

## WHEN DISSENT SOUNDS A CLARION CALL

Esmeralda MA Thornhill\*

---

*Many of us set much stock in the promise of Law  
believing that Law should be emancipatory  
and liberatory for everyone,  
should lift up the downtrodden,  
and should uplift the broken-spirited.  
Such is the promise of Law.<sup>1</sup>*

### 1. Introduction

There are times in history when the message carried by one single dissident voice rings true more arrestingly than the amplified chorus of a numerical majority.<sup>2</sup> And sometimes in legal history, one solitary dissenting opinion carries more meaning for justice and wields more impact than the majority

---

\* Professor of Law, Schulich School of Law, Dalhousie University. The author acknowledges Shirley Small and Professor John Barnstead for their thoughtful review, helpful comments and on-going encouraging support. The assistance of Me Jean El Masri and Me Melisa Thibault also provided me with useful information.

<sup>1</sup> Esmeralda MA Thornhill, "Focus on Racism: Legal Perspectives From A Black Experience" is in large part the author's oral deposition before the *Royal Commission of Inquiry into the Prosecution of Donald Marshall Jr* vol 7, edited transcript of Proceedings of Consultative Conference on The Impact of the Administration of Criminal Justice on Aboriginal and Black Communities, Halifax, November 24-26, 1988; also available in *Judicial Awareness: Race, Culture and the Courts*, volume of Reference Materials (Ottawa: National Judicial Institute, March 1995) at 91 [Thornhill, "Focus on Racism"]. English translation from original French, "Regard sur le racisme: perspectives juridiques à partir d'un vécu noir" in *La sensibilisation de la magistrature aux problèmes raciaux et culturels auxquels font face les tribunaux*, Volume des textes de référence, l'Institut national de la magistrature (mars 1995); originally published as the flagship article for the special thematic issue *Racism...Talking Out/ Le racisme...si nous vous en parlions* (1993) 6:1 *Revue femmes et droit* 1. See also Esmeralda MA Thornhill, "So Seldom For Us, So Often Against Us: Blacks and Law in Canada" in *Blacks in Canada: Retrospects, Introspects, Prospects*, flagship article for *Blacks in Canada*, special thematic issue (2008) 38:3 *Journal of Black Studies*; and see more generally, Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution" (1987) 101:1 *Harv L Rev* 1.

<sup>2</sup> I cite the following concrete examples:

a) Emile Zola, "J'accuse – Open Letter to Mr. Félix Faure, President of the Republic," a famous 1898 article in which the great French novelist accused the government of anti-Semitism in the Dreyfus affair. Written in the form of an open letter to the President of France, and published in the Paris literary newspaper, *l'Aurore* (The Dawn), the 4,000-word

decision. Oftentimes, the position of justice begins with the conviction and courage of at least one judge saying “No.”<sup>3</sup> Dissents delivered from the bench are important, especially when they show concern for, and

---

article provoked unprecedented public debate and controversy and had a significant impact on law, justice, and society.

b) Justice Harlan’s dissent in *Plessy v Ferguson*, 163 US 537 (1896). US Supreme Court Justice John Marshall Harlan, a former slave owner and staunchly pro-slavery antebellum politician, issued the Court’s sole dissent. In a scathing opinion, Harlan refuted Justice Brown’s assertion that the Louisiana law discriminated equally against both Blacks and Whites. He wrote :

Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.

Justice Harlan sharply disagreed with the majority’s assessment that segregation on the railcars did not violate blacks’ constitutionally protected right to equal protection of the law.

c) Elijah Harper’s dissent to the 1987 *Meech Lake Accord*, a package of proposed amendments to the Constitution of Canada that was negotiated by Prime Minister Mulroney at a meeting of the provincial Premiers. Ratification of the Accord required the consent of all provincial and federal legislatures within three years. The province of Manitoba required unanimous support by members of the legislature to approve the agreement. However, Elijah Harper, an Aboriginal member, objected to the lack of recognition of native rights in the agreement and voted against the Accord. His opposition not only prevented Manitoba approval, but prevented the adoption of that particular federal constitutional initiative as a whole.

<sup>3</sup> See e.g. Freeman JA’s dissenting reasons in *R v RDS* (1995) 145 NSR (2d) 284 [RDS] at paras 54, 62, 68-69:

I have had the benefit of reading the judgment of Justice Flinn, who develops the facts more fully. He has reviewed and summarized the law and I am in complete agreement with his conclusions as to the law, which I adopt and rely upon. I respectfully differ, however, as to whether, applying the tests he has set out, the remarks of the trial judge would give rise to a reasonable apprehension of bias. In my view, it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective. I am not satisfied that in doing so she gave the appearance of being biased herself [...]

The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding [...]

The need to accord deference to a trial judge in the key judicial task of determining what evidence to believe is too important and well established a principle to require restating. Assessing credibility is an art as much as a science and it draws upon all of the judge’s wisdom and experience. Questions with racial overtones make the difficulties more intense, yet these questions must be addressed freely and frankly and to the best of the judge’s ability. Because of their explosive nature they are more likely than any others to subject the judge to controversy and allegations of bias, but they cannot be ignored if justice is to be done. For this reason appeal courts must

sensitivity to, the “material reality”<sup>4</sup> of racism in the lives of those outside the mainstream – the disenfranchised, the un-empowered, the impoverished, those racialized for disadvantage.

In the February 2011 Supreme Court of Canada decision in *Bou Malhab v Diffusion Métromédia CMR inc.*,<sup>5</sup> a judgment delivered fully thirteen years after the originating incident, Abella J penned a strongly-principled dissenting opinion which, to many People of African descent, sharply resonates with and reminds us of the authority and the legitimacy of the Court as “protector of the powerless,” “fiduciary of fairness,” and “dispenser of justice.” From a Black Community perspective, the dissent of Abella J arrests our attention. It carries much meaning for and relevance to the *material reality* of racism in our daily lives. It represents a principled breaking of ranks with the majority. In this way, the dissent of Abella J falls within and evokes the established tradition of historic dissenting opinions. The very essence and social reality of *Bou Malhab* are encapsulated in Abella J’s trenchant dissent.

We often hear that justice delayed is justice denied. The protracted length of time this case took to eventually reach the Supreme Court of Canada immediately compels our scrutiny; this 2011 decision stems from events that had actually taken place in November 1998. *Bou Malhab* concerns a class action suit brought by the Arabic-speaking president of the Montreal Taxi League, Farès Bou Malhab, who, on behalf of a group of 1100 Montreal Arab and Haitian taxi drivers, sought redress in the form of compensation for slander.

In the same way that a given room can offer its occupants a variety of angles or different viewpoints from which to contemplate the room’s spatial reality, so too there are different coigns of vantage from which to

---

adopt a cautious approach when examining the trial judgment to determine whether it gives rise to an apprehension of bias. The objective test is the proper one, and the jurisprudence makes it clear the standard is high. While actual bias need not be proven, the apprehension of it must be real, not conjectural or a matter of mere suspicion. I consider Judge Sparks’ remarks to be more consistent with a fair inquiry into delicate subject matter than suggestive of bias on her own part.

In my view the summary conviction appeal court judge applied the correct test, but set too low a standard for the perception of bias. On close examination, the words of Judge Sparks, while not always clear and precise, would not cause a reasonable and informed person to be apprehensive that justice was not being done. I would set aside the summary conviction appeal court judgment and restore the acquittal entered at trial.

<sup>4</sup> Esmeralda MA Thornhill, “Focus on Racism,” *supra* note 1 at 84 and note 20 at 95 (illustrating and clarifying racism as a “material reality”).

