant if it could be specifically and definitively linked to juror bias.[477] Consequently, the formal race position of the lower courts was that Williams present concrete evidence of a causal link between racist attitudes and racist behaviours of prospective jury members.[478]

In contrast to the lower courts, the Supreme Court develops a relatively sophisticated and substantive understanding of racism. The court states that it is the very non-exceptional nature of widespread racial prejudice that leads to a concern that members of the jury pool will not be impartial.[479] Given that racism operates c/overtly, racial partiality amongst potential jury members cannot necessarily be, "...easily and effectively identified and set aside..."[480]. Moreover, it cannot be assumed that judicial directions to jurors to act impartially will always effectively counter racial prejudice.[481] To satisfy the purposive reading of s.638(1)(b), courts cannot set an unreasonably high evidentiary threshold. The

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[475] Tanovich, et. al., 114-115.

[476] Ibid.

[477] Ibid.

[478] From the formal race position, it is empirically possible to isolate and quantify the effect of race on jury decision-making. Specifically, in an individualised and motive-based understanding of racism, intent or motivation can be isolated, and the effects of the intent or motivation can be quantified.

[479] *Williams*, at 39.

[480] Ibid., at 21.

[481] Ibid.

requirement that the accused isolate and quantify the effect of race on jury decision-making is to demand evidence that is at the very limit of, if not beyond the capacity of social science. Moreover, this requirement derives from a persistent failure to grasp the concept of indirect discrimination.[482] The court wisely asserted that it is better to err on the side of caution and "...risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary."[483]

Despite these extremely positive comments, the reasoning of the Supreme Court does exhibit a number of theoretical inconsistencies. As with the decision in *Parks*, the Supreme Court's decision is extremely narrow in focus in that it permits a very limited inquiry on a challenge for cause. Stringent limitations on the number of questions that can be asked on a challenge for cause compromises, in particular, the utility of challenges that are intended to isolate racial partiality.[484] Moreover, an express endorsement of a narrow scope of inquiry on a challenge for cause cannot coexist with a commitment to a substantive understanding of race, racism and race equality. The limited inquiry can only be endorsed if one subscribes to formalist understandings of race and racism.

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[482] Mirian FitzGerald, "'Racism': Establishing the Phenomenon," in *Racism and Criminology*, ed. Dee Cook and Barbara Hudson (London: Sage Publications, 1993), 46. Motive-centered understandings of racial discrimination place an unduly high, if not impossible, burden of proof on the wrong side of the dispute. Government officials will always be able to argue that racially neutral considerations prompted their behaviour. Proof of racially motivated discrimination is even more difficult to provide when several parties are involved. See Charles Lawrence, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," *Stanford Law Review* 39 (1987): 336.

[483] *Williams*, at 22.

The court also demonstrates its failure to apply its own substantive understanding of racism by asserting that its decision and reasoning are based on "...the understanding that the jury pool is representative."[485] While the court does assert that, "There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."[486], the court fails to contextualise the racial partiality of juror members within the larger context of structural racism built into the jury selection process. In doing so, the Supreme Court ignores the gravity of racism, hence the level of necessity for challenges for cause.

4.6.2 Confronting and Embracing Liberal Individualism and Liberal Legalism

In their rejection of the evidence tendered by the accused, and their active acceptance and endorsement of the evidence tendered by the Crown[487], Esson C.J.S.C. and Macfarlane J.A. demonstrate their clear commitment to liberal legalism and the maintenance of the myth of a raceless legal system. Despite recognising that the Crown's jury simulation studies were representative of only a small fraction of the total literature on the subject, Esson C.J.S.C. stated that it was significant that the studies presented by the Crown, "...[did] not in any consistent way contradict the conventional wisdom which has guided us for

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[484] Ibid., at 55. See also David M. Tanovich, "Rethinking Jury Selection: Challenges for Cause and Peremptory Challenges," *Criminal Reports* 30, 4th Series.

[485] *Williams*, at 42.

[486] Ibid., at 58.

[487] The evidence tendered by the Crown consisted of four published papers analyzing the results of studies based on jury simulations of mock jury experiments.

centuries in accepting that the jury system, *by its nature*, provides its own safeguards without the necessity for delving into the views of prospective jurors."[488] Clearly, Esson C.J.S.C.'s evidentiary preference is not simply for sound quantitative data. Esson C.J.S.C.'s evidentiary preference is for data that keeps intact the traditional orthodoxy that the liberal legal system is, and must be perceived of as, raceless and neutral.

The Supreme Court challenges these presumptions of impartiality and neutrality by exploring the multiple nuanced ways in which racial bias can, and does, affect a trial.[489] For example, racial prejudice may be implicated in a trial when there is an interracial element to a crime[490], or when there is a perceived link between someone of the accused's race and the crime the accused is being charged with.[491] Racial stereotypes can also affect jurors' assessments of the credibility of an accused[492], as well as how jurors process information and evidence.[493] Racial partiality can also lead jurors to perceive there to be a link between an accused of a certain race and crime in general.[494] Or, racial partiality

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[488] *Williams*, at 22 – emphasis added.

[489] Ibid., at 11.

[490] Ibid., at 28.

[491] Ibid.

[492] Ibid.

[493] Ibid.

[494] Ibid.

may lead jurors to associate the Crown with someone who is White, and who represents majoritarian interests.[495]

The court also challenges the lower courts' commitment to colour-blindness, a commitment that subjects any mention of race to a strict scrutiny test. Having adopted a substantive understanding of race and racism, the Supreme Court is able to differentiate between racism and anti-racism. Consequently, the court can recognise that an acknowledgement that racial and racist dynamics are at play during a trial is an anti-racist, not racist, strategy. Given the court's failure to do this in *R.D.S.*, this development is encouraging.

Despite these progressive statements made by the Supreme Court, the judgement still demonstrates a lingering attachment to traditional liberal orthodoxy. For example, the court asserts that "...once a finding of fact of widespread racial prejudice in the community is made on evidence...judges in subsequent cases may be able to take judicial notice of the fact."[496]. Unfortunately, the court does not, itself, do this. From a critical race perspective, the preferred outcome would have been if the Supreme Court had applied its substantive understanding of racism, and, itself, taken judicial notice of the existence of racial prejudice at a national level.[497]

A further weakness in the judgement is the court's replication of the two-prong treatment of partiality articulated in *Parks*. This two-prong approach requires that a successful application to challenge for cause *eventually*

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[495] Ibid., at 29.

[496] Ibid., at 54.

demonstrate a causal link between racist attitudes and racist behaviours. The court reminds us that the challenge for cause procedure involves two inquiries, two different decisions with two different tests.[498] *Williams* deals *only* with the first inquiry: Should the challenge for cause be permitted? The court calls for a more generous approach in this stage. However, the court explicitly states that questions of *proof* are more appropriate for the second stage of the inquiry.[499] In the second stage, the question is "...whether the candidate in question will be able to act impartially."[500] Given that *Williams* deals only with the first stage of the inquiry, the court has still left wide discretion for the actual triers of the challenge.

4.6.3 Confronting and Embracing Formal Equality

The lower courts' high evidentiary threshold ultimately undermines the accused's right to a fair trial and an accused's s.15 equality rights. The Supreme Court rejects this approach, recognises that the challenge for cause is an essential safeguard to an accused's s.11(d) *Charter* right, articulates that this right should also be considered an anti-discrimination right, and rejects the fundamental premise of formal equality that equality can be achieved by treating all accused the same.

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[497] Aylward, *Canadian Critical Race Theory*, 132.

[498] *Williams*, at 32.

[499] Ibid., at 33. The court states, "To demand, at the preliminary stage of determining whether a challenge for cause should be permitted, proof that the jurors in the jury pool will not be able to set aside any prejudices they may harbour and act impartially, is to ask the question more appropriate for the second stage."

[500] Ibid.

However, the court does not fully succeed in its application of a contextual analysis. In *Williams*, a contextual analysis would be mindful of the type of partiality alleged (racism) and the jury safeguards underlying the presumption of impartiality. A contextual analysis would consider the efficacy of a trial judge's instructions in light of the reality that the most persistent and pervasive form of racism in Canadian society is unconscious racism.[501] Consequently, a contextual analysis would exhibit some recognition that a trial judge's instruction to jurors to set aside any racial biases may be ineffective to alert the jurors to their deepest racial stereotypes.[502] A contextual analysis would also consider whether the efficacy of the trial judge's instructions to combat the risk of racial partiality is further limited by the fact that such instructions are not provided until after all the evidence has potentially been filtered through the lens of racially biased attitudes.[503] Moreover, a contextual analysis would be mindful of the fact that the efficacy of diffused impartiality as a safeguard for jury impartiality occurs within the context of *systemic racism* in the jury selection process itself. Namely, the efficacy of diffused impartiality exists within the context of the largely homogeneous racial composition of Canadian juries.

4.7 Conclusion

The Supreme Court's adoption of a more substantive understanding of racism is demonstrated in that the court recognised that the lower courts' search

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[501] Factum of the Intervener, African Canadian Legal Clinic, *R.* v. *Williams* 1998 (S.C.C.) at 17.

[502] Ibid.

[503] Ibid.

for a simple, definitive and quantitative causal link between Aboriginal over-representation in the Criminal Justice system and the racist or non-racist attitudes of jurors ignored the multifaceted complexity of racism. In this sense, the Supreme Court's decision in *Williams* is a long awaited victory. Not only did the court show a willingness to address the 'race' question in the context of jury trials, but the court also assertively stated that judicial notice of cases where widespread prejudice has been found is an appropriate means of satisfying the evidentiary threshold laid down in *Sherratt*. Moreover, the court embraced a more substantive understanding of the nature of racial prejudice by ruling that evidence of extreme prejudice is not mandatory for successful applications to challenge for cause because a "threshold met only in exceptional cases would catch only the grossest forms of racial prejudice. Less extreme situations may raise a real risk of partiality."[504] Finally, the decision is commendable because it affirms that the right to challenge for cause is essential to the *Charter* right to a fair trial, and that the right to a fair trial can, and should be considered a section 15 anti-discrimination right.[505]

Yet, if we are interested in pinpointing the development of a theory of substantive racial equality, the Supreme Court's decision in *Williams* falls short. Despite the positive disposition of the case, the principles laid down in *Williams* do not represent a mode of analysis indicative of a coherent and consistent theory of substantive equality. Specifically, the gravest error committed by the

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[504] Aylward, *Canadian Critical Race Theory*, 125.

[505] Ibid.

Supreme Court is its lack of contextual judging. However, as Stephen Coughlan has suggested, the reasoning of the Supreme Court in the *Williams* case is so similar to the decision in *Parks* that one is led to suspect that the Supreme Court refused leave in *Parks* in order to discover whether such challenges would seriously hinder the justice system. As Coughlan suggests, "Being assured by both Crown and defence from Ontario that no problem does arise, they have now approved the innovation for the rest of the country."[506] While this suggestion may border on cynical, it is important to note that the Supreme Court granted leave to appeal in *Williams* on exactly the same issue to which it had refused leave in *Parks*.[507] Consequently, it is not entirely clear whether the Supreme Court is to be commended for its ruling *Williams*. The motivation for the positive disposition of the *Williams* case cannot be definitively linked to a desire on the part of the country's highest court to develop a substantive equality approach to issues of race in the criminal justice system. Had the Ontario Court of Appeal's decision in *Parks* given way to 'excessive' complications in the jury process, it is not certain that the *Williams* case would have been decided in favour of the accused.

