Osgoode Hall Law Journal

Volume 54
Issue 3 *Volume 54, Issue 3 (Spring 2017) Special Issue: Law, Authority & History: A Tribute to Douglas Hay*

Article 6

8-4-2017

Sex, Race, and Motel Guests: Another Look at King v Barclay

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Abstract

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Keywords

Discrimination in public accommodations--Law and legislation--History; Racism--History; Prostitutes--Legal status, laws, etc.--History; Motels--Law and legislation--History; Canada

Cover Page Footnote

I am grateful to participants in that symposium and to Jim Phillips, Philip Girard, Mary Stokes, Joanne Prince, and two anonymous peer reviewers for their helpful comments on earlier drafts of this paper. Further thanks are owed to audiences at the University of Alberta, Faculty of Law Seminar Series, and the 2014 Annual Meeting of the Canadian Law and Society Association for their comments on earlier versions of this paper. Special thanks are also owed to the archivists at the Provincial Archives of Alberta for tracking down the original case file and to Doug Hay for his support during my year at Osgoode. The usual caveats apply.

Special Issue
Law, Authority & History: A Tribute to Douglas Hay

Sex, Race, and Motel Guests: Another Look at King v Barclay*

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The 1961 case of *King v Barclay* is something of a footnote in the history of discrimination against Black Canadians. If it is cited at all, it is usually cited alongside the more famous racism cases, such as *Christie v York*, as proof of the widespread nature of racism in Canada. In this paper, I re-read the trial decision and examine the original case file to show that the facts of *King* and the racism in the case are more complex than usually realized. *King* emerged out of a series of errors from both King and Barclay's Motel which resulted in the latter assuming, or seeming to assume, that King wished to visit two prostitutes working out of the motel. For obvious reasons, however, Barclay's Motel could not state such an allegation explicitly as that would have been tantamount to admitting that they knew the women in question were prostitutes. In order to recapture the full legal and social contexts of *King* this paper examines both the history of racial discrimination in public accommodations and the longstanding struggle to prevent prostitutes from using such accommodations to ply their trade. The paper also argues that King's legal action, even though he lost in court, was ultimately successful in that it prompted a legislative amendment, which removed the technicality upon which *King* turned.

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* An earlier version of this article was presented at the Law/Authority/History: A Tribute to Douglas Hay symposium to mark the retirement of Douglas Hay. The symposium took place on 5 and 6 May 2016 at Osgoode Hall Law School and the York University History Department, Toronto.

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L'affaire *King c. Barclay* de 1961 semble n'être qu'une note de bas de page dans l'histoire des discriminations à l'encontre des Canadiens noirs. Lorsque cette affaire est mentionnée, elle est habituellement citée au même titre que les affaires de racisme les plus célèbres, comme *Christie c. York*, afin de démontrer l'ampleur du racisme au Canada. Dans cet article, je propose une nouvelle lecture de la décision rendue et j'analyse le dossier initial de l'affaire afin de montrer que les faits et le racisme en l'espèce sont plus complexes qu'on l'imagine habituellement. L'affaire *King* découle d'une série d'erreurs commises par M. King et le propriétaire du Barclay's Motel, lesquelles ont (ou auraient vraisemblablement) amené ce dernier à supposer que M. King souhaitait rendre visite à deux prostituées travaillant dans le motel. Néanmoins, pour des raisons évidentes, le propriétaire du Barclay's Motel ne pouvait pas présenter explicitement une telle allégation, laquelle serait revenue à admettre qu'il savait que les femmes visées étaient des prostituées. Soucieux de recréer les contextes juridiques et sociaux complets de l'affaire *King*, cet article examine à la fois l'histoire de la discrimination raciale dans les logements offerts au public et la longue lutte menée pour empêcher les prostituées de pratiquer leur métier dans de tels lieux. L'article soutient également que l'action en justice intentée par M. King, même si elle a été perdue, s'est finalement soldée par un succès, dans la mesure où elle a entraîné l'adoption d'une modification législative visant à supprimer les points techniques qui sont ressortis des débats sur l'affaire *King*.

I. CONTESTED FACTS AND LEGAL TECHNICALITIES

ON THE EVENING OF 13 MAY 1959, an accountant called Theodore 'Ted' King and his friend Harvey J. Bailey decided to borrow a record player from their friend Jim Pelley. Unfortunately, neither King nor Bailey was sure where Pelley lived. They knew that he lived in Calgary, as they did. They knew that he was staying in a motel on the Macleod Trail, but this did not narrow matters down particularly, as there were a number of motels along that road. They also knew that Pelley drove a De Soto, was staying in room number three of his motel, and that he was, as they were, black. With this information, they decided to call the

motels on the Macleod Trail to see if they could find him.[1] It is not clear whether Barclay's Motel was the first motel they called, but at some point, they called it. Having given the motel owner the information they had about Pelley, including the fact that he was black, the owner replied that they "don't allow coloured people here" and hung up.

According to King, the racist outburst on the part of the motel owner prompted further investigation. King was, at the time, the President and Grievance Chair of the Alberta Association for the Advancement of Coloured People (AAACP). The AAACP aimed "to promote goodwill and to seek equality in social and civic activities throughout the province."[2] Given the AAACP's purpose and King's role in the organization it should come as no surprise that, about an hour after King phoned Barclay's Motel, he and Bailey arrived at the motel to ask for a room. The vacancy sign was up but King was refused a room on the grounds of his race. King did not particularly want a room. His purpose was to see if the motel would reject his request, and this tactic was common among anti-discrimination activists at the time.[3] Having thus proven racial discrimination, King and his lawyer, C.A.G. Palmer, went to the press and launched a legal challenge claiming that King had been "deprived of his lawful right to accommodation at Barclay's Motel and suffered humiliation, indignity and insult."[4]

John Barclay had a different take on what had happened. For one thing, he claimed that King was "somewhat belligerent" when he showed up at the

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1. *King v Barclay* (1960) 24 DLR (2d) 418, at paras 2-5, 31 WWR 451, (Alta DC) at paras 2-5 [*King*]. For the affirmation of this decision see, *King v Barclay*, 35 WWR 240, 1961 CarswellAlta 36 (SC(AD)). Throughout this paper I use the term 'black' rather than 'African Canadian' as the former term is more inclusive.
2. Examination for Discovery of Theodore Stanley King (6 August 1959) [King Discovery] in *King v Barclay*, Edmonton, Provincial Archives of Alberta (RG 2003, file 0543, box 2, v 18-39-5-6 at 3) [Case File].
3. See Frank Luce & Karen Schucher, "'The right to discriminate': Carl McKay and the Ontario Human Rights Commission" in Eric Tucker, James Muir & Bruce Ziff, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law, 2012) 119 at 123-24; Constance Backhouse, "Racial Segregation in Canadian Legal History: Viola Desmond's Challenge, Nova Scotia, 1946" (1994) 17:2 Dal LJ 299 [Backhouse, "Racial Segregation"]; Constance Backhouse, "'I Was Unable to Identify with Topsy': Carrie M Best's Struggle Against Racial Segregation in Nova Scotia" (1998) 22:2 Atlantis 16; Interview of Mojo Williams by Jennifer Williams & Donna Coombes-Montrose (October 2001) Oral History Interview Transcript, Alberta Labour History Institute [Williams]. This tactic is still used today in the fight for fair housing in the United States. See *e.g.* Fred Freiburg, "A Test of Our Fairness" (2009) 41:2 Urban Lawyer 229.
4. *King*, *supra* note 1 at para 14 (quoting Statement of Claim).

hotel.[5] Barclay maintained that King was refused a room because he was driving a car with a Calgary licence plate, not because of his skin colour.[6] Barclay had also correctly identified King as the man who had called earlier wanting to speak to someone in unit three. It was not uncommon, in fact it was standard practice, for motel owners to refuse rooms to local people on the grounds that they ought not need a room and perhaps only wanted one for illicit or immoral purposes.

