

Book Review: Race and Canadian Legal History -
Reviews of: "Race," Rights and the Law in the
Supreme Court of Canada, by James W. St. G.
Walker; Colour-Coded: A Legal History of Racism
in Canada, 1900-1950, by Constance Backhouse

Benjamin Berger
bberger@osgoode.yorku.ca

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Book Review

Citation Information

Berger, Benjamin. "Book Review: Race and Canadian Legal History - Reviews of: "Race," Rights and the Law in the Supreme Court of Canada, by James W. St. G. Walker; Colour-Coded: A Legal History of Racism in Canada, 1900-1950, by Constance Backhouse." *Osgoode Hall Law Journal* 38.3 (2000) : 519-529.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol38/iss3/5>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

RACE & CANADIAN LEGAL HISTORY

Reviews of:

“Race,” Rights and the Law in the Supreme Court of Canada

BY JAMES W. ST. G. WALKER

(Toronto, Ont.: The Osgoode Society for Canadian Legal History and
Wilfred Laurier University Press, 1997)¹ 448 pages.

Colour-Coded:

A Legal History of Racism in Canada, 1900-1950

BY CONSTANCE BACKHOUSE

(Toronto, Ont.: The Osgoode Society for Canadian Legal History and
University of Toronto Press, 1999)² 485 pages.

Canada is a dream; a dream of equality, a dream of liberty, a dream in which the right to be different is guaranteed in the basic law, in which the rights of Canadians as Canadians, because they belong to this country, are the same everywhere, whether they are men or women, native or from mother countries, or whether they are immigrants full of hope who have just arrived dreaming of liberty and justice.³

If this accurately describes the Canadian dream, then two recent books show that it is one imperfectly realized in the legal history of our country. Immersed within the modern language of rights, liberty, and equality, Canadians' historical memories are hazy or ill formed with respect to our country's racially discriminatory past. In contrast to our conception of the European and American experience, Canada is self-defined as a tolerant and just nation. The work of James St. G. Walker and Constance Backhouse fill a void in the scholarly literature surrounding the history of racism in Canada's legal structure, and demonstrate that this notion of Canada forms a veneer covering the surface of a disturbingly discriminatory past. These books teach us that law has not simply been a neutral tool in our society, coldly treating all

¹ [hereinafter “Race,” *Rights and the Law*].

² [hereinafter *Colour-Coded*].

³ House of Commons, *Hansard* (19 February 1981) at 7474-76, as quoted in “Race,” *Rights and the Law*, *supra* note 1 at 4.

Canadians similarly, but has been deployed in ideologically imbued and manifestly inequitable ways, influenced by notions of biology, religion, economics, and nationhood.

In "*Race, Rights and the Law*," James Walker sets out "to test the 'Canadian dream' against specific incidents from our past and in particular to explore the role of the Supreme Court of Canada in effecting the dream."⁴ The four legal incidents selected in this book cover a tumultuous period—the first half of the twentieth century—and represent the issue of race arising in a variety of social and economic contexts. In 1914, *Quong-Wing v. R.*⁵ brought the matter of Chinese businessmen hiring white women before the Supreme Court. *Christie v. York Corporation*⁶ addressed the right of a pub owner to refuse service to Blacks. Restrictive covenants preventing Jews from owning property were challenged in *Noble and Wolf v. Alley*⁷ and, in 1955, the Supreme Court of Canada considered the propriety of Canada's immigration laws in *Narine-Singh v. A.G. of Canada*.⁸

Walker argues that this "singled-out" case method of analysing the intersections between Canada's legal and racial histories carries a number of interpretive benefits. Analysis of the cases provides a contextually rich approach in which the study of case law and legal reasoning reveals prevailing social and economic pressures, the influence of both local interest groups and global trends, and, ultimately, the role of law in reflecting and/or reinforcing cultural views. Relying upon "thick description" and "actor-centred analysis," Walker is primarily concerned with the manner in which legal decisions reflect a range of attitudes on race at particular points in Canadian history. An important component in the analysis is what Walker describes as the "common sense" of the time, which until the post-World War II period assumed a racial hierarchy in which European Caucasians had proven themselves culturally superior. These four Supreme Court of Canada cases function as speakers emitting dominant and competing discourses circulating within both Canada as a nation and in local communities at the historical points in question.

