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Black Voices Matter Too: Counter-Narrating Smithers v The Queen

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Abstract

This article presents a legal history and counter-narrative of the Supreme Court of Canada's unanimous 1977 decision in *Smithers v The Queen*. *Smithers* is a criminal law case that focused largely on the issue of causation and is likely taught in most if not all Canadian law faculties annually. The case arose out of a fight following a midget league hockey game where one of the combatants died. In constructing its brief narrative of the facts, the Court understated drastically the racial dynamics that were in play during the game which prompted Paul Smithers, a Black and White biracial teenager to confront Barrie Cobby, who was White, and his primary racial antagonist. In framing its narrative, the Court caricatured Smithers as a Black aggressor preying on Cobby.

Drawing from critical race theory, this article advances a detailed counter-narrative challenging the Court's official account which ignored Paul Smithers' experiences and interpretation of events leading to Cobby's death. The article relies on primary sources such as the original trial transcripts including Smithers' testimony and those of defence witnesses. It also draws on the parties' factums and newspaper articles published contemporaneous to the original trial, in addition to those published as the case was being appealed. Such news articles include interviews with key witnesses like Smithers and other individuals which provide added insights on what transpired. Despite the racialized dynamics located within the decision, it has been overlooked in various Canadian legal histories centered on race. Thus, the article seeks to fill a gap in the scholarly literature on race and Canadian legal history. Through a broader historical account offered in this study, one learns not only about the intentional omissions in the Court's narrative in a racially polarized case, but that its construction of events and of the accused, effectively and implicitly advanced a white supremacist account of what took place. In addition to scrutinizing the Court's narrative, this study examines how Crown prosecutors minimized the role of racism within the case and its impact on Smithers. Lastly, this article emphasizes how racial bias may have played a role in one of the juror's decision-making, rendering Smithers' conviction suspect.

Keywords

Canadian legal history, race, racism, Smithers, counter-narrative, critical race theory, hockey, Toronto

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Cover Page Footnote

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The author expresses gratitude to the external reviewers, and the feedback he has received from numerous generous individuals on earlier drafts of this paper, including (in alphabetical order): David Asper, John Irvine, Richard Jochelson, Gerard Kennedy, Joshua Sealy-Harrington, and Virginia Torrie.

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Amar Khoday[*]

Abstract

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Drawing from critical race theory, this article advances a detailed counter-narrative challenging the Court's official account which ignored Paul Smithers' experiences and interpretation of events leading to Cobby's death. The article relies on primary sources such as the original trial transcripts including Smithers' testimony and those of defence witnesses. It also draws on the parties' factums and newspaper articles published contemporaneously with the original trial, in addition to those published as the case was being appealed. Such news articles include interviews with key witnesses like Smithers and other individuals, which provide added insights on what transpired. Despite the racialized dynamics located within the decision, it has been overlooked in various Canadian legal histories centered on race. Thus, the article seeks to fill a gap in the scholarly literature on race and Canadian legal history. Through a broader historical account offered in this study, one learns not only about the intentional omissions in the Court's narrative in a racially polarized case, but that its construction of events and of the accused effectively and implicitly advanced a white supremacist account of what took place. In addition to scrutinizing the Court's narrative, this study examines how Crown prosecutors minimized the role of racism within the case and its impact on Smithers. Lastly, this article emphasizes how racial bias may have played a role in one of the juror's decision-making, rendering Smithers' conviction suspect.

Racial violence against Black people[1] has been a persistent problem in North America and elsewhere for centuries. Though such racial violence was already well-known among Black

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[*] Associate Professor, Faculty of Law, University of Manitoba. The author expresses his gratitude to the external reviewers, and for the generous feedback he has received from numerous individuals on earlier drafts of this paper, including (in alphabetical order): David Asper, John Irvine, Richard Jochelson, Gerard Kennedy, Joshua Sealy-Harrington, and Virginia Torrie. The author is also grateful to Matthew Renaud of the E.K. Williams Law Library at the University of Manitoba, Eric Earhart of the University of Iowa Law library, and staff at the Supreme Court of Canada's Record Centre for their helpful assistance in obtaining copies of official documents that were indispensable to the writing of this article. The author thanks the editorial staff of the Osgoode Hall Law Journal for their detailed work in improving the article and preparing it for publication.

[1] Though I use the term "people" here, I recognize that this singularity can often obscure the diverse experiences and identities that individuals within a notional group or community might have, for example, with respect to gender, sexual orientation, socio-economic status, disability, age, language, national origins, or other characteristics. Yet, when it comes to racism in North America and elsewhere, this discrimination is arguably a common aspect that most

communities—given their lived experiences—over the past decade there has been a renewed sense of urgency to confront the unwarranted state and non-state violence inflicted on such communities. This reinvigorated consciousness has given rise to the Black Lives Matter movement, which was started in the United States and has spread well beyond its borders.[2] The 25 May 2020 police murder of George Floyd, a Black man in Minnesota, has, in particular, inspired an upsurge in public protests in the United States.[3] Not forgotten, however, are the many prior and subsequent homicides or acts of aggression perpetrated by police officers across the country. The protests have expanded beyond the United States and emerged in countries, such as Canada, that have their own very troubled histories of racial violence against Black people, Indigenous people, and people of colour.

This broader and more sensitive awareness has been partly due, in no insignificant measure, to various video recordings capturing lethal or otherwise brutal police conduct toward Black lives.[4] Such striking visual evidence and the proliferation of protests seem to have motivated responses from various public officials and institutions, however belated, to recognize systemic racism in their midst. For example, in a noteworthy letter issued by the Washington Supreme Court to members of the state judiciary and legal profession, the justices provided several significant acknowledgments concerning systemic discrimination against Black people.[5] Writing collectively, the justices asserted, "The devaluation and degradation of [B]lack lives is not a recent event. It is a persistent and systemic injustice that predates this nation's founding."[6] The court rooted the injustice plaguing the country in "the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all."[7] Assuming responsibility for its own institutional contribution to such actions, the court posited, "As judges, we must recognize the role we have played in devaluing [B]lack lives."[8] While recognizing the inability to turn back time, they affirmed, "We can develop a greater awareness of our own conscious and unconscious biases in order to make just decisions in individual cases."[9]

Black people as well as Indigenous people and people of colour face, regardless of other identities. That said, the experience of racism may intersect with other identities.

[2] See Garrett Chase, "The Early History of the Black Lives Matter Movement, and the Implications Thereof" (2018) 18 Nev LJ 1091.

[3] See Derrick Bryson Taylor, "George Floyd Protests: A Timeline," The New York Times (28 March 2021), online: <www.nytimes.com/article/george-floyd-protests-timeline.html>; Helier Cheung, "George Floyd Death: Why US Protests Are So Powerful This Time," BBC News (8 June 2020), online: <www.bbc.com/news/world-us-canada-52969905>; Jason Silverstein, "The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World" (4 June 2021), online: *CBS News* <www.cbsnews.com/news/george-floyd-black-lives-matter-impact>.

[4] See Nicol Turner Lee, "Where Would Racial Progress in Policing Be Without Camera Phones" (5 June 2020), online: *Brookings* <www.brookings.edu/blog/fixgov/2020/06/05/where-would-racial-progress-in-policing-be-without-camera-phones>; "Black Lives Upended By Policing: The Raw Videos Sparking Outrage," *The New York Times* (19 April 2018), online: <www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html>.

[5] Letter from the Supreme Court, State of Washington, to Members of the Judiciary and the Legal Community (4 June 2020), online (pdf): <www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

The Washington Supreme Court's admission of its own participation in devaluing Black lives should inspire the judiciary in other jurisdictions to reflect on their own past and present conduct. There are lessons to be learned from our legal pasts. Correspondingly, legal scholars and historians can play an important function in researching when, why, and how such judicial devaluations have transpired. These lessons may be instructive for courts, the practicing bar, and those teaching and learning within the legal academy and cognate disciplines. Interrogating past decisions is also important where the judicial depreciation of Black lives may neither be especially obvious from reading a particular decision nor necessarily reflected in the outcome. Needless to say, racism has been a persistent scourge affecting countless societies, including Canada's. Despite refusals by many, including some political figures, Canadian courts have recognized valid and tangible concerns about systemic racism within the country.[10] Various scholars have documented Canada's long-standing and endemic racism towards Black people, Indigenous people, and people of colour.[11] Despite such valuable contributions, there continues to be ample room for more academic engagement with our legal histories and the involvement that racism and racists have played in them. One need not go back too far in time. Objects in our historical mirror may be closer than they appear.

In this vein, and drawing from critical race theory, this article will examine the factual and racialized context of *Smithers v The Queen* (*Smithers*), a unanimous 1977 Supreme Court of Canada decision authored by Justice Brian Dickson (as he then was).[12] During a 1974 trial, an all-white jury convicted Paul Douglas Smithers of unlawful act manslaughter in connection with the death of Barrie Ross Cobby. Smithers is the son of a Black father and white mother (Donald and Joyce Smithers). Though Smithers is biracial, the Court identified him as Black, and certainly he was verbally and physically attacked because of his Blackness. Cobby was white and the son of two British-born immigrant parents (Leonard and Brenda Cobby). Smithers and Cobby were both sixteen years old at the time of Cobby's death. The case is read annually in criminal law courses across Canada as part of a suite of judgments that illustrate, among other things, the legal standard for proving legal causation in homicide cases.[13] In undertaking a legal history of this decision, my goal will be to excavate the traumatic racial violence perpetrated against Smithers by various actors, including the deceased. When one reads the Court's interpretation of the facts from the case and the decision as a whole, one might be forgiven for

[10] See *R v Williams*, [1998] 1 SCR 1128; *R v Parks* (1993), 84 CCC (3d) 353 (Ont CA) [*Parks*]; *R v Morris*, 2018 ONSC 5186; *R v Jackson*, 2018 ONSC 2527; *R v Le*, 2019 SCC 34. However, such recognition has not always been consistent, and courts have not been as attentive to concerns about race as they should have. See David M Tanovich, "The Charter of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008) 40 SCLR (2d) 655; Amar Khoday, "Ending the Erasure?: Writing Race into the Story of Psychological Detentions–Examining *R. v. Le*" (2021) 100 SCLR (2d) 165 at 169-72.

[11] For examples of such scholarship, see Eric M Adams, "Errors of Fact and Law: Race, Space, and Hockey in *Christie v York*" (2012) 62 UTLJ 463; Constance Backhouse, *Colour-Coded*: *A Legal History of Racism in Canada 1900–1950* (University of Toronto Press for the Osgoode Society for Canadian Legal History, 1999) [Backhouse, *Colour-Coded*]; Robyn Maynard, *Policing Black Lives: State Violence in Canada From Slavery to the Present* (Fernwood, 2017); Clayton James Mosher, *Discrimination and Denial: Systemic Racism in Ontario's Legal and Criminal Justice Systems*, *1892–1961* (University of Toronto Press, 1998); Esmeralda MA Thornhill, "So Seldom For Us, So Often Against Us: Blacks and Law in Canada" (2008) 38 J Black Studies 321; Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts*, *1858–1958* (University of Toronto Press for the Osgoode Society for Canadian Legal History, 2010); James W St G Walker, *"Race," Rights and the Law in the Supreme Court of Canada: Historical Case Studies* (The Osgoode Society for Canadian Legal History & Wilfred Laurier University Press, 1997).

[12] [1978] 1 SCR 506 [*Smithers*].

[13] See *R v Harbottle*, [1993] 3 SCR 306; *R v Nette*, 2001 SCC 78; *R v Maybin*, 2012 SCC 24.

failing to notice or remember the role that racism played in the events leading to Cobby's death. For this, I argue, the Court bears significant responsibility.

In order to situate the reader, I furnish the facts as presented in the decision now. I later provide a counter-narrative and legal history that challenges this account. The portion that follows the ellipses in the passage quoted below appears later in the decision (in connection with the Court's dismissal of the claim of self-defence), but it provides critical insight into the Court's perception of what took place and its construction of Smithers and Cobby as participants:

> On February 18, 1973 a hockey game was played between the Applewood Midget Team and the Cooksville Midget Team at the Cawthra Park Arena in the Town of Mississauga. The leading player on the Applewood team was the deceased, Barrie Cobby, sixteen years of age; the leading player on the Cooksville team was the appellant. The game was rough, the players were aggressive and feelings ran high. The appellant, who is black, was subjected to racial insults by Cobby and other members of the Applewood team. Following a heated and abusive exchange of profanities, the appellant and Cobby were both ejected from the game. The appellant made repeated threats that he was going to "get" Cobby. Cobby was very apprehensive and left the arena at the end of the game, some forty-five minutes later, accompanied by eight or ten persons including friends, players, his coach and the team's manager. The appellant repeated his threats and challenges to fight as the group departed. Cobby did not take up the challenge. Instead, he hurried toward a waiting car. The appellant caught up with him at the bottom of the outside steps and directed one or two punches to Cobby's head. Several of Cobby's team mates grabbed the appellant and held him. Cobby, who had taken no steps to defend himself, was observed to double up and stand back while the appellant struggled to free himself from those holding him. While Cobby was thus bent over, and approximately two to four feet from the appellant, the appellant delivered what was described as a hard, fast kick to Cobby's stomach area. Only seconds elapsed between the punching and the kick. Following the kick, Cobby groaned, staggered towards his car, fell to the ground on his back, and gasped for air. Within five minutes he appeared to stop breathing. He was dead upon arrival at the Mississauga General Hospital.
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> …
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> Although undoubtedly much upset by the actions and language of Cobby during the first ten minutes of play, thereafter the appellant alone was the aggressor. He relentlessly pursued Cobby some forty-five minutes later for the purpose of carrying out his threats to "get" Cobby.[14]

In this article, I shall demonstrate that the *Smithers* decision presented a rather succinct, but altogether uncomplicated and largely one-sided narrative regarding what transpired, including the fight that led to Cobby's untimely death. As can be understood from the excerpt above, the Court acknowledged only once in its judgment, and summarily, that Smithers was subjected to racial insults. In doing so, the Court drastically understated and omitted the significant role that racism played in provoking Smithers to confront Cobby. This is striking, especially given that *Smithers* is a decision that focuses notionally on the theme of causation. To the extent that the Court even barely recognized the racism to which Smithers was subjected, this reality was functionally offset by its construction of Smithers and the broader narrative. Through its interpretation of what transpired and, just as critically, its omissions from that story, the Court painted Smithers as a Black "aggressor" who stalked his (white) prey for some forty-five minutes. It is Cobby who is portrayed effectively as the sympathetic, youthful, white victim who purportedly sought to avoid a physical confrontation but was relentlessly pursued by an incensed Black male: Smithers.

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[14] *Smithers*, *supra* note 12 at 508-509, 522.

Through this article, I shall argue that issues of race permeated various aspects of the *Smithers* case, including the Court's account of what transpired, the manner in which the Crown prosecutors at trial minimized the role of racism and its impact on Smithers, and concerns about racial bias with respect to at least one juror. In Part II, below, I offer a more complex history of the case and a counter-narrative of the events leading up to Cobby's death—an account that challenges the Court's rendition. This shall include an alternative narrative of the fight itself as seen primarily through the eyes of Smithers and revealed during his trial testimony. As the case is taught annually in law school, one of my objectives is to encourage scrutiny regarding the facts we receive from appellate judgments. Presenting a counter-story that highlights Smithers's account of what transpired would not necessarily have changed the outcome of the Court's decision. This is especially the case in *Smithers*, where a jury preferred the Crown's evidence and concluded Smithers's guilt beyond a reasonable doubt.[15] That said, in Part IV, below, I identify reasons to consider that one or more jurors were racially biased.