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[506] Coughlan, 291.

[507] Ibid., 300.

CHAPTER FIVE - THE CASE OF VAN DE PERRE

In the spring of 1996, Kimberly Van de Perre and Theodore Edwards began a relationship that lasted approximately eighteen months. At the time their relationship began, Van de Perre, a single White woman, was living in Vancouver. Edwards, an African-American, was a professional basketball player playing for the Vancouver Grizzlies. At the time of the affair, Edwards was married to an African-American woman, Valerie Edwards, and the couple had twin daughters. During the course of the affair, Van de Perre became pregnant and in June 1997 gave birth to a son, Elijah. When Elijah was three months old, Van de Perre, Elijah's primary care-giver, began proceedings for child custody and child support, naming Edwards as Elijah's father. Edwards responded by seeking joint custody and liberal access, but he later changed his response to seek sole custody.

Although the main issue facing the Supreme Court of Canada was determining the applicable standard of review for appellate courts in custody cases, the custody battle over Elijah clearly involved issues of race. The Edwards argued that because Elijah would be perceived of as a black child, Elijah needed to be raised in a black family household where he would be equipped with the tools to deal with racism. Consequently, the Supreme Court had to clarify the importance of race and culture in the best interest test.

Van de Perre shows few similarities to *R.D.S.* and *Williams*. Unlike the other two cases, *Van de Perre* does not turn overtly on issues of impartiality. While a neutral interpretation of the best interests of the child test does figure prominently in this case, the questions arising from *Van de Perre* are much

different than those in the previous two. *Van de Perre* necessitated that the Supreme Court tackle the issue of intersectionality, as well as conceptual issues surrounding the meaning of 'race'. Moreover, the court was faced with the task of speaking about race, without reifying it. This was particularly difficult given Elijah's biracial identity. Consequently, *Van de Perre* tested the court's ability to approach the case from a colour-conscious perspective, where race is both observed *and* considered.

What set *Van de Perre* apart the most from the other two cases was that there was no necessarily 'right' disposition in the case. Without being privy to more personal information regarding the parties involved, it is simply not clear to an outsider whether Elijah should have been placed with his mother or his father. In some ways then, *Van de Perre* is fitting as the final case to be analysed in this trilogy because the Supreme Court's reasoning is put centre stage. From a critical race perspective, dispositions in a case are meaningful; however, it is ultimately the theory behind the said disposition that is critically important.

5.1 Procedural and Legal Context

Based on the rationale that children cannot always effectively represent their own interests, Canadian provinces have charged the courts with the duty of protecting the best interests of the child in custody and adoption disputes.[508] When the court weighs all relevant factors to determine which home environment will most benefit the child, this is called the best interests of the child test. By the

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[508] Eileen Blackwood, "Race as a Factor in Custody and Adoption Disputes: *Palmore* v. *Sidoti*," *Cornell Law Review* 71 (1985-86): 212.

1970s, the best interests of the child test had become established as the first and paramount consideration in parental custody disputes throughout the Commonwealth and American jurisdictions.[509] Despite the highly discretionary nature of the test, the best interests' standard was adopted because of its flexible, child-centered approach.[510] However, as a central concept in family law, the best interests' standard incites a great deal of critique.[511]

Initially, the test was contentious because the best interest standard remained entirely unarticulated.[512] While the unarticulated standard allowed for flexibility, it did not foster a consistent, predictable or reliable approach to custodial determinations.[513] Moreover, the lack of articulated criteria increased the possibility and likelihood that judges would and could make custodial decisions on the basis of personal values and biases.[514] Of particular controversy was the fact that the authoritative language of the phrase 'best interests of the child' created the illusion that a child's best interests were entirely objective and discoverable.[515]

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[509] Bernd Walter, Janine Alison Isenegger and Nicholas Bala, "'Best Interests' in Child Protection Proceedings: Implications and Alternatives," *Canadian Journal of Family Law* 12 (1994-95): 371.

[510] Gayle Pollack, "The Role of Race in Child Custody Decisions Between Natural Parents over Biracial Children," *New York University Review of Law and Social Change* 23 (1997): 611.

[511] Walter et al., 376.

[512] Ibid., 374.

[513] Pollack, 604.

[514] Walter et al., 374.

[515] Ibid., 377.

In the past two decades, the best interests' standard has been increasingly legalized through the greater structuring of judicial discretion.[516] A major aspect of this trend has been the introduction and articulation of a set of non-exhaustive criteria to be considered by judges when determining a child's best interests.[517] For example, in British Columbia, the *Family Relations Act* (*FRA*)[518] governs child custody, guardianship, access, spousal and child support, and the division of property. In section 24(1), the *FRA* specifies five factors which a judge must consider when determining the best interests of the child. These factors include the health and emotional well-being of the child, the views of the child, the ties of affection that have developed between the child and other persons, education and training for the child, and the capacity of those persons eligible for custody to exercise the above parenting duties adequately. The *FRA* does not list race and/or culture as factors to be given emphasis.

The intent of articulating specific criteria is to encourage the introduction and due consideration of evidence that factually addresses the enumerated factors.[519] Specifically, the articulation of criteria is designed to check a judge's ability to rely on his or her unarticulated presumptions concerning both a child's welfare and the obligations and duties of a parent.[520] While there is general agreement that the listing of relevant factors is preferable to the former approach,

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[516] Ibid., 374.

[517] Ibid.

[518] *Family Relations Act*, R.S.B.C. 1979, c. 121 [*FRA*].

[519] Walter et al., 375.

there is still some scepticism as to whether judges actually consider the individual factors when making their decisions.[521]

In Canada, only New Brunswick's *The Child and Family Services and Family Relations Act*[522] and the Northwest Territories, *Children's Law Act*[523] specify that culture and religion are relevant to the best interests of the child. None of the provincial and territorial statutes specify the relevance of race to the best interests of the child. Consequently, judges can, consciously or not, overlook, under-consider, and sometimes even over-consider the role of race in custody decisions.[524]

Generally, in custody determinations, the issue of race arises in one of three situations. First, courts might consider race in adoption cases when the child to be placed is a member of a visible minority group.[525] Second, courts might consider race when a divorced parent sues for custody because the custodial parent remarries interracially.[526] Third, courts might consider race when parents of different races sue for custody following the dissolution of their relationship.[527]

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[520] Ibid.

[521] Ibid., 376. See also Pollack, 612.

[522] *The Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1 re-titled *Family Services Act*, S.N.B. 1980, c. F-2.2, as amended by S.N.B. 996, c. 13.

[523] *Children's Law Act*, S.N.W.T. 1997, c.14.

[524] Pollack, 612.

[525] Kim Forde-Mazrui, "Black Identity and Child Placement: The Best Interests of Black and Biracial Children," *Michigan Law Review* 92 (1993-1994): 930.

[526] Ibid.

[527] Ibid.

Generally, the custodial controversy surrounding biracial children revolves around a child's sense of identity.[528] In the case of 'minority/White' unions, the minority parent often fears that, if the other parent gains custody, the biracial child will lose identification with the minority culture and/or race, resulting in a loss of self-esteem.[529] Because of their mixed racial background, biracial children often encounter certain stresses not encountered by children with one racial background. These stresses range from confusion over their self-identity, to societal hostility towards their biracial ancestry.[530] Child specialists have accumulated substantial evidence that indicates that a guardian's ability to cope with these specialized stresses is crucial to a biracial child's best interests.[531] Consequently, in considering race in custody determinations, a child-centered approach would, ideally, focus on the parents' abilities to care for the child's special psychological needs as opposed to focusing on the racial characteristics of either parent.[532]

Regardless of the scenario faced by the courts, Canadian courts have tended to consider race in custody determinations in one of four ways. First, some lower courts have attributed a high degree of importance and weight to a

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[528] Blackwood, 217. To be clear, this paper is focused on 'minority/White' unions more broadly, and Black/White unions in particular. Different dynamics can and do govern unions between two racialised groups and/or two minority cultures. Consequently, these others unions are beyond the scope of this paper.

[529] Ibid.

[530] Ibid., 223.

[531] Ibid.

[532] Ibid.

child's racial heritage, but have done so without much discussion of its significance.[533] Second, some lower courts have identified race as one factor amongst many, but, again, have devoted little analysis to the role of race in assessing a child's needs, nor the extent to which race plays a role in the development of a child's identity.[534] Third, some courts have utilised a 'race-matching' approach, whereby biracial children are 'matched' to the parent whose physiognomy they best approximate.[535] Fourth, some courts, in addition to giving strong weight to race, have elaborated on its importance with respect to biracial children.[536] These courts have also concluded that the child's best interests would be met by awarding custody to the parent most able *and* willing to provide for this aspect of the child's needs.

The unpredictable case-law history indicates that the courts' understanding of the weight and importance of race in custody determinations has not been consistent. Consequently, the Supreme Court of Canada was presented with an important opportunity in *Van de Perre*. While the best interest standard embodies the goal of flexible and individualised decision-making, this type of decision-making requires broad discretion that ultimately lends itself to unpredictability and

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[533] See, for example, *Von Bezold v. Brideau*, [1986] P.E.I.J. No. 3 (P.E.I.S.C.), and *Maier v. Chiao-Maier*, [1990] S.J. No. 531 (Sask. Ct. Q.B.).

[534] See, for example, *Darling v. Chung*, [1988] O.J. No. 1334 (Sup. Ct. Ont.), and *White v. Matthes*, [1997] N.S.J. No. 604 (N.S. Fam. Ct.), and *Anderson v. Williams*, [1998] B.C.J. No.1428 (B.C.S.C.).

[535] See, for example, *Kassel v. Louie*, [2000] 11 R.F.L. (5th) 144, and *Hayre v. Hayre*, [1975] 21 R.F.L. 191 (B.C.C.A.); [1993], 11 R.F.L. 188 (B.C.S.C.).

[536] See, for example, *Camba v. Sparks*, [1993], 124 N.S.R. (2c) 321 (N.S. Fam. Ct.), and *Ffrench v. Ffrench*, [1994], 134 N.S.R. (2d) 241 (N.S.S.C.), and *Hennebohm v. Hennebohm*, [1995] 149 N.S.R. (2d) 125 (N.S. Fam. Ct.).

bias.[537] Moreover, given the breadth of discretion and inherent vagueness of the best interests' standard, error is difficult to establish, resulting in the relatively rare scrutiny of decisions via appeal.[538] *Van de Perre* offered the Supreme Court the opportunity to pronounce upon the importance of race in custodial determinations, offer guidance to lower courts, ensure that biracial children are served equally and equitably by the best interests test, and curb the propensity towards biased reasoning in custody determinations.

5.2 Lower Court Judgements

5.2.1 British Columbia Supreme Court

On February 25, 1999, Warren J. awarded sole custody to Van de Perre, with specified access periods to Edwards. In determining which parent would better provide for the bests interests of Elijah, Warren J. heard from an extensive list of witnesses.[539]

Warren J. expressed concern over the perceived instability of the Edwards' marriage. Warren J. found that, in addition to the affair with Van de Perre, Edwards' two other extra-marital affairs contributed to an unstable relationship between Edwards and his wife Valerie. Moreover, Warren J. found Edwards'

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[537] Walter et al., 381.