As fate would have it, room three of Barclay's Motel was occupied not by Jim Pelley, but "by two women registered as married women from the United States whose behaviour aroused suspicion."[7] At some point, either earlier on 13 May or the following day, Detective Gray of the Calgary Police visited the motel and advised Barclay that these two white women, who called themselves Mrs. W. Lathrop and Mrs. R. Harrington, "were undesirables" who should be encouraged to leave.[8] The presence of Lathrop and Harrington complicated the case, not because it would turn on whether they were actually sex workers, but because their presence changed how Barclay's acts would be seen. While everyone involved in the case agreed that racism was wrong, combatting prostitution was not.

These facts raise a number of questions that are almost entirely absent from any subsequent discussions of *King*. Such discussions often fail to mention the two women in unit three or the broader responses to the case. As a result, *King* has become what I call a 'see-also case.' *King* is cited or discussed, if at all, only as further proof that courts across Canada tolerated racism. It is the see-also case to the more (in)famous *Christie v York*, in which a Montreal bar refused service to a black man, Fred Christie.[9] *King*, much like *Christie*, turned on whether the establishment denying admittance met the common-law definition of an inn, and therefore on whether or not King really was a traveller.

While it is true that the Alberta courts followed *Christie* in *King*, the racism in *King* is neither as straightforward nor as uncontested as it was in *Christie*. Whereas *Christie's* York Tavern openly claimed never to have served black

5. *Ibid* at para 8.
6. At this point in time Alberta licence plates used a system whereby certain letters were reserved for particular locations. See *King*, *supra* note 1 at para 8.
7. *King*, *supra* note 1 at para 8.
8. The names are taken from the registration cards included in the case file. Case File, *supra* note 2; *King, supra* note 1 at para 9.
9. *Christie v York Corporation* (1939), [1940] SCR 139, [1940] DLR 81 [*Christie*]. For a fuller discussion of *King*, see James W St G Walker, "The Law's Confirmation of Racial Inferiority: *Christie v York*" in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) 242 at 299-300 [Walker, "Law's Confirmation"].

people,[10] the motel owner in *King* went to some lengths to argue that he was not racist and that he had allowed other black people to stay in his motel.[11] Contemporary commentators on *King*, quoted in the press, agreed that they had never heard of any instances of racism as alleged in *King*.[12] In addition, the presence of the two women complicated the simple example of racism King hoped to present. Ironically, these women also complicated Barclay's attempted defence and denial of racism.

In the late 1950s racist sentiment was still widespread in Canada, though attitudes were shifting.[13] Unease with explicitly racist policies has a lengthy history in Canada, including Alberta. To put it more accurately, Canadians were not always willing to admit their racism to those most affected by it, often refusing even to mention race. There are reasons why Canadian racism is often less explicit than that seen in the United States. Canadians have often quietly judged the overt racism of the United States and have sought to differentiate themselves in this respect.[14] As will become clear, the responses to the accusation of racism in *King* drowned out the accusation itself. By re-reading the case I show that *King* is an example of how white responses to accusations of racism silence the voices of those most likely to experience racial discrimination, and of how "racist discourse is not solely embedded within matrixes of overtly discriminatory discourse and practice."[15]

While it may not be a surprise that *King* became a see-also case, the case is worthy of study in its own right for three reasons. First, alongside the overt racism, the case also offers a subtler and more intersectional example of racism. Secondly, *King* offers a glimpse into gendered, racialized, and class-based notions

10. *Christie*, *supra* note 9 at 141-43.
11. This is further explored below.
12. "Motel Claims No Color Bar," *Calgary Herald* (15 May 1959).
13. For the shift in attitudes see also Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 281 [Backhouse, *Colour-Coded*].
14. Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: University of Toronto Press, 2010) at 3-4, 142 [Walker, *Race on Trial*]; Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood, 1999) at 14; Lyndsay Campbell, "Race, Upper Canadian Constitutionalism and British Justice" (2015) 33:1 LHR 41 at 42; Backhouse, *Colour-Coded, supra* note 13. But see, "Canadians 'Smug' Over Negro Race Issue," *Ottawa Citizen* (13 August 1960) online: <www.news.google.com/newspapers?id=U1ExAAAAIBAJ&sjid=euQFAAAAIBAJ&pg=7249%2C2134909>. Here some people, including Ted King, blamed American influence for some of Canada's racism, while others noted that some aspects of Canada's racism were all its own.
15. Walker, *Race on Trial, supra* note 14 at 10.

of respectability in late 1950s Alberta. King may have been black, but he was an accountant and his sister was a lawyer.[16] Barclay may have been white, but his motel was hardly the Palliser Hotel.[17] Moreover, he may have been tolerating prostitution on his premises: Lathrop and Harrington may have been white, but they were likely prostitutes, and Barclay's defence insinuated that they may have been the people King was really trying to visit. Thirdly, much as with *Christie* and *Desmond*,[18] two earlier attempts to challenge racism through the courts, King's challenge failed. The Alberta legislature, however, swiftly removed the technicality that caused King to lose. This outcome suggests that, unlike *Christie* or *Desmond*, *King* achieved its purpose of drawing attention to, and winning legal protection from, discrimination.

To tease out these issues, I begin in Part II with a discussion of anti-black racism in Canada as well as the long-standing association between prostitution and Alberta's hotels and, later, motels. Part III gives a brief overview of the trial decision and highlights some seemingly odd statements from District Court Judge Hugh C. Farthing. Part IV analyzes the two versions of the story with help from the original case file and discusses the outcome of the trial decision. I conclude by examining the aftermath of the case.

II. UNDESIRABLES: RACIAL MINORITIES AND FEMALE SEX WORKERS IN EARLY-TWENTIETH-CENTURY ALBERTA

Historically, Canada often sought to limit and discourage diversity both by limiting who was allowed to enter and remain in Canada, and by imposing cultural uniformity on the population.[19] Put simply, in the late nineteenth and early twentieth centuries, the federal government was trying to create a white nation (ideally a white *British* nation) and was quite open and explicit about that

16. Rachel K Bailie, "Minority of One: Violet King's Entry into the Legal Profession" (2012) 24:2 CJWL 301-27.
17. The Palliser being one of Calgary's most luxurious hotels. It is one of Canada's railway hotels having been commissioned by the Canadian Pacific Railway.
18. For further discussion of this case, see Backhouse, "Racial Segregation," *supra* note 3.
19. For Canada's racist immigration policies, see *e.g.* Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) 29:3 Osgoode Hall LJ 619; Isaac Shin Imai, *Canadian Immigration Law and Policy: 1867-1935* (LLM Thesis, York University, 1983) [unpublished]. For cultural uniformity, see *e.g.* Canada, Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Manitoba: Truth and Reconciliation Commission of Canada, 2015) at 1.

