BIASED IMPARTIALITY: A SURVEY OF POST-*RDS* CASELAW ON BIAS, RACE AND INDIGENEITY

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Based on an empirical review of post-RDS caselaw, I argue that there is a demonstrable colour blindness within the existing jurisprudence on judicial impartiality. I illustrate this colour blind approach through two arguments. The first argument is based on the evidence needed to pierce the veil of judicial impartiality. A large number of the cases surveyed illustrate the propensity of decision makers to deny recusal arguments based on the cogency of the evidence. In these cases of colour blind decision making, the presented evidence was deemed insufficient to warrant piercing the veil of judicial impartiality. The second argument focuses on judges that adopt an antiracist perspective. When judges have relied on social science evidence to engage in contextual and antiracist judging, they have been policed and their decisions overturned by supervisory and appellate courts.

À la lumière d'un examen empirique de la jurisprudence postérieure à RDS, l'auteur fait valoir que la jurisprudence existante portant sur l'impartialité des juges n'est pas impartiale, et que cela peut être démontré. Il illustre ce manque d'impartialité au moyen de deux arguments. Le premier est fondé sur la preuve nécessaire pour lever le voile sur l'impartialité de la magistrature. Un grand nombre des affaires étudiées illustrent la tendance des décideurs à rejeter les arguments pour la récusation en se basant sur le bien-fondé de la preuve. Dans ces exemples de daltonisme racial, la preuve présentée a été réputée insuffisante pour lever le voile de l'impartialité de la magistrature. Le deuxième argument porte sur les juges qui adoptent un point de vue antiraciste. Lorsqu'ils se sont fondés sur des preuves découlant des sciences sociales pour trancher de manière contextuelle et antiraciste, ils

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ont été contrôlés et leurs décisions ont été infirmées par les tribunaux d'un ordre supérieur ou d'appel.

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1. Introduction

There is a resounding call for racial justice in this particular moment in Canada. Advocates, activists and even the reasonable bystanders have joined the movements led by Black people, Indigenous Peoples and racialized people in demanding fuller and more meaningful racial equality. Their demands are based on the experiences of specific racial injustice in Canada. Racial equality as imagined within the Canadian justice system is under significant attack from various perspectives. Some of these challenges have focused on the very nature of judging within the Canadian legal system, especially whether judicial decision makers have the capacity to be impartial and mete out justice.

Focusing on systemic racism within the Canadian legal system, the 1997 Canadian Supreme Court decision in *R v RDS* ("*RDS*") is celebrated for setting the limits on judicial impartiality.[1] The decision is famous for a robust articulation of antiracism and a genuine call for contextual

[1] *R v S (RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS* cited to SCR]; for a summary of the entire proceedings, see Brenna Bhandar, "R. v. R.D.S.: A Summary (1998)" 10:1 CJWL 164 [Bhandar].

judging that acknowledges the history of anti-Black, anti-Indigenous and different forms of racism in Canada. This case centred around Rodney Smalls, a then 15-year-old Black Nova Scotian, and his violent interaction with Police Constable Donald Stienburg. Smalls appeared before Justice Connie Sparks in the Youth Court on criminal charges of assaulting a police officer, assaulting a police officer with the intention of preventing the arrest of Smalls' cousin and resisting arrest.[2] In determining Smalls' guilt, Justice Sparks sought to acknowledge the racism prevalent in Nova Scotia. In her oral reasons, after hearing from Smalls and Constable Stienburg, and determining their credibility, she made comments that were challenged by the Crown "as raising a reasonable apprehension of bias."[3]

RDS is a landmark decision that occupies a prominent place in Canadian jurisprudence. This decision helps define the meaning and scope of judicial impartiality in all aspects of Canadian law. To determine partiality, the Canadian judiciary continues to rely on Justice de Grandpré's 1978 dissenting view on reasonable apprehension of bias.[4] Justices L'Heureux-Dubé and McLachlin's sharp legal analysis in *RDS* can be deployed to illustrate the significance of contextual judging that takes stock of the deep historical injustices prevalent in Canada and pushes the boundaries of reasonable apprehension of bias. The dissenting and the concurring reasons in *RDS* are quite powerful as well. Similarly, the academic commentary that followed this decision is diverse and complex.[5]

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2 *RDS*, *supra* note 1 at 514, 516.

3 *Ibid* at 516.

4 The legal test for reasonable apprehension of bias for public decision makers is based on Justice de Grandpré's dissenting opinion in *Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716 [*Committee for Justice*].

5 Richard Devlin & Dianne Pothier, "Redressing the Imbalances: Rethinking the Judicial Role After R. v. R.D.S." (1999) 31:1 Ottawa L Rev 1 at 29; Constance Backhouse, "Bias in Canadian Law: A Lopsided Perspective" (1998) 10:1 CJWL 170 [Backhouse, "Bias in Canadian Law"]; The Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 CJWL 1 [The Honourable Maryka Omatsu]; Richard F Devlin, "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995) 18:2 Dal LJ 408; Reg Graycar, "Gender, race, bias, and perspective: OR, how otherness colours your judgment" (2008) 15:1/2 Intl J Leg Profession 73 [Graycar]; Allan C Hutchinson & Kathleen Strachan, "What's the Difference? Interpretation, Identity and R. v. R.D.S." (1998) 21:1 Dal LJ 219; Sherene Razack, "*R.D.S. v. Her Majesty the Queen*: A Case About Home" (1998) 9:3 Const Forum Const 59 [Razack, "RDS"]; Robert J Currie, "The Contextualised Court: Litigating 'Culture' in Canada" (2005) 9:2 Intl J Evidence & Proof 73; April Burey, "No Dichotomies: Reflections on Equality for African Canadians in R. v. R.D.S." (1998) 21:1 Dal LJ 199; Carol A Aylward, "'Take the Long Way Home' *R.D.S. v. R.* The Journey" (1998) 47 UNBLJ 249; Bruce P Archibald, "The Lessons of the Sphinx:

Given the significance of this case, a survey of the post-*RDS* reasonable apprehension of bias jurisprudence was warranted.[6] Two preliminary questions guided this survey: has *RDS* created an opportunity for more antiracist and contextual judging? Has *RDS* mitigated racist predispositions of decision makers[7] based on their conduct in the courtroom?

Even though *RDS* is celebrated as a landmark decision, this empirical review of the caselaw on bias reveals another metanarrative, that harkens back to the insights developed by scholars theorizing the 'lived experience' of Black people, Indigenous Peoples and racialized people in North America.[8] Based on the review of the cases since *RDS* (September 1997), I argue that there is a demonstrable colour blind approach to race and Indigeneity within the existing jurisprudence on judicial impartiality. I illustrate this approach through two specific arguments. The first argument is based on the evidence needed to pierce the veil of judicial impartiality. The legal test for bias and the ensuing jurisprudence demand that an objective bystander would be affronted by the egregious conduct.

Avoiding Apprehensions of Judicial Bias in a Multi-racial, Multi-cultural Society" (1998) 10:5 Crim Reports Articles 54.

6 See section two for fulsome discussion on bias; see generally Laverne Jacobs, "Caught Between Judicial Paradigms and the Administrative State's Pastiche: 'Tribunal' Independence, Impartiality and Bias" in Colleen Flood & Lorne Sossin, *Administrative Law in Context*, 2nd ed (Toronto: Edmond Montgomery, 2013) at 233 [Jacobs].

7 I use judges and decision makers interchangeably. In this paper I focus on decision makers that are imbued with independence and impartiality; see *Valente v The Queen*, [1985] 2 SCR 673, 24 DLR (4th) 161 [Valente cited to SCR]; *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 [*Ocean Port*].