Another purpose in undertaking this study is to humanize Smithers, who is perpetually vilified through the Court's prose. To be clear, my goal is not to beatify Smithers, but rather to contextualize and understand his actions as a victim of racial aggression. Through this counter-narrative, I shall also demonstrate that the deceased, while clearly not deserving of death, was no mere victim. Rather, Cobby was a racial antagonist whose conduct contributed significantly to Smithers's determination to confront him regarding his racism during the hockey game and subsequent reluctance to apologize.[16] In purposely omitting a more nuanced account and portraying Smithers as a Black aggressor, the Court effectively (even if unintentionally) legitimized a white supremacist account of the events. Generally, white supremacy has been explained as "a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings."[17] By simultaneously purging Smithers's account and those of defence witnesses from the official narrative, the Court furthered a tale that accentuated Cobby's victimhood as a young white male, while largely concealing the racist aggression Smithers endured at the hands of white players and spectators, alongside the neglect of white hockey officials who failed to intervene. In so doing, I contend that the Court devalued Smithers's voice as a Black person fighting against the racism he was subjected to. By re-inscribing Smithers's subjectivity through a counter-narrative, I argue that Smithers engaged in acts of resistance, however imperfect, tragic, and unintended in their outcome, to the anti-Black racism that plagued him and the systemic nature that allowed it to

[15] For instance, on the matter of legal causation, which is the primary reason the case is included in Canadian criminal law textbooks, the Court stated, "[I]t may shortly be said that there was a very substantial body of evidence, both expert and lay, before the jury indicating that the kick [delivered by Smithers] was at least a contributing cause of death, outside the *de minimis* range, and that is all that the Crown was required to establish." *Smithers*, *supra* note 12 at 519. Thus, even if the Court constructed a more comprehensive narrative, the testimony of Crown witnesses provided sufficient evidence, which, if believed, could sustain a finding for legal causation.

[16] I should add that had he lived, Cobby might have matured, reflected on his racist attitudes, and looked back at his behaviour toward Smithers with deep regret.

[17] Cheryl I Harris, "Whiteness as Property" (1993) 106 Harv L Rev 1707 at 1714, n 10, citing Frances Lee Ansley, "Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship" (1989) 74 Cornell L Rev 993 at 1024, n 129. Interestingly, Ibram X Kendi explains how white supremacy often works to the detriment of white people in a variety of ways. See *How to Be an Antiracist* (One World, 2019) at 131-32.

persist. Smithers was both a victim of white supremacy and someone who resisted it. This was a narrative that was left out of the Court's decision.

In order to present a counter-narrative that in many ways inverts the Court's account, I draw on official and unofficial sources, including those available to the Court. With respect to official sources, I rely on a specific portion of the original trial transcript and the parties' factums. The trial transcript consisted of five volumes, of which volume four comprised the direct and cross-examination of defence witnesses, including Smithers. Given that the Court's interpretation of events already reflects a prosecution-friendly perspective that was clearly more sympathetic to Cobby, my goal here, drawing from critical race theory, is to offer a historical counter-narrative based principally on volume four of the trial transcript. In addition, I rely on numerous newspaper articles written during the 1970s, including those published in *The Toronto Star*, *The Globe and Mail*, *The New York Times*, and *The Washington Post*. Some of these articles were contemporaneous to the trial that occurred in April 1974, while others were published following the trial and as the case was being appealed to the Court of Appeal for Ontario and the Supreme Court of Canada. In the post-trial articles, Smithers and other individuals familiar with the case gave interviews and offered perspectives which reinforced or, in some circumstances, drew attention to facets which may not have been present or apparent in the official sources mentioned above. These include concerns related to allegedly racist attitudes held by one or more jury members that prompted Smithers's appellate counsel Roy McMurtry, in 1975, to seek federal ministerial review of the decision to convict Smithers at trial.

This article tells a story concerning overt acts of anti-Black racism. The narrative includes the utterance of vile and destructive words synonymous with such discrimination. As a person of colour who is not Black, I do not claim any license to employ such racist terms in an unrestricted manner. When not quoting from sources, and in instances where I refer generally to the most common and destructive anti-Black racist slur, I shall employ the surrogate term "n-word" rather than the full word that it signifies. However, when citing to publications in the footnotes that employ racial slurs in the titles, I have retained the unredacted words to account for the sources accurately.

In telling the broader story of racism in the *Smithers* case, I have incorporated numerous statements by individuals who are Black, especially Smithers, and who, when speaking of their experiences of racism, employed the actual racist terms to explain what was said to them as well as the terms' damaging effects. When quoting such statements, I have chosen to reproduce the racist slurs in a redacted form by encapsulating them in square brackets with asterisks as substitutes for certain letters. I should briefly explain why I have incorporated quotations with racial slurs in this article at all, albeit in redacted form. First, including the racist language found in the original texts maintains fidelity to the historical record located in the trial transcripts, parties' factums, and newspaper accounts. Second, documenting such language shines a light on the reality and violence of overt anti-Black racism, which in the *Smithers* case was also an implicit assertion of white supremacy.[18] Third, most of the statements quoted below that employ the use of racist terms were made by Black individuals themselves while sharing their experiences of when such slurs were deployed against them or others. I am loath to censor their words in an article that seeks to value Black voices and Black people's experiences of racism.

[18] Anti-Black racism is not an epidemic isolated to white supremacy. Negative and destructive attitudes about Black persons are shared among other people of colour, including Asians. See *e.g.* Maya Prabhu, "African victims of racism in India share their stories" (3 May 2017), online: *Al Jazeera* <www.aljazeera.com/indepth/features/2017/04/african-victims-racism-india-share-stories-170423093250637.html>.

Given these stated reasons, some readers might find it odd that I would employ redacted forms of these racial slurs, especially when quoting from primary sources. I offer a few explanations for this. The sheer quantity of times that the n-word appears in the history of this case is far from scarce. While not all readers, including those who are Black, may find reading the unredacted racial slurs upsetting and triggering within the context of this article, others surely might for a host of legitimate reasons. This may prove to be a barrier to engaging with the article. Although the unabridged version of the n-word appears in a great deal of legal scholarship by Black authors from the United States,[19] it is not as common a practice in Canadian legal scholarship to use it and certainly not as extensively in any one single article.[20] Employing a redacted form of particular racist terms when quoting from primary sources still allows readers to fully understand what was said to Smithers and the terms' impact on him, while maintaining fidelity to the original texts in which these words appear and their readability. I have not replaced the original words with entirely different words, which would indeed be falsifying the record. In my respectful view, using redacted versions of the racial slurs when quoting source material is a reasonable approach. It seeks to avoid the harm that quoting the full and unabridged racist terms would cause to some readers, while steering away from sanitizing the account by excluding such language altogether, which would replicate the Court's approach. It is not enough to just state that racial slurs were directed at Smithers and to cite the relevant sources that corroborate this reality. As with all storytelling, it is important to show and not just tell about the racism Smithers was subjected to.

This article is divided into four main parts followed by a conclusion. Part I situates this article within several scholarly and intellectual frameworks, including critical race theory and Canadian legal history and historiography regarding race. Part II of this article presents a more robust counter-story of what occurred in the *Smithers* case that draws upon, from the official sources discussed above, the largely missing perspectives of Smithers and other defence witnesses. This counter-narrative will, in effect, not only reveal information that was excluded from the Court's narrative but will also serve as an inversion of the roles that Smithers and Cobby played in the official account. Part III focuses attention to how the prosecution's theory of the case and the statements of the prosecutors minimized the pivotal role that racism played in the events leading to Cobby's death, as well as the impact of such racism on Smithers as the victim of that prejudice. Part IV then redirects the reader to concerns relating to how racism may have played a role in at least one juror's decision making, affecting the fairness of the trial.

I. Situating This History

The *Smithers* case is rooted in racism and in the attempt to challenge such discrimination. In telling a different account, I have drawn on several interconnected forms of scholarship and intellectual frameworks and situate this article within such discourse. Part I(A) explains and places this work within the framework of critical race scholarship, its emphasis on the systemic

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[19] See *e.g.* Michele Goodwin, "*Nigger* and the Construction of Citizenship" (2003) 76 Temp L Rev 129; Gregory S Parks & Shayne E Jones, ""Nigger": A Critical Race Realist Analysis of the N-Word within Hate Crimes Law" (2008) 98 J Crim L & Criminology 1305; Darryll M Halcomb Lewis, "The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet Nigger" (2016) 53 Am Bus LJ 383.

[20] I conducted a search of Canadian law articles in Westlaw's database using the unabridged version of the n-word. This search turned up roughly thirty articles. Among those, the unabridged version of the n-word appears typically only a few times.

and regularized nature of racism, and its use of counter-storytelling as an instrument to challenge official or mainstream narratives. Part I(B) locates this article within the broader scholarship on race and Canadian legal history. In Part I(C), I discuss writings concerning the damaging nature of racial slurs and their impact on Black hockey players in particular. Part I(D) positions this article within the social history of Black resistance to racial oppression. In Part I(E), I consider scholarship on judicial narratives and storytelling, with a focus on fact construction by appellate courts.

A. Critical Race Theory

During the late twentieth century, critical race theory (CRT) first emerged as an intellectual response to the notion of colour-blindness in the context of institutional struggles regarding the scope of equality and the content of American legal education.[21] Despite its origins in the legal academy, scholars in various other disciplines, as well as those who are based outside the United States (including in Canada), have come to adopt and consider CRT as a central feature of their work. While there is much diversity among critical race scholars, it may be said that there are some basic and common understandings or approaches that constitute this scholarship. I focus on two of these that are relevant to this article.

First, as Richard Delgado and Jean Stefancic assert, one such shared understanding is that racism is "ordinary, not aberrational."[22] Indeed, racism is systemic and widespread, rather than consisting of episodic and isolated phenomena. Given racism's systemic nature, CRT can provide an especially important lens when examining criminal law, criminal justice, and systemic racism.[23] This can extend to the manner in which racialized groups are viewed and constructed as dangerous or threatening, and thus subjected to significant policing and heightened scrutiny.[24] Examined through a critical race lens, there is legitimate skepticism about the roles of the adversarial system or juries as guarantors of racial justice, given the realities of systemic racism and the over-policing of racialized communities.[25] Drawing on CRT, Kelsey L. Sitar has argued for a greater appreciation of race and racialization within various aspects of Canadian criminal trial processes.[26] Specifically, Sitar posits that considerations of racial profiling and over-policing should factor into judicial determinations of applications arising under the *Canadian Charter of Rights and Freedoms*[27] concerning the constitutionality of particular police detentions, vehicle stops, search and seizure issues, and the exclusion of

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[21] See Kimberlé Williams Crenshaw, "Unmasking Colorblindness in the Law: Lessons from the Formation of Critical Race Theory" in Kimberlé Williams Crenshaw et al, eds, *Seeing Race Again: Countering Colorblindness Across the Disciplines* (University of California Press, 2019) 52 at 52. Though the history and development of CRT is beyond the scope of this article, see also Kimberlé Williams Crenshaw, "The First Decade: Critical Reflections, or 'A Foot in the Closing Door'" (2002) 49 UCLA L Rev 1343.
[22] *Critical Race Theory*: *An Introduction* 2nd (New York University Press, 2012) at 7 [Delgado & Stefancic, *CRT: An Introduction*].
[23] See Richard Delgado & Jean Stefancic, "Critical Race Theory and Criminal Justice" (2007) 31 Humanity & Society 133.
[24] *Ibid* at 140.
[25] *Ibid* at 141.
[26] "*Gladue* as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20 Can Crim L Rev 247 at 248.
[27] Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

evidence.[28] Despite law's preoccupation with race neutrality and colour-blindness in various spheres, policing does not occur in a social vacuum.

A second common feature of critical race scholarship has been to expose various ignored or alternative realities concerning people of colour. Critical race scholars articulate that "whiteness is…normative; it sets the standards in dozens of situations."[29] By contrast, people belonging to racialized groups may simply be characterized or defined by their non-whiteness without any sufficient regard for their experiences. Given their alterity, minorities can appear in various narratives, including in court cases and popular culture, as villains or oversexed subjects.[30]

Critical race scholars have sought to inscribe such alternative or ignored realities through diverse means. They have written "personal histories, parables…poetry, fiction…revisionist histories,"[31] and "counterstories," as well as "investigated the factual background and personalities, frequently ignored in the casebooks, of well-known cases."[32] As noted above, examining and advancing alternative narratives to mainstream accounts of the lives and experiences of racialized persons and communities is important since many "members of [a] country's dominant racial group," who in turn often comprise institutions of power, "cannot easily grasp what it is like to be nonwhite [*sic*]."[33] Many white and non-white members of society in the global north may subscribe to what Daniel Solórzano and Tara Yosso refer to as a "majoritarian story," which, among other things, "distorts and silences the experiences of people of colour."[34]

Counter-storytelling can shed light on the lived experiences of people of colour, which are elided or treated with insufficient sensitivity in official narratives.[35] Solórzano and Yosso define a counter-story as "a method of telling the stories of those people whose experiences are not often told,"[36] and as "a tool for exposing, analyzing, and challenging the majoritarian stories of racial privilege" that may be silent on race.[37] Counter-storytelling is important because, as Delgado and Stefancic remind us, "People of different races have radically different experiences as they go through life."[38] While individuals occupy certain normative universes from which they may be difficult to dislodge, "well-told stories describing the realit[ies]" of the lives of racialized persons can assist readers (or receivers) of these narratives to "bridge the gap between their worlds…and others."[39] Telling counter-stories is important for challenging myths and preconceptions in legal discourse. Delgado and Stefancic argue that "preconceptions and myths, for example about black criminality or Muslim terrorism, shape mind-set."[40] They articulate that

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[28] Sitar, *supra* note 26 at 254-62.
[29] Delgado & Stefancic, *CRT: An Introduction*, *supra* note 22 at 84.
[30] *Ibid*.
[31] Charles R Lawrence III et al, "Introduction" in Mari J Matsuda et al, eds, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993) 1 at 5.
[32] Delgado & Stefancic, *CRT: An Introduction*, *supra* note 22 at 44.
[33] *Ibid* at 45. See also Russell K Robinson, "Perceptual Segregation" (2008) 108 Colum L Rev 1093.
[34] "Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research" (2002) 8 Qualitative Inquiry 23 at 29.
[35] See Joshua Sealy-Harrington, "Untelling the Story of Race," *The Walrus* (15 July 2020), online: <thewalrus.ca/untelling-the-story-of-race>.
[36] Solórzano & Yosso, *supra* note 34 at 32.
[37] *Ibid*.
[38] Delgado & Stefancic, *CRT: An Introduction*, *supra* note 22 at 47.
[39] *Ibid* at 47-48.
[40] *Ibid* at 49.

a “mind-set” is in turn understood as the “bundle of received wisdoms, stock stories, and suppositions that allocate suspicion, place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened.”[41] Critical race writers can play a key role in using counter-stories to engage in resistance[42] and “to challenge, displace, or mock these pernicious narratives and beliefs.”[43]

Solórzano and Yosso identify that there are, generally, at least three types of counter-narratives.[44] The first type focuses on personal stories that are autobiographical in nature and explore forms of racism and sexism experienced by people of colour.[45] The second type is more biographical in nature; they narrate other people’s stories, are told in the third person voice, and discuss experiences of racism and sexism in a sociohistorical context.[46] The last type centers on composite stories or narratives that “draw on various forms of ‘data’ to recount the racialized, sexualized, and classed experiences of people of color.”[47] This third category may provide both “autobiographical and biographical analyses because the authors create composite characters and place them in social, historical, and political situations to discuss racism, sexism, classism, and other forms of subordination.”[48]

As I undertake in this article, applying a critical race lens is vital when examining the historical record in criminal cases where race has largely been sidelined and where racialized individuals may be cast in certain roles. Drawing from CRT, my approach to counter-narrating the *Smithers* decision combines a revisionist approach to the legal history of this case with the second category that Solórzano and Yosso explain, which depicts another person’s experiences with racism. In telling a counter-narrative of the *Smithers* case, I shall illustrate the normalized manner in which racism was aimed at Smithers, particularly during his time playing hockey. Such experiences were defined by his Blackness, which was also notably identified in the Court’s judgment. By marking Smithers as an aggressor seeking to “get” Cobby for forty-five minutes, the Court cast him in the role of the Black villain. Through the counter-narrative in Part II below, I hope to shed light on the lived experience of a racialized teenager who endured repeated and socially tolerated racial abuse, and to counter and invert the Court’s official narrative, which is read annually by students of law.