fact. The best-known examples of these attempts to create a white nation were the Chinese Head Tax and the Komagata Maru incident, both of which sought to limit or prevent non-white immigration to Canada.[20]

Such racist policies surrounding immigration to Canada were often supplemented by legislation restricting what ethnic minorities could do in Canada. Many provinces, for example, passed legislation preventing Chinese employers from hiring white women as employees.[21] Alberta was one of the few provinces without any "white women's labour laws," but this did not mean Alberta lacked the racism and sexism that gave rise to such laws.[22] In fact, a few years before other provinces enacted their anti-Chinese labour legislation, pressure from Alberta had led to a federal order-in-council that temporarily banned black emigration to Canada.[23] Alberta's pressure stemmed from the fact that between 1910 and 1912 it had been the recipient of a trickle of black emigration from parts of the United States, particularly Oklahoma.[24] As one of the daughters of those emigrants put it, they moved because they thought there would be more freedom in Canada.[25] That turned out not to be the case and, while there may not have been much in the way of explicit, legislative discrimination, many tacit policies, regulations, and practices enforced racial segregation in Alberta and elsewhere in Canada.[26]

In detailing the history of legally tolerated anti-black discrimination, Canadian legal historians have discussed how law and social practices operated

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20. Constance Backhouse, "Legal Discrimination Against the Chinese in Canada: The Historical Framework" in David Dyzenhaus & Mayo Moran, eds, *Calling Power to Account: Law, Reparations, and the Chinese Canadian Headtax Case* (Toronto: University of Toronto Press, 2005) 24; Hugh Johnston, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: UBC Press, 1989).
21. Constance Backhouse, "The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada" (1996) 14:2 Law & Hist Rev 315.
22. For an example of Albertan reluctance over the mixing of Chinese men and White Women see Mah Wing's attempt to apply for a marriage licence for his wedding to Janet Given, a White woman. See Belinda Crowson, "Ethnic diversity in Lethbridge's red light district 1880s to 1944" (2009) 57:4 Alberta History 2 at 6.
23. Dominique Clément & Renee Vaugeois, *The Search for Justice and Equality: Alberta's Human Rights History* (Edmonton: John Humphrey Centre for Peace and Human Rights, 2012) at 19.
24. *Ibid* at 18.
25. Interview of Gwen Hooks by Jennifer Kelly (May 2001) Interview Transcript, Alberta Labour History Institute at 2 [Hooks]. See also, Gwen Hooks, *The Keystone Legacy: Reflections of a Black Pioneer* (Edmonton: Brightest Pebble Publishing, 1997).
26. For an overview of this de facto segregation see Walker, "Law's Confirmation," *supra* note 8 at 246-58.

spatially to both create and enforce racial divides. Lyndsay Campbell uses the example of how Hamilton's Prince's Island became a proxy for race in a series of criminal trials in the 1850s.[27] She concludes that a connection to Prince's Island, rather than actual evidence of guilt, proved damning. This state of affairs was partially due to the characterization of this island as having "various markers of vice, including blackness and interracial sex."[28] In a similar vein, Eric Adams' study of *Christie* highlights its lessons about "the role of space and context … in conceptions of citizenship and community."[29] Adams' study, though emphasizing space, also tacitly acknowledges the temporal shifts in how Montreal's colour bar worked. By correcting the recorded facts—Christie was not attending a hockey game but a boxing match, and an interracial one at that, Adams highlights how questions of timing mattered in the operation of racial segregation in Montreal.[30]

Adams argues that the error over the hockey game resulted from Christie's lawyer's attempt to pitch Christie as being quintessentially Canadian and thus worthy of equal treatment. This observation echoes Constance Backhouse's work on Viola Desmond's case.[31] Desmond also challenged her exclusion from a particular public place—the lower floor of a movie theatre in New Glasgow, and Backhouse emphasizes how Desmond's demeanour challenged racist assumptions about black women.[32] As with *Christie*, Desmond's case offers an example of lawyers and activists picking a 'good' candidate or a 'good' story which lays bare the harm and exclusion of discrimination. Like Christie, Desmond failed in her attempt to challenge the cinema's discriminatory policy. Backhouse notes that Desmond was unaware of the cinema's policy because she had not grown up in New Glasgow and was thus oblivious to these unofficial rules. Adams echoes this point when he notes that in Montreal "the colour bar worked because it did not

27. Lyndsay Campbell, "'The Disorderly Conduct of a Few': Crime and Hamilton's Racial Geography in the Early 1850s" (2013) 28:3 CJLS 369 [Campbell, "Disorderly Conduct"]; Lyndsay Campbell, "Race and the Criminal Justice System in Canada West: Burglary and Murder in Hamilton, 1852-53" (2012) 37:2 Queen's LJ 477 [Campbell, "Race and the Criminal Justice System"].
28. Campbell, "Disorderly Conduct", *supra* note 27 at 384.
29. Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in Christie v York" (2012) 62:4 UTLJ 463 at 467 [Adams].
30. *Ibid*.
31. Constance Backhouse, "'Bitterly Disappointed' at the Spread of 'Colour-Bar Tactics': Viola Desmond's Challenge to Racial Segregation, Nova Scotia, 1946" in Nick Larsen & Brian Burtch, eds, *Law in Society: Canadian Readings* (Toronto: Nelson, 2010) 108; Backhouse, "Racial Segregation," *supra* note 3.
32. *Ibid* at 313-14.

have to," by which he means that everyone simply knew where the white-only bars were and where the black districts were.[33]

Historically, many Canadian cities had black districts and well-known policies of segregation in public spaces and facilities, even if these practices were not enshrined in law. When black patrons challenged their exclusion from certain buildings or sections of buildings, as Desmond and Christie did, the courts fell back on the idea of freedom of commerce.[34] Freedom of commerce and contract had the ability to maintain racial discrimination while denying its existence. Theatre owners, tavern keepers, salesmen, and employers could just as easily refuse a white person service or employment as they could a black person, so the argument went. Such an argument was never, as far as I am aware, supported by any evidence of a white person being denied a service or a job on the grounds of race.

Consequently, black Canadians were "caught between formal legal equality and deeply entrenched social and economic inequality."[35] In addition they were seen as being both "dangerous Others" and "pitiable colonized subjects in need of salvation."[36] As discussed below, these twin paradoxes were evident in *King* even though the white participants in the case seemed blind to them. Perhaps nowhere were these twin paradoxes more exemplified than in the arena of racial mixing, particularly in relation to sexual encounters between white women and black men but also in the context of whether white and black should mix in public spaces such as theatres and taverns. As *Christie* and *Desmond* make clear, these questions remained potent as late as the 1940s.