<sup>5</sup> 2011 SCC 9, [2011] 1 SCR 214 [*Bou Malhab*].

approach a Supreme Court judgment. This commentary elects to address *Bou Malhab* from the vantage point of Abella J's dissent rather than conventionally focusing primarily or directly on the majority decision of her colleagues. Given the material reality of racism within the lives of peoples of African descent, this dissenting opinion has profound meaning and relevance for us as a community.

This commentary's deliberately apophatic approach to the Supreme Court decision in *Bou Malhab*, *ipso facto* focuses principally on the cogent dissent of Abella J and its socio-historical importance within the 'race'-conscious context of the Montreal taxi industry. In so doing, by inference it inevitably brings certain aspects of the majority decision into sharp relief. The format selected for this commentary does not require probing the technicalities of class action as an effective collective recourse against, and remedy for racial discrimination, nor does it delve into the intricacies of the *Quebec Civil Code* governing defamation.<sup>6</sup> Such considerations lie beyond the scope of this reflection.

Adopting an Afrocentric<sup>7</sup> stance, this commentary briefly sets out the factual and judicial background of *Bou Malhab* before presenting in detail the dissent of Abella J. Then follows a critical reflection based both on the importance of context and contextualization and on the fact that freedom of expression is *not* an absolute right. This critical reflection highlights concrete examples of "situation-specific" contextualizing elements that should have informed the adjudication of this case. In the spirit of the James Robinson Johnston Endowed Chair in Black Canadian Studies'

---

<sup>6</sup> The Quebec law governing defamation is grounded mainly in Article 1457 of the *Quebec Civil Code*, LQ 1991, c 64.

<sup>7</sup> Afrocentric theory places African ideals and values at the centre of inquiry. It is rooted in the centrality of African peoples as subjects. Afrocentric theory has much to do with location, place and stance – in other words, the perspective from which the person approaches and examines data. Without repudiating the right of Europe to view the world from its own cultural centre, however, Afrocentric philosophy maintains that this view is *not* to be imposed as universal. In the words of its founder, Molefi Kete Asante:

The crystallization of this critical perspective I have named Afrocentricity which means, literally, placing African ideals at the centre of any analysis that involves African culture and behaviour... To be Afrocentric is to place Africans and the interest of Africa at the centre of our approach to problem-solving.

See Molefi Kete Asante, *Afrocentricity: A Theory of Social Change*, 2nd ed (Trenton, New Jersey: Africa World Press, 1988); Molefi Kete Asante, *The Afrocentric Idea*, revised and expanded ed, (Philadelphia: Temple University Press, 1998) at 2. For additional information on Afrocentric theory, see Molefi Kete Asante, *Kemmet, Afrocentricity and Knowledge* (Trenton, New Jersey: Africa World Press, 1982); Asa G Hilliard III, *The Maroon Within Us: Selected Essays on African American Community Socialization* (Black Classic Press, 1995).

mandate to “bring Black culture, reality, perspectives, experiences and concerns into the Academy,”<sup>8</sup> this commentary amplifies and validates in legal discourse the voices and perspectives of African-descended victim-survivors of racist speech.<sup>9</sup> It is my hope that this commentary will help advance ‘race’ literacy and dialogue by raising the level of debate and enhancing the quality of discourse.<sup>10</sup>

## 2. Facts

On the morning of November 17, 1998, during his regular call-in open-line talk-show on Montreal radio station CKVL,<sup>11</sup> program host André Arthur<sup>12</sup> made discriminatory, racist remarks that specifically targeted Montreal taxi drivers who were Arabic and Creole-speaking. Firing off a salvo that leveled “accusations of uncleanness, arrogance, incompetence, corruption and ignorance of official languages,”<sup>13</sup> broadcaster Arthur unabashedly declared on live air:

[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that’s French and English? ... I’m not

---

<sup>8</sup> James Robinson Johnston was the first African Nova Scotian to graduate from a university and to practise law in Canada. The James Robinson Johnston Endowed Chair in Black Canadian Studies was established in 1996 at Dalhousie University to honour his memory and legacy. See *James Robinson Johnston Endowed Chair in Black Canadian Studies* at <<http://first.jamesrobinsonjohnstonchair.dal.ca/>> Accessed August 2, 2011.

<sup>9</sup> Patricia Williams, “Spirit-murdering the Messenger: Fingerprinting As the Law’s Response to Racism” (1987-1988) 42 U Miami L Rev 127 at 152: “To live imperviously to one’s impact on others is a fragile privilege, which depends ultimately on the inability of others to make their displeasure known.” For me, the accuracy of critical scholar Patricia Williams’ foregoing statement is borne out by the fact that all too frequently, it is the White perspective and White voices that dominate legal narratives, thereby obliterating the reality of African-descended peoples. Hence the decision to focus on the reality of African-descended people.

<sup>10</sup> A goal also espoused by other critical race legal scholars; see e.g. Derrick Bell, “Foreword to Issue on Race Relations” (1982) 61:2 Or L Rev 151.

<sup>11</sup> Radio host André Arthur made the impugned comments during his regular call-in morning talk show on Nov. 17, 1998, on CKVL, a radio station operated by Diffusion Métromédia CMR Inc. The topic for the show was whether Québécois were satisfied with restaurants and hotels, particularly in Montréal.

<sup>12</sup> A well-known but often controversial radio host, Arthur has been the object of a variety of complaints and several lawsuits that have resulted in a number of confrontations with the statutory monitoring, license-granting and enforcement agency, the Canadian Radio-Television and Communications (CRTC); see e.g. Decision CRTC 88-888. Arthur scored a major upset in 1996 when he was elected as an Independent Member of Parliament in the riding of Portneuf-Jacques Cartier. He went to the House of Commons as the only Independent MP but was defeated in 2011.

<sup>13</sup> *Bou Malhab*, *supra* note 5 at para 82.

very good at speaking “nigger” ... [T]axis have really become the Third World of public transportation in Montreal. ... [M]y suspicion is that the exams, well, they can be bought. You can’t have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. ... Taxi drivers in Montreal are really arrogant, especially the Arabs. They’re often rude, you can’t be sure at all that they’re competent and their cars don’t look well maintained.<sup>14</sup>

### 3. *Judicial History*

#### A) *The Quebec Courts*

In the Cour supérieure, Marcelin J dismissed the application for authorization to institute the class action.<sup>15</sup> The Quebec Court of Appeal set aside that decision. Writing for a unanimous Court, Rayle JCA allowed the class action, suggested that by way of collective remedy a sum of \$220,000 be paid to a charity, and referred the case back to the Cour supérieure for a hearing on the merits.<sup>16</sup>

Holding that André Arthur’s comments were defamatory and “wrongful,” and considering himself bound by the Court of Appeal decision, Guibault J of the Cour supérieure allowed the class action and ordered that a collective recovery mechanism of \$220,000 be paid to the Association professionnelle des chauffeurs de taxi, a non-profit organization.<sup>17</sup>

On appeal, the Quebec Court of Appeal, in a split decision,<sup>18</sup> set aside this judgment. Writing for the majority, Bich J reasoned that an ordinary person would not have believed the impugned comments uttered by André Arthur, and would have believed the offensive comments to be diluted by the large size of the group of 1100 members.<sup>19</sup>

#### B) *Supreme Court of Canada Majority Decision*

According to the majority ruling of the Supreme Court of Canada, which found the impugned remarks to be “wrongful,”<sup>20</sup> the only question at issue before the Court for determination was that of injury.<sup>21</sup> Accepting the

<sup>14</sup> *Ibid* at para 3.

<sup>15</sup> CS – SOQUIJ AZ01021767.

<sup>16</sup> [2003] RJQ 1011 at para 8.

<sup>17</sup> 2006 QCCS 2/24, [2006] RJQ 1145 [*Bou Malhab QCS 2*].

<sup>18</sup> Beauregard JA dissented; see *Bou Malhab*, *supra* note 5 at para 10.