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[41] *Ibid.*
[42] Solórzano & Yosso, *supra* note 34 at 32.
[43] Delgado & Stefancic, *CRT: An Introduction*, *supra* note 22 at 49.
[44] Solórzano & Yosso, *supra* note 34 at 32.
[45] *Ibid* at 32-33.
[46] *Ibid* at 33.
[47] *Ibid.*
[48] *Ibid*. For an insightful Canadian-situated example of this form of composite counter-storytelling, see Kanika Samuels-Wortley, “To Serve and Protect Whom? Using Composite Counter-Storytelling to Explore Black and Indigenous Youth Experiences and Perceptions of the Police in Canada” (2021) 67 Crime & Delinquency 1137.

B. Race, Law, and Canadian History – Setting the Historical and Historiographical Scene

Despite many Canadians' romantic image of their nation and society as open and accepting,[49] both historically and in our present context, this has hardly been everyone's experience.[50] As law is a reflection of broader cultural values, it has been misused as a tool for advancing racial ideologies, exclusion, and mistreatment. Various legal and socio-legal scholars have examined themes of race and racial discrimination through the law in Canadian society. Notably, among the scholarship written about race and legal history in Canada, the *Smithers* case does not seem to have captured any real attention.[51] This is likely because the judgment is focused largely on the matter of causation and other legal issues. Regardless of the sheer abundance of evidence in the trial record concerning the racism that was directed at Smithers and its role in the events leading to Cobby's demise, this discrimination was omitted from the Court's decision but for a single sentence. The racial dimensions of this case have been substantially overlooked. Thus, a scholarly examination of the racial characteristics of the *Smithers* case has been absent from the rich body of work on race and Canadian legal history. This article seeks to address that lacuna.

In recent decades, there has been significant work on the intersection of race and the law within a historical framework. For instance, Constance Backhouse has written about the legal history of racism in Canada. In one monograph, she examines the period covering 1900 to 1950 and highlights key instances of discrimination directed at Indigenous people, Black people, and people of colour in Canada. Through her work, Backhouse aims to document the "central role of the Canadian legal system in the establishment and enforcement of racial inequality."[52] She adds that the "Canadian legal system played a principal and dominant role in creating and preserving racial discrimination. Racism is a deeply embedded, archly defining characteristic of Canadian history."[53] In other work, Backhouse observes that, in many decisions, judges have failed to account for the racial identities of the actors involved in the events, even where cases revolved around arguments of racism.[54] Even where visible minorities may be given a racial designation, white actors in these cases can remain raceless.[55] Backhouse posits, "To the individuals involved in real cases, however, race can be the critical variable underlying the actual dispute."[56] As the discussion in Parts II–IV, below, illustrates, race was a critical aspect of the *Smithers* case but was largely ignored by the Court.

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[49] J Walker, *supra* note 11 ("Canadians perceive themselves to be tolerant of racial and cultural diversity, to possess a history of equal treatment towards all, to have avoided the syndrome of racism so evident south of the border" at 3).
[50] See Backhouse, *Colour-Coded*, *supra* note 11 at 7. Backhouse asserts, "To fail to scrutinize the records of our past to identify the deeply implanted tenets of racist ideology and practice is to acquiesce in the popular misapprehension that depicts our country as largely innocent of systemic racial exploitation. Nothing could be more patently erroneous."
[51] Though in fairness to several scholars, some of their studies were temporally limited to periods that culminated before the events of the *Smithers* case transpired.
[52] Backhouse, *Colour-Coded*, *supra* note 11 at 15.
[53] *Ibid* at 17.
[54] Constance Backhouse, "Bias in Canadian Law: A Lopsided Precipice," in *R v RDS*: *An Editor's Forum*, Case Comment, (1998) 10 CJWL 170 at 171-72 [Backhouse, "Bias in Canadian Law"]. This is, of course, not always the case, and some courts have been more sanguine in recent decades about the existence of racism and its impact in the criminal justice system. See *e.g. Parks*, *supra* note 10 at 369.
[55] Backhouse, "Bias in Canadian Law," *supra* note 54 at 170-72.
[56] *Ibid* at 172.

In addition to Backhouse, several scholars and writers have examined, specifically, the historical experience of Black Canadians in the Canadian criminal justice system.[57] Such work has salience to the *Smithers* case. In one study, Barrington Walker focuses particularly on the treatment of Black defendants in Ontario between 1858–1958.[58] He writes that the experience of many Black people was one of social exclusion and marginality with respect to places of employment, places where they could reside, schools they could attend, and spaces where they could worship.[59] This extended to involvement in sports. Walker and other authors have shown that this racist exclusion was predicated on perceptions of Black inferiority and criminality, which infected the criminal justice system resulting in unequal treatment.[60] Such notions impacted assessments of liability and punishment, particularly when the victims were white.[61] Tropes regarding the assumed inferiority of Black men have also been employed by defence counsel as mitigating circumstances; emphasis might be placed on the purported childlike qualities of Black defendants.[62]

There have been struggles with respect to documenting the history of Black Canadians through criminal law jurisprudence. As a historian, Barrington Walker reflects on such difficulties based on criminal case files, which can present methodological challenges common to all historians. Specifically, such "challenges stem from the well-known concerns about the fragmentary nature of case files and the difficulty of recovering muted voices of marginalized populations through documents created by elites."[63] He further contends, "The major challenge when one is confronted with researching the history of race on trial in a racial liberal order where colour-blindness is an integral part of legal formalism is the initial step of finding cases involving Black defendants."[64]

Fortunately, such difficulties are not present in *Smithers*. The Court's own judgment was not entirely colour-blind; Smithers was specifically labelled as Black, while Cobby's race was not identified, though likely presumed as white. Furthermore, the wider case record, including the appellant's factum and the trial transcripts, provide a fuller, deeper, and more disturbing account pertaining to the role of racism in the case. Although the voices of Black defendants may have been muted in numerous other cases, perhaps in part because the accused never testified, this was not the case here. Smithers not only took the witness stand at his trial but also gave interviews to several journalists following the trial's completion. He spoke about his experiences during hockey games and the need to confront the racism he faced. Thus, the source material available in the *Smithers* case, which appears in no way fragmentary, permits a deeper legal historical examination of the case and its situated status in the history of race and the law in Canada.

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[57] See Adams, *supra* note 11; Backhouse, *Colour-Coded*, *supra* note 11; Maynard, *supra* note 11; Mosher, *supra* note 11; Thornhill, *supra* note 11; B Walker, *supra* note 11; J Walker, *supra* note 11.
[58] See B Walker, *supra* note 11.
[59] *Ibid* at 3.
[60] See *e.g. ibid* at 20-21, 45-88, 123-31; Maynard, *supra* note 11 at 83-115; Mosher, *supra* note 11 at 129-34, 170-74.
[61] See Mosher, *supra* note 11 at 194-95. Mosher states, "These interracial crimes were perceived as particularly problematic by court officials, and judges confirmed their disdain for those who crossed racial lines by invoking the full weight of the law by imposing corporal punishment on such offenders and by sentencing them to lengthy terms of incarceration."
[62] See B Walker, *supra* note 11 at 72.
[63] *Ibid* at 12.
[64] *Ibid* at 13.

C. The "N-Word," Hockey, and the Impact of Racial Insults

At a general level, racial insults have a damaging impact upon their recipients. Richard Delgado posits that the "racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted. Such language injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood."[65] The psychological harms caused by racial stigmatization are often rather severe;[66] furthermore, the harms caused by racism and racial labelling may have a greater impact on children than on adults.[67] Smithers was a teenager when the events in his case transpired.

More specifically, with respect to anti-Black racism, the n-word as a racist insult has a lengthy and distressing history.[68] Scholars have identified it as having an assaultive quality capable of wounding its recipients.[69] Its injurious quality comes from certain constructed meanings. As African-American historian Elizabeth Stordeur Pryor explains, "Fundamentally, the n-word is an idea disguised as a word—that Black people are intellectually, biologically, and immutably inferior to white people."[70] She adds, "[T]hat inferiority means that the injustice we suffer and inequality we endure is essentially our own fault."[71] Pryor posits that during the early nineteenth century in particular, the n-word developed into a slur and weapon deployed against Black people as large numbers of Black people began to gain freedom in the northern United States.[72] She articulates that the word became "fundamentally an assault on Black freedom, Black mobility, and Black aspiration. Even now, nothing so swiftly unleashes an n-word tirade as a Black person asserting their rights or going where they please or prospering."[73] As the Smithers story and the stories of other Black athletes reveal, the n-word and other slurs are used, among other reasons, to attack and undermine the desire of Black athletes to engage in sports and to excel.

A number of (former) Black athletes have commented on the impact of the flagrant and repeated use of racial words against them while they played hockey professionally or in amateur settings as youths. The ruggedness that athletes in rough sports are assumed and expected to possess offers no shield. For instance, Toronto-based lawyer and writer Anthony Morgan has written of his experience and reactions to being the recipient of such language at the age of ten. During a hockey game, Morgan had managed to bump an opposing player off the puck, and the

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[65] "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 Harv CR-CLL Rev 133 at 135-36.

[66] See Roberta K Timothy, "Racism Impacts Your Health" (28 February 2018), online: *The Conversation* <theconversation.com/racism-impacts-your-health-84112>; David R Williams & Ruth Williams-Morris, "Racism and Mental Health: The African American Experience" (2000) 5 Ethnicity & Health 243.

[67] See Delgado, *supra* note 65 at 142-43.

[68] See generally Goodwin, *supra* note 19; Elizabeth Stordeur Pryor, "The Etymology of Nigger: Resistance, Language, and the Politics of Freedom in the Antebellum North" (2016) 36 J Early Republic 203.

[69] See e.*g*. Goodwin, *supra* note 19 at 193-95.

[70] "Why it's so hard to talk about the N-word" (14 December 2019) at 00h:04min:51s, online (video): *Ted Talks* <www.ted.com/talks/elizabeth_stordeur_pryor_why_it_s_so_hard_to_talk_about_the_n_word>.

[71] *Ibid.*

[72] *Ibid* at 00h:15min:13s.

[73] *Ibid* at 00h:16min:23s.

individual reacted by saying, "You f*cking [ni***r]!!"[74] He writes of his reaction in the following way:

> My heart just shattered. I stopped skating, and quickly turned around to look back at the player in disbelief and confusion. I could find no words and could barely breathe.
>
> We were just 10 years old, but in the moment that our eyes met, I saw a meanness that was so overwhelmingly venomous and disempowering that I just burst into tears right there on the ice. This was the only response I could muster. I had never felt so alone, so helpless, so worthless, so hurt, so ashamed, so lost.[75]

Morgan's poignant recounting of this event illustrates the devastation and sense of isolation that a racial insult can inflict. Various (former) Black professional hockey players have shared their experiences with racism while playing hockey as teenagers.[76] Such racism did not merely emanate from rival players,[77] but also from coaches and spectators. As former National Hockey League (NHL) player Georges Laraque remembers:

> The kids were calling me ['ni***r'], the coaches were calling me ['ni***r'], the parents in the stands were calling me ['ni***r']. It was unbelievable. I cried a lot when I was a kid. Not that I would cry in front of the other kids because I had a lot of ego. But I would go home and cry.[78]

Morgan and Laraque's experiences were not unique.

The distressing impact of being called the n-word affects adult Black hockey players as well as their younger counterparts. Michael Marson was the second Black person to play in the NHL and was recruited by the Washington Capitols in 1974 when he was eighteen years old.[79] Marson was born on 24 July 1955 and was one year older than Smithers.[80] Marson played in the Ontario Hockey League prior to joining the NHL.[81] He and a fellow Black teammate, Bill Riley, were subjected to a continuous cacophony of racial abuse.[82] Riley, who was Marson's senior, commented that the constant racism and use of racial epithets impacted Marson greatly. Riley observed that

> in the NHL, the stuff Michael had to deal with as a kid kind of destroyed him. We got called every dirty name in the book, and we were getting high-sticked and slashed and speared on the ice. We would both fight back, but those things just cut Michael's heart out.[83]

African-American sportswriter and independent journalist Cecil Harris has written about Black men's experiences playing in professional hockey. While racism was not the only theme touched upon in Harris's book, it was a significant and recurring experience for many Black hockey

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[74] Anthony Morgan, "Hockey was my game" (29 November 2019), online: *Ricochet* <ricochet.media/en/2833/hockey-was-my-game>.
[75] *Ibid*.
[76] See Cecil Harris, *Breaking the Ice: The Black Experience in Professional Hockey* (Insomniac Press, 2003).
[77] In some cases, the racial hostility emanates from one's own teammates. See Akim Aliu, "Hockey Is Not for Everyone" (19 May 2020), online: *The Players' Tribune* <www.theplayerstribune.com/en-us/articles/hockey-is-not-for-everyone-akim-aliu-nhl>.
[78] C Harris, *supra* note 76 at 106.
[79] *Ibid* at 57-63; Ben Raby, "Against the Odds: Remembering Mike Marson's Career with the Caps" (25 February 2019), online: *Washington Capitols* <www.nhl.com/capitals/news/against-the-odds-remembering-mike-marsons-career-with-the-caps/c-305201080>.
[80] C Harris, *supra* note 76 at 63.
[81] *Ibid* at 62-63.
[82] *Ibid* at 65-67.
[83] *Ibid* at 67.

players originating from Canada. Despite the successes many players may have had, Harris observes the following:

> [N]o amount of positive reinforcement can totally erase the pain of a [B]lack person subjected to a racial slur, particularly one uttered by someone in a position of authority, someone who could affect your quality of life. The slur is an attack on one's personhood, an attempt to damage the psyche and wound the soul. And for a [B]lack in the overwhelmingly white world of hockey, no slur cuts deeper and instills more pain than "[ni***r].[84]

As Smithers posited in an interview in 1975, being called the n-word is "the most degrading thing anybody can call me, but I guess I'm just supposed to take it."[85] In a more recent interview, Smithers (now in his early sixties) articulated, "I can't express to you the humiliation you feel when somebody calls you those names….You just want to hide. You just want to crawl under a table and not be seen."[86]

A full accounting of the racism experienced by professional and amateur Black hockey players is beyond the scope of this article.[87] It should be fairly well understood that instances of anti-Black racism are not confined to hockey or other sports. The purpose of this section is to identify the impact and emotional consequences of hurling racial slurs at young Black athletes, which will help to frame Smithers's actions in response to Cobby's racist violence—both verbal and physical. First, there is a particularly destructive quality to the n-word and other similar slurs largely reserved for Black people. Second, when these slurs are hurled in the context of organized sports, Black athletes sustain emotional damage. The use of such racist words is demeaning enough on its own; however, in the context of hockey, these words are also accompanied by physically violent actions. When Smithers was playing, he too was subjected to racist words, accompanied sometimes by physical violence directed his way. The impact of these racist words, over time, in combination with the failure of officials to respond appropriately to such racism, must be understood to contextualize Smithers's resistance to these words. The Court failed to recognize such realities and largely erased them from its narrative.