8 For an overview of critical race theory literature in the United States, see generally Kimberle Williams Crenshaw, "Twenty Years of Critical Race Theory: Looking Back and Moving Forward" (July 2011) 43:5 Conn L Rev 1253; for a partial overview of critical race theory literature in Canada, see e.g. Vincent Wong, "Ethnoracial Legal Clinics and the Praxis of Critical Race Theory in Canada" (2020) 16:1 JL & Equality 63; for a discussion on the distinctive nature of critical race theory in the United States, see Oluwaseun Matiluko, "Decolonising the master's house: how Black Feminist epistemologies can be and are used in decolonial strategy" (2020) 54:4 L Teacher 543 at 552–556. For scholarship on 'lived experience' drawn from everyday experiences of racism and patriarchy, see e.g. Derrick Bell, "The Power of Narrative" (1999) 23:3 Leg Studies Forum 315; Patricia J Williams, *Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge: Harvard University Press, 1991); Patricia Hill Collins, "Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought" (1985) 33:6 Social Problems 14; Linda Alcoff, "The Problem of Speaking for Others" (1991) 20 Cultural Critique 5; Daniel Solórzano & Tara Yosso, "Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research" (2002) 8:1 Qualitative Inquiry 23 at 27–30; Susan M Hill, "Conducting Haudenosaunee Historical Research from Home: In the Shadow of the Six Nations-Caledonia Reclamation" (2009) 33:4 American Indian Q 479; Alison Phipps, "Whose personal is more political? Experience in contemporary feminist politics" (2016)

The evidentiary standard is based on a balance of probability in this instance. A large number of the cases surveyed illustrate the propensity of decision makers to deny recusal arguments based on the cogency of the evidence. In these cases of colour blind decision making, the presented evidence was deemed insufficient to warrant piercing the veil of judicial impartiality. The evidentiary threshold remains quite elusive. In fact, the survey shows that 90% of the time, the veil of judicial impartiality is not pierced.[9]

The second argument focuses on judges that adopt an antiracist perspective. In these cases, judges relied on social science evidence to engage in contextual and antiracist judging. These judges nonetheless were policed and their decisions overturned by supervisory and appellate courts. These two arguments then coalesce to respond in the negative to the two preliminary questions that guided this survey at the outset.

The presumption of colour blindness of the legal system suggests that every individual should be treated equally without regard to one's race.[10] However, a colour blind approach removes the underlying systemic and ongoing social conditions that give life to racial discrimination, all of which are built into the Canadian legal system. American and Canadian critical race theory scholars have made persuasive arguments against the legal system's colour blindness.[11] These arguments against colour blindness were developed as a means to identify and overcome law's inequities rooted in white supremacy.[12]

17:3 Feminist Theory 303; Brenna Bhandar & Rafeef Ziadah, eds, *Revolutionary Feminisms* (London: Verso, 2020) at 13–27.

9 Of the 826 reviewed cases, 113 were relevant. Out of the 113 cases, there are 11 successful cases where the decision maker was found to be biased; See below for a fulsome discussion of the survey starting.

10 Neil Gotanda, "A Critique of Our Constitution is Color-Blind" (1991) 44:1 Stan L Rev 1; on ableism and colour blindness, see generally Osagie Obasogie, *Blinded By Sightseeing Race Through The Eyes Of The Blind* (Palo Alto, CA: Stanford University Press, 2013).

11 Kimberle Crenshaw et al, *Seeing Race Again: Countering Colorblindness across the Disciplines* (Los Angeles: UCLA Press, 2019) [Crenshaw, "Seeing Race Again"] 1–11; Kimberle Williams Crenshaw, "Twenty Years of Critical Race Theory: Looking Back and Moving Forward" (July 2011) 43:5 Conn L Rev 1253; Carol A Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax: Fernwood Publishing, 1999) at 14–49; David M Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); David M Tanovich, "Ignoring the Golden Principle of Charter Interpretation?" (2008) 42 SCLR 442 [Tanovich, "Golden Principle"].

12 There is a wealth of commentary from critical race scholars on race neutrality and colour blindness, largely focusing on the lived experiences of African Americans and racialized people in the United States; Crenshaw, "Seeing Race Again", *supra* note 11; Ian

Devon Carbado and Cheryl Harris, prominent American critical race theory scholars, have noted that colour blindness is understood as the "the non-utilization of race."[13] Colour blindness can be characterized as how "people comprehend, rationalize, and act in the world." [14] American critical race theory scholar Ian Haney López has described the country's legal framework as encompassing "a colorblind ideology that simultaneously proclaims a robust commitment to antiracism yet works assiduously to prevent effective racial remediation."[15]

While there are robust articulation of judicial impartiality and independence with significant attention to racial equality vis-à-vis judges and their conduct, empirical studies that focus on the factors that may affect judicial decision making are rare.[16] Adding to this context and relying on the above-described framework drawn from critical race theory scholarship, I argue that a colour blind ideology is prevalent in Canada. On the one hand, Canadian laws and the legal system proclaim commitments to equality

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F Haney López, *White by Law: The Legal Construction of Law*, 10th Anniversary ed (New York: NYU Press, 2006) [López, "White by Law"]; Ian F Haney López, "Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination" (2000) 109:8 Yale LJ 1717.

13 Devon W Carbado & Cheryl I Harris, "The New Racial Preferences" (2008) 96:5 Cal L Rev 1139 at 1142. There are various means by which colour blindness is achieved. See e.g. colour blindness is possible by adopting a 'race neutral' position in decision making; see Kimberle Crenshaw et al, "Preface and Acknowledgements: Praying to the Disciplinary Gods with One Eye Open" in Kimberle Crenshaw et al, *Seeing Race Again: Countering Colorblindness across the Disciplines* (Los Angeles: UCLA Press, 2019) at xiv–xvii; Barbara J Flagg, "'Was Blind, but Now I See': White Race Consciousness and the Requirement of Discriminatory Intent Requirement of Discriminatory Intent" (1993) 91:5 Mich L Rev 953.

14 López, "White by Law", *supra* note 12 at 157. See e.g. *4361814 Canada Inc v Dalcor Inc*, 2015 ONSC 1481 at para 2 [emphasis added] [*Dalcor Inc*] (Master Carol Albert notes: "Unimac asks me to recuse myself from this reference on grounds of judicial bias against Unimac on the basis that I am racist against its lawyer, Mr. Baichoo, who self-identifies as a visible minority. *Prior to this motion I was unaware that Mr. Baichoo is visibly a minority*").

15 López, "White by Law", *supra* note 12 at 148.

16 In the United States, scholars have surveyed the impact race of the decision maker on for example harassment cases. See e.g. Pat K Chew & Robert E Kelley, "Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases" (2009) 86:5 Wash U L Rev 1117; Pat K Chew & Robert E Kelley, "The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race" (2012) 28 Harvard J Racial & Ethnic Justice 91. For general summary of judicial diversity and impact on decision making literature, see Jeffrey J Rachlinski & Andrew J Wistrich, "Judging the Judiciary by the Numbers: Empirical Research on Judges" (2017) 13:1 Annual Rev L & Soc Science 203. In Canada, there are two relevant empirical studies. While Rehaag focuses on various factors that may affect the judicial decision on leave application from refugee determinations, Bahdi examines the stereotypes of "Arabs as Liars" in human rights cases: Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012)

before the law. Yet judicial interpretations undermine the equality that is provided for in the legal texts. Consequently, colour blindness, as a 'technology of power' is endemic within the Canadian caselaw and judicial reasoning that I surveyed.[17] Judges moreover are unable to acknowledge that racial discrimination is prevalent in Canada. Racism is subsequently contingent and judges get to decide who is racist and when. My findings are further corroborated by some of the existing academic commentary on *RDS* and is further reinforced by the lived experience of racialized judges like Justice Omatsu, the first female identified East Asian to be appointed to the Ontario Court of Justice.[18]

My starting point in embarking on this judicial impartiality project commenced with an unpacking of *RDS*. From there I reviewed 829 cases from September 1997 to June 2020. I focused on all of the provinces and territories, except Quebec. The survey method is further detailed in the relevant section below. My analysis begins by illustrating the prevalence of colour blindness in judicial impartiality. In the first section, I provide a detailed overview of *RDS* while setting out the concurring and dissenting opinions of the court on reasonable apprehension of bias. I then examine subsequent cases where an argument about a reasonable apprehension of bias and race and or Indigeneity were raised. In providing this taxonomy and delving into specific instances of a colour blind approach to race, I identify and expand on two arguments that manifest in the jurisprudence: there is high evidentiary threshold to establish a predisposition to an outcome and policing antiracist judging.

Importantly, my overall argument must be situated within the broader debates about law, the legal system and settler colonialism in what is now known as Canada.[19] The Canadian legal system was built

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38:1 Queen's LJ 1; Reem Badhi, "'All Arabs Are Liars': Arab and Muslim Stereotypes in Canadian Human Rights Law" (2019) 31 J L & Soc Pol'y 92.

17 Crenshaw, "Seeing Race Again", *supra* note 11 at 13. This argument is made notwithstanding the high standards that judges must strive towards; see Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004), in particular section 5 (equality) and section 6 (impartiality), and the ensuing commentary.

18 The Honourable Maryka Omatsu, *supra* note 5; Backhouse, "Bias in Canadian Law", *supra* note 5; Graycar, *supra* note 5; For a perspective on gender, see Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507.