Although the courts refused to offer any legal protection when presented with allegations of racial discrimination, there is some evidence that people knew racial discrimination was wrong. In Alberta, for example, the Alberta Liquor Control Board (ALCB) had a policy against licensing hotels run by Chinese Canadians. That policy was not published in the Alberta Gazette, it did not form part of the official regulations of the Board, it was only ever referenced in correspondence, and it did not seem to be public knowledge.[37] The ALCB's anti-Chinese policy was based on racial stereotypes common at the time, namely that Chinese Canadians were somehow more immoral than white people, but

33. Adams, *supra* note 29 at 494.
34. Walker, "Law's Confirmation," *supra* note 9 at 251-52, 290-304. See also Backhouse, *Colour-Coded*, *supra* note 13 at 226-71.
35. Walker, *Race on Trial*, *supra* note 14 at 3.
36. *Ibid* at 20.
37. Letter from Dinning to George F Peek, Secretary of Spirit River (5 June 1924), Edmonton, Provincial Archives of Alberta (RG 74.412, file 2387).

also that they would be unable to control drunk white men.[38] Early in the board's tenure, the lawyer for one Chinese-Canadian hotelier specifically asked the ALCB if they had such a policy and they denied it.[39] The lawyer in question had a long history of representing Chinese Canadians and had been a regular opponent of the liquor administration. If anyone would have challenged the anti-Chinese policy it would have been him.[40] The board may have denied the existence of the policy, but it remained in place.

By way of contrast, the Alberta government defended the right of some Chinese Canadians to vote in the early part of the twentieth century. The question arose in 1923 as the province prepared for a vote over the future of prohibition. The right to vote was limited to British subjects and at least one person wrote to the government to ask whether a Chinese person born in Hong Kong who had never been naturalized would be allowed to vote. Acting Deputy Attorney General R.A. Smith replied that such a man was a British subject and "[l]ike any other British subject he is, in the absence of special statutory disqualification, entitled to the franchise."[41] Here, then, was an example of the law's colour blindness in the face of the population's racism.[42]

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38. APP Report, Spirit River Detachment (25 April 1927); ALCB Preventive Officer Stewart-Irvine to ALCB Commissioner (26 April 1927), Edmonton, Provincial Archives of Alberta (RG 74.12, file 2387). The idea that people of Chinese-descent were immoral was a common one across the English-speaking world in the early twentieth century. See generally Charles J McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); Erika Lee, "Enforcing the Borders: Chinese Exclusion Along the US Borders With Canada and Mexico, 1882-1924" (2002) 89:1 J Amer Hist 54; John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws" (1996) 3 Asian LJ 55. See also Kif Augustine-Adams, "Making Mexico: Legal Nationality, Chinese Race and the 1930 Population Census" (2009) 27:1 L & Hist Rev 113.
39. Letter from FG Forster, Supervisor of Licenses to J McKinley Cameron (30 April 1924); McKinley Cameron to ALCB (11 July 1924); McKinley Cameron to Lai Noon (17 July 1924), Calgary, Glenbow Alberta Institute Archives (RG M-6840, file 390).
40. For more on the lawyer in question see James H Gray, *Talk to my Lawyer! Great Stories of Southern Alberta's Bar and Bench* (Edmonton: Hurtig Publishers, 1987) ch 4.
41. Mrs P Ford to Smith (2 November 1923); Smith to Mrs P Ford (3 November 1923), Edmonton, Provincial Archives of Alberta (RG 75.126, file 3728). See also, Smith to Nielson (3 November 1923), Edmonton, Provincial Archives of Alberta (RG 75.126, file 3728). At the time of the unnamed man's birth Hong Kong was a British possession hence his entitlement to British subject status.
42. In other parts of Canada, Chinese and Japanese Canadians were denied the franchise on the grounds of race. See *e.g. Cunningham v Homma*, [1902] UKPC 60, [1903] 9 AC 151 (PC). Status Indians were also denied the franchise.

All of which is hardly anything new. Other scholars have pointed out the ways in which the Canadian desire to have a colour-blind law and to do justice to ethnic minorities could sometimes work in the minorities' favour.[43] Whether the law would or would not be magnanimous and work to defend or benefit racialized minorities was unpredictable and appeared to have only a limited connection to the opinions of the broader population. Racism was not always enshrined in statute—though there are ample Canadian examples of legally mandated racism—but nor did the law actively seek to prevent racism. There was certainly unease when racism was challenged, particularly in the first half of the twentieth century, but the law was not going to force people to behave better. Nor did the law seek to challenge the racist fears that motivated discrimination, particularly in the context of interracial sex.

In terms of sexual contact between black and white people, the primary concern was contact between white women and non-white men. In fact, in some parts of Canada a couple would only be considered mixed-race if the woman was white.[44] Black men were constructed as hyper-sexualized and almost unable to control their desires. The law and legal actors sought to protect white women from this imagined threat.[45] Cases of black men raping white women were rare but remained the leading example of the threat white society thought black men posed to white women.

Of course, not all white women were equally worthy of protection, and intersections of class and sexism could render some white women undeserving. Walker's study did not include any example of sex workers alleging rape, but he did discuss a case from the 1920s in which Frank Turner was alleged to have assaulted a fifteen-year-old white girl, Willa Arnold. Walker notes that because Arnold had got into Turner's car voluntarily, her claim to "respectable white womanhood" was potentially "in jeopardy" and thus she had to argue that she only got into the car because she was intimidated by Turner.[46] Black men may have been seen as a threat, but white women were expected to put up some sort of a defence of their own virtue and to behave appropriately.

For much of the late nineteenth and early twentieth centuries, sex workers were excluded from the class of women that could claim the law's protection.

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43. For more on this argument, see Walker, *Race on Trial, supra* note 14. But see, Campbell, "Disorderly Conduct," *supra* note 27.
44. Robert A Campbell, *Sit Down and Drink Your Beer: Regulating Vancouver's Beer Parlours, 1925-1954* (Toronto: University of Toronto Press, 2001) at 13.
45. This is made clear in Barrington Walker's case study from Ontario. See Walker, *Race on Trial, supra* note 14 at 116-183.
46. *Ibid* at 157-58.

Even where the law seemed designed to punish prostitutes and their clients equally, in practice prostitutes were charged at rates far higher than those of their clients.[47] Moreover, prostitution was a status crime and, once convicted, a woman was always viewed as suspect, even if she never worked in the sex trade again.[48] Fear of prostitution constituted a moral panic, as sex workers were portrayed as vectors of disease and threats to family life. Such an understanding saw prostitutes as preying on men, who would not be led astray if not for the presence of such women.

While sex workers could be found in streets and brothels, there has long been a symbiotic relationship between prostitution and hotels despite various initiatives to sever this relationship.[49] The American historian A.K. Sandoval-Strausz describes hotels as posing a particular sexual threat due to the ease with which courting couples could find a private room.[50] Such observations were equally applicable to Canada and to motels as well as hotels.

