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Recognizing Racialization, Reforming the Law and Raising the Bar

I studied international relations in my heady undergrad years. In my breathtakingly privileged world, I remember thinking *I missed it*. The civil rights movements of the 1950s and 1960s had transformed the world to an equitable place. I did not consider examining the assumption. I did not consider how my assessment centred on America. I did not consider my whiteness; frankly, I did not consider any real evidence whatsoever. It was not a great start for someone contemplating a career in law with the view to protect peoples' rights.

The trend continued: in the aftermath of 9/11, the tsunami of xenophobia and the notion that non-citizens posed a potential terrorist risk flourished. I understood that it affected someone and felt a notion of indignation, but I did not respond, as I did not feel like it directly affected me. Later, a part-Kiwi, I studied law in New Zealand and was exposed to the semblance of recognition Maori law has throughout that state. I only notionally compared New Zealand's relationship with Indigenous peoples to Canada's, largely because, I did not understand Canada's relationship with our Indigenous peoples in any meaningful way, although I thought I did. And I did not truly understand until years later when I examined some of my own racist blunders, that we are all at least a little racist, and having racist thoughts or succumbing to the white lens is not an indictment of our character, but evidence of the systems that raised us.

By now, lawyers who are schooled by and for a system claiming to be rooted in principles of fundamental justice, (should) know that there is a distinction between being racist and being antiracist; that silence lands us on the side of the oppressors.

> **If we are not actively and routinely checking our unconscious biases, if we are not actively and routinely raising our voices when we see racist practices, then we are complicit in perpetuating the system that we can no longer pretend is not systemically racist by design.**

It was only through my own reckoning that I was prompted to look more critically at the way these systemic structures are (not) advancing towards progress. In an era where the police are rightfully and repeatedly being called to task for structural racism and brutality, I started to look around and wonder, where are we, the lawyers?[1] More specifically, where are we, the white lawyers?

If lawyers are the sentries posted to guard the rule of law, we have an obligation to evaluate critically and continually what it means for the system of law to be equitable. Equality will not redress or correct systemic racism and the subsequent historic wrongdoing. We need to be working for equity for all people participating in the justice system, not only for our clients, but for the lawyers making the arguments, the judges making the rulings and the administrative staff supporting the process.

We make a practice of returning to the pieces of legislation we know like the back of our hands because, inevitably, revisiting the text will often serve as a reminder of something we have missed. In the same way, we cannot neglect to revisit and interrogate even foundational premises of what it means to live in our democratic society that boasts its commitment to the rule of law. In 1982, the *Charter of Rights and Freedoms*[2] spelled it out clearly. Rule of law, equality, dignity: in. Inequality: out. For the lawyers who bear the task of persuading courts on how best to interpret the *Charter*, our marching orders are clear.

Yet Canada's genocide of Indigenous peoples has continued since first contact. People of Colour continue to endure violence and humiliation at the hands of the state. The discovery of hundreds of remains of Indigenous children is not news if we have been paying any attention at all. What *could* be new is the way we speak and act in response. The question as to whether we are ready to recognize that liberation of our BIPOC communities is bound to liberation for us all.[3] It is vital that we stop conflating an inability to change with a refusal to change. Lawyers have an opportunity to utilize our extensive training to accompany Canada's BIPOC communities in our journey for (re)conciliation by decolonizing and rebuilding the systemically racist system of law that exists in this country. And I've come to understand that at this point, the goal cannot be perfection because if it leads us to freeze, nothing will ever move forward.