Professor Walker begins his book by setting the methodological stage for his audience. His audience is a relatively broad one. Though

⁴ "*Race, Rights and the Law*," *supra* note 1 at 4.

⁵ (1914), 49 S.C.R. 440 [hereinafter *Quong-Wing*].

⁶ (1939), [1940] S.C.R. 139 [hereinafter *Christie*].

⁷ (1950), [1951] S.C.R. 64 [hereinafter *Noble and Wolf*].

⁸ [1955] S.C.R. 395 [hereinafter *Narine-Singh*].

the book has a strong theoretical introduction, which assists in making it attractive to scholars in history and law, it maintains at the same time a narrative ease and clarity of detail which makes it accessible to a wider audience. Walker introduces the reader to a number of schools of legal and social theory including Geertzian and Foucaultian interpretations of social history, as well as those of the positivist, Marxist, and *Annales* schools. He draws from the intellectual strengths of each of these to produce a compelling critical analysis. At the same time, he maintains a contextual vision that sets the law in its broader political, economic, and social context.

As each case study is considered, pictures of Canadian society are painted through a discussion of the local concerns and motivations that emerge out of an expansive approach to the case law. Each case study chapter shares a common structure. Walker first describes the incident or situation that will serve as the legal focus of the chapter. He then expands his frame to consider the prevailing historical, political, and cultural environment in which the case arose. The law and legal instruments that were critical to the case are discussed. Then the author traces the progress of the case through the various levels of court, including the Supreme Court of Canada. Once the rationale for the decision is analysed and the outcome of the case is recorded, Walker addresses scholarly comments that followed in the wake of the decision, examines the decision with a focus on its impact on race relations, and discusses its subsequent role as precedent.

"Christie v. York Corporation"⁹ represents Walker's most compelling chapter, and perhaps his best work. On 11 July 1936, Fred Christie, a Black man and long time resident of Montreal, entered the York Tavern and ordered steins of beer for himself and his two friends. Though Christie and his friends had patronized this tavern in the past, the establishment had recently moved into a location in the Montreal Forum. Relocation brought with it a new policy. The waiter indicated that he was instructed not to serve "Negroes." When the bartender and manager confirmed that this was the York Corporation's policy, Christie telephoned the police who, upon arrival, rather tactlessly informed him that there was nothing that they could do about the situation. Mr. Christie filed a lawsuit that eventually found its way to the Supreme Court of Canada where, in a four-to-one decision, the Court dismissed Mr. Christie's appeal, stating that "it cannot be argued that the rule

⁹ "Race," *Rights and the Law*, *supra* note 1, 122.

adopted by the respondent in the conduct of his establishment was contrary to good morals or public order.”¹⁰

In this chapter, Walker’s technique of “thick description” yields a particularly textured and broad image of the Montreal community at the time. Walker pays keen attention to each court’s use of precedent, also apparent in the other case studies, demonstrating the malleable and varied uses of previous cases dealing with the denial of service to Blacks. Walker’s use of precedent provides the reader with a strong sense of the prevailing culture of legal reasoning, which gave priority to traditional economic values rather than moral principles. Furthermore, he effectively demonstrates that the courts need not have invoked a “freedom of commerce” rationale. They might well have decided the case in favour of Mr. Christie on the basis of morality and public policy. The author’s discussion of the public interest groups involved and the political and social forces that impinged upon the case provides a contextual explanation, though not a justification, for the decision reached. The rich content of each of these chapters is powerfully delivered and, at some points, particularly in the *Christie* chapter, has an almost lyrical quality.

Some aspects of each case study would have benefited from a more sustained analysis. For example, Walker noted economic considerations that played into the dynamics of each case. In *Quong Wing* and *Narine-Singh*, concerns about employment were seminal factors affecting popular opinion. *Christie* addressed the issue of “freedom of commerce” directly while property ownership was at the core of *Noble and Wolf*. Though Walker touches lightly upon the impact of these economic concerns in each of the cases, the book might have benefited from a more sensitive consideration of the seemingly intimate relationship between race relations and economics. Indeed, the term “race” was originally concerned with *economic* differences, drawing class distinctions *within* English society. It would be interesting to read more discussion of the way in which concepts of “race” were deployed to economic ends in early twentieth century Canadian history.