There is relatively little evidence of racial mixing in Alberta's hotels.[51] There are scattered references to non-white women, usually non-status Indigenous women, using Alberta's hotels. Law enforcement officials, either the police or the ALCB's hotel inspectors, tended to assume these women were prostitutes and, even where this turned out to be untrue, frowned upon their presence in licensed hotels.[52] The board did not want any woman convicted of prostitution or related

47. Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Osgoode Society for Canadian Legal History and Women's Press, 1991) at 237.
48. Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925* (Toronto: University of Toronto Press, 2008) at 78.
49. In Alberta, these efforts included circulating the names of known sex workers around urban hotels, such lists can be found in the ALCB's hotel files. These initiatives often involved the cooperation of the police, the ALCB, and the hotel and motel owners.
50. AK Sandoval-Strausz, *Hotel: An American History* (New Haven: Yale University Press, 2007) at 205, 211.
51. For a discussion from British Columbia see Renisa Mawani, "In Between and Out of Place: Racial Hybridity, Liquor, and the Law in Late 19th and Early 20th Century British Columbia" (2000) 15:2 CJLS 9. See also, Nancy M Forestell, "Bachelors, Boarding-Houses, and Blind Pigs: Gender Construction in a Multi-Ethnic Mining Camp, 1909-1920" in Franca Iacovetta, Paula Draper & Robert Ventresca, eds, *A Nation of Immigrants: Women, Workers, and Communities in Canadian History, 1840s-1960s* (Toronto: University of Toronto Press, 1998) 251.
52. See *e.g.* Letter to Dinning (20 October 1924), Edmonton, Provincial Archives of Alberta (RG 74.412, file 1114). Even where the board's inspectors did not explicitly call them prostitutes they tended to refer to them as being "of the lower type." See *e.g.* ALCB Inspector Kehoe to Supervisor of Licensees Forster, (19 April 1926), Edmonton, Provincial Archives of Alberta (RG 74.412, file 1131).

crimes anywhere near a licensed hotel, but some women were more likely to be suspected of prostitution even where there was no formal conviction. As with Campbell's observation about Prince's Island in Hamilton, given the kind of spaces licensed hotels and motels were, women who frequented them tended to be considered suspect until proven otherwise—doubly so if they were non-white.

There was a brief flurry of press and popular attention given to the issuance of a licence to Edmonton's Shiloh Club, which had a membership of sixty-two black people. The *Calgary Albertan* reported that 20 per cent of the club's membership had a criminal record and that the club was near a high school.[53] This club does not appear ever to have been licensed by the ALCB; instead, its licence seemed to come from Edmonton's Chief of Police. The *Edmonton Journal* reported that some beer rooms had made it clear that they did not want black men to drink there, leading at least one city council member to speak out against racially segregated drinking.[54] Such comments were apparently to no avail and, based on the oral history interviews of members of the AAACP, licensed premises continued to refuse access to black people well into the 1960s. These interviews suggest that such discriminatory practices were a recurring and unpredictable problem, rather than a consistent policy.[55] Much as was the case in all facets of life, black Albertans were formally equal but subject to the whims of gatekeepers, and the law often did not concern itself with these whims. It was against this backdrop that King brought his case against John Barclay.

III. THE DECISION AT TRIAL

Historically, inns had a duty to serve all comers so long as they had room. By the time *King* came to court, this old common law duty had been largely codified. The most significant codification in Alberta was in the *Liquor Control Act* and the regulations of the ALCB. Unlicensed hotels like Barclay's Motel were caught by the *Hotelkeepers Act,* which did little other than guarantee that hoteliers could seize and sell the personal property of guests who had failed to pay their bills.[56] In 1958, the *Hotelkeepers Act* was amended and renamed the *Innkeepers Act*. This Act defined an innkeeper as the "keeper of a hotel, motel, auto court, cabin or other

53. "Caused by Issuing License to Local Colored Club," *Calgary Albertan* (16 June 1925).
54. "Chief of Police Shute to be reinstated in Office; Mayor Agrees," *Edmonton Journal* (2 July 1925); "Council Reaffirms Stand in Reply to Letter from Commissioner RJ Dinning," *Edmonton Journal* (24 July 1924).
55. See Hooks, *supra* note 25; Williams, *supra* note 3.
56. *Hotelkeepers Act,* RSA 1922, c 106.

place or house who holds out that to the extent of his available accommodation he will provide lodging *and food* to any person who presents himself as a guest."[57] The necessity of providing both food and lodging proved fatal to King's case, because Barclay's had "no food of any kind … available for patrons."[58]

In theory, this fact alone should have been enough to dispose of the case. However, Judge Farthing of the Alberta District Court made several additional observations about the case. He stated that he was "not fully convinced" that King would have been refused accommodation had he really been a traveller.[59] Yet, he did not think it advisable to extend the definition of an inn to cover motels such as Barclay's, calling such a move "unwise and even dangerous."[60] He also cited *Christie* and noted that this case upheld complete freedom of commerce. The differences in *Christie* were that the York Tavern was simply a bar, not an inn, and at no stage did its owners deny that they refused to serve Fred Christie on the grounds of his race. As if to negate his reliance on *Christie*, Judge Farthing praised King in bringing the action, saying that he was "actuated by the best of motives and has done what he sincerely conceived to be his duty."[61] All of which suggests a certain unease with the racism alleged in the case.

The trial decision skirts the question of Lathrop and Harrington's presence in unit three. Judge Farthing noted their presence and little more—he did not even name them.[62] He also hemmed and hawed over whose version of events he found more persuasive. He assumed King's evidence to be "correct in fact," which meant he did not need to "decide credibility as between himself and defendant."[63] Yet, given that he thought his decision would be appealed, he felt the need to explain that Barclay had given his evidence with "less confidence than plaintiff, but this should not necessarily weigh conclusively against any witness."[64] Furthermore, he said that either party "may at times be honestly mistaken by misunderstanding or imperfect memory."[65] He seemed to want to side with King, but he also seemed to want to avoid calling Barclay a liar or a racist. Yet Judge Farthing was equally keen to avoid dealing with the questions raised by the presence of the two women in unit three. Happily, for Judge Farthing at least, the law was clear: King was

57. *An Act to amend the Hotelkeepers Act*, SA 1958, c 28, s 3 [emphasis added].
58. *King, supra* note 1 at para 10.
59. *Ibid* at para 16.
60. *Ibid* at para 17.
61. *Ibid* at para 32.
62. *Ibid* at paras 8-9.
63. *Ibid* at para 16.
64. *Ibid*.
65. *Ibid*.

not a traveller and Barclay's Motel was not an inn. Such technicalities allowed Judge Farthing to sidestep attempts by both lawyers to raise doubts about the respectability of each other's clients and their behaviour.

Walker's brief discussion of *King* notes that both at trial and on appeal, the bench criticized King for taking his story to the press.[66] These comments are based on an interview conducted with King and are not reflected in either of the decisions. According to Walker, the appellate justices resented attempts to use the courts to effect social change, while Judge Farthing was annoyed at the way "the case had been publicized by King's lawyer."[67] As such, Judge Farthing's objection to the media attention seems to echo his written attempts to maintain respectability; it is as though he viewed the publicity as unsporting.