<sup>19</sup> *Ibid* at para 9.

<sup>20</sup> *Ibid* at paras 80, 92.

<sup>21</sup> *Ibid* at para 80. The video webcast of the hearing before the Supreme Court of Canada shows Deschamps J’s swift reaction to the early allusion to “race” made on behalf

Quebec Court of Appeal's rationalization, the majority of the judges also concluded:

- 1) that any personal injury sustained by the members of the group had *not* been established;<sup>22</sup>
- 2) that "an ordinary person certainly would not have associated the allegations of ignorance, incompetence, uncleanliness, arrogance and corruption personally with each taxi driver whose mother tongue is Arabic or Creole personally";<sup>23</sup>
- 3) that Arthur's comments, while "wrongful," did not damage the reputation of each Montreal taxi driver whose mother tongue is Arabic or Creole.<sup>24</sup>

Writing for the majority of the Court, Deschamps J first commiserated that "racist speech can have a pernicious effect on the opinions of members of its audience,"<sup>25</sup> but rejected the class action as not being "the appropriate recourse," and dismissed the appeal with the following concluding pronouncement:

[...] an action in defamation will not always be the appropriate recourse in cases concerning racism or discrimination. In the instant case, I am of the opinion that it is not the appropriate recourse. I would therefore dismiss the appeal. For the reasons given by the Court of Appeal on this question, no costs are awarded in this Court.<sup>26</sup>

#### 4. *The Dissent of Abella J*

The decision was not unanimous. Abella J was the lone dissenting voice. To the lengthy chain of rationalizations which the concurring majority judges used to support their dismissal of the appeal, Abella J responded directly and concisely, in less than thirty paragraphs. She concluded by allowing the appeal.

---

of Farès Bou Malhab. She narrowly circumscribed the issue by clarifying in definitive terms that only "injury" is on the table for determination. See online: <<http://scc-csc.gc.ca/insinc.com/en/clip.php?url=c/486/1938/200912150501wv150en,001Content-Type:%20text/html;%20charset=ISO-8859-1>>. Accessed October 20, 2011.

<sup>22</sup> *Bou Malhab*, *supra* note 5 at para 92.

<sup>23</sup> *Ibid* at para 90.

<sup>24</sup> *Ibid* at para 92.

<sup>25</sup> *Ibid* at para 94.

<sup>26</sup> *Ibid*.

Although she unequivocally distanced herself from the majority position in her strong dissent, Abella J agreed with the majority on two key principles:<sup>27</sup>

1. Context is important, and
2. Freedom of expression is *not* an absolute right.

Then, parting company, she registered in no uncertain terms her disagreement with the majority, contending that indeed the individuals in the group at issue were defamed, and that the facts substantiated this finding.

Like the majority, Abella J acknowledged that the authoritative case *Prud'homme v Prud'homme*<sup>28</sup> defines defamation and stipulates the two necessary elements to be established in order to prove defamation under the *Quebec Civil Code*:<sup>29</sup> fault (by malicious or negligent conduct), and injury.

Abella J pointed out that since fault was not contested, injury was the only element left to be proven. She then went on to address the test to determine injury as set out in a 2004 case, *Gilles E Neron Communication Marketing Inc v Chambre des notaires du Québec*.<sup>30</sup> This test involves asking

whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of another person.<sup>31</sup>

Rejecting the inappropriately elevated level of sophisticated knowledge that the Quebec Court of Appeal and her own Supreme Court of Canada colleagues attributed to “the ordinary person,” Abella J declared emphatically that the rest of the Court had incorrectly equated the characteristics of the ordinary person to “those of an ordinary third-year law student,”<sup>32</sup> and went on:

In my view, an ordinary person would conclude that the remarks made by Mr. Arthur were defamatory of these plaintiffs and therefore injurious. Mr. Arthur’s comments were not about the taxi industry in general. He targeted only Arab and Haitian taxi drivers and accused them of creating “Third World” public transportation in Montréal, of corruption

---

<sup>27</sup> *Ibid* at paras 96, 99-100.

<sup>28</sup> 2002 SCC 85, [2002] 4 SCR 663.

<sup>29</sup> *Supra* note 6.

<sup>30</sup> 2004 SCC 53, [2004] 3 SCR 95.

<sup>31</sup> *Bou Malhab*, *supra* note 5 at para 57.

<sup>32</sup> *Ibid* at paras 105-06.



in obtaining their permits, of incompetence, and of keeping unsanitary cars. He also said that neither Arab nor Haitian drivers knew their way around the city and that they could not communicate in either English or French. He denigrated Arab taxi drivers as “*fakirs*” and the Creole language as [TRANSLATION] “*nigger*.”<sup>33</sup>

In the initial hearing, Guilbault J had concluded that the impugned remarks were racist. Abella J agreed. Moreover, she maintained not only that these highly stigmatizing remarks attack and vilify members of vulnerable communities, but, more significantly, that

we are dealing with hortatory language seriously uttered that is blatantly racist, we are inherently dealing with words that diminish dignity and are an invitation to contempt.<sup>34</sup>

Noting that the majority decision itself acknowledges that “the fact that a group has been historically stigmatized may mean that offensive comments about that group will stick more easily to its members,”<sup>35</sup> Abella J insightfully pointed out that

[t]he requirement that each individual in the class demonstrate an injury caused by the statements is satisfied by having the representative plaintiff adduce evidence that the remarks made were, objectively, defamatory, and therefore injurious, of the members of the group. As in claims of discrimination, it is unnecessary that every member of the group testify that he or she has been affected. As LeBel J noted in his concurring reasons in [*WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 SCR 420], “actual harm to reputation is not required to establish defamation” (para 78). If the evidence adduced at trial demonstrates that the impugned statements are defamatory of the group members, it is unnecessary for each of the other individual group members to testify in order to show that they too were defamed.<sup>36</sup>

Abella J then proceeded to adopt and apply the following factors, already enumerated in the majority decision, as being relevant to the case: 1) the size and nature of the group; 2) the “seriousness or extravagance of the allegations;” and 3) the plausibility of the comments.<sup>37</sup>

After applying these factors contextually to the case at hand, however, Abella J – unlike the majority judges – concluded that the 1100 individual group members in this case had indeed been defamed.

---

<sup>33</sup> *Ibid* at para106 [emphasis added].

<sup>34</sup> *Ibid* at para107.

<sup>35</sup> *Ibid* at para 68.

<sup>36</sup> *Ibid* at para108.

<sup>37</sup> *Ibid* at para109.

Furthermore, regarding group defamation, Abella J first cited the authoritative common law case, *Knuppfer v London Express*.<sup>38</sup> Next, she endorsed completely the statement of Cromwell JA in *Butler v Southam*.<sup>39</sup> Then, relying directly on the case of *Ortenberg v Plamondon*,<sup>40</sup> cited in the majority decision, she concluded – again unlike the majority judges – that the identified class action group of 1100 Arab and Haitian taxi drivers is *not* so large as to be indeterminate, and further, the insult is *not* “lost in the crowd.”<sup>41</sup> Abella J painstakingly pointed out that members of the class – Arab and Haitian taxi drivers – are precisely defined and easily identifiable:

While the group targeted by the statements in this case was large, it was not so diffuse as to be indeterminate. Mr. Arthur’s criticisms were directed at Arab and Haitian taxi drivers in Montreal. This is a precisely defined and easily identifiable group.<sup>42</sup>

Mr. Arthur’s comments were aimed at a determinate group of individuals who were of particular racial backgrounds in a particular industry and in a particular city, leading the trial judge to conclude:

The general impression conveyed by the program is that problems with respect to taxis in Montréal are the fault of Arabs and Haitians, that they alone are responsible for those problems and that they must bear all the opprobrium for them.<sup>43</sup>

Abella J explained in meticulous detail that the group is defined and identifiable. She pointed out that the multiplicity of its members does not in any way affect the defamatory nature of the remarks which were clearly racist and discriminatory, a fact that the majority decision does not dispute. Abella J was emphatic: André Arthur’s comments were made “seriously,” not satirically or ironically, and they would not necessarily have been seen to be hyperbolic by the “ordinary person.”<sup>44</sup>

Abella J summarized her reasons for allowing the appeal as follows:

The members of the group Mr. Arthur vilified interact with the public on a daily basis and their livelihoods depend upon their ability to attract customers. Mr. Arthur’s defamatory comments were, it seems to me, analogous to those made in *Ortenberg*: they were made seriously and raised, objectively, the clear possibility not only of harm to reputation, but also of harmful economic consequences from customers who may have decided to avoid taxis driven by members of the group, members who were easily identified and who

---

<sup>38</sup> [1944] A.C. 116.