A starting point is, as always, to return to fundamental principles. A mentor and friend, gave me a reminder at graduation:

> *I was in a law office this week when my solicitor said, "my first duty is to the court; my second duty is to my client". I'm not sure I agree. Consider your primary duty to be to uphold the rule of law.*

The rule of law is a bedrock of jurisprudence. Yet how many of us think critically with any regularity about what the rule of law really means? I would posit that as lawyers, much of our understanding of the rule of law is taken for granted. Its precise confines are not universally agreed upon and, as a result, our attempts to define the rule of law lack clarity. There is a very real sense of "we know it when we see it."[4]

The Law Society of British Columbia (LSBC) is also grappling with this question. Just last year, LSBC launched the Rule of Law Matters Podcast. "If you're wondering what the rule of law means and why it matters, this is the podcast for you", champions the overview. The podcast "introduces listeners to the concept of the rule of law and how it protects our rights and freedoms in a free and democratic society." It is an important first step. The podcast got me critically thinking about the rule of law and what it means for our society. Discussions talked about the idea that people feel like they have been treated fairly, of having institutions we feel confident in. However, not one of the 11 episodes featured an identified racialized person, nor asked a person of colour if *they* feel they have the same rights, have been treated fairly, feel the same confidence in said institutions. Nor do they consider the implications of the rule of law for racialized peoples in relation to the power of the state to seriously interfere with an individual's liberty because of racial bias. This is not to say that the rule of law has not been a powerful tool lawyers have used to advance rights in Canada. But Canada's relationship with the rule of law is complex.

As lawyers, we need to continually be mindful that we shape the narrative. Law schools teach us to take a factually complex matrix and "drain the emotional life from the stories and human conflict beneath the surface of appellate cases -- the pathos and drama often at the heart of the narratives that cases are built upon, [enabling both students, and later the court as we lawyers implement these teachings, to] focus exclusively upon close legal analysis and parsing of doctrinal law."[5] Reading the law dispassionately and objectively is considered a crucial skill for all lawyers. Yet, "in the formative years of learning to 'think like a lawyer,' many law students are fed a perpetual diet of edited appellate opinions -- doctrinal pieces with the subtext of complex and compelling narratives removed or reduced to a mere backstory." [6]

Subtext is particularly important when the story exemplifies systemic racism. In such cases, the subtext not only needs to be told, but it needs to be amplified. There are countless examples readily available of why such emphasis is so critically important.

R. v. Yebes, is among Canada's most cited cases because of how it set the threshold requirement to find a jury's verdict unreasonable. It is also an illustration of a lost opportunity to amplify the racialized subtext.

In 1983, Tomas Yebes, an immigrant from Madrid, Spain, was charged with two counts of first-degree murder for the deaths of his two adopted children. The fire that killed the boys was first ruled an accident, however, Yebes was ultimately convicted of two counts of second-degree murder. Both the BC Court of Appeal and the Supreme Court of Canada upheld the conviction. The case was later taken on by the UBC Innocence Project. In November of 2020, Marilyn Sandford, one of Yebes' veteran legal team which was composed of some of Canada's most prolific advocates, addressed the court, pointing to independent forensic reports exposing critical flaws in the expert evidence at trial relating to contemporary fire science. Mr. Yebes was exonerated.

But the subtext is also important. After the boys' remains were

discovered, police and firefighters recalled Yebes speaking on the phone with his wife, in what they described as a "foreign language". Mr. Yebes' affect was described, depending on whose impression was accurate, as both "completely distraught" or "totally emotionless." One officer described Yebes as agitated and crying, while another officer described him as "calm and fairly detached from the situation."[7] Another firefighter got the impression that Yebes was emotionally "kind of cool" and another recalled how he did not look at the boys or cry for them.

Tamara Levy, the former defence lawyer and Crown prosecutor who now leads the UBC Innocence Project, is all too familiar with the common elements of wrongful convictions: individuals are outsiders in some way, sometimes facing cultural or language barriers, who do not behave as others expect them to during a crisis.[8] Implicit in this analysis is the role of unconscious bias, stereotyping and systemic racism in wrongful convictions. Yebes' lawyers clearly understood that systemic racism played a role in the outcome of this case, which remains our country's test of whether the verdict is one that a properly instructed jury, acting judicially, could have reasonably rendered. But why did the veteran lawyers not feel confident that this was a winning argument?