Another nuance of the concept of “race” which might have been developed is the religious layer. Walker is convincing in his assertion that Canada saw itself as a fundamentally White and European country, and hoped to preserve this composition. *Noble and Wolf* best raises the question of the extent to which Canadians also sought to maintain a Christian society. The author is, no doubt, correct when he states that “it is the law that orders power relations and rationalizes them according to

¹⁰ *Ibid.* at 144.

contemporary sensibility.”¹¹ However, surely religious institutions also participated in the establishment of racial “truths.” It would be interesting to explore the extent to which the concept of “race” took on religious shades when applied to certain groups. For example, in a case described by Walker that followed the decision in *Narine-Singh*, Justice McPhillips wrote of the impossibility of mixing “races” and, in doing so, described East Indians as belonging to “the Hindu race.”¹² What is the significance of this religious designation?

In the course of each of these case study chapters, Walker brings to the fore voices of dissent, both from the bench and the broader legal community. These sometimes boldly progressive visions add texture to the chapters, demonstrating that matters of discrimination were, even in their own time, contested concepts. Navigating his way through these debates, Walker builds a veritable who’s who of Canadian legal history. Names like Lyman Duff, F.A. Anglin, John Cartwright, J.J. Robinette, and F.R. Scott populate the text but, in the only break from the contextual vision that he so fruitfully employs, Walker fails to provide the reader with much in the way of biographical background for these key figures. Justice John Idington’s dissent in *Quong Wing* and Justice Mackay’s landmark decision in *Re Drummond Wren*¹³ are particularly tantalising examples. What factors might have influenced these jurists to embrace such bold perspectives? Consider the case of Justice Idington, declaring in a 1914 decision that legislation was inapplicable because “its evident purpose is to curtail or restrict the rights of Chinamen”¹⁴—a stance in stark opposition to the “common sense” of the time?

Walker finishes his book with a consideration of the implications of the case studies, and an afterword that updates the reader as to developments in race and the law since *Narine-Singh*. If there is a dominant thesis to be drawn from this work, it appears in these last sections. Walker argues that legal systems in Canada translated global forms of racial prejudice into a local instantiation that reflected domestic concerns. In this way, Canada participated in a broader “Western” value system, while producing its own contextually-influenced flavour of discrimination. Walker thus brings the reader full circle, having tested the Canadian dream and found that Canada’s legal systems and public opinion both participated in racial discrimination. Reflecting on what

¹¹ “Race,” *Rights and the Law*, *supra* note 1 at 322.

¹² (1914), 20 B.C.L.R. 243 at 290 (C.A.).

¹³ [1945] O.R. 778.

¹⁴ *Quong-Wing*, *supra* note 5 at 451, as quoted in “Race,” *Rights and the Law*, *supra* note 1 at 104.

each of these cases had to say about legal sensibilities, he also concludes that judges had choices that could have steered them away from institutional discrimination. Despite the presence of more benign options than those pursued, Walker is reluctant to identify villains in these stories.

This book is an invaluable analysis of the development of legal thought about race in the Supreme Court of Canada. It is a theoretically sophisticated work that effectively considers and integrates the legal, social, and historical pressures that affected each case. Dr. Walker provides his reader with a strong image of the trajectory of legal reasoning as the Court navigated its way through issues of race and discrimination in the first part of the twentieth century.