19 See generally Adrian A Smith, "Racialized In Justice: The Legal And Extra-Legal Struggles Of Migrant Agricultural Workers In Canada" (2013) 31:2 WYAJ 38; Amar Bhatia, "We Are All Here to Stay? Indigeneity, Migration, and 'Decolonizing' the Treaty Right to Be Here" (2013) 31:2 WYAJ 39; Vasanthi Venkatesh, "Pluralistic Legal Systems and Marital Rape: Cross-National Considerations" in Melanie Randall, Jennifer Koshan & Patricia Nyaundi, eds, *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi* (Oxford: Hart Publishing, 2017) 89; for a discussion of settler colonialism in business law see e.g. Jeffery Hewitt &

by, and for, settlers. It is a project that is rooted in white supremacy[20] and dispossession.[21] The current legal system then has a long history of maintaining white supremacist practices.[22] To that end, I conclude by exploring a deep connection between Canadian settler colonialism and the approaches taken by Canadian Courts in resolving reasonable apprehension of bias as it concerns cases affecting the racialized communities.

2. *RDS*, Reasonable Apprehension of Bias & Predisposition to an Outcome

Adjudicators and judges must act in an impartial manner.[23] A potential challenge to a decision maker's impartiality is framed within the doctrine of reasonable apprehension of bias.[24] The reasonable apprehension of bias caselaw has carved out four instances where bias may arise: financial interest[25]; personal interest[26]; prior knowledge[27]; and a predisposition to an outcome.[28] The fourth instance, a predisposition to an outcome, is used to challenge a decision maker's racism.

Shanthi Senthe, "Disrupting Business as Usual: Considering Teaching Methods in Business Law Classrooms Business Law Classrooms" (2019) 42:2 Dal LJ 261.

20 Barrington Walker, *Race on Trial: Black Defendants in Ontario's Criminal Courts, 1858-1958* (Toronto: U of T Press, 2012) at 1–40 [Walker, "Race on Trial"].

21 *Final Report of the Truth and Reconciliation Commission of Canada: Summary: Honouring the Truth, Reconciling for the Future* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) [*TRC Report*]; *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019) [*National Inquiry*].

22 See e.g. *R v Quong-Wing* (1914), 49 SCR 440, 18 DLR 121; *Christie v York Corp*, [1940] SCR 139, [1940] 1 DLR 81; *R v Stanley*, 2018 SKQB 27.

23 For independence and impartiality of adjudicators, boards and tribunals, see *Valente*, *supra* note 7; see generally Jacobs, *supra* note 6 at 233; See for a distinction between impartiality and impendence of judges and adjudicators vs. visa officers and other administrative decision makers, *Mengesha v Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 8594, 174 FTR 54 (FCTD) [*Mengesha* cited to CanLII]; *Au v Canada (Minister of Citizenship & Immigration)*, [2001] CarswellNat 584 (WL Can) at paras 23–29, 202 FTR 57 [*Au*].

24 *R v Lippé*, [1991] 2 SCR 114, 1990 CanLII 18 [*Lippé* cited to SCR].

25 *Dimes v Grand Junction Canal Co*, [1852] Eng R 789, (1852) 3 HL Cas 759 (HL (Eng)); *Energy Probe v Canada (Atomic Energy Control Board)*, [1985] 1 FC 563, 15 DLR (4th) 48 (FCA).

26 *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte,* [2000] 1 AC 61, [1998] 3 WLR 1456 (HL Eng)).

27 *Wewaykum Indian Band v Canada (AG)*, 2002 SCC 79.

28 *RDS*, *supra* note 1; *Es-Sayyid v Canada (Minister of Public Safety & Emergency Preparedness)*, 2012 FCA 59 [*Es-Sayyid*].

The legal test for reasonable apprehension of bias for decision maker is based on Justice de Grandpré's dissenting opinion in *Committee for Justice and Liberty et al v National Energy Board* (1978).[29] The apprehension of bias, he noted, must "be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information."[30] The reasonable person is informed and someone who examines the matter "realistically and practically."[31] The Supreme Court has followed Justice Grandpré's formulation consistently.[32]

In *RDS*, the Supreme Court was asked to determine if Justice Sparks comments gave rise to a reasonable apprehension of bias. Justice Sparks comments were as follows:

> I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.[33]

Six Supreme Court judges agreed that the comments did not give rise to a reasonable apprehension of bias. The Court's decision is challenging to follow with four different reasons that converge and, at times, overlap. For example, Justices Major, Sopinka, and Lamer dissented because they believed that Justice Sparks' comments were biased. Their reasons were delivered by Justice Major.

Justices L'Heureux-Dubé and McLachlin, along with Justices La Forest and Gonthier did not reach the same conclusion. In agreeing with Justice Sparks and her use of social context, Justices L'Heureux-Dubé and McLachlin insisted that judges should utilize their "varying perspectives."[34]

Justices Cory and Iacobucci, while agreeing with L'Heureux-Dubé and McLachlin's reasons that Justice Sparks' comments did not give rise

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29 *Committee for Justice*, *supra* note 4 at 392–406.

30 *Ibid* at 394.

31 *Ibid*.

32 For the most recent treatment, see *Yukon Francophone School Board, Education Area #23 v Yukon (AG)*, 2015 SCC 25; See also e.g. *Lippé*, *supra* note 24; *R v Find*, 2001 SCC 32 [*Find*].

33 *RDS*, *supra* note 1 at 543–44.

34 *Ibid* at 505.

to a reasonable apprehension of bias, nonetheless embarked on a different analysis. They suggest that, at times, Justice Sparks' comments "came close to the line."[35] For Justices Cory and Iacobucci, Justice Sparks' decision could be perceived as biased by a reasonable observer. Even though Justices Cory and Iacobucci agreed with L'Heureux-Dubé and McLachlin, their reasoning is closer to Justice Major's dissent than the minority decision. Their reasons were delivered by Justice Cory.

There are four separate reasons within *RDS* but, for the purpose of this paper, I have folded Justices Gonthier and La Forest's reasons into those of Justices L'Heureux-Dubé and McLachlin. Their short decision, penned by Justice Gontheir, agreed with the outcome of the case. They were supportive of Justices L'Heureux-Dubé and McLachlin analysis of "social context and the manner in which it may properly enter the decision-making process."[36] In what follows, I briefly describe the central reasoning at the heart of these overlapping and at times competing reasons by the Supreme Court of Canada. The analysis of the reasons in *RDS* informs the survey of caselaw that I describe in section three.

A) Dissenting view of Justice Major, Sopinka & Chief Justice Lamer (delivered by Justice Major)

Justice Major's dissent categorically denies that this case was not about racism. *RDS* was about "how courts should decide cases."[37] His analysis focused on trial fairness and whether Justice Sparks decided the case based on the evidence presented at trial. Two questions animated Justice Major's reasons. First, whether Justice Sparks instructed herself correctly on the evidence before her court? Second, whether her comments to, and about, Constable Stienburg gave rise to reasonable apprehension of bias (perceived or actual)?[38]

Justice Major reframed the reference to institutional and structural racism and police conduct in Nova Scotia as an attempt to stereotype the behaviours of *all* police officers.[39] He argued that this amounts to the "introduction of evidence to show propensity" which is prohibited by the Supreme Court's jurisprudence.[40] In considering the reference to "the prevalent attitude of the day" comment, Justice Major noted that the evidence should have been presented by the appellant, rather than by the

35 *Ibid* at 545.
36 *Ibid* at 501.
37 *Ibid* at 493–94.
38 *Ibid* at 494.
39 *Ibid* at 495.
40 *Ibid* at 495–96.

decision maker. Justice Sparks' decision to make such an inference by relying on "the prevalent attitude of the day", in his view, is "an error of law."[41]

Major's second question focused on whether Justice Sparks' comments to, and about, Police Constable Stienburg gave rise to reasonable apprehension of bias. Justice Major's analysis is about whether Justice Sparks could integrate her 'life experience' as a Black woman in Nova Scotia into the decision-making process.[42] For the dissenting judges, Justice Sparks' comments gave rise to a reasonable apprehension of bias and there was an error of law.[43] For Justice Major, the comments amounted to nothing more than stereotyping of Constable Stienburg and police officers in general, without any evidence.

B) Joint Reasons of L'Heureux-Dubé and McLachlin & Justices La Forest and Gonthier

Justices L'Heureux-Dubé and McLachlin start their reasons with an overarching discussion of the principles of judicial impartiality and independence. The manner in which Canadian courts determine the presence of bias, either actual or perceived, they argue, "is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality."[44] The varied lived experiences of judges and adjudicators can assist in their reasoning. Moreover, their lived experiences will be reflected in their decision, without unduly leading to stereotyping.[45]

Notwithstanding the importance of the presumption, they note that neutral judging is nonetheless a fallacy. Judges are, after all, human, and they tend to operate from their own perspectives, rooted in their lived

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41 *Ibid* at 496.