<sup>39</sup> 2001 NSCA 121, 197 NSR (2d) 97 (NSCA).

<sup>40</sup> (1915), 24 BR 69, 385 [*Ortenberg*].

<sup>41</sup> *Bou Malhab*, *supra* note 5 at para 114.

<sup>42</sup> *Ibid* at para 116.

<sup>43</sup> *Ibid* at para 119.

<sup>44</sup> *Bou Malhab*, *supra* note 5 at para 120.

stood accused not only of incompetence, but of having used corruption to become taxi drivers. In my view, those comments would palpably have been seen by an ordinary person as being defamatory, and therefore injurious, of the plaintiffs.<sup>45</sup>

Put another way, Abella J was attuned and sensitive to the harmful impact of the impugned racist remarks; more specifically, she was alert and alive to the material reality of racism and the devastation it wreaks on the daily lives of that identifiable, targeted group of taxi drivers.

### 5. Reflections on the Principle of Context and Contextualization

#### A) Principle of Context

Context is crucial. For me, the *Bou Malhab* case resonates at levels profoundly personal as well as professional. It also raises more questions than it provides answers – perhaps because as a Québécoise and Montréalaise, my childhood, adult years and professional life have been markedly punctuated and textured by memories of pervasive racism and racial discrimination.<sup>46</sup> My experiential journey plots the vantage points or locations which in turn inform and filter my own “readings” and understandings of the material reality of racism that is my existence. In particular, cognition of racism and racial discrimination in its multiple manifestations is scored deeply into my daily reality.<sup>47</sup> As a consequence, I “read” *Bou Malhab* as yet another point on that historical continuum of racism and racial discrimination which systemically scars the lives of other racialized persons in Montreal and across Canada.<sup>48</sup>

---

<sup>45</sup> *Ibid* at para 121.

<sup>46</sup> As a child growing up in the Montreal Black Community, which at that time was confined to “below the hill and between the tracks,” I clearly recall it being the common practice for Community members to patronize routinely the Veterans’ Taxi Company, a company that boasted two Black chauffeurs (one of whom was our neighbour). The Veterans’ Taxi Company had been set up specifically to provide employment for war veterans. Other taxi companies did *not* hire Black taxi drivers. In fact, two particular companies, Diamond and Lasalle, were eventually forced to alter their discriminatory hiring practices, thanks to Community public pressure tactics and the specific lobbying efforts of the Negro Citizenship Association (NCA). The president of the NCA, equipped with a university degree in accounting, pioneered the desegregation by deliberately taking on and holding down the position of taxi driver for an entire year, at substantial cost to himself and his family. For a more detailed account of the Montreal racial climate of the time, see Esmeralda MA Thornhill, *Dimension historique de la discrimination raciale à Montréal à travers le vécu du Negro Citizenship Association*, document complémentaire au «dossier taxi», Montréal, Commission des droits de la personne du Québec, juin 1983 [Thornhill, *Dimension historique*]; see also Thornhill, *Focus on Racism*. *supra* note 1 at 83-85.

<sup>47</sup> Thornhill, *Focus on Racism*, *ibid* at 83-85.

<sup>48</sup> *Ibid* at 1.

*Bou Malhab* does not exist *in vacuo*, devoid of context. This case must be addressed within the particularities of its context – a context composed of, notably: the socio-historical reality of racism and racial discrimination in the Montreal taxi industry; the situation-specific (Montreal) “ordinary person” set out in the defamation test; Canada’s *Charter*-imposed duties and its international treaty commitments to racial equality; the nature and material impact of unbridled discriminatory racist speech; constitutional and statutory limits on freedom of expression. All these, taken together, are situation-specific elements that comprise the context of this particular case. *These factors should inform the adjudication process.*

*1) The socio-historical reality of the Montreal taxi industry must contextualize this case.*

Canada is not a ‘race’-less society. We Canadians live in a ‘race’-conscious culture.<sup>49</sup> However, as a rule, we far prefer to *avoid* talking

---

<sup>49</sup> Esmeralda MA Thornhill, “Focus on Black Women” (1985) 1:1 CJWL 153; Ken Alexander and Avis Glaze, *Towards Freedom: The African-Canadian Experience* (Toronto: Umbrella Press, 1996). See also David Hughes and Evelyn Kallen, *The Anatomy of Racism: Canadian Dimensions* (Montréal: Harvest House, 1974) at 214 .7:

Canadians, it appears, are “polite racists.” They *politely* move slightly away from a Black co-passenger on the subway; they *politely* refuse to rent or hire a Black; they *politely* refer to Blacks as negroes rather than “niggers,” and in general, they politely continue to discriminate against and segregate themselves from all but the most impersonal, formal contacts with their Black fellow (or potential fellow) Canadian citizens.

In addition, Canadian courts have confirmed and taken judicial notice of the pervasiveness of racism, especially anti-Black racism, in Canadian society; see e.g. *R v Parks* (1993), 84 CCC (3d) 353 at 342, where Doherty JA stated:

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.

In *R v S(RD)*, [1997] 3 SCR 484, L’Heureux- Dubé and McLachlin JJ went as far as to affirm that:

The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose... Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against [Blacks]... The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. ...

about ‘race,’<sup>50</sup> little realizing that even in our very avoidance of ‘race,’ we are actually engaging with ‘race.’<sup>51</sup> We ‘race’-conscious Canadians studiously avoid talking about ‘race’ because this taboo subject so unsettles us. We conveniently elect to blot from our historical consciousness and memory those ‘race’-related acts that trouble us. Take, for example, the historical amnesia *vis-à-vis* the Montreal taxi industry, and the ways the factor of ‘race’ could and should inform this case.

As a product of Canadian society, the Montreal taxi industry is underpinned by a socio-historical context of racism and racial discrimination that ought to have contextualized the unexplored dimensions and unsounded depths of the *Bou Malhab* case. Unfortunately, this social context does not appear to have informed the adjudication process in any way significant enough to have been registered as part of the formal Court record. Why was this so?

- Perhaps a too narrow reductionist approach to defamation served to obliterate ‘race’ as a factor?
- Perhaps an acontextual legal strategy seduced the various counsel into dismissing ‘race’ and the Quebec Human Rights Commission’s public *Inquiry into Allegations of Racism in the Taxi Industry* as *passé*, dated, and therefore irrelevant?

---

See also *Nova Scotia (Minister of Community Services) v SMS* (1992), 110 NSR (2d) 91 (Fam Ct) at 108:

[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr; Prosecution*). A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

More and more our legal professional organizations are coming to acknowledge this race-conscious aspect of Canadian society, as illustrated by Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Legal Profession*, vol I: *The Challenge of Racial Equality: Putting Principles into Practice* and vol II: *Virtual Justice: Systemic Racism and the Legal Profession*, presented to the Council of the Canadian Bar Association, February 1999, online: <[http://www.cba.org/CBA/equity/pdf/Racial Equality. pdf](http://www.cba.org/CBA/equity/pdf/Racial%20Equality.pdf)>. Accessed July 28, 2011. See also Corrine Sparks, *Women of Colour in the Legal Profession* (Ottawa: Canadian Bar Association, 1993).