Constance Backhouse's recent book, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950*,¹⁵ represents another significant contribution to the history of legal racism in Canada. Though Professor Backhouse's book confirms many of the points made in Professor Walker's work, *Colour-Coded* presents an interesting and authentic counterpoint to "*Race, Rights and the Law*,"¹⁶ with its own unique and substantial achievements. At the outset, Backhouse declares that it is her goal to demonstrate "that the legal system has been profoundly implicated in Canada's racist history"¹⁷ and that "the Canadian legal system played a principal and dominant role in creating and preserving racial discrimination."¹⁸ To this end, Backhouse selects six cases from various jurisdictions and levels of courts that bring to the fore questions of racial definition and discrimination. The *Re Eskimos*¹⁹ case of 1939 offers a particularly fruitful example of the court's wrangling with race definition, in a dispute between governments about responsibility for welfare payments to Inuit during the Depression. The 1903 trial of Wanduta,²⁰ a Dakota man, for participating in Aboriginal dance and *Sero v. Gault*²¹ in which a Mohawk woman sued a fishing inspector for seizing her fishing net, illustrate the racist treatment that Aboriginals have suffered at the hands of the legal system. Backhouse also considers the regulation of Chinese businesses in Yee Clun's 1924 challenge to

¹⁵ *Colour-Coded*, *supra* note 2.

¹⁶ "*Race, Rights and the Law*," *supra* note 1.

¹⁷ *Colour-Coded*, *supra* note 2 at 15.

¹⁸ *Ibid.* at 17.

¹⁹ (1938-39), 80 S.C.R. 104 [hereinafter *Re Eskimos*].

²⁰ See *Colour-Coded*, *supra* note 2 at 72.

²¹ (1921), 64 D.L.R. 327 (Ont. S.C.) [hereinafter *Sero*].

Saskatchewan's "White Women's Labour Law,"²² the operation and history of the Ku Klux Klan in Canada in *R. v. Phillips*,²³ and the segregation of and discrimination against Blacks in *R. v. Desmond*.²⁴ The product is an extremely detailed and compellingly written examination of the racist workings of Canadian law in the first half of the 20th century.

Like Walker, Backhouse also adopts a case study method, arguing that this approach is particularly well suited to explicating the complex interactions among race, society, and the law as reflected in legal records. She is particularly concerned with these dynamics as they affect real people and this focus features strongly in her work. Without addressing the theoretical underpinnings of analysis and critique in the way that Walker does, Professor Backhouse also engages in a kind of "thick-description." Indeed, this is one of the overriding strengths of her book. The portraits that she paints of the players in each of these case studies are lucidly rendered, with biographical attention paid even to seemingly minor actors. Among the best examples of her biographical contextualisation are Viola Desmond, the subject of the legal dispute in the book's seventh chapter; George Frederick Blair, city solicitor for Regina and advocate for Yee Clun; and Andrew Gordon Chisholm, counsel for the Six Nations of Grand River in the *Sero* case. In the last case, Backhouse brings her painstaking research to bear in describing the relationship between Chisholm and Judge William Renwick Riddell—a relationship of confrontation that may very well have affected the outcome of Ms. Sero's claim. Throughout the book, Backhouse includes photographs, maps, posters, and quotations from key individuals. The rich details combined with thorough descriptions and analyses of the communities and organisations that participated in each case make for a lively and textured book.

Other methodological aspects of this work deserve mention. Backhouse's introduction demonstrates a highly nuanced understanding of what constitutes "race." She characterises "race" as a shifting and malleable concept embracing skin colour, diet, dress, religion, and geographical location, among many other factors. To be sure, all of her subsequent case studies focus on members of visible minorities and, as a result, her complex vision is not perfectly reflected in the main text.

²² *Yee Clun v. Regina (City of)*, [1925] 4 D.L.R. 1015 (Sask. K.B.) [hereinafter *Yee Clun*].

²³ (1930), 55 C.C.C. 49 (Ont. C.A.) [hereinafter *Phillips*].

²⁴ (1947), Public Archives of Nova Scotia, RG 39 'C' [Halifax], v. 937, no. 13347 (N.S.S.C.) [hereinafter *Desmond*].