42 *Ibid* at 497–98 Justice Major states as follows:

> The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

For a full summary of Justice Sparks' supplementary reasons, see Bhandar, *supra* note 1 at 165–66.

43 *RDS*, *supra* note 1 at 500.

44 *Ibid* at 501.

45 *Ibid* at 501, 503.

experiences.[46] Judicial impartiality is to be measured by a "reasonable, informed, practical and realistic person" that is not "very sensitive or scrupulous."[47] The description of these basic features of the impartial decision maker allows Justices L'Heureux-Dubé and McLachlin to pivot to two central aspects in their reasoning: the reasonable person's "knowledge and understanding of the judicial process" (or the nature of judging) and the community in which the decision occurred (the nature of the community).[48]

In considering the nature of judging, Justices L'Heureux-Dubé and McLachlin recognized that judges are shaped by their environments and their experiences within pluralistic, bilingual and multiracial communities. They reason that "[judges] cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench."[49] They argue that expecting judges to be "neutral ciphers" is untenable especially within a multicultural society, given the varied and diverse lived experiences of those appointed to the bench.

Simultaneously, when judges are applying the law to a set of facts, the law should dictate the outcomes, not the judges' perspectives. The application of the law to the facts nonetheless cannot take place within a vacuum. Social context is important, where judicial impartiality includes a conscious and contextual inquiry.[50] This type of inquiry then allows judges to locate the law and facts, while understanding the historical, social, and political context of the specific dispute. A reasonable observer would not be troubled by such a position.[51]

Based on this nuanced perspective on the nature of judging, Justices L'Heureux-Dubé and McLachlin turned to the nature of the reasonable

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46 Then Chief Justice McLachlin reaffirmed this position in 2001 in relation to jurors in *Find*, *supra* note 32 at para 43:

> It follows from what has been said that 'impartiality' is not the same as neutrality. Impartiality does not require that the juror's mind be a blank slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision maker and representative conscience of the community: As Doherty J.A. observed in *R v Parks* [footnotes omitted], '[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community'.

47 *RDS*, *supra* note 1 at 505.

48 *Ibid*.

49 *Ibid*.

50 *Ibid* at 507.

51 *Ibid*.

person's community. The reasonable person is situated within a larger community that prioritizes the Canadian *Constitution* and the principles enshrined within the *Charter of Rights and Freedoms*. This person then has an understanding of the role of discrimination in Canada's history.[52] More importantly, the reasonable person is rooted to their various communities. Such a person therefore has knowledge of the "local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against [B]lack and [A]boriginal people, and high-profile clashes between the police and the visible minority population over policing issue[s]."[53]

Justices L'Heureux-Dubé and McLachlin conclude that the reasonable observer would not perceive Justice Sparks' comments as biased. Their conceptualization of impartial judging is significant. They call for judging that fully recognizes the prevalent racism, analogous to Justice Sparks' decision, in Canada's history and that is premised on notions of equality guaranteed in the *Charter of Rights and Freedoms*.

It is important to note that the two central aspects of their reasons (nature of judging and the nature of the community) have been explored and accepted in numerous post-*RDS* cases. For example, in the context of the broader approach to the nature of the community and history of racism endemic to a settler colonial country like Canada, the Supreme Court has clearly adopted this particular perspective advocated for in *RDS*. The Court has adopted this perspective in various areas ranging from, for example, the duty to consult cases and in the framing of the Honour of the Crown,[54] taking account of the history of colonialism and its effects on Indigenous Peoples in the criminal context and criminal law generally.[55]

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52 *Ibid* at 507–08.

53 *Ibid* at 508. Contrast this view with Justice Doherty's refusal to accept the reasonable Black person standard in *Peart v Peel (Regional Municipality) Police Services Board*, 2006 CanLII 37566 at paras 54–55, 2006 CarswellOnt 6912 (WL Can) (CA) [*Peart*].

54 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 1–59; *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 31–54; John Borrows "Sovereignty's Alchemy: an Analysis of Delgamuukw v British Columbia" (1999) 37:3 Osgoode Hall LJ 537; John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46:3 McGill LJ 615; David Milward, "Freeing Inherent Aboriginal Rights from the Past" in Richard Albert et al, eds, *The Canadian Constitution in Transition (*Toronto: University of Toronto Press 2019) 245.

55 *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385; *R v Ipeelee*, 2012 SCC 13; Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Publishing, 2019); Tanovich, "Golden Principle", *supra* note 11.

These cases that followed *RDS*, while not falling within the ambit of the survey and this paper, nonetheless point to the significance of Justices L'Heureux-Dubé and McLachlin's reasons and the lasting impact of their analysis. For example, in *Find*, Chief Justice McLachlin (as she was at the time) examined the meaning and scope of partiality in jury selection. The test for partiality consists of two components: attitudinal bias[56] and widespread bias in the community.[57] In articulating the contours of partiality, her reasons are similar to those in *RDS*. In distinguishing racial bias and bias against a specific type of offender, Chief Justice McLachlin notes: "[r]acial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused."[58]

Returning to reasonable apprehension of bias and predisposition to an outcome, these positive steps towards holistic judging are not apparent in the cases surveyed in this analysis. The cases set out in the third section below illustrate instances where judges decidedly disregard the prevalence of racism in Canada and avoid Justices L'Heureux-Dubé and McLachlin's framework.

C) Justices Cory & Iacobucci Reasons: 'Coming close to the line'

Justice Cory's reasons set out a detailed summary of the proceedings. The summary is helpful in understanding the reasoning of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal. Both Nova Scotia courts determined that Justice Sparks' decision was biased.

In defining bias, Justice Cory canvassed an array of sources ranging from Justice Scalia's reasons in *Liteky v US*[59] to Justice Doherty's views in *R v Parks*.[60] For Justice Cory, bias is a partiality, that is both attitudinal and behavioural. It "refers to one who has certain preconceived biases and will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases."[61]

Justice Cory, while examining the importance of impartiality and independence within a democracy, pointed to the important role of the judiciary in meting out justice. The judicial role requires the highest

56 *Find*, *supra* note 32 at paras 34–38.
57 *Ibid* at paras 39–42.
58 *Ibid* at para 94.
59 *RDS*, *supra* note 1 at 528.
60 *Ibid* at 529.
61 *Ibid*.

standards of impartiality and therefore compels a presumption of judicial impartiality.[62] The 'wide powers' exercised by judges must be shielded from undue private and public influence. This has been secured through constitutional protections encapsulated within security of tenure and financial independence for judges.[63] Yet this ideal does not preclude the personal or professional experiences of judges. The duty to be impartial does not prohibit judges from bringing to the "bench many existing sympathies, antipathies or attitudes."[64] This presumption however can be rebutted with "cogent evidence."[65]

In applying the law to the facts in *RDS*, Justice Cory reiterates that notwithstanding her social markers, the presumption of impartiality applies to all decision makers, including Justice Sparks. He moreover reiterated the point that racialized judges must be impartial and he subsequently examined Justice Sparks' comments. In doing so, Justice Cory identified three troubling components in her comments:

> 1) I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups.
>
> 2) That to me indicates a state of mind right there that is questionable …
>
> 3) It seems to be in keeping with the prevalent attitude of the day.[66]

Justice Sparks' remarks about the potential possibility of overreaction by the police is noted by Justice Cory as troubling, notwithstanding the deep history of anti-Black racism in Nova Scotia. The animating purpose motivating Justice Cory's concern is the supposed lack of evidence before Justice Sparks that the officer reacted the way he did because of anti-Black racism. Even though there was ample evidence of the history of racism against Black Nova Scotians, Justice Cory focuses on the fact that there was no cogent evidence before Justice Sparks to make concrete connections between Constable Stienburg's racist conduct and anti-Black racism experienced by Smalls.[67] The lack of evidence is further substantiated by Justice Sparks' 'state of mind' comment. Justice Cory notes that there was a lack of evidence before the court to move from the general claims about racism in Nova Scotia to the specific conduct of Constable

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62 *Ibid* at 524.

63 *Beauregard v Canada*, [1986] 2 SCR 56, 30 DLR (4th) 481; *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 96, 99 & 100, reprinted in RSC 1985, Appendix II, No 5.

64 *RDS*, *supra* note 1 at 534.

65 *Ibid* at 542.

66 *Ibid* at 543–44 [emphasis added].

67 *Ibid* at 544–45.