<sup>50</sup> Esmeralda MA Thornhill, “Equality in the Legal Profession from the Perspective of ‘Race,’” from *Roads To Equality/Les voies de l’égalité* Workshop, vol 4, Annual Conference Papers (Ottawa: Canadian Bar Association, 1994 ); see also Thornhill, *Focus On Racism*, *supra* note 1.

<sup>51</sup> Gloria Ladson-Billings, “Foreword” in Glenn E Singleton and Curtis Linton, *Courageous Conversations, A Field Guide for Achieving Equity in Schools* (Thousand Oaks, California: Corwin Press, 2006) at xi.

- Perhaps since the impugned racist pronouncements of André Arthur were not contested, this had the effect of removing ‘race’ from the table?
- Perhaps since the sole issue before the Court for determination was “injury,” it was therefore believed all around that there was no need to dwell on ‘race’ or racism?
- Perhaps given the particular timing, there existed a latent and abiding “political and social fear,” a deep apprehension of opening the proverbial floodgates<sup>52</sup> if ‘race’ were to be put on the table?

To me, as to many members of the African Canadian Community, it is unfathomable that ‘race’ was so deftly excised from the picture. The Court’s decision, including the dissent of Abella J, failed in its reasoning to take into account the historical and factual evidence of racism and racial discrimination in the Montreal taxi industry.<sup>53</sup> Moreover and more importantly, the Court did not consider the comprehensive, lengthy public investigation carried out by the then Quebec Human Rights Commission (the Commission)<sup>54</sup> examining “allegations of racism in the Montreal taxi industry.”<sup>55</sup>

---

<sup>52</sup> At the same time, parallel to *Bou Malhab*, the case of Dr. Mailloux was receiving much public press in Quebec.

<sup>53</sup> Esmeralda MA Thornhill, *Dimension historique*, *supra* note 46.

<sup>54</sup> The Commission des droits de la personne du Québec was created by the 1975 *Charter of Human Rights and Freedoms*, RSQ, c C-12, online : <<http://www.canlii.org/en/qc/laws/stat/rsq-c-c-12/latest/rsq-c-c-12.html>> (the French version, *Charte des droits et libertés de la personne*, LRQ, c C-12, online : <<http://www.canlii.org/fr/qc/legis/lois/lrq-c-c-12/derniere/lrq-c-c-12.html>>) [Quebec Charter]. Accessed July 28, 2011. The *Charte des droits et libertés du Québec* came into effect in 1976. The current name and responsibilities of the Commission, *Commission des droits de la personne et des droits de la jeunesse*, result from the (controversial) merging in 1995 of the mandate of both the Commission des droits de la personne and the Commission de protection de la jeunesse.

<sup>55</sup> In relation to this Public Inquiry into Allegations of Racial Discrimination in the Montreal Taxi Industry, the findings of the Commission were presented in the following reports [referred to as a whole as *Rapport Final*]:

1) Commission des droits de la personne du Québec, *Les allégations de discrimination raciale visant les associations de service et des points de service*. Volume I du Rapport final de l’Enquête sur les allégations de discrimination raciale dans l’industrie du taxi à Montréal, octobre 1984.

2) Commission des droits de la personne du Québec, *Le cadre législatif, réglementaire et administratif*, Volume II du Rapport final de l’Enquête sur les allégations de discrimination raciale dans l’industrie du taxi à Montréal, octobre 1984.

3) Commission des droits de la personne du Québec, *Annexes. Enquête sur les allégations de discrimination raciale dans l’industrie du taxi à Montréal*, Rapport

On July 16, 1982 the Commission announced, with conventional fanfare, an unprecedented public inquiry into *Allegations of Racial Discrimination in the Taxi Industry of Montreal*.<sup>56</sup> The three-member board which was constituted held 43 sessions of public hearings (with *in camera* hearings taking place from October 1982 to June 1983 and public hearings from January to December 1983), heard 289 witnesses, and examined 300 documents totalling more than 15,000 pages.<sup>57</sup> Covering the period between 1977 and 1983, the inquiry concluded that different forms of discrimination were prevalent in the taxi industry,<sup>58</sup> such as the discriminatory practice of “*au suivant*,” notorious at public taxi stands and

---

final de l'Enquête sur les allégations de discrimination raciale dans l'industrie du taxi à Montréal, Montréal, octobre 1984.

<sup>56</sup> Commission des droits de la personne du Québec, *Rapport final de l'Enquête sur les allégations de discrimination raciale dans l'industrie du taxi à Montréal*, Volume I. Montréal, octobre 1984, p. 9:

Le 16 juillet, la Commission des droits de la personne décidait de tenir, de sa propre initiative, une enquête sur les allégations de discrimination raciale dans l'industrie du taxi à Montréal. Dans le passé, la Commission avait déjà été saisie, par des chauffeurs noirs, de plaintes de discrimination et elle les avait traitées *cas par cas*. Toutefois, la nature des plaintes spécifiques alors reçues et les caractéristiques propres à l'industrie du taxi ne permettaient pas à la Commission d'avoir une vue d'ensemble de la situation, ce qui limitait son intervention. La diversité des allégations de discrimination qui ont surgi pendant l'été 1982 et qui mettaient en cause une multiplicité d'intervenants, la nécessité de mettre en lumière la situation dans l'ensemble de l'industrie du taxi et la très large part accordée au client/public dans l'adoption de certaines pratiques discriminatoires alléguées, ont conduit la Commission à la décision de tenir cette enquête et à lui conférer un caractère public et global.

<sup>57</sup> *Les allégations de discrimination raciale visant les associations de service et des points de service*, *Rapport Final*, *supra* note 55 at 11.

<sup>58</sup> The Commission's Final Report documents that:

Parmi les allégations de discrimination raciale qui ont fait l'objet de l'enquête se trouvaient: le renvoi collectif de chauffeurs noirs par une association de service, la non-accessibilité pour les chauffeurs noirs de certains postes d'attente lucratifs, la tension raciale entretenue par certains chauffeurs blancs contre leurs collègues noirs, l'acceptation par des associations de service de commandes discriminatoires provenant de clients, le refus de certaines associations de service d'admettre des propriétaires ou chauffeurs noirs dans leurs rangs, la publicité raciste de certaines associations de service exclusivement composées de Blancs au détriment d'associations mixtes concurrentes, le harcèlement policier à l'égard de chauffeurs noirs, les effets de l'adoption du nouveau système de transport par taxi à l'Aéroport de Dorval sur les travailleurs noirs qui y oeuvraient auparavant, le refus de certains clients de prendre des taxis conduits par des chauffeurs noirs, etc.

See *Les allégations de discrimination raciale visant les associations de service et des points de service*, Volume I du Rapport final de l'Enquête sur les allégations de discrimination raciale dans l'industrie du taxi à Montréal, Montréal, octobre 1984 at 10.

carried out by taxi companies;<sup>59</sup> exclusively reserved waiting spots; “discrimination-by-proxy”<sup>60</sup> contracting practices; racially-biased recruitment and membership practices; closed shop or insider-sponsorships that depended on being “grandfathered” in.<sup>61</sup>

A survey poll conducted by the Université de Montréal revealed that 3.2 per cent of Montrealers canvassed admitted to having committed racist acts; 6.1 per cent harboured “attitudes” or “opinions” that were racist; 15.7 per cent were reluctant to get in the taxi of a Black taxi driver; and 25 per cent would have racial considerations when in the presence of a Black taxi driver.<sup>62</sup>

Racism and racial discrimination are clearly part of the social context of Montreal’s taxi industry. And since the landmark case, *R v S (RD)*, commonly referred to as *RDS*,<sup>63</sup> the Canadian judiciary has done much to espouse the principle of social context with members regularly undertaking training in social context education.<sup>64</sup> In light of this

---

<sup>59</sup> Under the practice of *au suivant*, customers and despatchers would blatantly skip over Black taxi drivers waiting their turn in line at public taxi stands for the next fare or call, until they came to a White chauffeur.