Nevertheless, Backhouse does a commendable job of recognizing the economic, cultural, and religious layers in the conflicts that she considers. Since one of her professed goals is to defeat the illusion of “racelessness” in Canadian legal history, the author elects to consistently identify the racial background of the major players in each case. Though it requires some adjustment on the reader’s part to become comfortable with the practice of identifying, for example, judges as “white” judges, this initial discomfort serves Backhouse’s purpose well in causing the reader to come to terms with the reality of Canadian racism. Backhouse is not reluctant, as Walker is, to label past actors and actions as “racist.” “‘Race,’” she points out, “is a mythical construct. ‘Racism’ is not.”²⁵ This approach imbues the entire work with a “racialised” feel in which notions of race and practices of discrimination are central.

Professor Backhouse’s book begins with *Re Eskimos*, a case in which the Supreme Court of Canada held that “Eskimos” were “Indians” for the purposes of Canadian constitutional interpretation. She places this chapter first because it is an instance in which the Court was challenged by the problematic and elusive nature of “race” definitions but, nevertheless, decided the matter with great certitude, as though it was straightforward and self-evident. This chapter sets the tone for the work, demonstrating the mutability and malleability of race definitions, and providing the broader cultural context in which “racism” was addressed by the law. In the process, Backhouse establishes her practice of providing thorough histories of the communities involved as well as presenting the key players with careful detail. Her analysis of the social and historical factors that contributed to the case in question provides the reader with an abundant landscape in which to set the more narrow legal issues.

Backhouse uses this approach consistently through the book, culminating in the final two substantive chapters about *Phillips* and *Desmond* respectively. *Phillips* resulted in the successful conviction of Dr. William A. Phillips, a Hamilton chiropractor, for being disguised by night. On 28 February 1930, Phillips and seventy-four other members of the Ku Klux Klan marched into Oakville, Ontario. The mob went to the home of Ira Johnson, thought to be Black but, in fact, of White and Aboriginal descent, who was living with a White girl named Isabel Jones. Intending to put an end to this relationship, the group removed Ms. Jones from the home and forcibly detained and threatened Mr. Johnson and his family while burning a cross in front of their home. On 8 November 1946, Ms. Viola Desmond had been travelling to Sydney,

²⁵ *Colour-Coded*, *supra* note 2 at 7.

Nova Scotia, when her car broke down in New Glasgow. While waiting for repairs, she decided to take in a movie at the Roseland Theatre. Unaware of the theatre policy that Black people were restricted to the upper balcony, Ms. Desmond purchased a downstairs ticket and, heading for the main-floor seating, was told that she would have to sit upstairs. She protested and nevertheless took a seat downstairs. When confronted by the manager, Desmond refused to leave, was forcibly ejected, arrested, charged, and convicted of failure to pay the proper theatre tax under the *Theatres, Cinematographs and Amusements Act*.²⁶ Viola Desmond was unsuccessful in her subsequent efforts to quash her criminal conviction.

In these chapters, Backhouse is at her best, presenting both the context and the law in a style that is at once moving and incisive. In these cases Backhouse samples broadly, considering community viewpoints, the opinions expressed in the media, the reasoning of the courts and, most importantly, dissenting voices within each constituency. In the *Desmond* chapter, the Black community is shown in all of its complexity, with both passionate support for Ms. Desmond's cause and cautious apprehension at "rocking the boat." *Phillips* is perhaps the best example in support of Backhouse's contention that even the victories during this period in Canadian history were ambiguous in their denunciation of racist practices. Chief Justice Mulock's decision condemned mob justice and defended the rule of law, but said nothing about racism and rights. This uneasy fit between the legal system and society, in which law's tools are episodically deployed against racism but never explicitly discuss racial issues is a leitmotif in the book, central to Backhouse's project of removing Canada's mask of "racelessness."

Desmond provides the best example of Backhouse's attention to economic and gender issues. She consistently addresses the way in which women and women's organisations affected and manipulated the concept of "race." *Yee Chun*, *Sero*, and *Desmond* stand out on this point and, in the latter, Backhouse argues persuasively about the way in which gender constructs contributed to the handling of the case. She notes that Viola Desmond became a symbol of middle-class Black femininity, and that the violation of this *femininity* contributed to public support for her case. Into this fabric Backhouse stitches economic considerations, noting that "most legal challenges to racial segregation in Canada seem to have come from middle-class individuals."²⁷ She suggests that this

²⁶ R.S.N.S. 1923, c. 162, ss. 8(8), 9, 10 & 14.