D. Confronting Racism as an Act of Resistance

Though racism and its pernicious impacts have been considerable features throughout Canadian history and that of other nations, many people of colour have resisted discriminatory oppression through legal actions and, in other situations, via extra-legal means. James W.St.G. Walker asserts, "Minority resistance challenged the hegemony of the prevailing paradigm and revealed

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[84] *Ibid* at 149.

[85] David DuPree, "Racial Taunts, Hockey Violence—Death is the Aftermath: Manslaughter Conviction Follows Death of Hockey Player," *The Washington Post* (1 March 1975) C1 at C5.

[86] Dave Feschuk, "The cost of words: It was almost 50 years ago when a night of slurs at the hockey rink led to a teenager's death," *The Toronto Star* (13 June 2020), online: <www.thestar.com/sports/hockey/opinion/2020/06/13/the-cost-of-words-it-was-almost-50-years-ago-when-a-night-of-slurs-at-the-hockey-rink-led-to-a-teenagers-death.html>. See also CBC News, "Racial slurs changed the life of Paul Smithers in 1973, but he still hopes for change" (12 June 2020), online (video): <www.youtube.com/watch?v=nCVJkHWsito>.

[87] Though it should be noted that concerns about the continued utterance of racial slurs persist today in minor league hockey in Toronto. See Rick Westhead & Solarina Ho, "Racial slurs are common in Toronto-area minor hockey league, players say" (6 June 2020), online: *CTV News* <www.ctvnews.ca/sports/racial-slurs-are-common-in-toronto-area-minor-hockey-league-players-say-1.4972991>.

the presence of multiple historical trajectories within Canadian society."[88] He observes that "minority resistance did not begin with World War II"; rather, "it was carried frequently before the majority population in petitions and delegations to legislatures, newspaper campaigns, action in the workplace, and testing through the courts."[89] As further evidence of this, Barrington Walker has illustrated how Black North Americans resisted slavery, racially charged insults hurled by white people, and other illegitimate race-related conduct perpetrated by state and non-state actors.[90] Backhouse has highlighted Viola Desmond's challenge to racial segregation in 1940s Nova Scotia.[91] Therefore, while Black Canadians are and have been targets of racial discrimination, James Walker posits that a broader social history recognizes that persons from minorities were "actively engaged, not as victims or objects, but as participants in the shaping of their own destinies."[92] Though it should be noted, such resistance bore mixed results. Some fought the law, but the law won.

It is in this broader socio-legal and historical context that I shall situate Smithers's actions against white supremacist attitudes and behaviour, which were dominant in hockey at that time; this is a counter-story to the Court's official narrative. Smithers's resistance did not reveal itself as genteel opposition to the racism he experienced from opposing players or spectators, or to the tolerance of racism by officials at the time. Smithers was confrontational and justifiably indignant. Though he was clearly a victim of racial aggression and experienced its impacts, he did not suffer the racism he endured as a passive victim. Smithers demonstrated agency. He challenged prevailing social prescriptions, founded in white supremacy, that he should simply endure his abusers' racism and violence. However, his resistance had certain unintended and unforeseeable consequences—the death of Cobby.

E. Judicial Narratives and Storytelling

This article is also concerned with fact construction and dissemination in the context of appellate decision making. During litigation, facts may be hotly contested. However, as Eric M. Adams contends, facts assume a "final form" in the written decisions of appellate courts, "ossify[ing] into something beyond debate."[93] Apropos to this article, he posits, "In the confident prose of judges, facts become the incontestable history of the moments they describe."[94] Adams's article itself is about how certain facts concerning a Supreme Court of Canada case, *Christie v The York Corporation* (*Christie*),[95] found their way into the dissenting opinion, and were patently incorrect.[96] Adams argues that such factual errors are illuminating for many reasons, not the least of which is that they may serve as the main reason for divergent approaches between a majority and a dissenting opinion.[97] Furthermore, as *Christie* was a case about racial exclusion with respect to accessing services in a tavern (during a period when human rights codes barring racial discrimination in the obtaining of services were non-existent), Adams articulates that the case

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[88] J Walker, *supra* note 11 at 321.
[89] *Ibid*.
[90] B Walker, *supra* note 11 at 28-44.
[91] Backhouse, *Colour-Coded*, *supra* note 11 at 226-71.
[92] J Walker, *supra* note 11 at 322.
[93] Adams, *supra* note 11 at 464.
[94] *Ibid*.
[95] [1940] SCR 139 [*Christie*].
[96] Adams, *supra* note 11 at 464-67.
[97] *Ibid* at 467-68.

and its factual errors tell an important historical story about how racism functioned in urban spaces in Canada at the time it was decided.[98]

Drawing from Adams, I argue that the *Smithers* case illuminates how, over time, the Court's view of the facts of a case can become the primary point of reference. Contemporaneous to the trial (April–June 1974), and in the following years leading up to the Court's decision (1977), newspaper reports revealed a broader accounting of what occurred on the evening that Cobby died, in addition to the factual context leading up to the fateful night. Since the Court's decision, such news reports concerning the case have receded from the public's attention and memory. It is likely that what most law students have learned about the facts in *Smithers* over several decades is what the Court has told us—subject to instructors assigning more material.[99] However, as Adams enquires, what if the facts are wrong (or otherwise so utterly incomplete)? In the *Smithers* case, unlike *Christie*, there was no dissent operating on the assumption of a different set of facts or factual assumptions. *Smithers* was a unanimous judgement subscribing to a particular interpretation of what occurred.

Following Adams's example, I provide a broader history of what ensued in *Smithers.* I hope to offer a revealing look at two ways that racism functioned in the case. First, *Smithers* illustrates how racism operated and was accepted in organized sports at the amateur level. Second, and perhaps more alarmingly, the Court's bare acknowledgement of this racism and construction of Smithers as a Black aggressor signifies its own complicity in legitimating this racism and advancing the pernicious caricature of Black males as uncontrolled savages and criminals.

When one contemplates ideas about judicial storytelling and the selection of which facts comprise the official narrative, one might consider Clifford Geertz's assertion that "legal facts are made not born" and are socially constructed in light of various considerations including the rules of evidence, law reporting traditions, and "the rhetoric of judges."[100] As noted earlier, Justice Brian Dickson authored the decision on behalf of the Court. He had a recognizable approach to writing decisions. In their biography of Justice Dickson, Robert J. Sharpe and Kent Roach observe that his opinions, for the most part, were "short and concise."[101] They posit that Justice Dickson was known for working very hard to make his judgments "as clear as possible."[102] These are laudable objectives, provided that a devotion to clarity, conciseness, and readability does not result in oversimplification, a lack of nuance, or a one-sided account that is unfair to a party in the case, particularly a criminal defendant. This is unfortunately what transpired in the *Smithers* case.

Judicial fact construction and storytelling at the appellate level become rather complex enterprises when cases arise out of a jury trial. In non-jury trials, the judge, sitting as the finder of fact, provides reasons that can serve as a key basis for appellate review.[103] Any review with respect to factual errors is assessed on a highly deferential standard.[104] During a jury trial, the

[98] *Ibid* at 495-97.
[99] For instance, I have assigned newspaper articles such as David DuPree's 1975 article in the *Washington Post*. See DuPree, *supra* note 85.
[100] *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983) at 173.
[101] *Brian Dickson: A Judge's Journey* (University of Toronto Press for the Osgoode Society for Canadian Legal History, 2003) at 116.
[102] *Ibid* at 202.
[103] David M Paciocco et al, *The Law of Evidence*, 8th (Irwin Law, 2020) at 25-26.
[104] *Le*, *supra* note 10 at para 23.

jurors determine what happened and apply the law as instructed by the judge.[105] The jury does not furnish reasons.[106] Even where an appellate court hears appeals from a jury trial on questions of law or mixed fact and law, there is a factual matrix from which the case emerges. How do appellate courts decide which facts matter, or even what happened, when there was conflicting testimony at trial? It may be prudent for appellate courts to at least acknowledge in their judgments that there were conflicting accounts given at trial but that the jury clearly or likely favoured certain evidence in arriving at its verdict. In other jury cases, both parties may arrive at an agreed set of facts from which an appellate court may draw when constructing the factual narrative. *Smithers* was a jury trial. There were no written findings of fact. While the Court was provided a broader understanding of the facts which gave rise to Cobby's death and the racialized context through the appellant's factum and specific references to the trial transcript, it largely disregarded them. For the most part, many of the factual representations in Smithers's appellant factum went uncontested in the Crown's respondent factum.[107]

Time plays a central role in constructing narratives. In judicial storytelling, when does the narrative begin? An account of the past that looks solely at the transgressive act(s) constituting the criminal offence and the moments that preceded the offence (even assuming that the account is accurate and not unduly one-sided) may nevertheless be impoverished if a broader and relevant contextual understanding is omitted. Take, for instance, the case of an accused who immolates a victim while the latter is sleeping. If evidence exists and is presented that the accused and victim were in a one-sided violent and abusive relationship (and the accused was at the receiving end of this abuse), should the narrative clock begin only moments before the transgressive and murderous act of immolation?[108] Such a move could be detrimental to an accused. As Tanzil Z. Chowdhury articulates, temporality impacts "what *types of facts*, or specifically, what *types of pasts* are emergent in [an] adjudication's determination of what happened."[109] Chowdhury maintains that how we frame the past has consequences for ascribing legal responsibility to an accused.[110] This framing is relevant with respect to liability, as well as sentencing and arriving at a punishment that is proportionate, accounting for, among other things, the offender's moral blameworthiness.

Time's relevance with respect to the Court's narrative in the *Smithers* case is striking. The Court is chiefly focused on Smithers's transgressive act, and the only relevant context in which it is interested is the heated nature of the game and Smithers's forty-five-minute pursuit of Cobby following their ejection, both of which precede the consequential fight in the parking lot. Even then, it drastically understates the details of the racism and violence targeted at Smithers during the actual game. Furthermore, Smithers's overall experience of racism while playing in the hockey league and the tolerance of said discrimination went unaddressed. The accumulated impact of these incidents helps to shape an understanding of Smithers's conduct on the night in question.

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[105] Paciocco et al, *supra* note **Error! Bookmark not defined.** at 25.
[106] *Ibid*.
[107] *Smithers v The Queen*, [1978] 1 SCR 506 (Factum of the Respondent [Respondent's Factum]) ("The Respondent accepts the facts as stated by the Appellant and draws the following additional facts to the attention of this Honourable Court" at para 1). Additional facts were focused largely on the medical testimony and the issue of causation (*ibid* at paras 5-31).
[108] See Tanzil Z Chowdhury, "Temporality and Criminal Law Adjudication's Multiple Pasts" (2017) 38 Liverpool L Rev 187 at 187-88.
[109] *Ibid* at 188 [emphasis in original].
[110] *Ibid*.

Having situated this article within several areas of scholarship, I next turn to presenting a counter-story that challenges the Court's official narrative.

II. Presenting a Counter-Story

In this portion of the article, I both deconstruct the Court's narrative and present a counter-story that challenges the misrepresentations of Smithers as an aggressor and Cobby as his victim. To recall, the Court's concise narrative is reproduced in its entirety in this article's introduction, above, and is focused exclusively on the events of 18 February 1973. The story builds toward Smithers and Cobby's fight and its tragic result. This Part is divided into five thematic and chronological sections: (A) the factual context of Smithers's experiences with racism prior to 18 February; (B) Smithers's and Cobby's encounters during the hockey game and the racist conduct of spectators on 18 February; (C) Smithers's and Cobby's interactions after they were ejected from the game, building towards, but prior to, their fight outside the arena; (D) the fight leading to Cobby's death; and (E) the events following Cobby's death, which were left out of the Court's decision.

A. Expanding Time – The Racialized Context Leading to 18 February

The temporal center of gravity of the Court's narrative is fixed on the events of 18 February 1973. For the Court, what preceded that day seemed to have no bearing with respect to its narrative and construction of Smithers or Cobby. Drawing from Chowdhury's work, mentioned in Part I(E), above, I argue that the racism Smithers endured leading up to 18 February gives much-needed perspective to his response to the discrimination that he was subjected to that day. This context provides insight into why Smithers elected not to let the matter drop after the game and opted instead to pursue Cobby and demand either an apology or a fight.

Smithers had been playing organized ice hockey since the age of eight.[111] On 18 February, both Smithers and Cobby were sixteen years old. Smithers was the only Black player in the midget hockey league in which he played. At trial, Smithers testified that during the hockey season (which commenced in September 1972), he was the target of racial epithets from various opposing teams, parents of such players, and other spectators. The following is an excerpt from Smithers's testimony on direct examination with his trial counsel, Arthur Maloney:

> Q [Maloney]: What is your recollection in the games that you played of reference being made to your race and colour?
>
> A [Smithers]: It seemed like every game it was getting a bit more. At the beginning of the year they didn't keep bothering me, as the year sort of went on it seemed to be getting out of hand I would have to say.
>
> Q: What sort of things were you called?
>
> A: [Ni***r], [c**n], things of that aspect, in relation to my colour.
>
> Q: And this wasn't just the Applewood Team, this was other teams, is that right?
>
> A: I would have to say probably most of them. I wouldn't say all of them, but most of them.
>
> Q: Now what about, who would address you in this way?

[111] DuPree, *supra* note 85 at C1.

> A: Players, fans, parents, anybody that was at the rink, except for probably spectators that were for our team I guess.
>
> Q: And what was this state of affairs, would you say this worsened as the season progressed?
>
> A: Yes.[112]

These experiences were corroborated by various defence witnesses, including Smithers's team's coach, as well as certain fellow teammates and their parents.

Although Smithers testified that most of the teams would use racist slurs against him, he and other defence witnesses observed that the Applewood (Cobby's team) and Malton teams rivaled each other in their heightened level of racial aggression toward him.[113] The game on 18 February was not the first time that Smithers and Cobby met on the ice, nor the only time that Cobby hurled racial insults at Smithers. On the witness stand, Smithers posited that in at least one previous game, Cobby "said maybe once, or twice, about – you know, he would call me a stupid [ni***r], something like that, I never really – you know, let it bother me because he wasn't really calling me that much."[114] However, in one news article, a fellow Cooksville player was interviewed stating that "Cobby always directed racial barbs at Smithers whenever the [Applewood and Cooksville] teams met."[115] Whatever the frequency (and once was more than enough), the game on 18 February was not the first instance where Cobby projected racial epithets at Smithers.

In providing some further context about Cobby's deployment of racist language, his use of the n-word was not confined to hockey matches and may have been deployed casually in his social life. He apparently utilized such language with at least one Black friend at school. Speaking with a reporter, this Black friend observed, "Oh, sure, [Cobby] called me a [ni***r] and things like that. But it was only joking."[116] As a teenager, Cobby's generalized but developing perceptions of Black people might be illustrated in a paper he wrote in school—notably, he wrote a paper that his parents shared with reporters in the years following his death to demonstrate that their son was not racist and to perhaps burnish his reputation posthumously. In this paper, written about *Adventures of Huckleberry Finn*, for which Cobby earned a B-plus grade, he commented about the manner in which slaves were mistreated in the southern United States "and the racial prejudice that is still shown in this day and age of freedom."[117] Cobby then revealed that the book "also showed me that Negroes are human. I often wondered if they were any different, although I don't think I was prejudiced."[118] That one can learn such important lessons from studying literature is perhaps a testament to its power and significance, yet one would think that even teenagers in the early 1970s would have learned the basic idea that Black people were humans prior to that, perhaps from their parents. In this regard, Cobby may have been ill served by his upbringing.