Stienburg.[68] The reference to the 'prevalent attitude of the day', to Justice Cory, moreover illustrates the troubling nature of what was said as it may create a perception "that the findings of credibility have been made on the basis of generalization, rather than the conduct of the particular police officer."[69]

According to Justice Cory, these three components of Justice Sparks' comments, when read individually, are "worrisome and come very close to the line."[70] But when the comments are considered in their entirety and located within the specific context of the case, a reasonable observer would understand that Justice Sparks did not conclude that the officer mislead the court or that Constable Stienburg overreacted because of racial bias.[71] More importantly, the Crown had not satisfied the onus to rebut the presumption of impartiality afforded to Justice Sparks. Ultimately, Justice Cory concludes that there was no reasonable apprehension of bias.[72]

In concluding his reasons, Justice Cory signals that he is in agreement with the dissenting view of Justice Major about the foundations of the reasonable apprehension of bias test.[73] Even though he arrives at a different outcome than the dissenting view and the dissent's reliance on colour blindness, Justice Cory is explicit that the test and the principles put forward are wholly different and incompatible with the framework developed by Justices L'Heureux-Dubé and McLachlin.

Justice Cory's decision, while paying attention to the lived experiences of judges, nonetheless discourages a holistic view of racism and the role of white supremacy[74] within Canada. Circling back to López, in both Justice Major's dissent and Justice Cory's concurring reasons, there is a clear adoption of colour blindness. For example, Justice Major notes that this case is not about racism but rather the stereotyping of police officers. He then focuses on the lack of evidence before Justice Sparks. Similarly, for Justice Cory, the comments are 'close to the line' given the lack of evidence in front of the decision maker. The adoption of a colour blind approach that I detail below in the caselaw is closely connected to their conclusion.

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68 *Ibid*.

69 *Ibid* at 545.

70 *Ibid*.

71 *Ibid* at 545–46.

72 *Ibid* at 546.

73 *Ibid* at 548.

74 For a detailed discussion of White supremacy see Charles W Mills, *The Racial Contract* (Ithaca: Cornell University Press, 1997); Walker, "Race on Trial", *supra* note 20; Adrian A Smith, "The Bunk House Rules: Housing Migrant Labour in Ontario" (2015) 52:3 Osgoode Hall LJ 863 [Smith]; Patricia Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 2000).

3. Review of Jurisprudence—Impartiality and Reasonable Apprehension of Bias

Justices L'Heureux-Dubé and McLachlin's reasons in *RDS* is a comprehensive framework that can be used by decision makers to integrate and acknowledge the prevalence of racism in predisposition to an outcome cases.[75] Notwithstanding these reasons in *RDS*, judges continue to reveal their own race-based predispositions. For example in *Kayhan v Greve*, Justice Cunningham of the Ontario Superior Court suggests that "[a]rguably, minorities in Canada have suffered from intolerance and prejudice."[76] The inclusion of the word arguably aptly describes the judiciary's colour blindness in predisposition to an outcome cases. Racism is arguable within the legal system.

Two central arguments can be distilled from the survey that evinces the colour blind approach in the surveyed jurisprudence on predisposition to an outcome. The survey of cases illustrates the decision makers tendency to deploy colour blindness through the following: there is a high evidentiary threshold to establish a predisposition to an outcome and antiracist judging is policed by supervisory and appellate courts.

There are other trends evident in the survey that I do not explore in this paper. For example there were specific procedural time limits that resulted in colour blindness.[77] For example, those alleging an actual or perceived predisposition to an outcome based on race and or Indigeneity during the proceedings must raise these issues as soon as the conduct occurred.[78] A number of cases demonstrate the court's refusal to engage with recusal motions on appeal or review because the claimant failed to immediately bring forward a recusal motion alleging bias. The origins of this line of jurisprudence can be traced to *R v Curragh Inc*, where the Supreme Court ruled that "allegations of bias should be made in a timely fashion."[79] In ordering a new trial, the Supreme Court not only signaled

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75 See e.g. *R v Brown* (2003), 64 OR (3d) 161, 2003 CanLII 52142 (CA) [*Brown* cited to CanLII]; *Warman v Glenn Bahr and Western Canada for Us*, 2006 CHRT 46.

76 *Kayhan v Greve*, 92 OR (3d) 139, 2008 CanLII 32832 at para 35 (Div Ct) [*Kayhan*].

77 See e.g. *Makoundi c Sous-ministre des Transports, de l'Infrastructure et des Collectivités*, 2014 FC 1177 (TD).

78 See e.g. *Ayangma v Canada Health Infoway*, 2017 PECA 13 at para 23:

> Mr. Ayangma is raising concerns about the motion judge's pre-hearing conduct before this court without having raised them before the motions judge. This manner of proceeding is out of order. Mr. Ayangma did not make the allegations of reasonable apprehension of bias relating to his pre-hearing concerns before the motions judge.

79 *R v Curragh Inc*, [1997] 1 SCR 537 at 545, 144 DLR (4th) 614.

to the importance of trial fairness but moreover noted the crown counsel's "courageous position of moving to have the trial judge" recused.[80] There are additional cases where the alleged biased decision maker renders a ruling on their own predisposition. This second line of cases is jarring; the claimant or the lawyer that experienced the racist conduct must put forward a "courageous" argument before their alleged aggressor for recusal.[81] In some instances, judges have specifically noted their colour blindness in deciding on their own predisposition to an outcome.[82] These cases require further investigation.[83]

In what follows, I expand on the method I used to arrive at these findings. I then turn to setting out my findings of the review of the caselaw.

A) Method

At the outset of this research project, I formulated two rudimentary research questions: has *RDS* created an opportunity for more antiracist and contextual judging? Has *RDS* mitigated racist predispositions of decision makers based on their conduct in the courtroom? Guided by these simplistic questions, student researchers and I set out to examine cases that resulted from the following keyword search terms in Westlaw[84] in 2016: "reasonable apprehension of bias race" and "reasonable apprehension of bias aboriginal". We also used "reasonable apprehension of bias Indigenous" but this did not yield the expected results. We surveyed cases from the Supreme Court of Canada, Federal Court, Federal Court of Appeal, and Federal Administrative Tribunals. We also surveyed all the provincial courts and the respective administrative tribunals. We excluded Quebec because of the difficulties in accessing translated tribunal records and lower provincial court records.[85]

I reviewed 829 cases decided between September 1997 and June 2020.[86] Of the 829 cases, I identified 113 cases where the decision maker's conduct gave rise to a predisposition to an outcome based on race or

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80 *Ibid*.

81 See generally e.g. *Dalcor Inc*, *supra* note 14.

82 *Ibid* at para 2.

83 Sujith Xavier, "Race, Bias and Procedural Barriers to Access Justice" [forthcoming].

84 Using these broad research terms resulted in hundreds of results. Westlaw allows researchers to transfer the search results into a searchable excel database. For this reason, I solely relied on Westlaw. Other databases do not have this functionality.

85 I limited the search to these provinces and institutions given the available resources.

86 I draw inspiration from the method adopted by Catherine Dauvergne & Hannah Lindy, "Excluding Women" (2019) 31:1 Intl J Refugee L 1 at 7–9 [Dauvergne & Lindy].

Indigeneity. I eliminated 27 cases from this list because of the nature of the decision makers role.[87] In this paper, I focus specifically on judicial and adjudicator decision making. For example, cases dealing with juror selection, decisions by immigration officers and pre-removal risk assessment officers, and decisions of Human Rights Tribunal investigators were eliminated. Their removal was due to my specific interest in decision makers invested with impartiality and independence as understood by the Canadian jurisprudence and the Canadian constitution.[88]

The remaining 86 cases were categorized based on the following distinctions: rejection of claims due to insufficient evidence to pierce judicial impartiality (56 cases); rejected recusal motions and or arguments because it was not raised at first instance (3 cases); decision did not deal with the reasonable apprehension of bias arguments raised by the applicants (2 cases); judicial backlash against antiracism (3 cases); frivolous and vexatious claims[89] (7 cases); sent back to the original decision makers for redetermination (4 cases); and successful predisposition to an outcome based on race and Indigeneity (11 cases).[90]

Understandably, the above listed categories overlap. Cases included in the high evidentiary threshold category are also part of other categories. For example, three cases from the high evidentiary threshold could have been categorized as part of the cases that did not raise the issue at first instance. To ensure that cases were not double counted, cases were included only in one category.[91]

There are several limitations with such a method. For example, I acknowledge the limitations of using these broad search terms of "reasonable apprehension of bias" and "race" instead of specific racial markers such as "Black" and "South Asian", or specific national identifiers such as "Nigerian" or "Sri Lankan Tamil". Using these search terms for example excluded cases like *R v Flis*.[92]

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87 There is some debate about the level of independence in the jurisprudence; see e.g. *Mengesha*, *supra* note 23; *Au*, *supra* note 23 at para 24.

88 *Lippé*, *supra* note 24; *Ocean Port*, *supra* note 7.