IV. THE BIGGER PICTURE: THE ORIGINAL CASE FILE

Two days after Barclay refused King a room, an article about the incident appeared in the *Calgary Herald*.[68] Already, Barclay and his wife were denying King's take on events, calling them "pure lies." The *Herald* also spoke to representatives of the American Motor Association (AMA), the Calgary Motor Association, and the Better Business Bureau, in part because King planned to write letters of protest to these organizations. The responses of these organizations set the tone for the case that followed. The representatives of the two motor associations agreed that the more likely explanation for Barclay's refusal was that the two men were local, with the AMA noting that motels "turn down white people for the same reason," while the Calgary Motor Association commented that "[m]ost of the time local people only want the place for undesirable purposes."[69] Such comments invoke the nature of motels as the problem and suggest that the real problem was King's place of residence rather than his skin colour. The Better Business Bureau representative said it was not justified to refuse to deal with people on the basis of race, but that there were two sides to every story.[70] In short, the consensus was that racism was wrong, but there was probably no racism in this case. Such lofty denials of the alleged racism, and of racism more generally, are not borne out by the original case file. In this section, I use the information in the case file

66. Walker, "Law's Confirmation," *supra* note 9 at 299-300.
67. *Ibid* at 300.
68. "Motel Claims No Color Bar," *Calgary Herald* (15 May 1959) in Case File, *supra* note 2.
69. *Ibid.*
70. *Ibid.*

to unpack the racism in *King* and shed new light on the idiosyncrasies of the trial decision.[71]

The trial decision hints at the tactics of Barclay's defence. According to its version of Barclay's account of the evening in question, King was pushy and rude, while King's account describes the motel owner and his wife, who often acted as receptionist, as the ones who were rude. A similar characterization of the parties was seen in the judgments in *Christie*. Justice Davis' dissent portrays Christie as polite and accommodating while the majority's reasons describe him as demanding.[72] It should go without saying that the boundaries of acceptable behaviour differ when it comes to racialized people. What white people would have interpreted as assertiveness on the part of a white man could have been read as belligerence when done by a black man. If it was unacceptable to refuse King on the grounds of his race—and it is clear that it was generally considered unacceptable at the time—it would have been acceptable to refuse him if Barclay felt threatened by him, or if he was not in a fit state to be received. Not surprisingly, Barclay's defence set out to prove that King deserved to be refused.

Throughout his examination for discovery, Barclay comes across as being the more difficult party. Doubtless he was frustrated and embarrassed at having to appear in court and at not having his account of events accepted. He was, however, recalcitrant to the point of ridiculousness, claiming that he did not know whether he was the defendant or not, and denying "each and every allegation contained in the Plaintiff's Statement of Claim," including whether or not King even came to the motel.[73]

Nonetheless, Barclay admitted to having vacant accommodation when he refused King a room.[74] The problem for Barclay was that the two most convincing, non-racist explanations for his refusal were unavailable to him. The first good reason for refusal would have been King's Calgary licence plate. However, as the questions went on, it became clear that Barclay's Motel did not always deny accommodation to locals and that Barclay did not always ask locals *why* they wanted a room.[75] In other words, whether or not a person with a Calgary licence plate received a room was entirely discretionary, instead of being subject to a

71. The case file did not contain a transcript of the trial itself. I found no evidence as to whether Jim Pelley was called to testify.
72. Adams, *supra* note 29 at 470; *Christie*, *supra* note 9 at paras 141, 146.
73. Examination for Discovery of John Barclay (20 July 1959) [Barclay Discovery] in Case File, *supra* note 2 at 2.
74. *Ibid* at 4.
75. *Ibid* at 26.

clearly defined procedure. As such, the issue of why Barclay refused King a room looped back to the allegation of racism.

Barclay's second potentially convincing reason for refusing King a room threatened to make Barclay look just as bad as did the allegation of racism. The second possible excuse would have centred on unit three of the motel and the unfortunate presence of the two women. According to Barclay, the presence of these women in unit three was an accident. Prostitution and Alberta's hotels and motels may have had a close association, but it was always strictly unofficial, and Barclay could not admit to knowing or suspecting that these women were prostitutes, prior to Detective Gray's visit.

Barclay's story with respect to these women was not as compelling as he tried to make it seem. He noted that it was the motel's policy never to accept reservations from people without their own car. On the day that the two women arrived, however, Barclay's daughter-in-law checked them in. She apparently forgot to ask if they had their own car, and allowed them to stay even though they arrived in a taxi.[76] The behaviour of the two women had also raised the suspicions of one of the maids who had reported "coloured people hanging around these [women]."[77] These "coloured people" were not registered guests and the motel did not seem to have any other record of them.[78] In short, the two women had caused some concern and behaved in a manner that only the most naïve of motel owners could have misinterpreted.

The exact date of Detective Gray's visit, when he urged the eviction of the two women, was unclear. Barclay claimed that the police visited motels every day, which may explain the lack of clarity over the exact date.[79] Gray's own notes did not shed any light on the matter, but Barclay thought it was the same day as King's call.[80] If so, Barclay allowed these two women to stay another night and did not ask them to leave immediately. The motel's own records show that the "two Air Force wives," as these women styled themselves, stayed at the motel from 30 April to 14 May.[81] Yet, according to Barclay, King's misfortune was to ask about unit three, because "[a]nything that day connecting or having anything to

76. *Ibid* at 21.
77. *Ibid* at 22.
78. *Ibid*.
79. *Ibid*.
80. *Ibid* at 23. For the discrepancy in Gray's notes see *King, supra* note 1 at para 9.
81. For the registration cards, see Case File, *supra* note 2.

do with Unit Three was distasteful to us."[82] He even claimed that had King asked about a different room, he would have been given one.[83]

The argument that Barclay was trying to make was that King wanted to visit these two women rather than his friend, or at least that Barclay *thought* King was trying to visit these women. If that was the case, then Barclay would have been entirely justified in his refusal. For this argument to work in Barclay's favour, he had to have only just found out the truth about the women in unit three; he could not admit to having known that they were women of ill repute before Detective Gray told him. It is possible that Barclay's story about the women in unit three was true and that he did not know they were "phonies" (to borrow the term hand-written on their registration card), but it is highly unlikely given Barclay's own account of their behaviour.[84] King's lawyer did not pursue the inconsistencies in Barclay's story, which was probably to Barclay's relief. After all, for a motel owner to admit to tolerating prostitution would have been just as bad as, and certainly more questionably legal than, admitting to racism.

Yet Barclay insisted that he was not racist and that other black people had stayed at his motel. The incident with King appeared to prompt a change in the motel's practices, which led Barclay to note the race of guests on their registration cards or at least to write "coloured" on the registration cards of black guests.[85] Two such cards are enclosed in the original case file and the word "coloured" is clearly written in a different shade of blue than the other information on the card, suggesting it was added at a later date. Only one of the cards clearly indicates the year—1957—two years prior to King's visit.[86] Finally, the cards also note that the guests in question were all from the USA, specifically California and Montana. The fact that Barclay thought adding "coloured" would be sufficient evidence of his racial tolerance speaks volumes about race relations in mid-century Alberta. It does not appear that Barclay or his lawyer ever attempted to track down the

82. Barclay Discovery, *supra* note 73 at 24
83. *Ibid* at 29.
84. Case File, *supra* note 2.
85. *Ibid* at 34.
86. That being said, based on the format of the California licence plate it cannot have been earlier than 1956 as it was in that year that California adopted the 'ABC 123' format noted on the registration card. Channing Sargent, "The Colorful History of California License Plates" *Los Angeles Magazine* (18 June 2014), online: <www.lamag.com/driver/the-colorful-history-of-california-license-plates>.

former guests, nor is there any record of other motel staff being interviewed to support the racial diversity of the motel's guests.[87]

Barclay then asserted that he and his wife "help the colored people."[88] It is not clear what he meant by this statement, other than to demonstrate that he was not racist. Here, Barclay invoked the idea that black people were to be pitied and saved at the same time as he invoked the idea of the "dangerous Other" to describe King (whom he claimed was rude)[89] and those "colored people" who lurked around unit three.[90] In short, even as he denied being racist, Barclay invoked racist tropes.