Leonard and Brenda Cobby gave interviews in the years following their son's death. After reading one particular article from 1975, one might arrive at certain assumptions as to the

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112 *Smithers v The Queen*, [1978] 1 SCR 506 (Trial Transcript, Vol 4 at 563-64 [Transcript]).
113 *Ibid* at 564.
114 *Ibid* at 567.
115 Ross Thomas Runfola, "He is a Hockey Player, 17, Black and Convicted of Manslaughter," *The New York Times* (27 October 1974) 5-2, online: <timesmachine.nytimes.com/timesmachine/1974/10/27/issue.html>.
116 Dan Proudfoot, "The Tragedy of Barrie and Paul," *Weekend Magazine* (12 July 1975) 4 at 8.
117 *Ibid* at 6.
118 *Ibid*.

source of Cobby's willingness to utter racial epithets at Smithers. In that article, Leonard Cobby offered the following observation to Dan Proudfoot:

> It was as though our boy was the villain and Smithers lily-white, when actually the black what's-it was a dirty hockey player and a violent person. If our boy called him a name, he bloody well deserved to be called it. I mean, we're all called names at times, aren't we? I mean, that's the first thing people turn to is your origins, isn't it? I've been called a limey what's-it many a time. *If they can't stand the name-calling*, *then maybe they shouldn't be permitted to be in the sport with the white people should they*?[119]

It is worth stressing that Leonard Cobby's comments were made within two years of his son's death and may be representative only of the substantial degree of anger and resentment that he harboured. While they may not reflect his views prior to his son's passing, it would not take a great leap of imagination to consider that they were indeed his longstanding perspectives and had been imparted to his son in some manner. Leonard Cobby's statements represent the reductive ideas that shouting racial epithets at Smithers was mere name-calling and deserved, in Leonard Cobby's mind, if Smithers was a "dirty" player and a violent person. Furthermore, if Black people cannot stand such name-calling, they should be excluded from playing with white people. These ideas, of course, signify that Leonard and Barrie Cobby failed to understand both the magnitude of racial epithets, including the n-word, and that their use constitutes more than simple name-calling.

The discrimination directed at Smithers was also connected to his membership in a particular family unit—one that included his Black father and white mother.[120] This was in an era where interracial relationships were likely neither prevalent nor widely accepted. A month prior to the game on 18 February, Smithers experienced a particularly vicious encounter with players from the Malton team after a hockey match. As Smithers and his mother were walking to their car, players from the Malton team referred to her as "[ni***r] lover" and "white whore" or "white pig."[121] Smithers, who would normally appear to take in stride the epithets directed at him during games,[122] angrily confronted their antagonists. He was restrained by his coach, George Spencer, and a ticket collector at the Malton arena, before a more serious altercation could occur.[123] Smithers testified that this verbal assault on his mother "probably bothered me more than being called [ni***r] myself."[124] The pain and anger prompted by this event persisted. In a 1975 interview, Smithers explained that after this incident in Malton, "he continued to feel angry and frustrated,"[125] which suggests that these feelings carried into the match on 18 February. He observed, "I guess what happened at Brampton two weeks later had been building up."[126]

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[119] *Ibid* [emphasis added].

[120] See Patrick Scott, "Sympathy eases pain of son's conviction," *The Toronto Star* (25 April 1974) A3. Scott states that witnesses at the trial testified "that spectators…also taunted [Smithers] throughout the game because of his color and because his mother was known to be white" (*ibid*). Donald Smithers observed that in their eighteen years of marriage, they never really experienced "real discrimination outside a hockey arena or baseball lot" (*ibid*). When they did experience it, Donald Smithers observed, "And it's always the adults, the other parents, who cause most of the trouble there" (*ibid*).

[121] Transcript, *supra* note 112 at 564-65, 634, 649; "Youth tells trial of race insults," *The Toronto Star* (19 April 1974) A3 ["Youth tells trial"].

[122] In one article, Smithers advised that "the name-calling has always hurt. He usually didn't let it show." DuPree, *supra* note 85 at C1.

[123] Transcript, *supra* note 112 at 649.

[124] *Ibid* at 565.

[125] Dupree, *supra* note 85 at C5.

[126] *Ibid*.

The racism Smithers suffered on 18 February 1973 did not occur in a vacuum. By framing the narrative solely in connection with the events of that particular day, the Court disregarded important and relevant contextual information that gave meaning to Smithers's actions during both the hockey game and the fight that followed. Omitting the context of blatant and permitted racism against Smithers that occurred over a period of time casts the events of 18 February as random moments, untethered to a pattern of discrimination perpetrated by, among others, Cobby and the Applewood team. However, the impact of veiling the context prior to 18 February is compounded by the Court's myopic construction of what transpired during the hockey game and the fight afterwards. In the next section, I offer a counter-narrative regarding what occurred during the game.

B. The Game

The Court's parsimonious discussion of the events leading to the confrontation between Smithers and Cobby outside the arena are encapsulated in ten sentences. In the second sentence, the Court informs the readers that Cobby was sixteen years old. The Court omits the fact that Smithers was also sixteen years of age on the night in question. This emphasizes Cobby's purported youthfulness and connects it to his untimely death while disregarding Smithers's adolescence.[127] The Court also fails to understand how a sixteen-year-old Black teenager might react when consistently subjected to racism without any intervention.

The Court's recapitulation of what transpired during the hockey game is also remarkably brief. To recall:

> The game was rough, the players were aggressive and feelings ran high. The appellant, who is black, was subjected to racial insults by Cobby and other members of the Applewood team. Following a heated and abusive exchange of profanities, the appellant and Cobby were both ejected from the game.[128]

While the Court succinctly acknowledges that Smithers was the target of racial insults, one might draw from this summary that both Smithers and Cobby engaged in equally unacceptable behaviour, which justified their simultaneous ejection from the game. This false moral equivalence, situated within a frugal reconstruction of the factual matrix, elides much. The Court's statement that Smithers was "subjected to racial insults by Cobby and other members of the Applewood team" does not sufficiently encapsulate either the nature and volume of the racial violence he endured or the range of actors involved.

According to various witness accounts, including Smithers's testimony,[129] both the Applewood and Cooksville players were aggressive from the outset. While this aggression was initially physical in nature, the racial invective materialized around the sixth or seventh minute of play.[130] Around this stage of the game, Smithers tried to gain control of the hockey puck while in a corner near the Applewood team's net. Cobby was present there too, as were other players

[127] Erasing Smithers's status as a minor is consistent with a broader phenomenon of adultification of Black youth. This involves institutional perceptions of and engagement with Black boys as adults. This transformation of Black boys into men and criminals works to "deny Black boys any access to childhood humanity." See T Elon Dancy III, "The Adultification of Black Boys: What Educational Settings Can Learn from Trayvon Martin" in Kenneth J Fasching-Varner et al, eds, *Trayvon Martin, Race, and American Justice: Writing Wrong* (Springer, 2014) 49 at 49.

[128] *Smithers*, *supra* note 12 at 508.

[129] Transcript, *supra* note 112 ("it seemed like everybody was sort of playing a dirty game…" at 568).

[130] Smithers testified that up to that point, he did not hear any racial epithets directed at him (*ibid* at 568-69).

from both teams.[131] As the whistle was blown to stop the play, Cobby proclaimed to Smithers that he was going to "get" him for "that" and then called him a "dirty bastard" or a "black bastard."[132] Smithers did not understand the reasons for Cobby's outburst.[133] In the view of one Crown witness, Smithers purportedly speared Cobby with his hockey stick, which then prompted Cobby's angry response.[134] Denying that he had speared Cobby, Smithers acknowledged at trial that Cobby thought he had done something.[135] There appears to be at least two other accounts that may explain what triggered Cobby's reaction. As reported in *The Toronto Star*, in coverage contemporaneous to the trial (and specifically in relation to Smithers's testimony), Cobby's reaction was prompted by the fact that Smithers was able to retrieve the puck from Cobby in the corner.[136] No mention was made in the article of any other physical contact to Cobby that may have instigated his reaction. In a *Washington Post* article published in 1975, another account revealed, "Early in the first period a Cooksville player not Smithers, elbowed Cobby. Cobby immediately lashed out at Smithers, however, calling him 'a dirty black bastard' and screaming 'I'll get you, I'll get you.'"[137] Whichever version proves most accurate, nothing Smithers did, if anything, justified Cobby's reaction or the racist statements that would follow minutes later. Nevertheless, a downward spiral ensued.

Within minutes of this confrontation, Cobby speared Smithers with his hockey stick, for which Cobby received a five-minute penalty.[138] According to Smithers's teammate, Frank Say, Cobby challenged Smithers, stating, "Don't think I'm scared of you, I'll fight you after the game."[139] As Cobby skated to the penalty box, he continued to holler at Smithers, "Com[e] on, let's fight you stupid [ni***r]."[140] At the time, Smithers was skating to his own bench to receive instructions from his coach. Smithers responded to Cobby by saying "okay."[141] The referee admonished Cobby and instructed him to proceed to the penalty box.[142] Being confined to the penalty box did nothing to quell Cobby's volubility. He continued to hurl racial vituperations at Smithers, including the n-word.[143] Testimony from Crown witnesses also confirmed that, while sitting in the penalty box, Cobby remained in an angry and agitated state and referred to Smithers as a "f…ing [ni***r]" a few times.[144] According to the testimony of timekeeper Nick Brouwer, who was sitting in the penalty box while Cobby was serving his penalty, Cobby referred to

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[131] *Ibid* at 569.
[132] *Ibid*.
[133] *Ibid* at 569-70; "Kicking of player was self-defence, accused testifies," *The Globe and Mail* (19 April 1974) 8 ["Kicking of player"].
[134] Transcript, *supra* note 112 at 611.
[135] *Ibid*.
[136] "Youth tells trial," *supra* note 121.
[137] DuPree, *supra* note 85 at C5.
[138] Transcript, *supra* note 112 at 570, 683; *Smithers v The Queen*, [1978] 1 SCR 506 (Factum of the Appellant at para 12 [Appellant's Factum]); "Kicking of player," *supra* note 133.
[139] Transcript, *supra* note 112 at 673. From direct and cross-examination of this witness, it appeared that Say was close enough to hear Cobby's statements clearly and similarly would have heard Smithers's response, if there was any. Say indicated that he did not hear any response from Smithers (*ibid* at 677-78).
[140] Transcript, *supra* note 112 at 570; "Kicking of player," *supra* note 133.
[141] Transcript, *supra* note 112 at 570. Reporting by David DuPree in the *Washington Post* indicates that as Cobby was on his way to the penalty box, he yelled at Smithers, threatening, "I'll get you, you black m·········, I'll get you." DuPree, *supra* note 85 at C5.
[142] Transcript, *supra* note 112 at 570.
[143] *Ibid* at 570, 612. During cross-examination, Smithers was asked what Cobby was saying to him. Smithers responded, "To the reference of the colour, like what I said, [ni***r], [c**n] and stuff like this" (*ibid* at 612).
[144] Appellant's Factum, *supra* note 138 at para 14.

Smithers as "[t]hat dirty black bastard" and further declared, "I'm fucking going to get him."[145] One can safely conclude from these accounts that Cobby engaged in overt racism, physical violence, and open exhortations to fight after the game. Notably, Smithers chose not to respond violently—despite Cobby's racially provocative language—and instead focused on the game.

With the Applewood team's star player serving a five-minute penalty for spearing, Smithers took advantage of the power play and scored a goal. After scoring, Smithers skated by the penalty box on the way to his own bench. As he did so, Cobby launched into a renewed series of racial slurs, with other Applewood players following his lead.[146] Smithers elaborated that these words included "[f]…ing [ni***r], stupid [ni***r], [c**n], things like that."[147] Smithers responded to Cobby with "that will show you."[148] The timekeeper testified that he heard Smithers utter something to the effect of "[h]a, we got a goal. Showed you up."[149] Unhinged, Cobby continued to unleash a torrent of racial expletives.[150] Smithers recollected that after he reached his bench, Cobby was still yelling at him from the penalty box.[151] Referee Thomas Drew then warned Cobby to stop and, when he refused, expelled him from the game.[152] Drew then skated to Smithers and similarly ejected him from the game, seemingly for engaging in an exchange of profanities.[153] According to Drew, who testified as a Crown witness, after Smithers scored his goal and made the comment referenced above to Cobby, there was an exchange of words between the two players.[154] With respect to Drew's observational skills, it is notable that, on cross-examination, he testified that he had not heard Smithers being called the n-word or other racial slurs.[155] This is striking, given that Cobby had uttered these words repeatedly and forcefully. Applewood manager John Lockey testified, "I heard '[ni***r]' and other remarks with racial overtones and Smithers was retaliating and using the term 'whitey.'"[156] Applewood coach John Beaune also testified that he heard slurs coming from not only Cobby but also other players from his team.[157] The Applewood players did not appear to suffer any repercussions for employing such language, apart from Beaune admonishing them to stop the "name-calling" and focus on the game.[158]

The racialized nature of what transpired before Smithers and Cobby were ejected from the game was not limited to the players. Testimony at trial conveyed that spectators also vocally

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[145] Proudfoot, *supra* note 116 at 6. In reporting by *The Globe and Mail* contemporaneous with the trial, it was reported that Michael Vukobrat, a coach of the Applewood Juvenile hockey team, stated that Cobby told him, while in the penalty box, that he was "going to get that 'dirty black bastard.'" "Racial taunts in hockey game ended in fight, witness says," *The Globe and Mail* (10 April 1974) 9 ["Racial Taunts in Hockey Game"]. This reference to Vukobrat may have been an error. It would seem more logical that Nick Brouwer, as a timekeeper, would have been present, rather than a coach from Cobby's team. In either event, there is consistency between the different reporting of this incident insofar as to what Cobby said in reference to Smithers.

[146] In an interview with *The Washington Post*, Smithers indicated that Applewood players chanted "get the [ni***r]…get the [ni***r]." DuPree, *supra* note 85 at C5.

[147] Transcript, *supra* note 112 at 571.

[148] *Ibid*.

[149] Appellant's Factum, *supra* note 138 at para 15.

[150] Transcript, *supra* note 112 at 571, 613-14.

[151] *Ibid* at 571.

[152] *Ibid*.

[153] *Ibid* at 572, 614.

[154] "Boy expected trouble, manslaughter trial told," *The Globe and Mail* (9 April 1974) 8 ["Boy expected trouble"].

[155] *Ibid*.

[156] "Racial Taunts in Hockey Game," *supra* note 145.

[157] Proudfoot, *supra* note 116 at 6.