[538] Ibid.

[539] In addition to examining the testimony of Van de Perre, and Mr. and Mrs. Edwards, Warren J. also examined third party testimony from friends and family of Van de Perre; Dr. Finding, Van de Perre's medical physician; Jane Grafton, the custody access facilitator; Van de Perre's former employer; friends of the Edwards family, and; Dr. Korpach, a psychologist who evaluated Mr. and Mrs. Edwards, Ms. Van de Perre, and 10 other individual witnesses. From court records, it is not clear what category the 10 individual witnesses fell into.

extramarital affairs to be relevant examples of conduct to be considered when assessing Edwards' capacity to provide for Elijah's best interests. Warren J. also isolated a number of other factors which troubled him during the course of Edwards' testimony.[540] Consequently, Warren J. found that Edwards' testimony lacked credibility in comparison to that of Van de Perre's.[541]

In making his determination, Warren J. explicitly rejected portions of the testimony of the court appointed psychologist, Dr. Korpach, who had concluded that Edwards *and* his wife would be more likely to be able to provide for Elijah's long-term emotional, attachment, and developmental needs.[542] Warren J. found certain portions of Korpach's submission to be "...disturbing, particularly her tendency...of adding bits of negative evidence about [Van de Perre] which were unrelated to the particular question."[543] However, Warren J. did accept Korpach's submission that if the custody recommendation was based on a consideration of Van de Perre and Edwards *as separate from their support and familial context*, it was in her opinion that the interests of Elijah may be best served by Van de Perre.[544]

In his eighty-six paragraph judgment, Warren J. outlined his position on the racial implications of the case in one sentence: "There is some evidence before

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[540] For example, while first denying it, Edwards eventually admitted that he had referred to Van de Perre as "poor white trash". In addition, throughout his testimony, Edwards went to great lengths to exculpate himself from responsibility for the affair.

[541] *Van de Perre v. Edwards*, [1999] B.C.J. No. 434 [*Van de Perre* 1999], at 55.

[542] Ibid., at 69.

[543] Ibid., at 72.

[544] Ibid., at 71.

me of the needs of the child to be exposed to his heritage and culture as the son of an African-American but there is also the need of the child to be exposed to the heritage and culture as the son of a caucasian Canadian."[545] Warren J. did not elaborate further on the particulars of African-American and 'Caucasian' culture, not did he assess how, and to what extent, racial and cultural heritage might, or might not be relevant to Elijah's emotional and developmental well-being.

5.2.3 British Columbia Court of Appeal

Edwards won his appeal of the trial court decision on March 9, 2000. During the course of the hearing, under *parens patriae* jurisdiction, Newbury J. invited Mrs. Edwards to apply for admission as a party in order to request joint custody with her husband. This new, joint application for custody was successful and Elijah was placed in the custody of *both* Mr. and Mrs. Edwards. While the court did not specify access provisions, Newbury J. did rule that Van de Perre's access would be generous.

Newbury J. clarified the scope of appellate review by confirming that "considerable deference" must be accorded to trial judges by appellate courts "...in reviewing decisions that are fact-based and discretionary – as in the case of family support orders."[546] However, Newbury J. cautioned that "...the interests of the child, being paramount, must prevail over those of the parties and of society

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[545] Ibid., at 80.

[546] *Van de Perre v. Edwards*, [2000] B.C.C.A. 167 [*Van de Perre* 2000], at 4.

in finality."[547] If a trial court ignores relevant evidence, or draws 'incorrect' conclusions from the evidence, appellate intervention may be required.[548]

Newbury J. identified five ways in which Warren J. had erred in such a way that necessitated appellate intervention. First, Warren J. was "...diverted by the arguments concerning Mr. Edwards' extra-marital affairs and the parties' attitudes towards each other, from the central question of where Elijah's interests would best be met."[549] The trial judge overestimated Van de Perre's 'suitability to raise a child'.[550] Second, it was unclear whether Warren J. had considered all the relevant factors set forth in section 24 of the *FRA*. Third, as per section 24(1)(c) of the *FRA*, Warren J. had erred in assessing Edwards in isolation from the rest of his family, namely Mrs. Edwards.[551] Fourth, Newbury J. expressed concern that Warren J. may have based his determination on stereotypical views of Van de Perre and Edwards, as well as on the 'tender years' doctrine'.[552] Finally, Newbury J. found that Warren J. had erred by giving, "...no consideration to issues of race and inter-racial problems as they related to Elijah...".[553]

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[547] Ibid., at 6.

[548] Ibid.

[549] Ibid., at 8.

[550] Ibid.

[551] Ibid., at 9.

[552] The 'tender years doctrine' refers to the practice of automatically placing young children (of tender years) with their mothers.

[553] *Van de Perre* 2000, at 9.

5.3 Supreme Court of Canada Decision

The Supreme Court released its judgment on September 28, 2001, four years after the custody battle for Elijah had begun. In a unanimous ruling, the Supreme Court overturned the decision of the B.C. Court of Appeal, restoring the decision of Warren J.. The key issue to be decided by the court was the applicable standard of review to be followed by appellate courts in family law cases involving custody determinations. The secondary issues included the clarification of the *parens patriae* jurisdiction of the court in adding Mrs. Edwards as a party to the custody dispute, and second, the appropriate role of race in custody determinations.

With respect to the scope of appellate review, the Supreme Court stated that the Court of Appeal had no cause to intervene and overturn the trial court decision. The court clarified that while a trial judge is expected to consider each of the factors outlined in s. 24(1) of the *FRA*, the trial judge is *not* "...obligated to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody to one person over another."[554] Appellate courts can intervene only if there is a serious misapprehension of the evidence, a material error, or an error in law.[555] Moreover, the court stressed that in custody disputes, finality *is* a societal interest, as well as in the interest of the child, and of the parties involved. Consequently, the court ruled that Warren J. did not make an error of law, or an error in understanding. In addition, the court clarified that

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[554] *Van de Perre*, at 10.

[555] Ibid., at 11.

the Court of Appeal erred in adding Mrs. Edwards as a party to the custody dispute.

Finally, in determining the scope and relevance of race in child custody determinations, the Supreme Court supported the approach of Warren J.: because Elijah is a child of mixed-race, both his African-American and Caucasian heritages must be considered when determining custody. Contrary to the Court of Appeal's assertion that Warren J. had given no consideration to race, the Supreme Court stated that the brevity of Warren J.'s consideration was attributed to the fact that he chose to recognise both Elijah's African-American and Caucasian heritages.[556] In addition, the brevity of his comments "...reflected the minimal weight that the parties themselves placed on the issue at trial."[557] The court clarified that while race can be factor in determining the best interest of the child, "...the relevancy of this factor depends on the context. Other factors are more directly related to primary needs and must be considered in priority. All factors must be considered pragmatically. Different situations and different philosophies require an individual analysis on the basis of reliable evidence."[558]

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[556] Ibid., at 36.

[557] Ibid., at 41.

[558] Ibid., at 38. It is not entirely clear what the court means by 'different philosophies'. Nor is it clear what constitutes reliable evidence to the court.

5.4 Analysis of the Supreme Court of Canada Decision

5.4.1 Confronting and Embracing a Formal Understanding of Race and Racism

In the context of *Van de Perre*, speaking of race, without adhering to a formalist position, becomes quite tricky. Generally, children who have a genetic connection to their parents, or children who look like one, or both, of their parents, are assumed to have acquired their parent's racial identity.[559] For example, 1 Black parent + 1 Black parent = 1 Black child. This intuitively logical 'racial equation' is thrown into disarray when applied to children of mixed ethnic or racial parentage.[560] Historically, societal guidelines, restrictions, and conventions have led to the automatic identification of a biracial child with the parent of colour.

This desire or societal need to assign one racial identity to a biracial child surfaces in Newbury J.'s judgement. Newbury J. observes that "Elijah will be seen by the world at large as 'being Black'"[561]. Consequently, "...it would obviously be in his interests to live with a parent or family who can nurture his identity as a person of colour and who can appreciate and understand the day-to-day realities that Black people face in North American society – including discrimination and racism in various forms."[562] Despite Elijah's mixed racial heritage, the Court of Appeal deems Elijah to be Black. More critically, however,

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[559] Annie Bunting, "Elijah and Ishmael: Assessing Cultural Identity in Canadian Child Custody Decisions," *Family Court Review* 42, no. 3 (2004): 473.

[560] Ibid.

[561] *Van de Perre* 2000, at 50.

[562] Ibid.

the Court of Appeal assumes that Elijah's "identity as a person of colour" is best nurtured by another person of colour.[563]

In one sense, Newbury J.'s reasoning is commendable in that it resists the legal tendency to erase the relevance of race. Moreover, Newbury J. can be commended for acknowledging the social reality that Elijah will, most likely, be perceived of as Black. However, in assigning Elijah a Black racial identity, and assuming that only a Black parent can address the needs of a Black and White biracial child, the Court of Appeal over-considers race, endorses a formalist doctrine of 'race-matching'[564], and ultimately adopts a formalist position.

Generally, proponents of race-matching advance three main arguments. First, in order for a Black or biracial child to develop a positive *racial identity*, s/he must be raised by a Black parent.[565] A child with a strong racial identity is one who places high priority on his/her race as a component of his/her self-image.[566] Proponents of race-matching argue that in a society that emphasizes and denigrates Black people, a strong racial identity enables a Black child to handle the messages of inferiority s/he receives from others.[567] It is, however, entirely plausible that a child whose self-image is more holistic may be just as happy as a

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[563] Ibid.

[564] See Forde-Mazrui, 925 and 955. Race matching refers to the practice of preferring to place Black children with Black parents, rather than White parents. Generally, those who have advocated race-matching policies have also argued that biracial children should be treated as Black, and accordingly not be placed with White parents. The position here is that a policy of race-matching is undesirable in that it predetermines custodial issues on the basis of a non-reflective understanding of the meaning of race.

[565] Ibid., 926.

[566] Ibid., 949.

child whose race is central to his/her sense of Self.[568] In fact, one method to cope with a personal characteristic that is disfavoured by society is to recognise its insignificance.[569] A child who places great currency on the colour of his or her skin may struggle more to preserve his or her self-esteem when subjected to racist treatment.[570] If race is perceived of as merely one of many characteristics, s/he may be less vulnerable to racial attacks.[571]

Second, proponents of race-matching argue that Black parents are better suited to foster a Black or biracial child's identification with Black *culture*.[572] Identification with Black culture is seen to be beneficial because such identification allows a Black or biracial child to gain membership in, and support from, a Black community.[573] This Black community is important because it exposes Black or biracial children to positive statements about their racial identity.[574]

This argument surfaces clearly in Newbury J.'s judgement. While Newbury J. asserts that race is implicated in custody determinations because of needs

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[567] Ibid.

[568] Ibid., 950.

[569] Ibid.

[570] Ibid.

[571] Ibid.

[572] Ibid., 948.

[573] Ibid., 946.