89 See e.g. *Re X*, 2012 CanLII 100290, 2012 CarswellNat 7111 (WL Can) (C (IRB)) [*X, Re* cited WL Can].

90 See e.g. *Brown*, *supra* note 75; David Tanovich, "Applying The Racial Profiling Correspondence Test" (2018) 66:1 Crim LQ 359 at 360.

91 This may explain the disproportionate number of high evidentiary cases.

92 In *R v Flis*, 2006 CanLII 3263 at paras 114–15, [2006] CarswellOnt 698 (WL Can) (CA), leave to appeal to SCC refused, 31391 (28 September 2006) (An off-duty white police officer was charged and found guilty of common law assault of Ryan Scullion, a 17-year-old white man. During the trial and unrelatedly, Justice Gregory Regis of the Ontario Court of Justice was interviewed by two newspapers for his contribution to the Black

Sociolegal scholars and Canadian courts have paid close attention to the contextual factors that affect decisions-makers in public law. In articulating the standards of review, the Supreme Court was heavily influenced by the nature of the decision and the delegated authority of the decision maker.[93] The nature of each administrative regime is important as there are specific practices based on the type of delegated authority, the nature of the decision and the expertise of the decision maker. Similarly, social scientists are keenly aware of contextual realities when engaging with large scale datasets from multiple sectors with respective cultures of process and adjudication.[94] Of the 86 cases that I focused on, 30 cases are drawn from immigration and refugee law while 16 cases originated from the human rights and labour related fields. Other cases focused on criminal law, while some dealt with Indigenous Peoples' right to hunt. The diversity of the cases can be viewed as a limitation. The specificity and context of each area may be lost with my broad review of cases and specific nuances from the respective fields may have been overlooked.

More importantly, a robust quantitative argument with a dataset of 86 cases from diverse areas of practice may not be possible, given contextual realities of immigration law and human rights law for example. Rather, in this instance, I will use paradigmatic cases to illustrate the colour blind approach taken by judges and adjudicators in deciding on race and Indigeneity.

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community. Justice Regis made the following statement in the interview: "everyone comes to every position affected by their experiences" and "being black gives me certain types of experiences. I have an appreciation of issues of racism, I have an appreciation for some of the problems [B]lack people in [Toronto] face in their dealings with the police". Counsel for Flis moved to have Justice Regis declare a mistrial based on his comments. Albert Flis, as a white police officer of the Toronto police force focused on the judge's comments about the conduct of some members of the Toronto Police Service and its effects on Black people. Flis argued that these comments gave rise to reasonable apprehension of bias. On appeal, Justice Moldaver of the Ontario Court of Appeal dismissed these claims as "baseless" and an "affront" to the trial judge. While Justice Moldaver's quick dismissal in four paragraphs is appropriate in this instance, the decision however did not fully engage with reasonable apprehension of bias and a predisposition to an outcome).

[93] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Dunsmuir v New Brunswick*, 2008 SCC 9; *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324, 74 DLR (4th) 449; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193; David Dyzenhaus "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (London: Hart Publishing, 1997) 279 at 279.

[94] Dauvergne & Lindy, *supra* note 86 at 7–9; Raya Ramji-Nogales, Andrew I Schoenholtz & Philip G Schrag, "Refugee Roulette: Disparities in Asylum Adjudication" (2007) 60:2 Stan L Rev 295.

B) Reasonable Apprehension of Bias and High Evidentiary Burden to Pierce the Veil of Judicial Impartiality

The first argument I pursue in this section is that there is an unduly high evidentiary standard that must be met to reach the threshold of racial bias.[95] This assiduously high evidentiary threshold works to ensure colour blindness, especially when the impartiality of decision maker is challenged.

This high evidentiary threshold is based on the presumption of judicial independence and impartiality.[96] For example, in *Es-Sayyid*, the Federal Court of Appeal went to great lengths to suggest that there is a "strong" presumption of impartiality for judges, especially when there are allegations of bias.[97] In a similar vein, even when decisions makers endorse assumptions about a racial group,[98] the appellate and reviewing courts have found that there was no bias given the presumption of judicial impartiality.[99] There are some race-based predisposition to an outcome cases where the comments are outrageous, "colourful," and effectively racist.[100] Yet there remains a list of cases that have failed to implement the type of judging advocated by Justices L'Heureux-Dubé and McLachlin.

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95 In *R v Brown*, 57 OR (3d) 615, 2002 CanLII 49404 at para 13 (Sup Ct) [*Brown* SCJ] Justice Trafford described it as follows:

> This presumption can be displaced with cogent evidence demonstrating that something the judge has done gives rise to a reasonable apprehension of bias. Cogent evidence is required … Suspicion is not enough. The threshold is high because such a finding, as advocated in this appeal, calls into question not only the personal integrity of the trial judge but the integrity of the entire administration of justice.

96 See *Lippé*, *supra* note 24 at 139 ("The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end' … Independence is the cornerstone, a necessary prerequisite, for judicial impartiality").

97 *Es-Sayyid*, *supra* note 28 at para 39. See also *Lippé*, *supra* note 24.

98 See e.g. discussion of cogent evidence in *Brown* SCJ, *supra* note 95 at para 13.

99 See generally, *Lippé*, *supra* note 24.

100 *Sawridge Band v R*, [1997] 3 FC 580, [1997] FCJ No 794 (QL) at para 19 (CA) where the judge who expressed the belief that policies conferring special benefits to members of Indigenous communities were "racist" and a form of "apartheid" was found to be biased. *Sawridge* was decided prior to *RDS* and was not included in the survey. See also *R v Koh*, 42 OR (3d) 668, 1998 CanLII 6117 (CA); *R v Parks*, 15 OR (3d) 324, 1993 CanLII 3383 (CA); *R v Ho*, [1996] OJ No 5344 (QL), 1996 CarswellOnt 5522 (WL Can) (Ct J (Gen Div)); *R v Brown*, 1999 CarswellOnt 4701 (WL Can), [1999] OJ No 4867 (QL) (Ct J (Gen Div)).

Cases such as *R v Laws*[101] & *Taylor v Canada (AG)*,[102] *Vollant v Canada (AG)*,[103] *Cina v Canada (AG)*,[104] *Jaroslav v Canada (AG)*[105] and *R v Liagon*[106] are good examples where a decision maker (or someone intimately tied to the decision maker) made explicit statements or engaged in conduct laden with assumptions about a racial group. Nonetheless, the respective reviewing courts found no bias based on a predisposition to an outcome.

Laws is a good starting point for the first argument about the evidentiary threshold. During the criminal trial of Dudley Laws and Lawrence Motley, two Black men accused of human trafficking,[107] Justice Whealy demanded that everyone in the audience remove their "hats."[108] This request was directed at Michael Taylor, a Black religious leader who was wearing his religious headdress in the courtroom.[109] The judge refused to continue the proceedings with Taylor, a practicing Muslim and Iman, unless he removed his kufi. Taylor was subsequently escorted out of the courtroom and prevented from returning to the courtroom. In Justice Whealy's decision on the recusal motion of the presiding trial judge (Justice Whealy himself), he states: "an application for violation of the Charter of Right [sic] belongs to the spectator and not to any party to

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101 *R v Laws* (1998), 41 OR (3d) 499, 1998 CarswellOnt 3509 (CA) [*Laws* cited to WL Can].

102 *Taylor v Canada (AG)* (2001), [2002] 3 FC 91, 2001 FCT 1247 (CanLII) (TD) [*Taylor* cited to CanLII].

103 *Vollant v Canada (Commission des droits de la personne)*, 2003 FCT 799 (CanLII), 241 FTR 1 (TD) [*Vollant* cited to CanLII].

104 *Cina v Canada (Citizenship and Immigration)*, 2011 FC 635 (TD) [*Cina*];

105 *Jaroslav v Canada (Minister of Citizenship & Immigration)*, 2011 FC 634 (TD) [*Jaroslav*];

106 *R v Liagon*, 2012 ABQB 740 [*Liagon* cited to WL Can].

107 Razack, "RDS", *supra* note 5 at 63.

108 *Laws*, *supra* note 101 at para 5 (The Arabic word for this religious attire is taqiyah, while the urdu word often used amongst people from the South Asian region is topi. Referring to this particular type of garment as a "hat" does not denote its significance to the followers of Islam. Justice Blanchard referred to it as "kufi" in *Taylor*, *supra* note 102 at para 1).