[158] *Ibid.*

contributed to the racism aimed at Smithers, who heard their abusive language.[159] Speaking more generally, Smithers testified that those who hurled racist slurs at him included opposing "players, fans, parents, anybody that was at the rink," with the probable exception of those who supported the Cooksville team.[160] Smithers posited that this behaviour worsened as the season progressed.[161] Such spectator participation was observed by others. Smithers's teammate, goalie Rick Bailey, asserted that while he often heard racial slurs during past games, it was excessive on the night of 18 February. He explained that there was "no way you could help but hear it. Players on the ice and people in the stands were calling Paul a black bastard and stuff like that."[162]

The utterance of racial slurs would also be accompanied by ominous suggestions of violence. Smithers testified that some spectators were shouting at the Applewood players, encouraging them to "get that [ni***r]," or words to that effect.[163] Other defence witnesses corroborated such spectator misconduct. Alfred Bartlett, a parent of one of Smithers's teammates, was present in the stands the evening of 18 February.[164] He witnessed others among his age group (he was 46 at the time of his testimony) refer to Smithers as a "black bastard" and yell out statements to "get the black bastard" (and possibly other epithets).[165] Far from an isolated incident, Bartlett observed that this was common when he would attend games in which Smithers was playing.[166] Two other defence witnesses, Lorne and Lorraine Bailey (a married couple and parents of a Cooksville player), took note of similar behaviour by younger persons.[167] Lorne Bailey recalled that there were "a number of very profane racial comments made by some of the spectators," who counselled Applewood players to "get that black bastard."[168] Lorraine Bailey testified that she overheard teenaged spectators calling Smithers "a black bastard" and the n-word.[169] Both witnesses also overheard some discussion after the game, among those sitting in front of them, about "getting" Smithers. This suggested a physical assault, though it was unlikely Smithers would have been able to hear the threats.[170]

Before proceeding to the next section, I offer a few observations. The flagrant, aggravating, and permitted instances of racism directed at Smithers by Cobby, his teammates, and various spectators provide more than ample context to comprehend Smithers's determination to confront Cobby and pre-empt future racist aggression. To recall an earlier discussion in this article, Smithers's experiences on 18 February and in earlier games resemble those of other Black Canadian hockey players, who were equally subjected to racism from rival teammates, coaches, and spectators during the 1970s and afterwards. Smithers's ordeals were part of a common pattern of behaviour. The Court's understating of this broader course of conduct—racial epithets combined with physical violence, Cobby's challenges to fight, and further calls to

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[159] In an article published after the jury's verdict (but prior to sentencing), Joyce and Donald Smithers both conveyed their bitterness "about the large number of adults—coaches, game officials and especially spectators, parents of the other players—without whose acquiescence and even vocal encouragement they feel the tragic incident would not have occurred." Scott, *supra* note 120.
[160] Transcript, *supra* note 112 at 563-64.
[161] *Ibid* at 564.
[162] DuPree, *supra* note 85 at C5.
[163] Transcript, *supra* note 112 at 591.
[164] *Ibid* at 632.
[165] *Ibid* at 632, 635-36; "Kicking of player," *supra* note 133.
[166] Transcript, *supra* note 112 at 635.
[167] *Ibid* at 589, 690, 695-97.
[168] *Ibid* at 690.
[169] *Ibid* at 696-97.
[170] *Ibid* at 690, 697

perpetrate violence against Smithers—behind a feeble acknowledgment that Smithers was subjected to racial insults was quite simply intentional and condemnable. Notably, the Crown did not dispute the racialized nature of the hockey game in its factum.[171]

In providing a broader account, following critical race scholarship, I have sought to expose, in some small measure, the lived experience of Smithers during the 18 February game and, in smaller measure, events prior to that day. By intentionally excluding this context, the Court fostered and reinforced a white supremacist caricature of Smithers as a Black "aggressor" with inherent anger management issues.

Smithers's treatment prior to and during the game establishes important context that provides some insight into the events that followed, which led to the physical confrontation with Cobby outside the arena. The next section examines what transpired after Smithers and Cobby were ejected from the game.

C. Chasing Cobby? – Seeking an Apology or Seeking a Fight

At this stage of its narrative, the Court explained that after being ejected from the game, Smithers assumed the role of the "aggressor" for the next forty-five minutes, which culminated in the fight outside the arena and Cobby's death. This resembles the Crown prosecutors' characterization of Smithers as a "hunter stalking his prey."[172] Readers are to believe that Cobby suddenly transmogrified into the hunted, given his purported apprehensiveness to fight and despite his repeated shows of bravado, entreaties to fight, and racially provocative words during the game—facts that were excluded from the Court's narrative. The counter-story below illustrates that, while Smithers was certainly persistent in confronting Cobby about the latter's challenges to fight, labelling Smithers an "aggressor" misrepresents a more complicated picture. This is especially the case since, according to his own testimony, Smithers sought an apology from Cobby, which would have ended the matter. However, it is clear that if he did not receive an apology, Smithers was prepared to fight in the hope that, whatever the outcome, he would earn the respect of his detractors and the racial slurs might cease.[173] Rather than an aggressive move, Smithers's readiness to fight could be understood as defensive and pre-emptive, in light of his overall experiences of racism while playing Cobby's and other teams. While Cobby's willingness to fight may have diminished after being ejected from the game, he neither hesitated to act in a dismissive manner toward Smithers nor indicated any fear or apprehensiveness while in Smithers's presence.

Soon after Smithers and Cobby were ejected from the game, they had a brief encounter near their respective teams' dressing rooms. Smithers asked Cobby whether he still wanted to fight, and said that if so, they should meet out in the hall in ten minutes.[174] Cobby flippantly responded with words to the effect of "[y]ou shake me up."[175] One of Cobby's friends provided

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[171] Respondent's Factum, *supra* note 107.

[172] "Youth, 17, guilty in hockey game fight death," *The Toronto Star* (23 April 1974) A3 ["Youth, 17, guilty"].

[173] Transcript, *supra* note 112 at 602-604. However naive it might seem to harbour such hope, others who grew up during this period and experienced racism took to fighting their tormentors as a way to stem further attacks. See Shree Paradkar, "As a Black student, he was told to dream small. He had hoped things would change for his son," *The Toronto Star* (6 September 2019), online: <www.thestar.com/news/atkinsonseries/2019/09/06/as-a-black-student-he-was-told-to-dream-small-but-he-hoped-things-would-change-for-his-son.html>.

[174] "Kicking of player," *supra* note 133 at 8.

[175] Transcript, *supra* note 112 at 573; "Kicking of player," *supra* note 133; Proudfoot, *supra* note 116 at 6.

corroborating testimony that this encounter transpired and that he was left with the impression that Cobby was trying to show off to everyone present that he was not afraid of Smithers.[176] After retiring to their dressing rooms, Smithers quickly changed and then waited outside the Applewood team's dressing room.[177] When the Applewood team's manager, John Lockey, exited the room, Smithers asked him if Cobby still wanted to fight. Lockey advised Smithers to leave and mind his own business. Smithers refused, responding resolutely, "No, because I want to get this thing straightened out, I'm not going to take it anymore."[178] Though it would not necessarily be clear from these words, Smithers testified that he wanted an apology from Cobby for his conduct and, if Cobby was not prepared to give it, Smithers was prepared to fight him.[179] Lockey observed Smithers saying, "I'm going to get him."[180] The door to the Applewood dressing room remained ajar, and Smithers and Cobby were able to make eye contact. Cobby merely sneered at him.[181] Alan Hay, a rink attendant, advised Smithers that if he wanted to fight, it would have to be outside. At trial, Hay posited that as Smithers walked away he stated, "Well, I'm going to get him, I'm not going to hurt him, I'm going to kill him."[182] On cross-examination, Hay clarified that he did not take Smithers's words seriously.[183] Given the relatively short time that had passed since being ejected from the game and being the recipient of Cobby's numerous racial slurs and challenges to fight, it is hardly surprising that Smithers was still extremely upset. When Crown prosecutor Leo McGuigan confronted Smithers with evidence of his statements to Hay regarding Cobby, Smithers asserted that he did not recall saying these words but estimated that he was still upset at the time over what had recently transpired.[184]

After several minutes, Cobby had changed into his street clothes and exited the dressing room with two friends to head to the rink area.[185] Smithers, who appears to have been close by, followed behind, once again inquiring if Cobby wanted to fight. Cobby replied with "[s]hut up" or words to that effect.[186] Cobby and his friends then situated themselves near the Applewood team's bench, while Smithers placed himself elsewhere. Smithers and Cobby were still within viewing distance of one another and continued to exchange sneers.[187] Given his anger over being thrown out of the game, Smithers also started to quarrel with, and allegedly directed abusive language at, Thomas Drew, the referee who had removed him from the game.[188] Drew responded by threatening to suspend Smithers for the rest of the season.[189] Undaunted, Smithers persisted with his vituperative commentary and Drew ended the game.[190] As the teams exited the rink and

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[176] Appellant's Factum, *supra* note 138 at para 19.
[177] Transcript, *supra* note 112 at 574.
[178] *Ibid*; "Kicking of player," *supra* note 133.
[179] Transcript, *supra* note 112 at 574; "Kicking of player," *supra* note 133; "Youth tells trial," *supra* note 121.
[180] Appellant's Factum, *supra* note 138 at para 20. *The Globe and Mail* quotes Lockey as testifying that Smithers uttered, "I've had enough of this. I'm going to get you. I'm going to get you." However, it is not clear from the article at what point on the night of the game Lockey was indicating that this occurred. "Racial Taunts in Hockey Game," *supra* note 145.
[181] Transcript, *supra* note 112 at 575.
[182] Appellant's Factum, *supra* note 138 at para 21.
[183] *Ibid* at para 22; Proudfoot, *supra* note 116 (Hay stated in cross examination, "It's not a threat you actually take for his word" at 7).
[184] Transcript, *supra* note 112 at 604-605; "Kicking of player," *supra* note 133.
[185] Transcript, *supra* note 112 at 575.
[186] *Ibid*.
[187] *Ibid* at 576.
[188] "Boy expected trouble," *supra* note 154; Proudfoot, *supra* note 116 at 6.
[189] *Ibid*; "Boy expected trouble," *supra* note 154.
[190] *Ibid*.

proceeded to their respective dressing rooms, Smithers followed Cobby and the Applewood team. Smithers once again asked Cobby if the latter wanted to fight. As before, Cobby merely told Smithers to "shut up."[191] One of Cobby's teammates then warned Smithers, "You had better shut up stupid [ni***r] or he will have to beat you."[192]

Once Cobby and the Applewood team returned to their dressing room, Smithers waited outside for roughly ten seconds to see if Cobby would emerge.[193] He then returned to his team's dressing room to speak with his teammates. When asked if he was going to fight Cobby, Smithers explained that he was prepared to if Cobby wanted to do so.[194] When it was suggested to Smithers that he should wait, so that his teammates could join him, Smithers responded, "If I'm going to fight, I'll fight him myself."[195] Soon after this, someone alerted Smithers that the Applewood team was leaving their dressing room.

As Smithers exited his team's dressing room, he followed behind Cobby and other members of the Applewood team as they ascended a staircase on their way to leave the building. Smithers stated to Cobby, "Apologize and we will forget the whole thing."[196] Cobby looked back at Smithers in amazement and then proclaimed, "Ha, me apologize to you."[197] Given Cobby's consistently derisive and racist attitude toward Smithers, it could hardly be surprising that an apology was not forthcoming, especially with Cobby's friends and teammates within earshot. It is worth noting that none of the other Applewood players, who testified as Crown witnesses, seemed to have heard either Smithers's request for an apology or Cobby's refusal to give one.[198] During his testimony, Smithers asserted that Cobby's response was "loud enough that I would have thought that anybody who was around there would have heard it, but evidently I guess they didn't."[199] Not surprisingly, this would suggest that someone was not telling the truth. While that person could have been Smithers, it could also have easily been an individual who engaged in racism against him or, at the very least, neither stopped nor openly admonished Cobby for doing so.[200] From their perspective, Smithers unjustifiably killed their friend for nothing more than engaging in insulting language—language which they likely viewed as part and parcel of the game.

The counter-story I have presented in this section, drawn largely from Smithers's testimony, problematizes two aspects of the Court's narrative: its characterization of Smithers as

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[191] Transcript, *supra* note 112 at 576.
[192] *Ibid*.
[193] *Ibid* at 578.
[194] *Ibid*.
[195] *Ibid* at 583.
[196] *Ibid* at 584-85.
[197] *Ibid* at 585; Proudfoot, *supra* note 116 at 7. In *The Globe and Mail*'s coverage of the trial and, in particular, Smithers's testimony regarding Cobby's response to his request for an apology, one article quotes Smithers as recollecting, "Huh? Me apologize to you?" See "Kicking of player," *supra* note 133. Contextually, *The Globe and Mail*'s phrasing strikes one as being possibly more accurate as to how the statement was framed and expressed during Smithers's testimony.
[198] One might add here that Cobby's friends, who testified for the Crown, also constructed a particular image of Cobby distinct from the behaviour he exhibited to Smithers. Smithers's trial counsel, Arthur Maloney, alerted to the jury in his opening statements, "His friends, I think perhaps unfairly to Barrie Cobby, have left a picture of a cowering frightened boy." Transcript, *supra* note 112 at 558.
[199] *Ibid* at 585.
[200] Lorraine Bailey was given a summons to appear on behalf of the Crown and sat with other potential Crown witnesses in a room. She observed that Cobby's friends, who also testified on behalf of the Crown, viewed the court case as a game. Bailey posited, "It was still a game for them, they had a great time going over their stories, over everything they testified." Proudfoot, *supra* note 116 at 7.

an aggressor and Cobby's apprehension about fighting. In addition to seeking an apology, Smithers inquired several times of Cobby whether he still wanted to fight in light of Cobby's many challenges. Notably, during the encounters described in this section, Smithers did not initiate an assault on Cobby. In addition, there are some doubts as to whether Cobby was truly apprehensive. The factual record is equivocal. While Cobby seemed to have resiled from his earlier challenges to fight Smithers after the game, he still maintained a rather dismissive posture and did not appear to exhibit any fear when in Smithers' presence. That said, Cobby remained consistently within proximity of his teammates while Smithers refused to involve his own teammates. It was also apparent to Smithers that Cobby was unprepared to apologize for his racist conduct earlier. The next section presents a counter-story regarding the fight outside the arena.

D. The Fight

The Court's account of the fight and the moments leading up to it indicate that Cobby was apprehensive about fighting Smithers and exited the arena in a hurried manner to a waiting car. Indeed, after Smithers's unsuccessful attempt to secure an apology earlier, he followed Cobby and his friends outside the arena.[201] Cobby had already descended the staircase when Smithers exited.[202] While some testimony suggested that Cobby was hurrying away to escape from Smithers, at least three Crown witnesses observed that Cobby merely walked down the stairs.[203] One of these witnesses even testified that Cobby "was taking his time walking downstairs."[204] This conflicting testimony establishes that it was less than evident that Cobby was hurrying to an awaiting car to avoid Smithers.

Soon after Smithers exited the building, the Applewood team manager, John Lockey, briefly restrained Smithers by grabbing his arms from behind.[205] However, Lockey then relinquished his hold and Smithers proceeded down the staircase.[206] What transpired after proceeded very rapidly. According to the Court, "[t]he appellant caught up with [Cobby] at the bottom of the outside steps and directed one or two punches to Cobby's head."[207] Nothing is said about Cobby's posture or the forcefulness of the punches—neither is insignificant. Drawing from Smithers's testimony, as he approached, he observed that Cobby's arms were raised and positioned at a ninety-degree angle.[208] Perceiving that Cobby was prepared to strike him,[209] Smithers threw a punch, but merely grazed Cobby's chin.[210]

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[201] Transcript, *supra* note 112 at 585.
[202] *Ibid*.
[203] Respondent's Factum, *supra* note 107 at paras 35, 38-39.
[204] *Ibid* at para 38.
[205] Transcript, *supra* note 112 at 585.
[206] *Ibid* at 585-86. One Crown witness also testified that Lockey and others let Smithers go. Respondent's Factum, *supra* note 107 at para 39.
[207] *Smithers*, *supra* note 12 at 508.
[208] Transcript, *supra* note 112 at 586, 626 ("[Cobby] had his hands up at the same angle as he did when he was ready to punch, I can't recall they may have been closed, or they may have been open, but they were up as if he was going to strike me" at 626).
[209] "Kicking of player," *supra* note 133 (reporting that Smithers testified, "I thought he was ready to hit me, so I punched him. I punched him more or less instinctively").
[210] Transcript, *supra* note 112 at 586, 625.

After striking Cobby's face, Smithers was almost immediately and aggressively restrained by Cobby's friends or teammates.[211] To recall the Court's account, "[s]everal of Cobby's team mates grabbed the appellant and held him."[212] Missing in this statement is the dangerously aggressive nature of the restraint, which would likely affect the forcefulness of the kick Smithers later delivered. One of the individuals who restrained Smithers, Richard Link, was positioned behind Smithers, grabbed him aggressively around his neck, and pulled back with force.[213] Meanwhile, at least two others, Bruce Rowbotham and James Cooper, grabbed Smithers's arms.[214] Smithers testified that his head was tilted back because Link "had a pretty tight grip on my neck"[215] and was pulling "fairly hard."[216] Smithers further explained, with respect to Link's hold, "Like he wasn't exactly choking me, he had a firm enough grip if I moved, you know, he probably would have been choking me."[217] On cross-examination, Smithers posited that the force Link applied to his neck indeed hurt him physically.[218] Accordingly, this was hardly a simple and relatively benign act of grabbing and holding Smithers, as the Court presented. Rather, it was an overtly aggressive action—one which could potentially restrict the restrained person's ability to breathe properly.