[574] Ibid., 947.

relating to culture and racism, Newbury J. places greater emphasis on the cultural affiliations the Edwards could provide Elijah with:

> ...it seems to me likely that being raised in an Afro-American family in a part of the world [Southern United States] where the Black population is proportionately greater than it is here, would to some extent be *less difficult* than it would be in Canada. Elijah would in this event have a greater chance of achieving a sense of cultural belonging and identity and would in his father have a strong role model who has succeeded in the world of professional sports.[575]

It is unclear how and why Newbury J. has come to the conclusion that Elijah's best interests would be fostered in the highly racialised and racist climate of the Southern United States. Specifically, it is not entirely clear how being raised in a profoundly racialised and racist environment might be 'less difficult' for Elijah's emotional well-being. Newbury J. seems to be asserting that, by virtue of 'numbers' alone, Elijah's feelings of racial and cultural belonging would be more fully satisfied if he were surrounded by large numbers of Black people. In Newbury J.'s formalist position, a context defined by extensive racism is not understood as a factor that might compromise Elijah's development of a strong and *healthy* racial identity.

In addition, while calling attention to issues of racial or cultural identity and belonging, Newbury J. does not attempt to define, or address the content of that culture.[576] Technically, Black people do not comprise a discrete culture.[577]

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[575] *Van de Perre* 2000, at 51.

[576] In asserting that Newbury J. does not attempt to define the 'content' of that culture, I am nonetheless aware that culture is inherently dynamic. As such, while it is impossible to pronounce determinately on culture, my contention is that culture becomes 'meaningless' if its content cannot be even approximated.

The Black community is diverse in terms of the practices and values of the people within it, members of the Black community are spread across geographic and class clines, and the Black community is not unified by shared language, religion, or representative leadership.[578] In fact, the diversity of Black people's attitudes towards Black identity may be inevitably linked to the fact that the commonality of Black people primarily depends on a physical appearance.[579]

Newbury J. seems to assume that *all* Black people, by virtue of the colour of their skin, belong to, and are committed to some type of 'Black cultural heritage'. While a consideration of Black culture is not in and of itself problematic, Newbury J.'s uncritical deployment of the term *is*. In over-observing race, Newbury J. erases the specificities of the Edwards' family context. Newbury J. fails to ask how the Edwards define their Black heritage and culture. How does a biracial child fit into Black culture? Through what means do they propose to pass along this heritage to Elijah? Does the perpetuation of a Black culture necessitate that the Edwards are in constant interaction with other Black people? What kind of neighbourhood do the Edwards live in? Do they live in a predominantly wealthy, Caucasian neighbourhood? If so, will this operate to Elijah's advantage or detriment? Will Elijah be attending a *de facto* integrated school?

Finally, proponents of race-matching argue that Black or biracial children must be placed with a Black parent in order for them to develop *coping skills* to

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[577] Forde-Mazrui, 962.

[578] Ibid.

deal with racism.[580] This argument is based on the assumption that a person must experience racism first-hand, or a person must belong to a community that has experienced racism directly, in order to teach a child how to cope with racism.[581] Clearly, White parents will not have experienced the racism directed towards Black parents. Given that White parents will not have developed personal strategies for coping with this type of oppression, Black or biracial children will be able to learn coping skills from their Black parent.[582] It does not follow, however, that a White parent cannot facilitate their Black or biracial child's ability to handle racism. As just one possible scenario, White parents, by deemphasizing race, may enable a Black or biracial child to cope better with racial attacks because the child may view the attacks less personally.[583]

By treating Elijah as Black, the Court of Appeal decided that a biracial child must identify as one, and only one race, and that this race should be Black.[584] If the flaw in the Court of Appeal's decision is that it *over-observes* race, both the B.C. Supreme Court and the Supreme Court of Canada err in *under-considering* race. For example, In positing equality between the amorphous African-Canadian

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[579] Ibid., 964.

[580] Ibid., 927.

[581] Ibid., 953.

[582] Ibid. It warrants mentioning that coping skills are not necessarily always positive. There are a range of reactions one can experience when subject to racism – anger, hurt, internalised inferiority, withdrawal, aggression, depression, transcendence - and there are a host of positive and negative ways to cope with those emotions.

[583] Ibid., 954.

[584] Ibid., 957. As Forde-Mazrui explains, for a biracial child, choosing an all-Black identity may contribute to a certain degree of identity confusion and self-rejection.

and 'Caucasian' racial cultures, Warren J. neglects the obvious observation that the dominant 'culture' in Canada and the United States is 'Caucasian'. In doing so, Warren J. displays a striking ignorance of racial inequality and racism in a race-conscious society. In endorsing Warren J.'s brief consideration of race, the Supreme Court of Canada also limits the scope of race to a function of culture or ancestry, rather than expanding the concept to include the physical and material realities of being a racialised child. Consequently, court 'neuters' the relevancy of race by implying that each parent has an equivalent claim to the best interests of the racialised child.[585]

What is curious about the decisions of all three courts is that, despite the different dispositions, they are *all* rooted in a formalist tradition. In their commitment to colour-blindness and formal equality, both the B.C. Supreme Court and the Supreme Court of Canada failed to acknowledge the specificities of Elijah's experience as a biracial child. Both courts falsely posited equality between Elijah's two racial backgrounds. Interestingly, the B.C. Court of Appeal decision can also be located in the formalist tradition. Here, the court over-emphasized Elijah's racial identity as Black, and effectively reified race as Elijah's biological and social reality.

Van de Perre demonstrates that the problem with any formalist position is that it is one that operates in polarities. In treating race as biologically real, the formalist position tends to over-observe race. However, in its commitment to colour-blindness, the formalist position tends to under-consider race. The social

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[585] Rachel F. Moran, *Interracial Intimacy: The Regulation of Race and Romance* (Chicago and London: University of Chicago Press, 2001), 139.

construction approach, however, negotiates a middle-ground between these two polarities.

In the context of *Van de Perre*, the social construction approach allows us to recognise that custody law must address the needs of biracial children in a racist society that was, and is, not designed to encourage or accept them.[586] Race does not have to be used as a stigma or a pejorative when considered in custody decisions. Instead, considering race can help to maximize the best interests of the child by insuring a parental placement that will help the child develop a positive identity.[587] From a substantive equality perspective, this need not involve race-matching.

The distinction between a formalist and social construction approach to child placements is quite clear. The formalist approach chooses a racial identity for the biracial child and allocates custody on that basis. The legal act of assigning a racial identity is equivalent to the legal act of denying any racial identity to the biracial child. In contrast, the social construction approach focuses not on defining the parties involved, but on insuring that biracial children have the tools with which to define themselves. This approach examines a parent's ability to teach a biracial child about his or her racial heritages hence provide the child with ample information with which to continually define him or herself.[588] A child's ability to sculpt and inform their own racial identity is an integral element to the personal development of their identity, and ultimately an important element in

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[586] Pollack, 623.

[587] Ibid.

their emotional health.[589] From a critical race perspective, all three of the courts in *Van de Perre* err in their consideration of race because their focus remains on assigning, or denying, a racial identity to Elijah.

5.4.2 Confronting and Embracing Liberal Individualism and Liberal Legalism

Like all Canadians, judges are socialized to, consciously or not, negatively stereotype particular marginalized communities.[590] Even if judges are vigilant in their self-awareness of the possible biases they harbour, judges hold preconceived value systems, cultural biases and stereotypical beliefs that can and do influence their judgments.[591] In the case of race and custody determinations, these unconscious biases can skew child placements so that race becomes wholly determinative or completely ignored with respect to the best interests of the child.[592]

Ultimately, the best interests test is an 'empty vessel'.[593] Given the absence of professional and societal consensus on what is 'best' for a particular child, the best interests of the child are determined by the decision-maker's personal philosophy, beliefs, and opinions about children, parenting and the

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[588] Ibid.

[589] Ibid., 619.

[590] Ibid., 614.

[591] Ibid., 614-615.

[592] Ibid., 614.

[593] Katharine T. Bartlett, "Comparing Race and Sex Discrimination in Custody Cases," *Hofstra Law Review* 28 (2000): 883.

family.[594] As Baskin comments, at the heart of most child placement decisions is a value judgment as to what kind of child one hopes to produce.[595] Consequently, the indeterminate and vague nature of the test allows decision-makers, who are generally members of the dominant culture, to impose family values and expectations that may be inconsistent with those of a minority group.[596]

Even if a judge makes conscious efforts to carefully consider race as part of the best interests evaluation, by virtue of his or her social position, s/he may not know *how* to consider race. Consequently, the case law on the issue tends to gravitate between the polarities of over-observing or under-considering race. Some judges may, without pause, place a biracial child with minority-race parents so that the child will learn how to cope with racism.[597] Alternatively, some judges may avoid considering, or avoid recording their consideration of race for fear of being labelled racist.[598]

While the purpose here is not to challenge the best interests of the child test, it is to illustrate how imperative it is that guidelines are articulated with respect to the consideration of race in child custody determinations. For example, in their Factum to the Supreme Court of Canada, the African Canadian Legal Clinic (ACLC), the Association of Black Social Workers (ABSW) and the

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[594] Walter et. al., 380.

[595] Ibid.

[596] Ibid.

[597] Pollack, 615.

[598] Ibid.

Jamaican Canadian Association (JCA) identified 22 significant and consistent race-related issues faced by biracial individuals.[599] Based on these issues, the interveners identified 17 areas of need for biracial children to develop the tools to deal with racism, as well as the tools to develop a positive racial identity.[600] Finally, based on these 17 areas of need, the interveners outlined 24 recommendations to be considered when determining the best interests of biracial children.[601]

In neither the trial court judgment, nor the Supreme Court's decision is there any recognition that *any* of the aforementioned factors *had been taken into account in assessing the needs and interests of Elijah*.[602] The Supreme Court provides absolutely no guidance to lower courts as to *how* and *when* race should be considered. In fact, the court states that "...omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial."[603] The court goes on to clarify that an omission is only a material

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[599] Factum of the Intervener, African Canadian Legal Clinic, *Van de Perre* v. *Edwards* 2001 (S.C.C.), at 82. Some of these issues include: sadness and confusion resulting from racist comments or ignorance of parents; racial ambivalence; appreciating of an understanding of grooming needs; being treated like a novelty; experiencing 'shadism', and; the experience of passing.

[600] Ibid., at 85. Some of these needs include: an environment free from racial stereotyping and negative attitudes; exposure to positive images of African Canadians; an absence of pressure to choose a racial identity, and; tools for coping with questions about racial origin.

[601] Ibid., at 88. Some of these recommendations include: frequent, quality contact with the extended racialised family should be encouraged; parents should seek out books, toys and programs that reflect the child's heritage; the child must have positive feedback about his or her physical characteristics, and; parents should choose ecological systems that are integrated and committed to diversity.

[602] At paragraph 37, the Supreme Court of Canada does briefly acknowledge and discuss the submission of the ACLC with respect to the needs of biracial children.

[603] *Van de Perre*, at 15.

error if it "...gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion."[604]

According to the Supreme Court, the limited findings of the trial judge on the issue of race were solely a reflection of the "...minimal weight that the parties themselves placed on the issue at trial."[605] While the court may be correct in its finding that the Court of Appeal had given the issue of race disproportionate emphasis[606], the Supreme Court clearly swings the pendulum in the opposite direction by advocating what appears to be a colour-blind approach. The court states that "there was absolutely no evidence adduced which indicates that race was an important consideration"[607], that "there was essentially no evidence of racial identity by reason of skin colour or of race relations in Vancouver or North Carolina"[608], and that "there was no evidence of the racial awareness of the applicants or of their attitudes concerning the needs of the child with regard to racial and cultural identity."[609]

Essentially, the Supreme Court is saying that because counsel did not choose to pursue the issue of race at the initial trial, the issue of race is not

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[604] Ibid.