109 *Laws*, *supra* note 101 at para 9. See *Taylor*, *supra* note 102 at para 1 where Justice Blanchard notes the following:

> Mr. Justice Whealy of the Ontario Superior Court was presiding over the trial of Dudley Laws a well-known leader in the African-Canadian community. On November 23, 1993, Mr. Justice Whealy issued an order to the effect that males wearing head cover could not be admitted to the courtroom, Michael Taylor was therefore unable to attend the trial of Mr. Laws. Mr. Justice Whealy maintained this position even after he was presented with a sworn affidavit from Mr. Taylor deposing that his 'kufi' was worn as part of his religious practice.

the proceedings. In my view, only if the public is wholly or substantially excluded from the court can the accused in the criminal case raise any such issue under s. 11(d) of the Charter."[110]

Despite this explicit expression of cultural insensitivity, on appeal, Chief Justice McMurtry of the Court of Appeal for Ontario focused on whether religious headdresses are allowed in the courtroom and the public nature of the trial. Even though the Court of Appeal references *RDS* and in particular, Justice Cory's separate reasons, the discussion does not turn to reasonable apprehension of bias. Chief Justice McMurtry notes the following:

> We are therefore of the opinion that the trial judge erred in excluding certain members of the public from the courtroom, and that this may well have resulted in creating an atmosphere that *undermined the appearance of a fair trial.* However, having regard to our disposition of this appeal on grounds relating to the wiretap authorization, which are dealt with hereafter, we do not consider it necessary to form a concluded view whether the ground of appeal now under consideration is in itself sufficient to constitute reversible error.[111]

The Court of Appeal for Ontario was not able to visualize the important connections between Justice Whealy's conduct of removing a Black person wearing religious attire in the courtroom[112] and his ability to be impartial during the criminal trial of two racialized accused.[113] Instead of focusing on how Justice Whealy's racist predispositions may have 'undermined the appearance of a fair trial', in a colour blind manner the Court of Appeal relies on the wiretap authorization to allow the appeal.[114] More importantly, by focusing on the legal arguments before Justice Whealy rather than on his conduct, the Court of Appeal was able to ignore the context that was so relevant in *RDS* and continue with relying on a high evidentiary threshold for a predisposition to an outcome based on race. This was further cemented by the ensuing decisions of the Canadian Judicial Council and the Federal Court in Taylor's complaints against Justice Whealy.

Taylor, following his eviction from Justice Whealy's court, filed a judicial complaint against the judge with the Canadian Judicial Council. Once the Court of Appeal had delivered its decision and while the Council was in possession of Taylor's complaint, Justice Whealy wrote

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110 *Laws*, *supra* note 101 at para 8.

111 *Ibid* at para 28 [emphasis added].

112 Gay Abbate, "Man pursues eight-year complaint against judge" (03 May 2001), online: *Globe and Mail* <www.theglobeandmail.com>.

113 Razack, "RDS", *supra* note 5 at 63–64.

114 *Laws*, *supra* note 101 at paras 18–24.

to the Council. He noted: "Accepting as I must the decision of the Court of Appeal, I was in error in excluding Mr. Taylor. I sincerely regret if the impression was created that I am insensitive to the rights of minority groups. That is not the case and was never my intent."[115]

The Council rendered a decision in December 1998 where it concluded that "the conduct complained of warranted an expression of disapproval but no formal inquiry or further action by the Council."[116] Taylor sought to judicially review this decision by raising a number of issues before the Federal Court, including reasonable apprehension of bias based on the part of the Council.[117] While this reasonable apprehension of bias claim is outside the purview of this paper as it did not encompass a predisposition, it is noteworthy how Taylor's allegations are restricted and contained by the Council and the Federal Court. These findings then work to reinforce the Court of Appeal's admonishment of Justice Whealy's conduct without any serious repercussions. Much more importantly, Taylor was left without a satisfactory remedy for what he was forced to endure.

In *Vollant*, the applicant in a judicial review proceeding argued that the Chairperson of the Canadian Human Rights Tribunal made racist assumptions about violence and safety in an Indigenous community during a conversation with the applicant's counsel:

> He added that he owned a cottage near a lake north of Baie Comeau, and that on the drive between his home in Beauce and his cottage on Highway 138, between Forestville and Baie Comeau, he passed the sign for the community of Betsiamites. Mr. Doyon asked me (as a former member of the RCMP who was in charge of the Baie Comeau post) whether he could drive freely around the *Indian reserve in question without fearing for his safety.*[118]

The Chairperson's comments constitute a direct and unequivocal assumption about the lawlessness within an Indigenous community, where one should have a particular fear and worry about personal safety on an Indigenous community's reserve.[119] Such assumptions undoubtedly have an impact on how the Chairperson viewed Vollant and the veracity of her claims of discrimination and the testimony of Vollant's two Indigenous witnesses.[120] The case centred on the discrimination experienced by Jeanne D'arc Vollant, an Indigenous employee of Health Canada.

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115 *Taylor*, *supra* note 102 at para 13.

116 *Ibid* at para 2.

117 *Ibid* at para 17.

118 *Vollant*, *supra* note 103 at para 12 [emphasis added].

119 See generally Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon: Purich, 2015).

120 *Vollant*, *supra* note 103 at para 18.

Upon analysing the reasonable apprehension of bias claim against the Chairperson of Canadian Human Rights Tribunal, Justice Tremblay-Lamer of the Federal Court concluded that an allegation of bias must be supported by evidence.[121] According to the Federal Court, however, the Chairperson's "careful" review of the evidence and "harmless" nature of the comments precluded any potential for bias.[122] These comments did not reach the evidentiary threshold required to overcome judicial impartiality. The reasonable apprehension of bias (actual or perceived) arguments put forward by the applicant were subsequently dismissed.

In *Cina* and *Jaroslav,* and several similar cases,[123] a claim of institutional bias was brought before the Immigration Refugee Board because of the Minister of Citizenship and Immigration's comments about members of the Roma community.[124] The Minister is responsible for the administration of the *Immigration Refugee Protection Act*.[125] The Immigration Refugee Board, empowered through this act, relies on the Minister for various regulatory and oversight matters.[126] Justice Kelen of the Federal Court framed the issue as follows in *Cina*: "Does the dramatic difference in the Board's acceptance rate for Czech Roma refugees before and after comments by the Minister in April 2009 raise a reasonable apprehension of bias on the part of members of the Board with regard to their determinations of refugee claims from the Czech Republic?"[127]

The predisposition claim was based on comments made by Jason Kenny, the then Minister invoking racial tropes about the Roma: "Czech

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121 *Ibid* at para 17 (in support of this position, Justice Tremblay-Lamer cites to *Arthur v Canada (AG)*, 2001 FCA 223 instead of *RDS* or any other cases on reasonable apprehension of bias and predisposition to an outcome based on race and Indigeneity).

122 *Ibid*.

123 *Cina*, *supra* note 104; *Jaroslav*, *supra* note 105 (*Cina* and *Jaroslav* were heard consecutively by Justice Kelen and both decisions were released on May 31 2011); *Dunova v Canada (Minister of Citizenship & Immigration)*, 2010 FC 438 (TD) [*Dunova*]; *Gabor v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1162 (TD) [*Gabor*]; *Cervenakova v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1281 (TD) [*Cervenakova*].

124 A claim of institutional bias on similar issues was accepted by the Federal Court of Appeal in *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 [*Geza*] (An important distinction must be noted between allegations of institutional bias and individual bias. As expected, they are distinguished by whether the source of the bias is individual or institutional. However, they both involve the same analysis described in *RDS*. As such, the reasonable apprehension of bias analysis outlined in *Laws* is suitable for both individual and institutional bias claims. See also Julianna Beaudoin, Jennifer Danch & Sean Rehaag, "No Refuge: Hungarian Romani Refugee Claimants in Canada" (2015) 52:3 Osgoode Hall LJ 705).

125 *Immigration and Refugee Protection Act*, SC 2001, c 27, s 4.

126 *Ibid*, ss 74, 164(2).

127 *Cina*, *supra* note 104 at para 26.

refugee claimants are 'fraudulent.'"[128] Similar bias arguments were raised in *Dunova*,[129] *Gabor*[130] and *Cervenakova*.[131] Surprisingly, Justice Kelen provided context to the Minister's comments. For example, Justice Kelen notes: "the Minister obviously had heard reports of 'unscrupulous operators' who promote and assist Czech refugee claimants to Canada in return for money."[132]

Justice Kelen then notes that "[w]ithin the above described context, the Court understands why the Minister made his alleged comments expressing a concern 'about the numbers of false refugee claimants' from the Czech Republic."[133] Moreover, the Court sought to justify these comments by reading in a rationale for the Minister's comments: "these comments [were] made in Paris by the Minister in the presence of senior political and bureaucratic officials from the Czech Republic."[134]

The Federal Court could have contemplated arguments about the Minister's biased comments and the potential impact it may have had on the racialized Roma refuge claimants or the Immigration and Refugee Board, given his important statutory role.[135] Even though the Board's independence is firmly established,[136] the claimant's actual or perceived bias arguments are dismissed outright without a consideration of the Board's decisions. Justice Kelen relies on the impartiality of the Board Members to argue against the actual or perceived bias as result of the Minister's comments.[137] The evidentiary threshold then, based on a balance of probabilities, remains quite high.[138] The Board members are assumed to be independent and impartial in this context because they

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128 *Jaroslav*, *supra* note 105 at para 7.