²⁷ *Colour-Coded*, *supra* note 2 at 243.

disproportionate participation was the product of a heightened sense of the indignity of discrimination combined with a financial base upon which to build a legal claim.

At the outset of the work, Backhouse declares that, “[i]n an effort to make this book as accessible to the reader as possible, I have used a narrative format that tries to keep the intricacies and complicating details of the underlying legal framework away from the storyline.”²⁸ The effect of this choice is an eminently accessible book. However, this approach leaves some gaps as well. A reader interested in plotting the development of legal institutions or following trends in legal reasoning will not find a great deal of material with which to work in the body of the text. For the most part, each case study is considered as largely discrete from the others, and trends in legal reasoning are backgrounded to the consideration of patterns in racism and “race” definition. Although Backhouse includes many of these leads in the book’s scholarly apparatus, this choice effectively sidelines any analysis of the development of judicial decisionmaking.

Professor Backhouse also fails to consider the precedential value of each of these cases. It would be interesting to know the way in which the decisions outlined in the book sit within the broader context of Canadian law. For example, Backhouse sensitively considers the reactions to the decision in *Re Eskimos*. She even postulates that “the designation of federal jurisdiction may have proven salutary for the Inuit.”²⁹ She does not, however, address the impact of this decision on the many subsequent cases in which it was considered in some way, most recently in *R. v. Blais*.³⁰

Colour-Coded may have benefited from addressing two time periods that exist only as uneasy absences in the text. First, although her work is intended to be “A Legal History of Racism in Canada, 1900-1950,” there is an 18-year gap between case studies, leaving a silence hovering over the years between 1903 and 1921. There is no dearth of case law to consider in this period and one wonders why this empty space exists. Second, perhaps understandably owing to the already substantial scope of this work, Backhouse does not provide even a cursory treatment of the legal history of racism in Canada subsequent to the *Desmond* case in 1946. Admittedly, her book is styled as a legal history of racism in Canada between 1900 and 1950 and one must take

²⁸ *Ibid.* at 16.

²⁹ *Ibid.* at 55.

³⁰ [1998] 10 W.W.R. 442 (Man. Q.B.).

care not to commit the “sin” of presentism. Nevertheless, Professor Backhouse has explicitly targeted her book at a broad audience and non-historian readers may well be left wondering where all of these issues stand today.

Overall, Professor Backhouse leaves her readers moved and provoked. With gifted writing, commendable research, and thorough contextualisation, she has produced a book that admirably meets her expressed goals. Backhouse effectively conveys the ways in which Canada’s legal system has been implicated in racism and, while doing so, casts a critical eye towards the concept of “race.” She shows the malleability of “race” as a concept when pressured by social and economic concerns. Backhouse demonstrates the complex ways that communities of both discriminators and the discriminated respond to race and effectively and consistently unveils the involvement of the state and its legal apparatus in Canada’s racist history.

Both *Colour-Coded* and “*Race,*” *Rights and the Law* ask hard questions and reveal truths that are, at times, disturbing. Combined with sensitive and thorough research, both authors’ singled-out case approach succeeds in reconstructing the contextual matrix out of which each of these events emerged. Despite these commonalities, a number of qualities separate the two works. Professor Walker’s book is a volume well-suited to those concerned with the history of the Supreme Court of Canada, and interested in taking a sustained look at legal reasoning in issues of “race.” In this way, Walker’s book is a strong and more conventional piece of legal history, offering an image of the development of jurisprudence in the Supreme Court of Canada. Backhouse provides a more critical look at the concept of “race” and focuses the reader on the local and personal details that affected the development and resolution of each issue. She blurs the boundaries between biography, social, and legal history with unwavering attention to the complexities of community dynamics and shifting notions of “race.”

Both books are substantial contributions to Canadian legal history, and establish a standard of scholarship in this area to be met by future writers. Compelling and precise, these books could as easily find their place on a scholar’s bookshelf, in a history-buff’s library, or at the centre of a university course dedicated to the history of racism in Canada.

Benjamin Berger
Faculty of Law
University of Victoria