[605] Ibid., 41.

[606] Ibid.

[607] Ibid., at 42.

[608] Ibid.

[609] Ibid.

relevant to Elijah's best interests.[610] Phrased differently, Elijah's best interests are directly correlated to the thoroughness of the lawyers representing Van de Perre and Edwards. In this sense, the reasoning of the Supreme Court is decidedly outside of a child-centered framework. In addition, while the court does clearly state that race can be a factor in determining the best interests of the child, the court's comments on evidence convey the perception that race was irrelevant in the case of Elijah.

In pursuing a colour-blind path, the Supreme Court has obfuscated the extent to which the best interests of the child are not self-evident. Having left the use of race and its relative weight to the discretion of individual judges, the Supreme Court's judgment does little to change the extent to which a judge's own personal and cultural biases influence his or her rulings on custody. Instead of using *Van de Perre* as an opportunity to clarify the role of race in child custody, the Supreme Court provides no framework for the consideration of race.

5.4.3 Confronting and Embracing Formal Equality

The Supreme Court's lack of guidance on the best interests standard is particularly troubling because the court failed to apply *any* equality analysis with respect to the application of the best interests of the child provision. By invoking the *Charter* in child custody determinations, the Supreme Court could have set parameters on an area of judicial decision-making involving an extreme amount

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[610] While parties cannot raise new issues or new evidence on appeal, judges can and sometimes do bring in evidence themselves. For example, in *R. v. Gladue*, [1999] 1 S.C.R. 188, the Supreme Court refers to the trial judge taking active steps, with little if any assistance from counsel, to obtain information on the accused's aboriginal heritage. However, this practice was not encouraged in the case of *R. v. Hamilton*, [2003] 172 C.C.C. (3d) 114.

of judicial discretion, hence the propensity for judicial bias.[611] Moreover, by invoking the *Charter*, the Supreme Court would have heightened the importance of the child-centered aspect of the best interests test. As put forth by the ACLC, a substantive equality approach requires that "...the determination of the 'best interests of the child' for the biracial child must take into account that child's place in society, and her unique interests and needs in order for her to enjoy *equal benefit* of the law."[612] Given the particular nature of the needs of biracial children, the failure to give explicit consideration and considerable weight to race in custody and access disputes "...is to discriminate against racialized children."[613]

In addition to failing to apply an equality analysis, the court demonstrates an inability or unwillingness to adequately account for the power dynamics in family law in general, and in the *Van de Perre* case in particular. In failing to consider the context of *Van de Perre*, the court fails to apply a contextual analysis. *Van de Perre* did not solely turn on the issue of race. In addition to race, issues of gender, class, and heterosexuality permeated the case, the trial, and the judgments. For example, there are indications that the decisions of the B.C. Supreme Court *and* the B.C. Court of Appeal were based on stereotypical views regarding marriage, motherhood, sexuality and race.[614] While the two

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[611] Susan Boyd, "The Impact of the *Charter of Rights and Freedoms* on Canadian Family Law," *Canadian Journal of Family Law* 17, no. 2 (2000): 295.

[612] African Canadian Legal Clinic, at 97.

[613] Ibid., at 8.

[614] For example, while Warren J. never explicitly endorses the dominant ideology of motherhood, at several points in his judgment, Warren J. seems to accept and validate some of its tenets. In describing Van de Perre, Warren J. asserts that prior to her pregnancy, Van de Perre, "...flitted through life without a purpose, other than perhaps to enjoy the advantages her youth and beauty conferred upon her." See *Van de Perre* 1999, at 6. Warren J. then proceeds to explicitly concur

courts made two very different dispositions, their reasoning exhibits one common feature. Both the B.C. Supreme Court and the B.C. Court of Appeal seemed to respond to arguments that constructed the parties involved as stock legal subjects.

For example, Newbury J. was clearly influenced by the arguments of the Edwards' team that, because Elijah would be perceived of as a Black child, he needed to be in a Black family household where he could be equipped to deal with racism.[615] The Edwards team also suggested that Elijah's future encounters with racism would be better managed if he was in the United States, amongst other Black people.[616] Very clearly, the custody battle did implicate race. Consequently, it was difficult to argue against the assertion that Elijah would be

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with the testimony of Van de Perre's father that Van de Perre had "...attained 'instant maturity' after the baby was born." See *Van de Perre* 1999, at 23. It is worth questioning, had Van de Perre been employed at the time of the trial would this have affected Warren J.'s custody determination? Or, had Van de Perre been a poor, single Black mother, would Warren J.'s assessment have been any different? Similarly, it would appear that the Court of Appeal focussed quite extensively on the 'predatory nature' of Van de Perre herself. Painting a vivid contrast between Van de Perre and the ideal of motherhood, the appeal court focussed on testimony that detailed that Van de Perre pursued extensive 'night clubbing', and that her socializing with various men was conducted in "...circumstances of doubtful propriety." See *Van de Perre* 2000, at 18. Moreover, the appeal court cast a shadow over Van de Perre as a 'fit' mother by reasserting the testimony of parties that claimed to have heard Van de Perre refer to her pregnancy as a 'profit pregnancy'. See *Van de Perre* 2000, at 18. The Court of Appeal clearly contrasts Van de Perre's capacity to mother with that of Mrs. Edwards. In doing so, Newbury J. demonstrates the extent to which ideologies of motherhood in custody determinations are not only gendered and racialised, but profoundly pivot on issues of class. Namely, Mrs. Edwards' status as a stay-at-home mother is undoubtedly facilitated by the Edwards' family wealth. In this sense, the application of an ideal of motherhood by the Court of Appeal privileges the Edwards family, as opposed to Van de Perre's single-parent family unit. Moreover, while the ideology of motherhood seemed to have, in some respects, privileged Van de Perre at the trial court level, it is now employed to her detriment. For more information on the dominant ideology of motherhood, see Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women," in *Mothers in Law: Feminist Theory and the Legal Regulations of Motherhood*, ed. Martha Albertson Fineman and Isabel Karpin (New York: Columbia University Press, 1995).

[615] C.C. Williams, "Race (and Gender and Class) and Child Custody: Theorizing Intersections in Two Canadian Court Cases," *NWSA Journal* 16, no. 2 (2004): 51.

[616] Ibid.

perceived of as Black.[617] Strategically presented as a single axis issue, the Edwards' team's focus on race as the primary axis of discrimination was very powerful.

However, the arguments presented by the Edwards' team did not capture the full scope of this custody battle. Edwards was faced with being problematically stereotyped as a hyper-sexualised Black male, who had violated a vulnerable White woman. Consequently, the Edwards' team strategically constructed a narrative where Van de Perre would be viewed as dangerous, predatory, promiscuous and racist.[618] Again, the Edwards' strategy required that Van de Perre be identified only on a single axis; Van de Perre's whiteness would define her as a potential oppressor.[619] Moreover, as articulated by Williams, the Edwards' team presented another troubling stereotype that finds its origins in the exploitation of Black women as workers and 'breeders' during times of slavery: the ideal of the strong, Black woman who nurtures children and forgives her philandering mate.[620]

Clearly, the arguments of the Edwards' team may have been in response to Warren J.'s heavy emphasis on the sexual activity of Edwards. Specifically, Warren J.'s reasoning may have reflected stereotypes about Black men in general and Black athletes in particular. Moreover, the subtle characterization of Edwards as a 'sexual predator' cannot be isolated from a racialized history

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[617] Ibid.

[618] Ibid.

[619] Ibid.

wherein White women have been deemed to be in need of protection from 'dangerous' Black men. Nonetheless, in countering these stereotypes with their claim of Black strength and Black vulnerability, the Edwards' team's argument may have served to reinforce deeply embedded racist ideology.[621]

The Edwards' team expected the court to focus on Van de Perre's racist potential, rather than on Edwards' power as a well-educated, extremely wealthy man.[622] In addition, the Edwards' team presented Edwards as the victim of a greedy woman, who was emotionally unstable, and of questionable morals and values. More broadly, the Edwards relied on a single-axis argument that posited the racist context of the custody dispute as the primary axis of discrimination, when in fact the context of *Van de Perre* was sexist, heteronormative and classist. Edwards' experience of racism was ameliorated by his status as a wealthy, married, famous American man.[623] As articulated by Williams, Edwards held several advantages over Van de Perre:

> He could present the wife that bolstered the case; he could purchase the legal power to defend his case; he could garner the attention of the press and multiple supportive advocacy organizations; he could intimidate Canadian courts with the claim of black identity as an American identity, and the threat that an unfavourable decision could unleash an undesirable clash with the powerful American government.[624]

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[620] Ibid.

[621] Ibid.

[622] Ibid., 54.

[623] Ibid., 58.

[624] Ibid.

In contrast, while Van de Perre's White privilege may have contributed to some of her legal success, the reality of her situation was that she is a single mother, supporting herself and her child through part-time work, social assistance, and child support payments.[625] Van de Perre did not have the resources to assemble an ideal family, an ideal child-care network, legal support, or legal advocates.[626]

The point here is that the B.C. Court of Appeal was clearly responsive to a single-axis argument. This type of argument presents race as not just the primary axis of discrimination, but instead as the only axis of discrimination. Clearly, single-axis arguments cannot adequately describe the context of legal cases in general, and *Van de Perre* in particular. Consequently, the Court of Appeal was not able to engage in contextualised judging as the substantive equality approach would mandate.

The Supreme Court fared no better than the lower courts with respect to theories of intersectionality and multiple-axis discrimination. The court's decision is clearly focussed on one major issue: What is the appropriate standard of review to be followed by appellate courts in family law cases involving custody? Despite the wealth of identity and equality issues that could be addressed in *Van de Perre*, the court approached this potentially important decision with the 'neutrality' the liberal State would be proud of.

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[625] Ibid., 59.

[626] Ibid.

5.5 Conclusion

Almost three and half years after the Supreme Court rendered its judgment in *Van de Perre*, it seems that Elijah ended up in the right home. Ordered to pay over $300,000 in missed child support payments in 2004 by the B.C. Supreme Court, the Edwards have effectively cut off contact with the boy they had so desperately sought custody of.[627] In hindsight, for Elijah, the Supreme Court and the B.C. Court of Appeal made the right decision. In hindsight, however, the decision of both courts did not further a theory of substantive racial equality.

The Supreme Court judgment underestimates the importance of race to biracial children, articulates minimal awareness of the particular type of racism directed towards biracial children, implicitly endorses a colour-blind approach to custodial determinations, implicitly treats the best interests standard as objective, downplays the need for judicial transparency in legal decisions that are highly susceptible to bias, ignores the extent to which stereotypes about race, class and gender continue to inform contemporary assessments of parenting capacities, and fails to apply an equality analysis to the best interests of the child standard. In addition, given its failure to provide guidance to the lower courts, the Supreme Court's commitment to a rigid standard of judicial deference by appellate courts is troubling.