What complicated this picture both in terms of King's behaviour and the insinuations about his true purpose in visiting the motel was that Barclay knew who King was. Barclay's daughter had gone to school with King's sister, Violet, who was the first black woman to be admitted to the Alberta Bar.[91] When asked if he knew that King was married with children, Barclay replied that he had heard of it. King's lawyer then asked, "And did you think that he was the type of man who had come to visit two white women who you knew them to be of bad character?"[92] In reply, Barclay repeated the connection to unit three as if to suggest that the problem was the unit King had asked about. Here we see the linking of particular places and times with problems, rather than an admission that the real issue was one of race.[93] Somewhat ironically, Palmer's question was itself racist, given that it implied only a certain type of black man would visit white women of bad character. Palmer may have been trying to show that Barclay knew King to be a respectable man, but he implicitly suggested that such interracial mixing would be inappropriate.

Barclay's insinuations about the real purpose of King's visit posed just as much of a problem for King as they did for Barclay. King's lawyer clearly tried to refute these implications by showing that Barclay knew King and knew him to be respectable. It is not clear why Palmer felt the need to identify the race of the two women in unit three. Perhaps he was trying to show that Barclay's real

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87. The trial decision does quote the evidence of Florence Jensen who worked at the motel to support the argument that the motel's policy was to refuse Calgarians rather than to refuse accommodation on other grounds. *King*, *supra* note 1 at para 12. Jensen's evidence is not included in the case file.
88. Barclay Discovery, *supra* note 73 at 39-40.
89. *Ibid* at 18.
90. For the source of this paradox, see Walker, *Race on Trial*, *supra* note 14 at 20.
91. *Ibid* at 28. For more on Violet King, see Bailie, *supra* note 16.
92. Barclay Discovery, *supra* note 73 at 29.
93. Compare Campbell, "Disorderly Conduct," *supra* note 27.

objection was to interracial sex, but seeing as the white women in question were likely prostitutes, their race hardly mattered; any sex offered by prostitutes would have been unacceptable and any upstanding motel owner would have sought to prevent prostitution from occurring on the premises.

Not surprisingly, Palmer opted against pressing the issue with respect to the women in unit three and moved back to King's behaviour. Barclay noted that King was "well dressed" but could not tell whether King was drunk or not.[94] Palmer's tactic was obvious, to paint his client as a well-dressed, respectable, sober, and polite man asking for a room. Again, Palmer's tactic may have misfired here as Mojo Williams' account of racism a few years later makes clear. Some years after the events in *King*, Williams investigated an incident in which black men were refused entry to an Alberta nightclub. The nightclub's manager assumed that since the men were well dressed, they must be pimps, as he thought that only black men who were pimps could afford to dress well.[95] Barclay did not make a similar statement in his examination for discovery, but had King been poorly dressed that would not have helped his case either. King's dress could have been used against him no matter what he wore; the real objection was his skin colour.

King's examination for discovery was much shorter and focused on his allegation of racism. King observed that there were "[q]uite a few" discriminatory acts in Calgary but declined to name any.[96] He said that Barclay's racist outburst had caught him by surprise as all he was trying to do was check whether his friend Jim was in the motel.[97] King also said he had called Barclay's only because another friend thought Jim lived there.[98]

Echoing Barclay's answers, R.G. Couch, Barclay's lawyer, sought to show that King deserved to be refused a room. Couch's first tactic was to try to get King to admit to being angry. King may have gone to visit Barclay's on the same night as the phone call, but he found time to eat dinner at home beforehand, suggesting a measured decision to visit.[99] King also claimed that he brought Bailey along as a witness, further suggesting that the visit was thought out rather than being

94. Barclay Discovery, *supra* note 73.
95. Williams, *supra* note 3 at 17-18.
96. King Discovery, *supra* note 2.
97. *Ibid* at 6.
98. *Ibid.*
99. *Ibid* at 7.

prompted by anger or a desire to intimidate.[100] Couch then directly asked King if he had been angry, to which King replied that he had been annoyed but not angry. King said he just wanted to know why Barclay was discriminating against black people. "I found many times in the past," he said, "that people have what they think [are] good reasons for not wanting coloured people in their places, but they can't seem to get through their heads is that what one person does the rest of the people don't."[101]

With anger unlikely, Couch went on to ask King if he had been drinking, to which he responded "I don't drink at all."[102] Couch, however, had one further line of questioning:

> Q: How big is Mr. Barclay?
> A: How big is he?
> Q: Yes?
> A: Well, I wouldn't say that he is a large man, I would say he is a rather small man.
> Q: In comparison with you?
> A: Yes, in comparison with me he would be, he is about the same higt [sic], but I imagine he is quite slender.[103]

King appeared slightly thrown by the question, but Couch's intent was clear. He was trying to insinuate that Barclay felt threatened. Couch also asked about Bailey's reaction to Barclay's comment, to which King said "Well, it's like this, I don't think either he or I are surprised at the statements when they come out. I mean I have run into too many of them, that's the reason I don't get surprised."[104] According to King, the only angry person was Barclay.[105]

Couch's attempt to portray King as being drunk, angry, or otherwise threatening failed, but he did score one crucial victory. King asserted that if he had been given a room at Barclay's he would have spent the night there, but he also admitted that he was not inconvenienced by the refusal.[106] It was this

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100. *Ibid* at 8-9. It is not clear whether Harvey Bailey was the same Harvey Bailey who had found some success as a boxer but it at the very least it is reasonable to conclude that they were related. For the boxer, see Karen L Wall, *Game Plan: A Social History of Sport in Alberta* (Edmonton: University of Alberta Press, 2012) at 210. See also, the archived website of Alberta's Black Pioneer Heritage, Alberta Source: <http://wayback.archive-it.org/2217/20101208162324/http://www.albertasource.ca/blackpioneers/people/bailey.html>.
101. King Discovery, *supra* note 2 at 10.
102. *Ibid* at 11.
103. *Ibid* at 12.
104. *Ibid* at 14.
105. *Ibid* at 16.
106. *Ibid* at 12.

concession that would ultimately win the case: even if Couch's client was racist, King was not a traveller.

Regardless, King's comments about the frequency of racist sentiment are in stark contrast to both Barclay's account and the statements of the organizations quoted in the newspapers. For the white people who were involved in or who commented on this case at the time, racist discrimination was both wrong and non-existent. They had never even heard of anyone being refused service on the grounds of race, despite it being common enough that black Calgarians like King were not even surprised by it. The ignorance of white commentators is hardly surprising. At the time, the black population of Calgary was small, and it is doubtful that any of the commentators actually knew any black people, or if they did, they perhaps did not know them well enough to be familiar with the racism they faced. Accordingly, King offers yet another example of the "long tradition of unfamiliarity with the experiences of Blacks in colonial and post-Confederation Canada."[107] By agreeing that racism was wrong and that they had never heard of such a complaint as King's, white commentators removed themselves from any responsibility for such racist incidents. Racism was something they could not imagine because they did not have to.

It is telling that the first instinct of the white commentators was to cast doubt on whether or not there had been any racism. Rather than listen to King's account, they agreed that the real reason he was refused was the fact that he was a Calgarian. This was not just a silencing; it was a corrective and a subtle attack on King's request for equal treatment. By saying that a white person would have been refused as well, the white commentators in the *Herald* implied that a claim for equal treatment was a claim for *special* treatment.