<sup>60</sup> “Discrimination-by-proxy”: This is my own term for the practice whereby taxi companies or despatchers would willingly comply with customers’ expressed wishes not to send them any Black taxi drivers.

<sup>61</sup> Grandfathered in: Sponsored by some mentor already employed in or connected to the company.

<sup>62</sup> Pierre Bouchard, *Comportements du public Montréalais à l’égard des chauffeurs de taxi noirs. Résultats d’un sondage*. Université de Montréal, 20 septembre, 1983. See also *Annexes du Rapport final de l’Enquête sur les allégations de discrimination raciale dans l’industrie du taxi à Montréal*, Montréal, octobre 1984 at 10.

<sup>63</sup> *Supra* note 3.

<sup>64</sup> Social context education: The landmark *RDS* case gave a much needed boost to the growing interest in social context which has been fostered by a number of training initiatives undertaken by certain legal institutions geared to the Canadian judiciary such as the National Judicial Institute (NJI), Western Judicial Education Centre, Canadian Institute for the Advancement of Justice. For example, according to the NJI, the Social Context Education Project (SCEP) was a special two-phased project of the National Judicial Institute between 1996-2003. Phase I concentrated on full-court education seminars in every province of Canada with a view to creating a common base of information and understanding of the relevance and applicability of social context among all judges in Canada. Phase II focused on developing skilled judicial education leaders in this area through an intensive program of judicial faculty development, with curriculum development also being included as a focus. Since 2003, social context has been integrated as a regular component of NJI work. It is now recognized that equality and contextual judicial inquiry are not optional but are mandated by law in Canada through our constitution and accession to relevant international conventions. It is an explicit ethical obligation of Canadian judges to “conduct themselves and proceedings before them so as



evidentiary backdrop of conclusive findings, is it any wonder that African-Canadians like myself register surprise to see this appeal rejected? It is ironic, given recent emphasis on social context education,<sup>65</sup> that six of seven judges should foreclose on class action recourse as a collective remedy for racial discrimination, leave the uncontested wrong unredressed, and implicitly refer the 1100 targeted Arab and Haitian taxi driver-plaintiffs to the Commission in their quest for remedy, relief, and reparation.

*2) The “ordinary person” of the Court’s defamation test is “situation-specific,” and accordingly, a “situation-specific-ordinary person” must contextualize this case.*

The Commission’s public investigation into allegations of racial discrimination in the Montreal taxi industry confirmed the pervasiveness of racism and racial discrimination there. The general public being such an essential complicit partner in the taxi industry, the Commission made “public education” a top priority<sup>66</sup> in its attempts to address the social problem exposed and the inquiry’s *Final Report* received wide publicity and dissemination. This inquiry proved a defining moment for the Montreal taxi industry, which, down through the years, had inherited and perpetuated throughout its ranks a legacy of racism and racial discrimination.<sup>67</sup> No ordinary person in Montreal – racialized persons included! – would have been left unaffected by this legacy of racial discrimination in the city’s taxi industry.

---

to assure equality according to law;” see Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at 23. Increased judicial awareness of social context, then, is not only essential to good judging, but is required by law. In view of Smith J (as she now is), “all judges should be leaders in bringing about equality” and... it is necessary for judges to “have an understanding of the social context in which equality principles are being applied;” see Lynn Smith, *Statement of Needs and Objectives for Continuing Legal Education on the Social Contract of Judicial Decision-Making* (Ottawa: National Judicial Institute, 1996). See NJI posting at <[http://www.nji.ca/nji/internationalforum/SCEP\\_summary.pdf](http://www.nji.ca/nji/internationalforum/SCEP_summary.pdf)> Accessed October 29, 2011.

<sup>65</sup> These efforts are outlined in note 64.

<sup>66</sup> *Les impacts éducatifs de l’enquête publique sur les allégations de discrimination raciale dans l’industrie du taxi*. Commentaires du Service de l’éducation. Suite au rapport de l’enquête publique, décembre 1983; see also *Rapport final*, *supra* note 55.

<sup>67</sup> Thornhill, *Dimension historique*, *supra* note 46.

3) *Quebec and Canadian Charter-imposed duties and Canada's international treaty commitments to racial equality must contextualize this case.*

Both the 1975 *Quebec Charter of Human Rights and Freedoms*<sup>68</sup> and the 1982 *Canadian Charter of Rights and Freedoms*<sup>69</sup> entrenched binding obligations to respect racial equality, obligations which all Canadians and Canadian institutions must fulfill. The Section 15 equality provision, which imposes a constitutional duty that Canada is additionally obligated to fulfill because of the international commitments it has undertaken as a United Nations member,<sup>70</sup> particularly one in good standing in the international community, prohibits racial discrimination.

4) N—<sup>71</sup> *constitutes prohibited assaultive speech and its egregious nature must contextualize this case.*

Given the past history of our western hemisphere,<sup>72</sup> N— is a word that belongs among the phrases of dishonour. This obloquy has festered as a derivative outgrowth from an abusive past that still stains the fabric of North American government and society.<sup>73</sup>

---

<sup>68</sup> *Quebec Charter*, *supra* note 54.

<sup>69</sup> *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Canada Act 1982*, (UK) 1982, c 11, which came into force on April 17, 1982.

<sup>70</sup> For example, as a member of the UN, Canada is a party to the *International Bill of Rights*. It has ratified or acceded to the following UN instruments which specifically prohibit discrimination: *Universal Declaration of Human Rights* (December 10 1946); *International Covenant on Civil and political Rights* with its *Optional Protocol* (May 19, 1976), and Canada also made the *Declaration* recognizing the competence of the Committee under: Article 41 of the said Covenant to receive and consider communications submitted by another State Party (October 29, 1979); *International Covenant on Economic Social and Cultural Rights* (May 19, 1976); *International Convention for the Elimination of Racial Discrimination* (October 14, 1970); *Convention on the Prevention and Punishment of the Crime of Genocide* (September 3, 1952). These instruments may be consulted at Canadian Heritage, United Nations Treaties at <<http://www.pch.gc.ca/ddp-hrd/docs/treat-trait/un-eng.cfm>>. Accessed July 29, 2011.

<sup>71</sup> I shall use N—as my example although much of what I say can equally well be extended to the term “fakir.”

<sup>72</sup> The western hemisphere – North, Central and South America – was colonized on a racially imperialistic basis wherein colonizers appropriated the lands of Indigenous peoples and the labour of Peoples of African descent. See Cheryl I Harris, “Whiteness as Property” (1993) 106:8 Harv L Rev 1707; bell hooks, *Ain't I A Woman?: Black Women and Feminism* (Boston: South End Press, 1981) at 151, 10-12, 121-22.