The judgments of all three courts clearly illustrate the extent to which law is ill-equipped to deal with theories of intersectionality. In fact, the judgments in *Van*

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[627] See Neal Hall, "Ex-Grizzlie 'cut contact' with son after losing case:[Final Edition]" *The Vancouver Sun*, Jun 5, 2002: A3, and Andy Ivens, "Ex-Grizzlie ordered to pay $343,500 toward support of his son", *The* Province, Apr 29, 2004: A4.

de Perre demonstrate the extent to which law responds to stock legal characters, stock legal subjects, or stock legal narratives. When faced with the difficult task of teasing out the messy strands of dominance and power visible in *Van de Perre*, the Supreme Court effectively remained silent. Certainly, it is not 'easy' to speak of issues of race, class and gender in the context of *Van de Perre*. However, in remaining silent on the issues at play in *Van de Perre*, the Supreme Court's decision ultimately invites bias.

CHAPTER SIX - CONCLUSIONS

Having addressed the limitations in McLachlin C.J.'s address, as well as the limitations in the Supreme Court of Canada's judgements, the following questions can now be answered: Is McLachlin C.J.'s position representative of the Supreme Court of Canada's? Do the assumptions embedded in McLachlin C.J.'s address appear in the Supreme Court judgements? Do the theoretical problems that emerge in McLachlin C.J.'s address also appear in the judgements? How might these assumptions be leading race equality jurisprudence in a certain direction? In what direction is race equality jurisprudence heading? And, most importantly, do the three legal cases – *R.D.S.*, *Williams*, and *Van de Perre* – confirm McLachlin C.J.'s assertion that the current period of race and the law is one characterised by a commitment to substantive racial equality?

McLachlin C.J.'s formalist approach to race and racism, her liberal individualist approach to the State and law, her excessively optimistic view of the *Charter*, and her vague articulation of the substantive equality ethic all exemplify an equality approach inconsistent with that of substantive racial equality. Certainly some of these problems do appear in the Supreme Court's decisions. *Van de Perre* replicates many, if not all, of the flaws evident in McLachlin C.J.'s address. And, the decisions in *R.D.S.* and *Williams* exhibit, to a lesser extent, some of McLachlin C.J.'s commitments to formal race, liberal individualism, liberal legalism and colour-blindness.

Nonetheless, the judgements do exhibit some important differences from the theory grounding McLachlin C.J.'s address. With respect to conceptual

issues surrounding race, only *Van de Perre* seems to adopt, perhaps as a matter of terminological necessity, McLachlin C.J.'s formalist understanding. While *R.D.S.* and *Williams* do not directly address the issue, the judgements seem to endorse a more constructivist approach in their recognition that racial designation does contribute to variability in experience.

Also, none of the decisions adopt McLachlin C.J.'s strange endorsement of Ardrey's territorial imperative. In fact, the judgements in *R.D.S.* and *Williams* far exceed McLachlin C.J.'s individualist and formalist understanding of racism.[628] In addition, but for *Van de Perre*, the judgements attempt to challenge McLachlin C.J.'s liberal legalism. In *R.D.S.*, the majority counters traditional commitments to neutrality by calling for impartiality, embracing the contextual legal method, and expanding the concept of the reasonable person. And in *Williams*, the court asserts that race is implicated in juror decision-making and that to ignore race would be an error, given that racial dynamics may already be present in a given trial.

Consequently, but for *Van de Perre*, McLachlin C.J.'s position is technically not representative of the Supreme Court of Canada's.[629] In fact, the Supreme Court does a far better job in articulating a substantive equality approach than does McLachlin C.J.. Given this, McLachlin C.J.' s address no longer seems an appropriate standard by which to assess the judgements in *R.D.S.*, *Williams*, and *Van de Perre*.

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[628] In *Van de Perre*, discussion of racism is minimal to non-existent.

[629] In the narrow sense of having more differences than similarities.

However, as my analysis has demonstrated, *R.D.S.*, *Williams* and *Van de Perre* still exhibit a number of theoretical limitations. Consequently, the remaining portion of this paper must address the following two questions: First, if McLachlin C.J.'s position is not an appropriate standard by which to assess the court's theory of substantive racial equality, what is? How do we define substantive equality from a critical race perspective? Second, based on this new understanding of substantive equality, do the judgements of the Supreme Court represent, as a whole, adherence to a theory of substantive racial equality?

6.1 What is substantive equality from a critical race perspective?

Conceptually, the meaning of equality is neither inherent nor self-evident. Instead, interpretations of equality proceed largely from the worldview of the interpreter. Consequently, to define or 'pin-down' an ethic of equality is a complex and thorny task. Certainly, it is easiest to define substantive equality in contradistinction to formal equality. And, in *R.D.S.* and *Williams*, the Supreme Court does this quite successfully. However, the court's judgements also demonstrate how and why it is simply not sufficient to define substantive equality in reference to 'what it is not'. Based on my analysis of McLachlin C.J.'s address, and of the three Supreme Court cases, the following nine commitments represent a more specific and directed attempt to not only define substantive racial equality, but to provide a measure against which the Supreme Court judgements can be weighed.[630]

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[630] See Fiona Sampson, *LEAF and the Law Test for Discrimination: An Analysis of the Injury of Law and How to Repair It.* A Paper Prepared for the Women's Legal Education and Action Fund,

1. Differentiation is not necessarily a violation of equality rights.

An ethic of substantive equality begins with the recognition that differentiation, in and of itself, is not a violation of equality rights.[631] Only differentiations that substantively discriminate constitute equality violations.[632] In addition, the failure to recognise and address difference can also constitute substantive discrimination.[633] From a critical race perspective, this is consistent with the racialisation focus of a social construction approach. Racialisation refers simply to the process of assigning difference, whereas racism involves an assignment of difference *and* differential valuation of the constructed category of difference. Consequently, the concept of racialisation enables us to use the language of race in a decidedly anti-racist fashion. Thus, while a formal equality ethic might subject any mention of race to a strict scrutiny test, a substantive equality approach invites consideration of race. This, in turn, garners more theoretical specificity in terms of being able to analyse the content and meaning of racialised language.

Of the three Supreme Court cases, only *Williams* represents adherence to this tenet. Here, the court invites consideration of race, recognises that Williams requires 'special treatment' by virtue of his racial designation, recognises that this 'special treatment' represents a commitment to equity and equality, and in doing so, recognises the difference between racism and anti-racism. In contrast, the

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2004, http://www.leaf.ca/legal-pdfs/Law%20Report%20Final.pdfInternet. Sampson identifies eight principles fundamental to any equality rights analysis.

631 Ibid., 9.

632 Ibid.

majority in *R.D.S.* fail to clearly differentiate between a racist and anti-racist consideration of race in contextual analyses. And, in *Van de Perre*, the court fails to fully acknowledge that Elijah's racial identity may necessitate special recognition of special needs in the context of the best interests test.

2. Discriminatory differentiations are based on historical patterns of oppression of particular groups and individual members of these groups.

A substantive equality ethic is based on the recognition that those differentiations that substantively discriminate are by and large grounds-based, and that these grounds of discrimination are interlocking, yet, distinct. While discriminatory differentiations cannot be restricted to, or fully captured by these grounds, the grounds provide an arguably adequate *starting point* because they can capture historical patterns of oppression of particular groups and individual members of these groups.[634] By correlation, a substantive equality ethic must begin with a conceptually sound understanding of why differences exist, and the simultaneous recognition that discriminatory differentiations are about power.

The social construction approach is consistent with this commitment because the focus on racialisation interrogates how, when and why racial meaning is extended to previously racially unclassified individuals, groups, relationships, or social practices. Where the formal race approach naturalises race, a social construction approach recognises that the act of designating race is

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[633] Ibid., 10.

[634] It is beyond the scope of this thesis to address the controversy surrounding an equality approach based on 'grounds' and an equality approach based on 'groups'. For an interesting commentary see, Dianne Pothier, "Connecting Grounds of Discrimination to Real Peoples' Real Experiences" *Canadian Journal of Women and the Law* 13(2001): 37-73.

a historically specific ideological process. From a substantive equality perspective, the social construction approach is preferable because it provides a context for understanding discriminatory differentiations, hence a more nuanced approach to understanding claims of inequality. Ideally, the specificity afforded by a social construction approach would counteract symmetrical interpretations of the grounds-based approach.[635]

Once again, the judgement in *Williams* is the only to clearly articulate this position in its decision. The court recognises that Williams's status as an aboriginal man involves dynamics of power and that his aboriginal status implicates historical patterns of oppression. In *R.D.S.*, the majority does recognise that dynamics of power related to racial identification were most likely implicated in R.D.S.' interaction with Constable Stienburg and that this power imbalance has historical roots. However, the court fails in that it trivialises Sparks J.'s racial and gendered identity, and the historical link between legal legitimacy and identity. Once again, in *Van de Perre*, the court seems to fail entirely in applying any power analysis by positing the parties as equal and by positing equality between both elements of Elijah's racial identity.

3. The prohibited grounds of discrimination should not be interpreted as symmetrical.

In the Canadian context, the prohibited grounds of discrimination include those enumerated in section 15 of the *Charter*, grounds analogous to the

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[635] In addition, where the formalist approach precludes a discussion of power, the power analysis in the social construction approach allows more room for discussions of change. Specifically, if racial inequality is neither natural nor inevitable, it can and should be changed.

enumerated grounds, and interlocking grounds.[636] Because the grounds of discrimination are set out in neutral terms, the interpretation of these grounds must be specified. First, assessments of inequality must consider how identity and the experience of inequity intersect. Second, the experience of inequity must be positioned within the context of larger patterns of historical oppression. Third, the enumerated, analogous and interlocking grounds cannot be characterised as natural or immutable. The intent of these three considerations is to prevent neutral interpretation of equality rights.

From a critical race perspective, the social construction approach is consistent with the above commitment because it focuses on the intersection of identity with experience, while at the same time positioning identity and experience within the context of patterns of historical oppression. In particular, the social construction focus on power precludes rigidly symmetrical analyses of race-based protections.

Again, the court succeeds in *Williams* by acknowledging that Williams' particular status is linked with a particular type of discrimination. In turn, the court recognised that presumptions of credibility or innocence are *not* granted symmetrically. While the majority in *R.D.S.* position R.D.S. correctly in terms of identity and the experience of discrimination, they fail to do so with Sparks J. The Court does not fully acknowledge that presumptions of impartiality are not applied equally. Finally, in *Van de Perre*, the court fails to link Elijah's identity to the

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[636] Sampson, 9.

experience of contemporary and historical discrimination by calling for a 'neutral' or symmetrical application of the best interests test.

4. An ethic of substantive equality must account for intersectional discrimination.

A substantive equality ethic begins with the understanding that the prohibited grounds of discrimination represent distinct, but interlocking types of oppression. Consequently, an ethic of substantive equality is committed to the understanding that experiences of inequality are intersectional, and that experiences of inequality do not necessarily and neatly correlate to one distinct ground of oppression. In this light, the prohibited grounds of discrimination serve merely as a starting point.[637]

In *Williams*, the court's judgement seems to indicate a tentative, but higher level of awareness/understanding of the nature of Williams' discrimination. However, the court's capacity to understand Williams' experience of discrimination could be attributed to the extent to which Williams' 'deviates' from the norm of the White male. The court does not, however, fully grapple with the experience of discrimination faced by Sparks J. or Elijah. In *R.D.S.*, the majority make no mention of racist sexism, or sexist racism and their impact upon perceptions of impartiality. As well, in *Van de Perre*, the court fails to acknowledge at a minimal level the multiple identities of Elijah, Van de Perre or Edwards.