The question of racism and the awkward fact of the women of poor character in unit three apparently made this a difficult case to decide. Judge Farthing seemed to be at pains to avoid two unpalatable conclusions. The first was finding that Barclay was racist; the second was finding, or strongly implying, that King, a married man, was visiting prostitutes, which also would have implied that Barclay had tolerated prostitution on his premises. Both of these findings would have cast doubt on the respectability of the two men in question. Even if Judge Farthing had found Barclay to be racist, the law did not offer any real remedies as motels were not inns and, even if they were, King was not a traveller.

In a sense, the trial decision can be seen as an attempt to allow both parties to save face. On the one hand, Judge Farthing noted that he found King's version to be more persuasive, without explicitly calling Barclay racist. On the other,

107. Walker, *Race on Trial*, *supra* note 14 at 4.

he noted that King had not actually suffered because he was not a traveller and the entire visit to the motel was a misunderstanding. Judge Farthing's decision left out the detail about King specifically calling the motel under the belief that his friend was there, and made it seem as though King was calling or planned to call a number of motels. It is not clear why this detail was omitted, but it made the whole affair seem coincidental. In a sense both men had done the right thing: King by investigating on behalf of travellers, and Barclay by refusing to rent a room to locals. Perhaps because he was not convinced King would have been refused had he actually been a traveller,[108] Judge Farthing was not willing to impose a general duty of fair accommodation without legislation explicitly mandating it, as was the case in Ontario.[109] Like the commentators quoted by the *Herald*, Judge Farthing could not quite believe in racism and so did not see the need for protections against it.

In short, for the law and for Judge Farthing, the facts in *King* were not well suited to the goal King was hoping to advance. Yet *King* should not be viewed as a complete failure in its attempt to challenge racism. It was unfortunate that unit three of Barclay's Motel was occupied by the "phonies" known to police. Perhaps the outcome would have been different had the room been empty or occupied by someone else, or perhaps not. Nonetheless, *King* highlighted a technicality in the law that could be used as a legal loophole for discrimination. Judge Farthing and the Appellate Justices who upheld his decision may not have been willing to change the law, but the legislature was, and in 1961 it passed an amendment to the *Innkeepers Act* striking out the requirement that an innkeeper offer food.[110] This amending act also added section 10 to the *Innkeepers Act*, which made causing or tolerating disturbances (fighting, screaming, and loud noises) an offence.[111] It is not clear that section 10 was linked with *King*, but it does suggest that hotels and motels were having some trouble with difficult guests. Such behaviour had long been illegal in licensed hotels, and in 1961 it was explicitly extended to unlicensed hotels. If, as Barclay claimed, the police visited motels every day, section 10 gave them the legal coercion needed to punish motel keepers as well as the perpetrators of such disturbances.

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108. *King*, *supra* note 1 at para 16.
109. *Ibid* at para 25; *Fair Accommodation Practices Act*, SO 1954, c 28.
110. *An Act Respecting Hotelkeepers*, RSA 1955, c 148, s 1(a) as amended by SA 1961, c 40, s 2 (note that s 1(a) was itself added by SA 1958, c 28, s 3).
111. *Ibid*, s 3.

V. CONCLUSION

Although *King* offers an example of racism and the law's apparent tolerance of it in Canada, the actual racism in the case is subtler than is usually acknowledged. Contrary to *Christie* there was no admission that the establishment had a racist policy—in fact, the accusation of racism was strongly denied by almost all white participants and contemporary commentators on the case. Somewhat ironically, the denial of racism and the ready acceptance of an alternate explanation were racist in themselves, along with the apparent discomfort of Barclay with what he seemed to assume was the potential for interracial sex. Even if the events that precipitated *King* were all a misunderstanding, this fact did not and does not excuse Barclay's couching his refusal in racist terms. Nor does it excuse the ready denials of racism seen in and around *King*. King's account, and the accounts of other black Albertans about the 1950s and 60s, make it clear that racism was common.

It would seem that *King* was the only court case the AAACP pursued. Mojo Williams' account of his time as Grievance Chair suggests that he preferred a more informal approach that involved talking to the person accused of discrimination and figuring out what went wrong. In addition, Williams did not hesitate to call in the liquor board or the head office to put pressure on local establishments that refused service on the grounds of race.[112] According to Williams' account, the AAACP petered out as people grew more complacent and as they got the legal guarantees that would finally allow recourse through the courts.[113] In the years following *King*, not only did the legislature strip the technicality from the *Innkeepers Act*, but other provincial groups such as the Alberta Federation of Labour organized anti-discrimination drives,[114] and in 1966 Alberta enacted its first, if ineffective, *Human Rights Act*.[115] Alberta also became "one of the first jurisdictions to make its human rights law paramount over other provincial laws," following the election of the Progressive Conservatives in 1971.[116]

When *King* is cited, it is cited because of its "we don't allow coloured people here" statement, but as I have shown, this is only part of the story.[117] *King* contains a subtler racism and a commentary about respectability in mid-twentieth-century

112. Williams, *supra* note 3 at 5.
113. *Ibid* at 9.
114. Clément & Vaugeois, *supra* note 23 at 20.
115. Dominque Clément, "Alberta's Rights Revolution" (2013) 26:1 Brit J Can Studies 59 at 62.
116. *Ibid* at 66.
117. *King*, *supra* note 1 at para 2.

Alberta. That both King and Barclay stood to lose face from the allegations each explicitly or implicitly made about the other helps explain Judge Farthing's comments effectively commending both men for their behavior. In so doing, however, Judge Farthing glossed over King's belief that his friend did live at Barclay's Motel, and Barclay's allowing Lathrop and Harrington to stay for two weeks. The particular space of Barclay's Motel and King's apparently unfortunate timing were thus also missed.

Unwittingly, Judge Farthing reinforced the subtler racism in the case: namely, the eagerness to explain what had really happened despite King's insistence that he had suffered racial discrimination. King was careful to bring his friend Bailey along to the motel for the express purposes of having a witness.[118] It is perhaps ironic, then, that Bailey never appears to have been called to testify. Then again, Bailey was hardly a neutral third party in the case; he was a black man and a friend of King's, which would have made his account easy to dismiss. As it was, King's own account was easily dismissed, not just because white people did not believe he had really suffered racism, but because there were two women in Barclay's Motel whose presence was the exact reason any local was supposed to be refused access. That Barclay only seemed to object to black men trying to access these women—both in his comments about what the maid saw and in his misunderstanding of King's request—suggests that his objection to these women might not have been that they were prostitutes but that their clients were black men. I am, however, reluctant to belabour the role of Lathrop and Harrington in *King*. King's account of the night in question makes no reference to these two women. Nor was he asked directly about these women. It is entirely possible that their coincidental occupation of unit three offered an after-the-fact excuse for Barclay's refusal to grant King a room. As excuses went, however, the women were a double-edged sword and the lawyers for both parties tiptoed around their presence.

Judge Farthing also avoided a full discussion of Lathrop and Harrington, to say nothing of his handling of the alleged racism. He may not have been convinced that Barclay would have refused King a room had he really been a traveller, but the question Judge Farthing declined to ask was: What would have happened had King been white? Legal technicalities may have rendered the latter question moot for the courts, but the 1961 legislative amendments suggest that the answer may have been that King would have gotten a room.

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118. King Discovery, *supra* note 2 at 9.