<sup>73</sup> As African American author Ezra Aharone has aptly written in his article, *The Unabolishable N-Word*:

[The N-Word] ... manifests today in disproportionate and dysfunctional Black conditions that require remedies beyond jobs, education, and voting. But the lofty

Language being the most powerful weapon that we each wield on a daily basis, words then, are of critical importance. With words, we can ennoble or demean, uplift or crush. Every single word we use, therefore, is a choice made, an option exercised.<sup>74</sup>

In the lexicon of 'race' relations, N— is a historically-charged keyword that stingingly adjures African-descended peoples, "Know and keep your place!"<sup>75</sup> Black people were (and still are) collectively labeled with derogative terms. Not an isolated expression devoid of context, the insult N— is a universally recognized opprobrium that stigmatizes peoples of African descent.<sup>76</sup> Recognized as such, this opprobrious term is employed and deployed, always intentionally, solely to heap contempt<sup>77</sup> upon Black people, whom some still perceive to be an inferior racial group. N—constitutes assaultive speech. Far from being "just a word," N— is a deadly stealth missile that, when launched, wounds to the core,<sup>78</sup> leaving

---

liberties and moralities that Euro-Americans self-profess today, is not something portable that can be retroactively applied to cushion the wrecking-ball impact of "N-Word hardships" that they even codified into law during 3½ centuries of enslavement and segregation which ended less than 50 years ago.

Remember, the N-Word is symptomatic of our unedited historical experience with Americanization ... Like fingernails raking a chalkboard, it screeches that: "All Has Never Been Well With American Democracy." So, when you factor the totality of past relationship deformities, combined with all the present un-reconciled complexities that the N-Word figuratively embodies – advising young Blacks to simply "Don't Say It" is like saying, "hide under the bed," as a solution to escape a raging house fire.

See Ezra Aharone, *The Un-Abolishable N-Word* posted August 24, 2010 at <<http://www.mybrotha.com/unabolishable-n-word.asp>>. Accessed July 28, 2011.

<sup>74</sup> Esmeralda MA Thornhill, "Teasing Out the Material Reality of Racism," workshop handout, Training Seminar on Racism and Public Policy, Queen's University, School of Public Policy, May 1994 (on file with author).

<sup>75</sup> Randall Kennedy, *Nigger: The Strange Career of A Troublesome Word* (New York: Pantheon Books, 2002) at 4.

<sup>76</sup> *Ibid* at 93.

<sup>77</sup> *Ibid* at 5.

<sup>78</sup> See Mari J Matsuda, Charles R Lawrence III, Richard Delgado, and Kimberlè Williams Crenshaw Williams, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder: Westview Press, 1993).

as collateral damage “spirit injury.”<sup>79</sup> Fighting words like N—, by their very utterance, inflict injury.<sup>80</sup>

Racial insults relying as they do on the unalterable fact of the victim’s race and on the history of slavery and race discrimination in [the Western Hemisphere], have an even greater potential for harm than other insults. ... *A racial insult is always a dignitary affront, a direct violation of the victim’s right to be treated respectfully.* [And yet], our moral and legal systems recognize the principle that individuals are entitled to treatment that does not denigrate their humanity through disrespect for their private or moral worth. A racial insult is a serious transgression of this principle because it derogates by race, a characteristic central to one’s self-image.<sup>81</sup>

Consequently, singling out Haitian and Arab taxi drivers as targets for racist revilement, invective, and vituperation disseminated over the public air waves, is an egregious act that, *ipso facto*, really is an ugly portrait of Canadian racial hostility. Such racially discriminatory language, formally prohibited by law in Canada at federal and provincial levels,<sup>82</sup> is both injurious and illegal.

---

<sup>79</sup> As defined by Patricia Williams,

... *spirit injury is disregard for others whose lives qualitatively depend on our regard.* Spirit injury leads to the slow death of the psyche, of the soul, and of the identity of the individual. Spirit injury on the group level is the cumulative effect of individual spirit injuries, which leads to the devaluation and destruction of a way of life or of an entire culture.

Quoted in Adrien Katherine Wing and Sylke Merchán, “Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America,” in Richard Delgado, ed, *Critical Race Theory: The Cutting Edge*, Philadelphia: Temple University Press, 1995 at 516. For more detailed information on the concept of “spirit injury,” see Williams, *supra* note 9 at 129.

<sup>80</sup> Kennedy, *supra* note 75 at 67-68:

In *Chaplinsky v New Hampshire*, the 1942 case that established the fighting-words doctrine, the United States Supreme Court observed, “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting words’—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”... Elaborate hearings, the court maintained, were not needed to determine the effects of *nigger* on black targets. “No fact is more generally known,” it declared, “than that a white man who calls a black man ‘nigger’ within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate.”

<sup>81</sup> Matsuda *et al*, *supra* note 78 at 94.

<sup>82</sup> Prohibited in particular by Section 15 of the Canadian *Charter* and by Section 10 of the Quebec *Charter*.

*5) Freedom of expression is not an absolute right – its attendant limitations must contextualize this case.*

In *Bou Malhab*, we witness individual and collective rights colliding. However, when, like the majority Supreme Court judges, we erroneously frame the debate

as one in which the liberty of free speech is in conflict with the elimination of racism – we have advanced the cause of racial oppression and placed the bigot on the moral high ground, fanning the rising flames of racism.<sup>83</sup>

Generally speaking, freedom of expression has limitations at both federal and provincial levels<sup>84</sup> that are *Charter*-imposed obligations to equality, and exact duties not to discriminate.

The undisputed principle that freedom of expression is *not* an absolute right is a key factor in this case. Freedom of expression must be contextualized according to the specific limitations triggered by the particularities of each specific situation.

Inherent in freedom of expression is the right, for example, *not* to be subjected to messages that are discriminatory or racially abusive. Open-line radio programs are diffused through designated public air space<sup>85</sup> that

---

<sup>83</sup> Matsuda *et al.*, *supra* note 78 at 57.

<sup>84</sup> Quebec *Charter*, *supra* note 54; Canadian *Charter*, *supra* note 69.

<sup>85</sup> In addition to those imperatives imposed by the Canadian *Charter* and the Quebec *Charter*, broadcasting policy for Canada is set out in the *Broadcasting Act*, SC 1991, c 11, in section 3 (1)(d) (i) and (iii), and (m)(viii):

3 (1) It is hereby declared as the broadcasting policy for Canada that

(d) the Canadian broadcasting system should

(i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,

(iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society ...

(m) the programming provided by the Corporation should

(viii) *reflect the multicultural and multiracial nature of Canada ...* [emphasis added].

is legally regulated by the relevant statutory license-granting monitoring and enforcement agency, the Canadian Radio and Television Commission (CRTC).<sup>86</sup>

Access to this space is not automatic, but is strictly controlled. The license issued is a revocable privilege, granted conditional upon the respecting of certain ethical principles and guidelines<sup>87</sup> contained in the *Canadian Radio-television and Telecommunications Commission Act* and relevant regulations. Radio licensees and broadcasters are thus bound and regulated both by statutory duties and obligations, as well as by principles and codes of conduct formulated and issued by the monitoring and licensing body, the CRTC.<sup>88</sup>

Speech must be well-considered. Unbridled racially-offensive speech is not permitted.

The foregoing elements constitute parameters that demarcate the context and limits within which André Arthur and other broadcasters enjoy privileged access to the public air waves, a privilege which brings with it serious responsibilities. To maintain their license, licensees and broadcasters must discharge the many legal and social duties, as prescribed in the *Canadian Radio-television and Telecommunications Commission Act*, and in the Quebec and Canadian *Charters*, obligations not to discriminate.

---

<sup>86</sup> A regulatory agency created by the *Broadcasting Act*, the *Canadian Radio-television Commission* (CRTC) was established by Parliament in 1968. In 1976, it became the *Canadian Radio-television and Telecommunications Commission* with an expanded mandate to include telecommunications companies. Today, the CRTC supervises and regulates Canadian broadcasting and telecommunications while remaining independent – so it can serve the needs and interests of Canadian citizens, industry and government. It reports to Parliament through the Minister of Canadian Heritage; see online: <<http://www.crtc.gc.ca/eng/home-accueil.htm>> Accessed July 29, 2011.