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[637] See Diana Majury, "The *Charter*, Equality Rights, and Women: Equivocation and Celebration," *Osgoode Hall Law Journal* 40 (2002): 332. As Majury explains, this is particularly tricky because while the substantive equality ethic of the *Charter* does not mandate identical treatment, the approach has required the comparison of likes. This comparative approach is a limiting feature of the Charter's grounds-based approach and impedes the courts' ability to address situations of intersectional discrimination.

5. Discrimination or inequality is normal in the sense that discriminatory norms reflect and naturalise the needs, realities and circumstances of powerful individuals/groups.

An ethic of substantive equality recognises that dominant groups in society have the power, and use their power, to consciously or unconsciously impose norms that reflect and naturalise their needs, realities and circumstances.[638] These norms involve relations of power and these norms constitute passive and active discrimination. These norms are not, however, 'normal' in the sense that they are natural or inevitable. Instead, these norms are 'normal' in that they are deeply embedded in all realms of the State.

With respect to race and racism, a substantive equality ethic recognises that racism, or racist discourse, is most effective when racial categories are perceived of as natural or intrinsically real. This process of normalization allows racist behaviour/organization to be enacted on the basis of fact. Consequently, a social construction approach to race is further consistent with a substantive equality ethic because it exposes how difference is constructed in and through axes of power. This approach examines not only the State being constructed, but who is doing the constructing and for what purpose. The tangible consequence of this approach is the understanding that the prevalence of racism cannot be defined by its most overt or aggressive incarnations. Instead, based on the understanding that the reach of racism is broad, the social construction approach also understands the reach of race equality jurisprudence and substantive racial equality to be broad.

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[638] Sampson, 10.

In *Williams* and *R.D.S.*, the majority of the court recognises that racism in Canada is 'unexceptional' in that racism often constitutes the context of both police-civilian encounters/conflicts and criminal jury trials. However, all three judgements fail to fully capture the prevalence and depth of racism. In *R.D.S.*, the majority are not prepared to acknowledge that legal judicial impartiality is linked to identity, and that these presumptions are naturalised as neutral in the legal system. This is striking given that the court does acknowledge as much in the context of juror-decision-making in *Williams*. However, the *Williams* court fails to fully account for the prevalence of racism by allowing only a limited scope of inquiry on the challenge for cause. Finally, in *Van de Perre*, the court errs by failing to acknowledge that racial discrimination is 'normal' in the lives of biracial individuals, and as such should be accounted for in the application of the best interests standard.

6. An ethic of substantive equality is committed to equality and equivalence. Hence, an ethic of substantive equality is committed to positive and negative rights.

An ethic of substantive equality recognises that the injuries of discrimination "...deny equal inclusion and participation in society, deny equal recognition as citizens, deny equal enjoyment of social and economic resources, and deny equal autonomy as human beings."[639] This ethic is also based on the recognition that eliminating differentiation is the appropriate remedy where differentiation results in negative effects upon members of a marginalised

[639] Ibid.

group.[640] On the other hand, differentiation is the appropriate remedy where failure to recognise and account for difference results in negative effects upon members of a marginalised group.[641] Ultimately, an ethic of substantive equality is committed to equality, equivalence, hence both positive and negative rights. The theory of racialisation is consistent with this commitment because the theory facilitates a colour-conscious inquiry that neither over-observes, nor under-considers race.

Once again, the *Williams*'s court succeeds by recognising the need for Williams to be treated differently in the name of both equality and equivalence. In *R.D.S.*, L'Heureux-Dubé and McLachlin JJ. can be commended for recognising that Sparks J.'s consideration of race was appropriate and consistent with substantive equality's call for contextual judging. However, while the court succeeded in applauding Sparks J.'s commitment to equality and equivalence, the court faltered in its own commitment to the same by under-considering the implications of Sparks J.'s racialised and gendered identity. Finally, in *Van de Perre*, the court demonstrates little commitment to equality and equivalence by denying Elijah special consideration under the rubric of the best interests test. In doing so, the court denies Elijah equal benefit of the best interests test.

7. An ethic of substantive equality is based on the recognition that discrimination is not always intentional.

An ethic of substantive equality is based on the recognition that equality claimants need not prove discriminatory intent. This tenet is consistent with the

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[640] Ibid.

social construction understanding of racism where racist acts may be deemed racist solely on the basis of outcome; express intent is not required. Particularly in a system of institutionalised racism, the focus of a substantive equality approach is on the effect of the discrimination on the claimant. Consequently, the purpose of a substantive equality ethic is to remedy inequality, not assign blame or impose punishment.

In *Williams*, the court does recognise the fallacy of requiring quantitative proof of partiality. Despite this said recognition, the court's two-prong approach to partiality ultimately necessitates drawing a definitive causal link between racist attitudes and racist behaviours. Similarly, half of the judges in *R.D.S.* wanted some degree of tangible 'proof' that Constable Stienburg was racist.[642] Without this proof, these justices articulated that, at best, Sparks J.'s consideration of race was "close to the line". Finally, in *Van de Perre*, the court did not acknowledge that 'neutral application' of the best interests test could ultimately result in a discriminatory outcome.

8. An ethic of substantive equality is informed by the recognition that patterns of disadvantage and oppression exist across society, including the State and the State's institutions.

An ethic of substantive equality is informed by the recognition that patterns of disadvantage and oppression occur at all levels of society, including the State and the State's institutions. Consequently, the liberal legalist understanding of the law as a neutral arbiter of competing interests is at odds with an ethic of

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[641] Ibid.

[642] Again, the misses the obvious fact that Sparks J. never stated that Constable Stienburg was racist.

substantive equality. Similarly, an ethic of substantive equality rejects the liberal legalist call for neutrality, endorsing, instead, a realist approach to judging. This approach calls for impartiality, and recognises that judges and those who appear before them have experiences and identities that inform their understandings and their conduct. This context influences the way in which a judge sees evidentiary issues, assesses credibility and understands the law and its application.

The *Williams*' court can be commended for acknowledging that racism is implicated in the criminal justice system in general and in criminal trials in particular. The court recognised that in order to secure a just trial, a context of race and racism must be acknowledged. That being said, the *Williams'* court cannot be commended for explicitly choosing not to position Williams' case within the larger context of a racist jury selection process. The majority of the *R.D.S.* court also recognised that racism is implicated in the criminal justice system, and the majority also articulated their preference that impartiality be the standard for judging. The court was, however, hesitant to acknowledge that race and racism are implicated in the highest areas of the justice system – judicial decision-making. Standing apart, the judgement of L'Heureux-Dubé and McLachlin JJ. demonstrated a clear preference for the impartiality standard. However, the majority's tentative stand against liberal legal orthodoxy is muted given that they resort to the rationalising trope of the reasonable person to define the boundaries of said impartiality. Finally, in *Van de Perre*, the court is clearly and firmly committed to the liberal legalist position in that they characterise the best interests test and its application as neutral.

9. An ethic of substantive equality is based on a commitment to contextualism, not abstractionism.

Abstractionism refers to the idea that legal rules have universal qualities and are universally applicable. Because the focus of this approach is procedural, abstractionism is consistent with a formalist understanding of race, racism, and equality. In contrast, contextualism accepts that legal rules are inherently indeterminate in that the meaning of law is variable depending on context. This indeterminacy is directly correlated to the fact that legal rules have a perspective in that they have been structured around the interests of those who hold power. In the broadest of senses, a contextual approach will consider whether the experiences and perspectives of marginalised groups have been excluded from the development of law.[643] Because this approach is impact-oriented, contextualism is consistent with a substantive understanding of race, racism and equality.

Despite the positive attributes of the judgements, from a critical race perspective, the area of greatest concern is precisely that in all three cases, the court fails in its own application of contextual judging. In *R.D.S.*, in adopting the probability standard, the court was not mindful of the context of systemic bias in the legal community. Nor was the court mindful that the case of Sparks J. was not representative of the intent and purpose behind the law on bias. Similarly, had the court applied a contextual analysis in *Williams*, the court would have

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[643] See Claire L'Heureux-Dubé, "Beyond the Myths: Equality, Impartiality, and Justice," *Journal of Social Distress and Homelessness* 10, no.1 (2001): 94. L'Heureux-Dubé states that the contextual approach encourages judges to consider the broader social context as they apply and interpret legal rules. In addition, this approach encourages judges to understand and account for the diversity of peoples' experiences.

been mindful that the efficacy of diffused impartiality exists within the context of the largely homogeneous racial composition of Canadian juries. Finally, had a substantive equality approach and contextual analysis been applied in *Van de Perre*, the court would have recognised the history of racism of Canada, understood and accounted for the unique positioning of mixed-race children within the Canadian context, and on that basis, applied an equality analysis to the custody determinations of mixed-race children.

Based on the above analysis, the three judgements of the Supreme Court in *R.D.S.*, *Williams*, and *Van de Perre* do not represent an ethic of substantive racial equality. By far, the court's judgement in *Williams* comes closest to approximate a theory of substantive racial equality, and in many respects, *Williams* can be seen as a success from a critical race perspective. However, taken together, the judgements of the court do not present any underlying or unifying theory of substantive racial equality. Instead, the decisions of the court are riddled with ambiguities that compromise the court's commitment to an ethic of substantive equality. At best, the Supreme Court has demonstrated an ability to articulate, but not apply, a theory of substantive racial equality.

6.2 Where do we go from here?

It is critical to remember that had the court applied a contextual analysis in each of the three cases, all of the cases would have, or would likely have, resulted in the same outcome. However, as explained in the introduction to this thesis, the primary objective in a critical race approach to substantive equality is not simply the strategic value of getting the 'right' disposition. The legal

disposition is secondary to the theoretical reasoning behind said disposition. Consequently, the focus of an ethic of substantive equality is long-term and group-focussed, and the interest lies in securing a sound theoretical base upon which to make future race equality judgements. [644]

Having demonstrated that the court has not established a unified, consistent or coherent theory of substantive racial equality, and having specified where the court is lacking, what remains is the more ambitious aim of this paper: to identify those theoretical limitations that hinder the advancement of race equality cases and offer suggestions on how race equality seekers might try to tackle these deficiencies.

Race equality advocates are faced with the task of working with and through people and institutions that are adept at speaking the language of equality, but are resistant, hostile, and perhaps ill-equipped to "think through" equality. In adopting a critical race perspective from the outset of this analysis, I have demonstrated that substantive equality cannot be treated as 'neutral'; substantive equality must be treated as an ethic. Consequently, the context-oriented approach mandated by substantive equality must be characterised as having an ethical foundation. Defining a context requires making active choices regarding what is, or is not relevant. These choices are directly correlated to the

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[644] Given that the court did get to the 'right' result in each of the three cases, it could be suggested that the Supreme Court has applied, but not articulated, its theory of substantive racial equality. However, given that my analysis has demonstrated the theoretical ambiguities and inconsistencies of the court's judgements, I am inclined to think otherwise. Nonetheless, in order to test the above proposition, it would be useful to carry forth this research and examine how the three cases have been used as precedents.

ethical system one subscribes to, or, more specifically, for our purposes, the theoretical approach one adheres to.