Perhaps an argument rooted in systemic racism was simply not the strongest. I can only speculate that the decision was made, at least in part, because these learned lawyers understandably felt they could not trust that an argument rooted in systemic racism would not trigger the same systemic racist processes that contributed to the prosecution and conviction of Yebes in the first place. Whatever the reason for not pursuing a racialized line, the consequences remain for any racialized accused who continues to be subjected to a concept of reasonableness, as set out *Yebes*, that is rooted in whiteness.

Questions of racialized subtext are also raised by the case of Phillip Tallio, another case taken on by the UBC Innocence Project. Mr. Tallio spent over 34 years in prison without parole for a murder he says he did not commit. If Mr. Tallio is exonerated, it may not only be the longest known imprisonment for a wrongful conviction in Canadian history, but also one of the country's longest single prison terms.

Media coverage from the British Columbia Court of Appeal highlighted defence lawyer, Tom Arbogast, amplifying that "the finding was made that he (Tallio) was intellectually impaired and that is something that this court must give deference to;" that "Phillip Tallio was overwhelmed, and he did not comprehend the gravity of his situation." [9] If recollection serves me, the Crown asked the Court to draw adverse inferences from Mr. Tallio's demeanor and long pauses when he testified on his own behalf. What did not reach the media is that Arbogast reminded the court to be very careful about drawing adverse issues in the context of cultural issues in play. Arbogast stated, that in his experience, it is not uncommon for an Indigenous person to use long pauses when speaking. I know this argument was made only because I listened to some of the oral arguments.[10]

Two cases, two men jailed for significant periods of their life, both with racialized subtexts, both before the court in BC in the last year alone. For advocates in the criminal justice system, it is both our job and our ethical obligation to put forward not only a rigorous defence, but one with a reasonable prospect of success. Mr. Tallio was a 17-year-old Indigenous man whisked through a legal system not designed to accommodate for different cultural understandings. One wonders whether future cases with similar fact patterns might raise arguments confronting the system. Arguments such as contesting the validity of Mr. Tallio's guilty plea, validity grounded in part by a cultural assumption of the lived experience of whiteness, could have been pursued regardless of the reality that it likely would have been rejected outright. These questions, for now at least, remain in tension between advancing client's interests and risking racial backlash.

Case law and legislation have changed the ethical obligations of defence lawyers in sexual assault cases. Section 276 of the *Criminal Code of Canada*, for example, now prohibits the admission of a complainant's prior sexual history for the purpose of discrediting on the grounds of prior sexual experience or for the purpose of inferring there was more likely consent to the sex at issue in the allegation. The amendment to the *Criminal Code*[11] combined with the ruling in *R v DD*[12], has made the timing of disclosure of a sexual assault, in itself, irrelevant to whether a sexual assault complainant is a credible witness.

Section 273 of the *Criminal Code,* in conjunction with the decision in *R v Ewanchuk*[13] has rejected the notion that a complainant's failure to fight back demonstrates consent. In essence, defence lawyers are now precluded from pursuing lines of argument that rely on their probative value for these three social assumptions about sexual violence that have been "legally rejected as baseless and irrelevant."[14] Yet some defence counsel in Canada continue to invoke these strategies and some judges allow it, at least in part, because it is believed that these strategies are still successful.[15]

The fear of challenging race mythology is no doubt true for lawyers facing the decision to raise racialized defences. We know that racialized mythologies persist. Even the most unapologetic antiracist advocate would have to take serious pause in an era where calling out someone as racist is inexplicably more offensive than the racism itself.

The countless incidents of police brutality, the anti-Asian hatred, the remains of hundreds of Indigenous children— just the beginning of what we are going to discover—in Canada, underscore that we have already lost too much. The risk we face by not using our voices is continuing to repeat what we do not repair. As we stand by, we risk clients foregoing their *Charter* rights for self-preservation.