<sup>87</sup> *Canadian Radio-television and Telecommunications Commission Act*, RSC 1985, c C-22, online: at <<http://laws-lois.justice.gc.ca/eng/acts/C-22/>> Accessed July 28, 2011; *Radio Regulations*, 1986 (SOR/86-982), online: <<http://laws-lois.justice.gc.ca/eng/regulations/SOR-86-982/page-3.html#h-7>> Accessed July 28, 2011.

<sup>88</sup> On July 29, 1988, as part of its review of open-line programming, the CRTC issued Public Notice CRTC 1988-121 which called for comments on a set of proposed guidelines for open-line radio programs. Essentially, the guidelines pertained to three areas: “abusive comments,” “balance,” and “high standards in programming.” On-air comments contravene the *Regulations* where all three of the foregoing criteria are met. The CRTC’s “Open-Line Policy” sets out the responsibilities of broadcasters with respect to open-line programs; see *Policy Regarding Open-Line Programming*, Public Notice CRTC 1988-213, December 23, 1988, posted at <<http://www.crtc.gc.ca/eng/archive/1988/pb88-213.htm>>. Accessed July 28, 2011.

In other words, André Arthur's individual right to express himself is not boundless. His publicly broadcasted speech must – by law and in the public interest – be gauged against, and balanced with, for example, the collective equality rights of Haitian and Arab taxi drivers *not* to be subjected to racial discrimination, vilification and pervasive stereotypes, publicly disseminated and broadcasted by those granted privileged access to public air waves.

It is thus clear that any publicly diffused radio program must be attuned to the “multicultural and multi-racial”<sup>89</sup> Canadian listening public.

## 6. Conclusion

What does the future augur? What are the implications for the everyday *material reality* of those 1100 Arab and Haitian and other racialized taxi drivers in Montreal? Will the targets of racial invective now be forced first to line up, one after another, to lodge individual complaints alleging racial discrimination, and then be obliged to undertake onerous and protracted litigation? Are collective remedies ever to be made available to racialized groups in need of collective redress for collective public racial discrimination?

All people should be treated equally and with respect before the bar of justice. The dissent of Abella J proceeds from this basic premise. Her dissent is crucial because it provides a solid coign of vantage from which to oppose a majority decision that not only trivializes and dismisses the very wrong that the judges purport to denounce, but a majority decision that, by offering safe harbour to racially abusive language, also risks emboldening the André Arthurs of this world and their ilk.<sup>90</sup> This solitary dissent is a stinging rebuke to the majority decision which, if left untrammelled, would be prone to entrench further racial animus. To the ears of the African Canadian Community, Abella J's powerful dissent sounds the clarion call. Given the wrong committed, and taking into account the social context of an undeniable history of racism in the Montreal taxi industry, in the *Bou Malhab* case justice,<sup>91</sup> reason and common sense

---

<sup>89</sup> *Broadcasting Act*, *supra* note 85, s 3(1)(m)(viii).

<sup>90</sup> Kennedy, *supra* note 75 at 103. It is worth noting that, on the day that the Supreme Court of Canada handed down its judgment, public air waves and print media abounded with public reactions of hostility for the appellants and satisfaction with the majority decision.

<sup>91</sup> Patricia Williams clarifies “justice” and “legal” in the following way:

The root of the word “legal” is the Latin word *lex*, which means law in a fairly concrete sense—law as we understand it when we refer to written law, codes, and systems of obedience. The word *lex* does not include the more abstract, ethical

compel a remedy.<sup>92</sup> How ironic it is that the clarion dissent of Abella J should come both in 2011, the United Nations International Year for Peoples of African Descent,<sup>93</sup> and during February Black History Month.<sup>94</sup>

---

dimension of law that contemplates the purposes of rules and their effective implementation. This latter meaning is contained in the Latin word *jus*, from which we derive the word “justice.” This semantic distinction is not insignificant. The word of law, whether statutory or judicial, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; *lex* is applied without *jus* and is therefore unjust. The result is compliance with the letter of the law, not the spirit.

See Williams, *supra* note 9 at 132-33.

<sup>92</sup> Kennedy, *supra* note 75 at 83.

<sup>93</sup> United Nations (UN) Resolution 64/169 adopted by the General Assembly on 18th December 2009 proclaimed the year 2011 the International Year for People of African Descent (IYPAD) with the theme: “Recognition, Justice, Development.” Additionally, in 2010 the UN further recommended that an International Day for People of African Descent (IDPAD) also be observed during this international year. The Resolution states:

*Reaffirming* the Universal Declaration of Human Rights, which proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind; *Recalling* the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention on the Rights of Persons with Disabilities and other relevant international human rights instruments; *Recalling* also the relevant provisions of the outcomes of all major United Nations conferences and summits, in particular the Vienna Declaration and Programme of Action and the *Durban Declaration and Programme of Action*;

*Recalling* further its resolutions 62/122 of 17 December 2007, 63/5 of 20 October 2008 and 64/15 of 16 November 2009 on the permanent memorial to and remembrance of the victims of slavery and the Transatlantic Slave Trade;

*It is therefore proclaimed* that the year beginning on 1 January 2011 be the International Year for People of African Descent, with a view to strengthening national actions and regional and international cooperation for the benefit of people of African descent in relation to their full enjoyment of economic, cultural, social, civil and political rights, their participation and integration in all political, economic, social and cultural aspects of society, and the promotion of a greater knowledge of and respect for their diverse heritage and culture.

To this end we recommend that October 12 be observed as the International Day for Peoples of African Descent (IDPAD).

<sup>94</sup> February Black History Month now forms part of Canada’s national public policy. On December 14, 1995, the House of Commons adopted a motion moved by the Honorable Jean Augustine to recognize February as Black History Month. The Senate



“It is no secret that People of African Descent have for centuries been victims of racism, racial discrimination and enslavement and of the denial by history of many of their rights.”<sup>95</sup> It is also of public notoriety in racialized communities across Canada that, all too often, when allegations of racism or racial discrimination are investigated and adjudicated, findings of wrong-doing are routinely made, but no wrongdoer is identified or acknowledged.<sup>96</sup> The *Bou Malhab* case presents a curious variation on this all-too-familiar theme. Here the Court’s findings, (Abella J’s dissent excepted), identify both wrongdoing and wrongdoer, but with no injury to either group or individual, *even though a specifically designated group was targeted for public calumny*.<sup>97</sup>

Will African-descended victim-survivors of racism and racial discrimination *ever* be able to count on the courts for collective remedy, relief and reparation?

---

followed suit when, on February 14, 2008, Senator Donald Oliver tabled a motion to officially recognize Black History Month, and this motion was unanimously adopted by members of the Senate on March 4, 2008.

<sup>95</sup> Statement by Professor Verene Shepherd, Member of the Working Group of Experts on People of African Descent, Professor of Social History & Director, Institute for Gender & Development Studies, The University of the West Indies, at a High-Level Meeting to Commemorate the 10th Anniversary of the Adoption of the *Durban Declaration and Program of Action*, The United Nations, New York, September 22, 2011, Roundtable I “Victims of Racism: Recognition, Justice, Development.” Also, for relevant articles on conquest, colonization and African enslavement, see Verene A Shepherd and Hilary McD Beckles, eds, *Caribbean Slavery in the Atlantic World* (Kingston: Ian Randle, 2000).

<sup>96</sup> For those readers who do not share a Black perspective, the truth of racism can frequently appear stranger than/ fiction. To the many readers unaware of, or oblivious to the daily reality of racism and racial discrimination, see e.g. the inventory of day-to-day examples of the material reality of racism enumerated in Thornhill *Focus on Racism*, *supra* note 1; also see Peggy McIntosh, “White Privilege: Unpacking the Invisible Knapsack” (1990) 49:2 Independent School 31.

<sup>97</sup> *Bou Malhab*, *supra* note 5 at para 82.