We have now reached the critical stage of the narrative where Smithers delivered a kick to Cobby's stomach area. To recall, the Court explained, "While Cobby was thus bent over, and approximately two to four feet from the appellant, the appellant delivered what was described as a hard, fast kick to Cobby's stomach area."[219] Notably, from this official version, Cobby is clearly portrayed as a victim who was kicked while in a vulnerable or defensive state; that is, he was bent over. By contrast, Smithers's account reveals a role inversion. With respect to Cobby's posture at the time of the kick, Smithers testified during cross-examination, "When they were all holding me, [Cobby] sort of turned around and started coming towards me sir, like in a manner that he was ready to hit me, or something, hit me or kick me, or whatever sir."[220] On this reading, Cobby was prepared to opportunistically and cowardly assault Smithers while Smithers was in a compromised position and his head was being forcibly pulled back by Link.

Feeding into the Court's perception of Cobby as the victim, and Smithers as the unmitigated aggressor, is the characterization of the kick delivered—"a hard, fast kick to Cobby's stomach area."[221] However, the forcefulness of the kick was in dispute at trial. Indeed, the aggressive nature of Smithers's restraint provides important contextual information. It is

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[211] *Ibid* at 586-87; Appellant's Factum, *supra* note 138 at para 33; DuPree, *supra* note 85 at C5; Proudfoot, *supra* note 116 at 7. According to an article published in *The Globe and Mail* during the trial, Applewood coach, John Beaune testified that he was present and intervened during this altercation. Beaune stated that Smithers had one hand on Cobby's jacket and as Beaune attempted to pull Smithers's hand away, Smithers then kicked Cobby. "Boy expected trouble," *supra* note 154. This particular version of events was neither accounted for in the Court's decision, the parties' factums, nor in Smithers's testimony. Indeed, it seems strikingly inconsistent with even the Court's official narrative of Smithers delivering the kick while being held back by Cobby's teammates, as well as when Cobby was already doubled over a few feet away.
[212] *Smithers*, *supra* note 12 at 508.
[213] Appellant's Factum, *supra* note 138 at para 34; Transcript, *supra* note 112 at 587; DuPree, *supra* note 85 at C5.
[214] *Ibid*; Appellant's Factum, *supra* note 138 at para 34; Transcript, *supra* note 112 at 587.
[215] *Ibid* at 587.
[216] *Ibid* at 588.
[217] *Ibid*.
[218] *Ibid* at 628 ("Well the guy that had me around the neck sort of hurt my neck a bit, but nothing serious").
[219] *Smithers*, *supra* note 12 at 507-508.
[220] Transcript, *supra* note 112 at 625.
[221] Smithers, *supra* note 12 at 508-509.

indeed questionable just how potent Smithers's kick might have been while he was being forcibly pulled back in the position described in his testimony. At trial, Smithers himself posited confidently that his kick was in fact not forceful.[222] When Smithers was cross-examined by Crown prosecutor Leo McGuigan about how he was so positive that the kick was not delivered with great force, he responded, "If you are hitting something solid you can sort of just tell, it felt like it was a very light kick. I know it was a light kick, I know, I could just tell."[223] In addition, others testified that Smithers was heard expressing this similar reflection about the weakness of the kick soon after the incident.[224] In other words, Smithers's recollection of the feebleness of his kick was not manifested solely at the trial. Furthermore, the strength of Smithers's kick was also placed in doubt by a Crown witness who was present during the fight.[225] According to this witness's testimony, Smithers's right leg came up as a result of being pulled back and losing his balance.[226] The witness further observed that Smithers's leg did not come up to the kicking point due to the struggle.[227] Together, such evidence impugns the singular notion that Smithers delivered a hard, swift kick to a purportedly vulnerable Cobby. Indeed, the leg movement that the Court characterized as a kick appears to be scarcely voluntary—that is, an act that "resulted from the choice of a conscious mind and an autonomous will"—if voluntary at all.[228]

E. After the Fight

After documenting the fight and Cobby's death,[229] the Court moved swiftly to the medical testimony. In this section, I present an account of what took place following the kick, which incorporates the seeming reluctance of many, including Cobby's friends and teammates, to provide assistance to Cobby. The following counter-narrative also offers an indication of Smithers's confused and distraught reaction to what had just occurred, as well as the impact of being the target of repeated racial slurs.

Soon after the kick, Cobby fell to the ground and was seen gasping for air.[230] As was later testified through medical testimony, Cobby passed away after asphyxiating on his own vomit, which passed into his trachea due to a malfunctioning epiglottis.[231] One defence witness, Alfred Bartlett, posited that while Cobby was laying on the ground struggling to breathe, there seemed to be little effort by his friends, teammates, or other adults present, either to assist him or to call for medical assistance.[232] Bartlett explained that he arrived after the fight and observed Cobby lying on the ground gasping for breath.[233]

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[222] Transcript, supra note 112 at 630.
[223] *Ibid*.
[224] *Ibid* at 675, 691-92, 698.
[225] Appellant's Factum, *supra* note 138at para 36.
[226] *Ibid*.
[227] *Ibid*.
[228] *R v Ruzic*, 2001 SCC 24 at para 34.
[229] *Smithers*, *supra* note 12 at 509. The Court stated, "Following the kick, Cobby groaned, staggered towards his car, fell to the ground on his back, and gasped for air. Within five minutes he appeared to stop breathing. He was dead upon arrival at the Mississauga General Hospital."
[230] Appellant's Factum, *supra* note 138 at para 41; Transcript, *supra* note 112 at 639.
[231] *Smithers*, *supra* note 12 at 509.
[232] Transcript, *supra* note 112 at 639, 647.
[233] *Ibid* at 639.

When Bartlett approached Cobby to provide assistance, he remarked to the Applewood players present, "I hope you are proud of yourselves what happened here [*sic*]."[234] They responded by telling him to "[f]… off" and to "leave [Cobby] alone."[235] Bartlett refused, telling them, "This boy is hurt and he needs help."[236] Indeed, after being admonished by Smithers's coach, George Spencer, to not get involved, Bartlett reiterated that "[t]his boy is hurt and hurt bad."[237] After calling over to another adult bystander to assist him, Bartlett proceeded to pump Cobby's chest while the other individual attempted to provide mouth-to-mouth resuscitation.[238] Bartlett directed Cobby's teammates to place their jackets over Cobby to keep him warm. Bartlett asked these teenagers whether they had called for an ambulance, to which they responded, "[n]o."[239] He instructed one or more of them to go inside and call for one and for the police. Soon after, Bartlett noticed that Cobby had stopped breathing and that he could not feel a pulse.[240]

On cross-examination, Bartlett's account regarding his assistance to Cobby and the failure of Cobby's teammates to provide much aid was not seriously challenged, but for a very brief exchange. Crown prosecutor Leo McGuigan asked, "If I understand your evidence, you got in your car, you started it up, drove it up, got out and you were really the first one who gave any assistance or help?"[241] Bartlett replied that this was correct.[242] McGuigan inquired, "That's your evidence?" Bartlett responded, "That's my evidence." McGuigan concluded, "Fine, thank you."[243] While one could infer that McGuigan was expressing incredulity about Bartlett's testimony, he did not refer to the testimony of any Crown witnesses to contradict Bartlett's account, something he did when cross-examining and challenging the accounts of other witnesses, such as Smithers.

Meanwhile, after Cobby collapsed, Smithers returned to the inside of the arena and remained with Lorne and Lorraine Bailey. He did not flee the scene. Given the violent way that he was restrained and the nature of the kick as he recalled it, Smithers appeared to be bewildered as to how the kick could have resulted in hurting Cobby. As Smithers stood with the Baileys, one of Cobby's teammates uttered to him, "I hope you are satisfied you black bastard he is hurt."[244] Smithers then expressed to the Baileys, "I couldn't have hit him that hard, I just don't believe I could have hurt him."[245]

Soon after the call was placed for medical assistance, Police Constable James Vanhaverbeke arrived on the scene. He could detect no signs of a pulse or respiration from Cobby.[246] After entering the arena, he walked toward Smithers. Vanhaverbeke testified that as he approached Smithers, the latter stated, "I'm the one you want. Can I call my parents, I don't want

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[234] *Ibid*.
[235] *Ibid*.
[236] *Ibid*.
[237] *Ibid*.
[238] *Ibid.*
[239] *Ibid.*
[240] *Ibid* at 640.
[241] *Ibid* at 647.
[242] *Ibid*.
[243] *Ibid*.
[244] Notably, Applewood coach, John Beaune, testified that "he and several others tried to revive Cobby, whose eyes were closed and appeared unconscious." See "Boy expected trouble," *supra* note 154.
[245] Transcript, *supra* note 112 at 691.
[246] *Ibid* at 692, 698.

to say anything until I talk to my parents."[247] As Vanhaverbeke escorted Smithers to his police cruiser, he heard Smithers repeatedly say, "I didn't kick him that hard."[248] On cross-examination, Vanhaverbeke acknowledged that Smithers was "sobbing and highly distraught."[249] Salient to the impact of the repeated racial insults to which Smithers was subjected, Vanhaverbeke also testified that on their walk to the police cruiser, Smithers asserted, "He called me [ni***r], every game, I'm sick of it, that's all I got [ni***r], [ni***r]."[250] Smithers also opined to Vanhaverbeke that "the fight was started on the ice, and it had started a long time ago."[251] Vanhaverbeke placed Smithers in his police car. Detective Sergeant Barry King arrived at the scene soon after. After learning of Cobby's death, he approached Vanhaverbeke's cruiser and observed Smithers sitting in the car with "his head down toward his knees" and crying.[252] After informing Smithers that Cobby had died, he noticed Smithers further break down and cry.[253]

The Court's portrayal of Smithers as an aggressor, as opposed to a victim of racial violence who demonstrated both agency and suffering, advances a white supremacist narrative. Its narrative denies recognition of Smithers's humanity, including the impact of racist and threatening conduct towards him, his appreciation that Cobby was injured, and his reaction when he learned of Cobby's death.

Through this entire counter-story, we learn about the significant impact that racism had on Smithers. I have offered a version of events that was largely kept out of the Court's reductive narrative and its characterization of Smithers: A Black aggressor preying on his white teenage victim. Given the evidence available to the Court through the trial transcript, along with pointed references to the evidence by Smithers's appellate counsel William McMurtry in both written and oral submissions,[254] the Court's one-sided narration and characterization cannot be seen as anything but deliberate and intentional. The Court opted to project a particularly misleading story and representation of Smithers, despite the complexity offered in the record.

The Court's narrative of the events is not the only problematic feature of the case. A broader reading of the case history also points to concerns about the prosecution's efforts during the trial to minimize Smithers's experiences of racism while playing hockey and the role that racism played in jury deliberations. I turn to these issues next.

III. Minimizing Racism

Thus far, I have focused most of my attention on providing a counter-narrative to the Court's decision by emphasizing the role that race played. However, the Court is not the only actor that minimized the significance of racism in the case. In this Part, I examine primarily the Crown prosecutors' role in diminishing the importance of race and the moral culpability of those who engaged in racism against Smithers. Such minimization ties into a larger social expectation that

[247] Appellant's Factum, *supra* note 138 at para 46.
[248] *Ibid* at para 46.
[249] *Ibid*.
[250] *Ibid* at para 47.
[251] *Ibid*.
[252] *Ibid* at para 48.
[253] *Ibid*.
[254] See Mary Trueman, "Justices cool to points in racial slaying appeal," *The Globe and Mail* (11 February 1977) 9. William McMurtry replaced his brother Roy McMurtry as Smithers's counsel before the Court.

Smithers endure the racialized verbal and physical assaults, both on and off the ice, and not respond violently.

During litigation, notwithstanding the clear evidence of racist slurs being projected at Smithers, Crown prosecutors made distinct efforts to undermine the role of racism and its impact. When prosecutor Leo McGuigan cross-examined Smithers, he asserted that he did not condone racism.[255] Yet during his closing arguments, McGuigan sought to dismiss the racial animus inherent in statements expressed by both Applewood players and spectators. He conveyed that such expressions were made in the heat of the moment and did not demonstrate that such persons were prejudiced, "otherwise Applewood would not be a good place to live in."[256] This illustrates a problematic commitment to rehabilitating racists and protecting discriminatory language by obscuring the obvious racial hatred and violence behind the words. McGuigan's statements suggest a special degree of deliberate ignorance to the frequency and level of racial hostility directed at Smithers during both the game on 18 February and prior matches. It is exactly this type of underlying tolerance of racism that allowed Cobby, his teammates, and spectators to feel empowered to bully and racially abuse Smithers in a manner that was clearly threatening and intimidating.

The prosecution's efforts to downplay the racism directed at Smithers was also exemplified in comments made by McGuigan's co-counsel John Greenwood, who seemed critical of the attention given to the case because of Smithers's race. In a literal appeal to colour blindness regarding a case about racial discrimination, Greenwood observed, "If you take away Smithers' color, there wouldn't be so much attention given this case [*sic*]."[257] In addition, Greenwood offered that "[i]f Smithers were white…[t]here probably wouldn't be so much public concern. He probably would have been convicted and that would have been that."[258] This was strikingly obtuse. The likely reasons that the case received such attention (including international coverage in *The New York Times* and *The Washington Post*) were the degree of racism Smithers experienced *because he was Black* and the fact that he fought back against it. Furthermore, but for the discrimination and repeated racial slurs directed at Smithers, there would have been no reason for him to confront Cobby after the game.

While unable to sweep such blatant racism under the rug, the prosecution argued that Smithers was largely unaffected by these racist slurs, as he was accustomed and conditioned to hearing such words thrusted at him. McGuigan questioned Smithers about whether he was conditioned to hearing racist terms directed at him. Smithers responded, "I get conditioned to a certain amount of it, but that was an excess amount of it that I received that night."[259] McGuigan then inquired if "in the course of the heat of a hockey game things are said from one player to another in which it means no more than the fact that it's said in the part of the hockey game?"[260] In response, Smithers acknowledged that "certainly a lot of things do get said in a hockey game, but there's no reason for the fact for him calling me as continuously as he did, it was more than obvious that it wasn't just in the heat of the hockey game as far as I am concerned sir."[261] McGuigan suggested to Smithers that the utterance of racial terms directed at him (as a Black

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[255] Transcript, *supra* note 112 at 599.
[256] "Youth, 17, guilty," *supra* note 172.
[257] DuPree, *supra* note 85 at C5.
[258] *Ibid*.
[259] Transcript, *supra* note 112 at 631.
[260] *Ibid*.
[261] *Ibid*.

person) was no different than what other nationalities commonly experience from time to time.[262] Smithers recognized that such derogatory terms are uttered, but returned to the fact that the continuous and excessive use of racist slurs aimed at him indicated that it was "more or less personal."[263] Smithers maintained, "I think it was really meant to hurt me more than anything. There's quite a difference, that's the way I feel, that is my opinion."[264] Perhaps emblematic of the Crown's insensitivity to Smithers and his experience of racism, and the Crown's dismissiveness of this history, McGuigan then asked, "Do you feel you might be over sensitive on that [*sic*]?"[265] Smithers replied, "No I have been brought up with it all my life, but I still, you know, I don't understand why I had to go through what -- why [Cobby] had to persist on that continuously. You know he excessed it, quite obviously."[266] McGuigan's questioning points to two things: Either Smithers was accustomed to the racism, and it really had no effect on him, or he was simply over-sensitive because the derogatory name-calling was part and parcel of the game. This was the crude and unsophisticated binary offered to Smithers. In either event, the Crown sought to invalidate Smithers's experience of racism and its impact on him.