There is a reason for the old trope, around since Shakespeare and a favourite of despots, to kill all the lawyers. Until 1951, it was legislated through the *Indian Act* that it was illegal for First Nations to hire lawyers or seek legal advice, fundraise for land claims, or meet in groups.[16] If Indigenous peoples could not hire a lawyer, they would not have the power to change the law. Lawyers hold the power to achieve staggering change. We have the training and the toolkit to fight (and win) in the face of injustice. Systemic racism is not simply a catchline; the system is designed to perpetuate the preservation of white power. The task we face as lawyers is not easy, but it is clear. We know there is not a more fundamental system in our society than the system of justice that we serve as lawyers. Understanding systemic racism is not simply an exercise reserved for our academic colleagues, doing the heavy lifting at higher learning institutions to provide frameworks of thinking and possible solutions for redress.

While there are the abhorrent acts of racism that will continue to dominate headlines and will provide obvious opportunities to speak out and appear in our highest courts, it is the day-to-day dealings that will effect meaningful change. Just as we practice law, we must practice antiracism: the daily conversations we have amongst colleagues; the way we run our practice; the way we build on precedents like *R v Parks*: "Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views..."[17], resulting in the outcome that judicial notice of anti-black racism in our society now may be taken; the sound bites we provide the media; the arguments we make in Provincial and Supreme court alike; and the judgments rendered, including the unreported judgments. To do this, we need to master antiracism fluency, and we need to be relentless. White lawyers have long enjoyed the privilege of a system that is established to elevate us into the positions where

we now sit. It is our obligation to ensure that our justice system evolves beyond preserving and perpetuating white power. The only way forward is through.

1 Particular acknowledgment to the multitude of racialized and white lawyers who have and continue to make progress in the justice system.
2 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
3 Based on a quote credited to Lilla Watson: "if you come here to help me, you're wasting your time. If you come because your liberation is bound up with mine, then let us work together", cited in *Accomplices Not Allies: Abolishing the Ally Industrial Complex*, < https://www.indigenousaction.org/accomplices-not-allies-abolishing-the-ally-industrial-complex/>.
4 This phrase was used in 1964 by United States Supreme Court Justice Potter Stewart to describe his threshold test for obscenity in *Jacobellis v. Ohio*, 378 U.S. at 197 (Stewart, J., Concurring).
5 Philip N. Meyers, "How to shape your legal storytelling". ABA Journal, October 1, 2014, https://www.abajournal.com/magazine/article/shaping_your_legal_storytelling.
6 *Ibid.*
7 Jana G. Pruden, "Tomas Yebes always said he didn't kill his two sons. Nearly four decades later, the courts finally agree". *The Globe and Mail*, February 20, 2021, <//www.theglobeandmail.com/canada/article-the-yebes-test-one-mans-37-year-journey-from-wrongful-conviction-to/>
8 *Ibid.*
9 Camille Bains, "B.C. court hears accused charged with toddler's murder had capacity of a child", The Canadian Press, November 24, 2020, https://www.com/news/canada/2020/11/24thestar/bcs-top-court-hears-closing-arguments-in-1983-murder-of-toddler.html
10 *R. v. Tallio*, Oral Arguments, BCCA November 24, 2020.
11 *Criminal Law Amendment Act*, SC 1980-81-82-83 c 125, s 19
12 2000 SCC 43 at paras 63-65, 2 SCR 275 [*R v DD]*
13 [1999] 1 SCR 330, 169 DLR (4th) 193
14 Craig, Elaine. "The Ethical Obligations of Defence Counsel in Sexual Assault Cases." *Osgoode Hall Law Journal*
15 *Ibid.;* e.g., *R. v. AA*, 2004 ONCJ 101, 62 WCB (2d) 405 [*R v AA*].
16 Appendix B: Indian Act Timeline, <opentextbc.ca/indigenizationfoundations/back-matter/appendix-b-indian-act-timeline/>
17 *R v Parks* (1992), 15 O.R. (3d) 324; *Supra* 19 at [46].