While the Supreme Court and McLachlin C.J. demonstrate the ability to observe race, hence 'speak' the language of substantive racial equality, both parties falter in that they do not seem to fully 'think through' race, racism, and substantive race equality. Their version of substantive racial equality is 'empty' in the sense that it is not supported by a deep and well thought-out analysis of race and racism. Specifically, their version of substantive racial equality is 'empty' in that they have failed to fully *consider* the meaning of race and racism in a Canadian legal context. In this sense, because the court and McLachlin C.J. seem to treat race as neutral, self-evident and 'emanating from nowhere', the same can be said for their treatment of substantive racial equality.

Consequently, race equality advocates must instil meaning into this 'neutered' understanding of substantive racial equality.[645] To do this, advocates must focus on conveying, leading and teaching those in the law *how* to think about race, racism and the Canadian racial State in the context of individual race equality cases. Based on my analysis, I propose the following three-step approach that equality advocates should seek to entrench in the decision-making process in Canadian courts. In seeking to entrench this process, advocates can use these steps when structuring legal interventions, when structuring legal arguments brought before the courts and during the initial process of 'choosing'

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[645] In making these suggestions, I do not want to ignore or downplay the extremely thoughtful contributions and invaluable work that equality advocates (i.e. academics, lawyers, non-governmental organizations, students) are *already* engaged in. These suggestions represent one small contribution to ongoing strategies already underway.

what cases constitute race equality cases. Ultimately, the purpose of these three steps is to embed a mode of thought, or way of reasoning, in the court, that will bring stability, structure, consistency and depth to Canadian race equality jurisprudence.

First, equality advocates must begin by stressing that a substantive equality ethic requires a substantive understanding of race and racism within the racial context of Canada. Advocates should demonstrate to the court how, in clarifying the fundamentals, their judgements will exhibit greater contextual analytic rigour. For example, the focus on racialisation would allow room to consider the ways in which individuals and groups are racialised relationally. In the case of *Van de Perre*, this approach allows the court to specify *why* Elijah's status as a 'mixed-race' child, who is neither Black nor White, is meaningful on its own. The racialisation approach also gives the court the capacity to speak of race in a decidedly anti-racist fashion. Capable of doing this, the court could distinguish, as it failed to explicitly do in *R.D.S.*, between anti-racist and racist decision-making. In defining these fundamentals, and using them as a backdrop to judicial decision-making, the court could clarify the ongoing confusion and tension between colour-blind and colour-conscious approaches to judging.

In adopting the more substantive understanding of racism, the court would also be better equipped to handle and understand claims of systemic discrimination. The court would have a valid theoretical basis for not requiring proof of motivation with respect to racial discrimination, and the court would have a valid theoretical basis for pursuing remedial, not punitive, measures to rectify racial inequality. For example, in *Williams*, the court would recognise that asking

for proof of a causal link between racist attitudes and racist behaviours would place an unduly high, if not impossible, burden of proof on the party seeking a challenge for cause. Or, in *Van de Perre*, the court would recognise that neutral interpretation of the best interests test can lead to a racially inequitable outcome, despite a lack of racist motivation. Moreover, in positioning cases within the context of Canada as a racial State, the court would be better able to define the specific context of a given race equality case. In the case of *Williams*, this understanding would demand that the case be positioned within the larger context of a racialised jury selection process. Or, in the case of *Van de Perre*, this would demand recognition that family law is itself deeply imbued with the politics of race, class and gender, and that neutral application of the best interests test is, at best, a legal fiction.

The second step that advocates should pursue when seeking to entrench a way of thinking about substantive racial equality involves 'filling up' the concept of substantive equality itself. The purpose of this step is to: a) recognise and affirm that substantive equality is not neutral, and instead, must be situated within a consistent and coherent theoretical framework, and; b) rectify the theoretical inconsistencies evident in McLachlin C.J.'s address. Advocates should begin with the basic understanding of substantive equality already articulated by McLachlin C.J. and the Supreme Court of Canada. However, advocates would move further by 'filling' up the concept with the nine tenets outlined earlier in this chapter.

Again, I am encouraging that advocates communicate these first two steps consistently and overtly as a means to entrench a certain mindset, mode of

reasoning and ethic of reasoning within the minds of judicial decision-makers. Consciously followed at first, these steps would ideally become obsolete in the sense that they would become normalized in the judicial reasoning process. More specifically, however, the purpose of these steps is to limit arbitrary approaches to race and race equality in the law. While law is in many respects a field bound by precedent, the only certainty regarding race equality in the wake of these three judgements has been that there is no certainty. Consequently, the first two steps attempt to formalise, at the very least, a way of thinking about race, racism and substantive racial equality.

The final step I am suggesting that advocates seek to formalise in the judicial decision-making process is admittedly the most difficult because this step involves application of the previous two to each individual case at bar. This step formalises, to some degree, application of the contextual legal method. Having established the theoretical fundamentals in the first two steps, advocates can demonstrate to the court that they are equipped to assess race equality cases from a theoretically coherent position. Advocates can then proceed to outline a number of fundamental questions that should be answered when courts are seeking to contextualise a case. While these questions should not be treated as a 'check-list', the questions do establish some direction in terms of the type of thought-inquiry process that would be consistent with a substantive equality approach.

First, advocates must stress that, when faced with possible race equality cases, the court should begin by asking, ***Could* race be an issue in this case?** Of importance, the question at this initial stage is one intended to raise

possibilities, not establish certainties. The court should be guided by a substantive understanding of race, where the meaning of race is understood as socially constructed, fluid and broad. Consequently, the court will not limit race to its 'biological' incarnations. Instead, the court will consider whether issues of culture, language, immigration, ethnicity, etc..., should be 'read into' the category 'race', or more importantly, are experienced as part of the category 'race'. In addition, the court's consideration of whether race is an issue in a given case should be positioned within the understanding of Canada as a racial State. Consequently, the inquiry at this point *will* err on the side of caution and consider race as a possible dimension. Specifically, the broadness of this question is intended to encourage colour-conscious inquiry, from a critical race perspective, as a norm.

When the court affirmatively establishes that race could be an issue in a given case, the court should then turn to examining or understanding the claim itself. Here the court should ask, **What is the issue, and for whom?** The court will clarify, from the perspective of the claimant, what the issue is, who is asserting that this is an issue, and why this has become an issue. Again, these questions and their answers should be positioned within the context of a substantive understanding of race, racism and the Canadian State, as well as within the parameters of a theory of substantive racial equality.

Before assessing the validity of the claim itself, the court must then ask, **What is the context of this case?** To contextualise a case, the court can proceed in a number of ways. First, the court could examine race at an individual level by simply observing the racial identities of the parties involved. While this

type of contextualising is limited because it stresses race as 'biology', it can also be useful as a first step. For example, in the case of *R.D.S.*, *Williams* and *Van de Perre*, recognition of the racialised identities involved, in combination with recognition of the racialised identities of the judicial decision-makers themselves, automatically flags these cases as potential race equality cases. More importantly, however, these racialised identities are meaningful because the court will have already adhered to a substantive understanding of race.

The court must also focus on positioning a given case within an institutional and systemic context. By institutional or systemic, the court might position a case within a specific area of the law (i.e. criminal law, family law or immigration law), or within a specific institutional process (i.e. jury selection), or, more broadly, within a system such as the criminal justice system. In taking this step, the court acknowledges that institutions of the State are not neutral, and that positioning a case within its institutional and systemic context is critical if we are to fully capture the dynamics of race. For example, the context of *Williams* is one where the jury selection process disproportionately favours property-owners, which, in turn, is disproportionately composed of middle-class, White, men. Moreover, the context of *Williams* is one where the Canadian aboriginal population is disproportionately represented in the criminal justice system. This type of institutional context is critically relevant to our understanding of Williams' right to challenge for cause.

Having contextualised the case more broadly, the court must position the particular claim within said context. **How does the context of this case support or weaken the claimant's case? Within this racialised context, how**

is the experience of inequality linked to identity? How does the rule, principle, doctrine, policy or practice affect the claimant's experience of inequality or equality? Again, in making these assessments, the court must be fully committed to a substantive understanding of race and racism, as well as the nine theoretical commitments of substantive equality. For example, in matters of evidence, the court will understand that a requirement for quantitative proof of racial discrimination may not be reasonable in light of the nature of racism itself. In this situation, contextual positioning of a case can be critical when making a determination on the validity of an equality claim. Or, by contextualising a claim and linking the experience of inequality with identity, the court can avoid symmetrical interpretation of equality rights.

While the processes I have outlined above will certainly not resolve the issue of racial inequality, they serve as an adequate point of departure to tackle some of the problems with Canadian race equality jurisprudence. Ultimately, the purpose of my recommendations is to instil consistency, coherence, depth and transparency in judicial decision-making on issues relating to race equality. The contextual analysis mandated by substantive equality is about assumptions, values, choices and the power of judicial actors to determine what is seen and how it is seen. It simply 'will not work' if substantive racial equality is seen as 'self-evident' and neutral. Just as one makes a series of choices to support a regime of inequality, one must similarly engage in a series of choices to support a regime of equality. The purpose of this exercise has been to lay bare the processes that should be involved as we attempt to trudge through issues of race and racism on our way to substantive racial equality.

6.3 Conclusions

At the outset of this paper, I suggested that we are at a legal crossroads of sorts in terms of race equality jurisprudence. Despite my critiques of McLachlin C.J.'s address, and the Supreme Court of Canada's decisions in *R.D.S.*, *Williams* and *Van de Perre*, that suggestion still holds. The Supreme Court did not, in this particular trilogy of cases, develop a consistent and coherent theory of substantive racial equality. However, the court is, at the very least 'speaking' the language of substantive racial equality. While not entirely perfect, the court's judgement in *Williams* reflects some of the court's best thinking on race, racism and race equality.

The structure of this paper has ultimately been intended to reflect the structure of the thought-process I am suggesting that advocates seek to entrench in the minds of judicial decision-makers. In some ways tedious, it is, nonetheless necessary to walk through the fundamentals before we move onto theorizing about equality, because as this paper demonstrates, the two are directly correlated. How we understand race will directly impact upon how we understand racism, and how we conceive of prescriptions for it. In addition, it is necessary to position equality within a theoretical, ethical and moral framework. If equality is treated as self-evident and neutral, the concept remains a concept - empty, vacuous and fleeting.

No *theory* of any type will resolve racial inequality in Canada - this has never been the intent of this thesis. The intent has been, however, to address one avenue in the struggle for racial equality and equity that is sorely lacking direction and depth. In a very fundamental way, law is discourse, and theory

gives us the tools to understand said discourse. Consequently, in the legal battles surrounding race equality, theories of race and theories of equality cannot be ignored. We *are* at crossroads of sorts with respect to racial equality. Since 2001, the new regime of 'fear' or 'security' has clearly demonstrated, not only the fragility of Canada's multiculturalism, but the fluidity of racial categorization and racism. As court's are currently, and will undoubtedly continue to be, faced with equality issues where race figures in, the need for a consistent, coherent, well-thought-out, and just approach to race equality becomes ever more urgent.

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