Smithers's acknowledgement during cross-examination of being accustomed to some level of racism may have been partly performative and meant to demonstrate his masculinity and toughness in a notoriously violent sport. Like other Black players, he was expected to endure such racism. *Washington Post* journalist David DuPree wrote about Smithers's case in 1975. In the course of researching, he interviewed Smithers and others. Regarding the racial epithets hurled at Smithers, DuPree wrote, "Smithers says the name-calling has always hurt. He usually didn't let it show."[267] Following the trial, Smithers was granted bail pending appeal. He continued to play hockey and was still subjected to racial slurs. Smithers commented to DuPree, "And people still call me [ni***r]. That's the most degrading thing anybody can call me, but I guess I'm just supposed to take it."[268]

What emerges is the idea that a Black player, when faced with racial slurs, should simply sustain the taunts and not be "over-sensitive." When trial court Justice B. Barry Shapiro sentenced Smithers to six months' incarceration in an adult training centre in Brampton,[269] he encouraged Smithers to continue playing sports.[270] However, he counselled Smithers to "restrain his temper" and that, "[i]n case of racial insults, you should seek redress in a nonviolent manner."[271] This demands that victims of racial discrimination, such as Smithers, keep their cool in the face of patent verbal and physical aggression in addition to explicitly threatening and intimidating behaviour. It expects nothing of racial aggressors to hold their animus in check and refrain from verbalizing their prejudices.

Justice Shapiro's advice harkened to imagery of Black athletes who have shouldered the racism aimed at them. Such symbolism was weaponized against Smithers. For example, a white

[262] *Ibid*.
[263] *Ibid*.
[264] *Ibid*.
[265] *Ibid*.
[266] *Ibid*.
[267] DuPree, *supra* note 85 at C1.
[268] *Ibid* at C5.
[269] Michael Solomon, "Supporters crowded courthouse as Smithers gets six months," *The Globe and Mail* (5 June 1974) 1.
[270] DuPree, *supra* note 85 at C5.
[271] *Ibid*.

spectator once told him, “Jackie Robinson took it, you better learn how to take it, too.”[272] As is well known, Robinson was the first Black player in Major League Baseball and was subjected to racism by fellow players, opponents, and spectators.[273] As part of the quid pro quo in being permitted to play, Robinson needed to demonstrate his ability to endure the racism foisted on him.[274] Robinson was seen as a hero for his accomplishments, for being a sports pioneer, and for not giving in to his justified anger. Consequently, Robinson’s stoicism as an adult was weaponized against Smithers, who, unlike Robinson, was still a teenager. Smithers’s father, Donald, further posited that, at the time of the tragic game against Applewood, “Paul was just a young boy. Who can say he should have controlled his emotions when players and fans were calling him ‘[ni***r]’ every game? He was bound to explode.”[275] More generally, the elder Smithers asserted that over the course of the trial, there was an attitude or expectation

> that a black person should go out on the ice and just let people call him a “[ni***r]” or whatever, even if it comes from parents (in the stands), and that you shouldn’t lose your cool. That there was a white boy killed because you couldn’t take it being called [ni***r].[276]

Leaving aside Donald Smithers’s partiality, his statements were reasonable and tacitly pointed to the repeated failure of league officials to respond to the racism his son experienced.

IV. Suspected Racial Bias and the Jury

Racism played a feature role in the events leading up to Cobby’s death, despite the Supreme Court’s efforts to obscure it. There were also valid concerns that racial prejudice may have played a role in the jury’s decision making. This should hardly be surprising. As the Court of Appeal for Ontario acknowledged in 1993:

> Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil.[277]

This would have been no less the case some nineteen years earlier, when Smithers’s trial occurred in 1974. Concerns about empanelling persons with racial bias persist today.[278] As Randall Kennedy observes, when the n-word is explicitly invoked in the context of jury deliberations, this taints the process and can also impact jurors who hear such language.[279]

At Smithers’s trial, the jury heard testimony over a two-week period. Justice Shapiro instructed the jury that they could find Smithers guilty either of unlawful act manslaughter or on the lesser and included crime of “common assault.”[280] The jurors took two hours to deliberate

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[272] *Ibid* at C1.
[273] See Jonathan Eig, *Opening Day: The Story of Jackie Robinson's First Season* (Simon & Shuster, 2007) at 38-45, 74-76.
[274] *Ibid* at 27-28.
[275] Runfola, *supra* note 115.
[276] Gerald Seniuk, “Smithers once afraid, now vows he will fight,” *The Globe and Mail* (5 June 1974) 10.
[277] *Parks*, *supra* note 10 at 369.
[278] See *R v Johnson*, 2020 ONSC 3673.
[279] *Nigger: The Strange Career of a Troublesome Word* (Pantheon Books, 2002) at 57-60.
[280] *Smithers*, *supra* note 12 at 511; “Youth, 17, guilty,” *supra* note 172.

before arriving at their verdict, finding Smithers guilty of unlawful act manslaughter.[281] Those empanelled to determine Smithers's guilt were nine men and three women, all white. This did not in itself mean that the entire jury was biased, though it reflects a problematic and systemic lack of representation and diversity. Yet in light of Cobby's malfunctioning epiglottis and the seemingly tenuous connection between Smithers's kick and Cobby's asphyxiation, the jury's verdict triggered (or perhaps confirmed) suspicions of racism or some underlying agenda. Joyce Smithers commented to a *Globe and Mail* reporter that "the jury made it a political type of thing. They made it themselves."[282] Though no further explanation was provided, perhaps the political motive Joyce Smithers alluded to was in an all-white jury finding her son guilty of having challenged the anti-Black racism of his tormentors. When Dr. Ross Runfola interviewed Smithers and others for his article, published in *The New York Times*, Runfola asked Smithers why he had been convicted of manslaughter. Runfola reported, "Without pause, [Smithers] blurted out, 'Because I'm [B]lack.'"[283] Runfola added that Smithers then "quickly offered an opinion designed to be more acceptable to his father, who is standing nearby."[284] Smithers clarified, "No. The fact that I'm [B]lack is not the point. Any 12 decent people would have found me not guilty. I think I got a bad deal from the jury, especially in view of the medical testimony."[285]

The following year, Smithers provided further insights on racism and the jury. Dan Proudfoot, writing for *Weekend Magazine* in 1975, interviewed the Smithers family for his article. Proudfoot wrote, "Paul Smithers and his parents were sure the jury had been racist in its verdict, as sure as Paul had been that Barrie Cobby had been a racist calling him a [ni***r] and a [c**n] during the game."[286] Anticipating some doubts about this statement, Smithers offered:

> I know, I know, white people think [B]lacks are always looking for racism where there isn't any, […] but believe me, I knew that jury would find me guilty. You can tell, just looking somebody in the face, whether they're prejudiced or not – and the only time those people looked at me was when something came out that made me look bad. I knew what to expect from those people.[287]

Smithers's intuitions about the jury's attitudes toward him may have been accurate, at least in part. Information came to light in 1975 that one of the female jurors at his trial expressed views indicating a racial bias against Smithers. This was revealed in an interview with Leonard and Brenda Cobby, who were lamenting their son's vilification as a racist in the news coverage of the trial. Leonard Cobby posited:

> It was so slanted. I mean, we know one of the jurors, she lives near here, who said she knew after two or three days of the trial that the 'Black Basket' was guilty. But anybody reading the newspapers bloody well wouldn't have been able to come to that conclusion.[288]

It is worth noting that the defence started to call their own witnesses on 18 April, while the Crown began calling witnesses as early as 8 April. Thus, if the juror "knew after two or three days of the trial" that Smithers was guilty,[289] this would mean that she had already prejudged the case before hearing all of the Crown's evidence, much less from the defence's witnesses.

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[281] "Mississauga Youth Guilty in Fight Death After Hockey Game," *The Globe and Mail* (23 April 1974) 1.
[282] Seniuk, *supra* note 276.
[283] Transcript, *supra* note 112.
[284] *Ibid*.
[285] *Ibid*.
[286] Transcript, *supra* note 112 at 7.
[287] *Ibid*.
[288] *Ibid* at 8.
[289] *Ibid*.

Following on the heels of Leonard Cobby's statements, Smithers's new counsel (and future Attorney General and Chief Justice of Ontario), Roy McMurtry, wrote to Federal Minister of Justice Otto Lang requesting ministerial review due to jury bias and seeking a new trial.[290] He based the request on the Proudfoot article.[291] In his letter, McMurtry expressed, "One could also draw the inference that if one of the jurors was prepared to speak so openly about the matter, that in all probability there were other jurors harboring similar prejudices."[292] In support of McMurtry's letter and his former client, Smithers's trial counsel (and appellate counsel before the Court of Appeal for Ontario), Arthur Maloney, dispatched his own communication to Lang, dated 6 August 1975. Maloney asserted, "It seems to me that if there is any reason whatsoever to believe that even one member of the jury, motivated by racial hatred, had made up his mind in advance of hearing the evidence, that this should in itself be a ground for a new trial."[293]

In his written communication, Maloney provided further information supporting the position that the juror was racially biased against Smithers. Independent of Leonard Cobby's disclosure about the juror, Maloney had learned from a separate source that the daughter of this same juror expressed surprise that her mother was empanelled, since "she had a dislike of Negroes."[294] The juror's daughter purportedly further advised "that there was only one person who disliked Negroes more [than her mother], and that was her father."[295] Maloney revealed that the daughter relayed this information to a lawyer named F.G. Felkai. Felkai, in turn, informed Maloney of the statements a few days after the trial. When *The Globe and Mail* followed up with Felkai about the identity of the juror, he refused to disclose her identity but indicated that if the matter proceeded to a new trial, he would do so at that time.[296]

The Department of Justice responded to McMurtry's letter and indicated that it would consider reviewing the jury issue following the Court decision.[297] After the Court's ruling to affirm the decisions below, Smithers began to serve his six-month sentence and was ultimately paroled after three months.[298] After his release, the Smithers family was in communication with the Department of Justice regarding the application for ministerial review initiated by McMurtry in 1975.[299] Following the Court's dismissal of Smithers's appeal, the Department did not pursue the matter because there was, in its view, no further request from Smithers's counsel to do so.[300] However, even if such a request had been made, where ministerial review is granted the usual remedy is a retrial. At this stage, Donald Smithers was seeking not a retrial but a public investigation into the original trial and, particularly, the issue of whether one or more jurors were

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[290] See "Juror's dislike of blacks called grounds for new trial," *The Globe and Mail* (23 August 1975) 3 ["Juror's dislike of blacks"]. McMurtry took over the case when Maloney was appointed as Ombudsman for the province. See "Bias investigation unlikely until court appeal ends," *The Toronto Star* (26 August 1975) A3 ["Bias investigation unlikely"].
[291] Transcript, *supra* note 112.
[292] "Juror's dislike of blacks," *supra* note 290.
[293] *Ibid*.
[294] *Ibid*.
[295] *Ibid*.
[296] *Ibid*.
[297] See "Bias investigation unlikely," *supra* note 290.
[298] See "Smithers allowed to work outside," *The Toronto Star* (14 June 1977) B1; "Jailed in hockey death Paul Smithers paroled," *The Toronto Star* (12 August 1977) B2.
[299] See "Father seeking probe on trial of Smithers," *The Globe and Mail* (15 September 1977) 57 ["Father seeking probe"].
[300] *Ibid*.

racially biased against his son.[301] The Department of Justice indicated that such an investigation would be within the purview of the Attorney General of Ontario.[302] There is no indication that any public investigation was ever undertaken on the issue of racism among the jurors, let alone any other issue surrounding the trial. No concerns regarding the jury were mentioned in the Court's decision.

V. Conclusion

This article tells a historical counter-narrative of the *Smithers* case. It draws substantially from the perspective of Paul Smithers, through both his testimony at trial and interviews in the years immediately following it. It is a story that highlights his experiences of anti-Black racism, their impact on him, and his attempts to resist such discrimination. The case and its racial dimensions have remained hitherto unnoticed in Canadian legal histories on race. This study has sought to fill this gap. In presenting this counter-story, I have attempted to challenge the Court's official narrative, largely on the basis that it substantially understates the extent and depth of Cobby's racial transgressions, which were perpetrated in the presence of both adults who participated in the discrimination and arena officials who failed to intervene.

As the Court is an appellate court, it made no formal findings of fact. Nevertheless, in narrating the facts of the *Smithers* case, the Court relied on a selective interpretation of the evidence presented at the jury trial. The Court's factual matrix projects an especially Crown-oriented view of the events. It does not even acknowledge the conflicting evidence presented by the defence. One might divine from this that writing a case history is a zero-sum game, which must be told in a rather caricatured manner and solely from the perspective of the legal victor—here, the Crown.[303] But more devastating and condemnable is the fact that the Court's portrayal of Smithers as an angry Black aggressor, together with their obscurement of the deep-seated and systemic racism he experienced, strongly resemble a white supremacist narrative of what transpired, even if the Justices themselves harboured no obvious or actual racial animus. This may be a harsh statement. However, I am reminded of African-American legal scholar D. Marvin Jones's observation that Black men "are perceived as congenitally disobedient and lawless. This is true because of how white male ideas about manhood distinguished between man—read civilized man—and savage."[304] By presenting the facts in the way that it chose to, the Court in *Smithers* left itself open to such criticism.

In addition to providing a counter-narrative, this article also highlighted the Crown prosecutors' role in minimizing the impact of race in the case. Lastly, this article brought renewed attention to concerns about overt racial bias, regarding at least one member of the jury, as well as systemic discrimination, as the jury was all white. Echoing the Washington Supreme Court's recognition of its own contribution to the devaluation of Black lives, my hope is that this

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[301] *Ibid*. See also "Smithers is allowed out on parole in middle of manslaughter term," *The Globe and Mail* (15 August 1977) 5.

[302] See "Father seeking probe," *supra* note 299.

[303] I am drawn here to Jim Phillips's point that "like all history, legal history produces 'winners' and 'losers.' Losers are those whose vision of society and belief systems lost out in the struggle with other visions." In a similar vein, losers may include parties in a legal dispute whose version of events lost out. "Why Legal History Matters" (2010) 41 VUWLR 293 at 308.

[304] "'We're All Stuck Here for a While': Law and the Social Construction of the Black Male" (1998) 24 J Contemp L 35 at 48.

article will encourage Canadian courts and other actors within the legal system to reflect on their contributions to such devaluation of both Black lives and Black voices. Though the outcome might not be any different, a one-sided story does not serve the ends of justice—certainly not when the story of a victim of racial violence is erased.

The *Smithers* case, despite the concerns raised above about the manner in which the facts are represented, is taught annually in most, if not all, criminal law courses across Canada. It is not a decision buried in a vast sea of thousands of forgotten Supreme Court judgments. This is not a judgment that is allowed to be forgotten. In crafting this counter-narrative, I have tried to allow for a long-silenced Black voice to pierce through the juridical veil. At the very least, we can now engage with the factual matrix of the case anew, through a lens that demonstrates greater sensitivity to the systemic racism that continues in Canada—a matter of tremendous importance for criminal law.[305] Or, alternatively, one may choose to remain deliberately ignorant and disregard this broader understanding of the case in favour of the official tale that was spun, over forty years ago, by the Supreme Court.

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[305] Indeed, we could also ask whether a case similar to *Smithers*, if decided today with a racially diverse jury, would produce different conclusions on a number of issues including voluntariness, causation, or self-defence.