129 *Dunova*, *supra* note 123.

130 *Gabor*, *supra* note 123.

131 *Cervenakova*, *supra* note 123.

132 *Cina*, *supra* note 104 at para 49.

133 *Ibid* at para 52.

134 *Ibid*.

135 *Ibid* at paras 60–62.

136 *X, Re*, *supra* note 89.

137 *Cina*, *supra* note 104 at paras 60–62; Jaroslav, *supra* note 105 at paras 60–62.

138 See *Geza*, *supra* note 124 at paras 12-14, 60 (Notwithstanding these decisions, there is a Federal Court of Appeal decision from 2006 that tackles similar issues (and claimants) where is the outcome is somewhat different. In *Geza,* the issue concerned the use of lead cases by the IRB and the various Federal departments as it related to the influx of Roma refugees claimants. Justice Evans determined that all of the facts combined could lead a reasonable person to apprehend bias).

are insulated by independence, all the while erasing the racialized lived experiences of the Roma refugees fleeing race based persecution.[139]

Liagon was found guilty of operating a motor vehicle while his blood alcohol level exceeded the legal limit. Justice Shriar of the Alberta Provincial Court also dismissed his application that "his *Charter* rights had been breached based on lack of proficiency in English resulting in an inability to understand his rights."[140] Richard Nappoling Liagon is from the Philippines and "his first language is the Ifuago dialect of Tuwali."[141] During the proceedings, Justice Shriar made a number of comments about immigrants and their capacity to speak English (in reference to a judge of the Ontario Court of Justice),[142] she made generalizations about peoples' conduct,[143] and referred to an inappropriate and homophobic metaphor. Justice Shriar is quoted as stating: "Well [...] I'm not sure that I think—I mean I think there's a little bit of—I'm not sure what the word is, but a little bit of silly *bugger* here."[144]

On appeal, Liagon argued that all of the comments by Justice Shriar, and in particular the reference to "silly bugger" amounted to actual bias. Justice Erb of the Alberta Court of Queen's Bench however did not agree. He quickly dispensed with the first two comments. While the reference to the Ontario judge was viewed as unfortunate and ill advised,[145] the second comment was situated as banter with counsel.[146] Finally, the reference to "silly bugger" was neutralized by signaling to the qualifier used by Justice Shriar and then providing the context in which the comment was made. To Justice Erb, there was a qualification based on "I'm not sure what the word is" and this was followed by an explanation.[147] Moreover the comment was made within a broader context of the accused's credibility and therefore a "a reasonable person would neither apprehend that the trial judge was calling the Appellant a "'silly bugger,' nor that she was suggesting that 'silly buggery' was at play, but rather voicing her concerns about the Appellant's testimony."[148] Justice Shriar's comments thus were

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139 Sean Rehaag, "'I Simply Do Not Believe': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 Windsor Rev Legal Soc Issues 28.

140 *Liagon*, *supra* note 106 at para 15.

141 *Ibid* at para 12.

142 *Ibid* at para 34.

143 *Ibid* at para 36.

144 *Ibid* at para 38 [emphasis added].

145 *Ibid* at para 42.

146 *Ibid* at para 43.

147 *Ibid* at para 45.

148 *Ibid* at para 53.

not biased and did not reach the threshold needed to piece the veil of judicial impartiality.

These cases have offered examples of decisions where the judiciary across various jurisdictions insist on a high evidentiary standard to establish a reasonable apprehension of bias and predisposition to an outcome. Even though the evidentiary burden for a reasonable apprehension of bias based on a predisposition to an outcome must be decided on a balance of probabilities.[149] Notwithstanding the 'cogent evidence' presented to the respective court, the evidence is not sufficient to rebut the presumption of judicial impartiality.[150] The required evidence to rebut the presumption of impartiality in these paradigmatic instances serve as an illustration of the colour blindness that is pervasive within predisposition to an outcome cases since *RDS*.

Taylor, Vollant and *Liagon* are good examples of the explicit racist statements and conduct by the decision maker. These statements and conduct were nonetheless rendered harmless through a colour blind approach to race. These cases reveal a racial predisposition of the decision makers (actual or perceived) through their conduct as in for example *Laws, Vollant* and *Liagon*. Courts nonetheless continue to conclude there is insufficient evidence to establish a racially-motivated predisposition, notwithstanding the lower evidentiary threshold of balance of probabilities.

In what follows, I chronicle how judicial antiracist efforts are dismissed, in a similar manner. The policing of antiracist judges is, I argue, part of the colour blind approach to race and Indigeneity adopted by the Canadian legal system.

C) Antiracism[151] as Giving Rise to a Reasonable Apprehension of Bias

Justice Major arrived at colour blind conclusion about Justice Sparks' efforts to recognize the history of racism against Black Nova Scotians. In doing so, he relied on stereotyping of police officers:

> It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with

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149 *Marchand v The Public General Hospital Society of Chatham*, 51 OR (3d) 97, 2000 CanLII 16946 at para 131 (CA).

150 *Ibid* at para 142.

151 Backhouse, "Bias in Canadian Law" *supra* note 5 at 175 where Backhouse frames antiracism judging in the following manner:

> respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.[152]

This type of colour blind reasoning, which suggests that Justice Sparks was biased for relying on social science evidence, exists within the case law that I surveyed. This mindset sustains systemic racism, as elaborated earlier and is part and parcel of the colour blind approach to race adopted by the various stakeholders within the legal system. The legal system too has adopted this perspective as a means to erase the significant "otherness" produced by racialization and "cover over embodied inequalities with a disembodied universalism."[153] Framing antiracist judging as biased decision making is also an act of covering over.

In addition to *RDS*, there are numerous examples where decision makers were punished for their antiracist efforts through reasonable apprehension of bias. In the two cases I chronicle below, judges that introduced or accepted social science evidence and acknowledged the history of racism noted in the minority reasons of *RDS* were found to be biased.[154]

Justice Borkovich's decision in *Kayhan* to strike Greve's jury notice and have the matter heard by a judge alone is an excellent starting point for this analysis. The issue centred around whether Kayhan would receive a fair trial given her religion and Afghani identity within the post-9/11 political climate at the time in Hamilton, Ontario.[155] After reviewing the evidence and hearing the motion, Justice Borkovich struck the jury notice and stated: "I am taking judicial notice that there is a strong risk, a

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> We live in a society in which there is a great deal of documented evidence to suggest that, at least systemically, whites continue to hold a position of dominance over people of colour, and men continue to hold a position of dominance over women. When judges are perceived to possess perspectives that support and reinforce these imbalances, you have a problem. When judges are perceived to possess perspectives that consider such imbalances to be improper and needing alteration, you have something quite different.

152 *RDS*, *supra* note 1 at 499.

153 Crenshaw, "Seeing Race Again", *supra* note 11 at 3.

154 See also *Children's Aid Society of the Regional Municipality of Waterloo v T (C)*, (2017) ONSC 1022.

155 See *Kayhan*, *supra* note 76 at para 2 where Justice Cunningham suggests that following:

> This motion was brought on the grounds that the plaintiff, a Muslim-Canadian woman of Afghani descent, would not receive a fair trial because of '… the current political climate, which stems not only from the 9/11 attacks, but subsequent terror (and attempted terror) attacks around the world, a politically controversial war in Afghanistan, and the unfortunate, but very real, existence of racism in Canada'.

reasonable apprehension that there could be bias on the part of the jury based on a system where there are no checks."[156] In doing so, Justice Borkovich adopted an antiracist perspective. The decisions that follow in this case can be used to illustrate the judicial 'backlash' to the *RDS* minority reasons.[157] The appellate court overturned Justice Borkovich's judicial notice of racism and the recognition of the prevalence of racist views within Canadian communities.

Justice Harris granted leave to appeal by suggesting the following: "the instant case was determined on the basis of race, country of origin, religion and not on any individual determinative qualities of the plaintiffs or factors having to do with the case."[158] Both Justice Harris in the leave to appeal decision and Justice Cunningham of the Ontario Superior Court of Justice, Divisional Court on appeal took issue with Justice Borkovich's decision to accept the prevalence of anti-Muslim sentiment present in a post-9/11 Hamilton, Ontario. It culminates with Justice Cunningham and his argument that arguably discrimination is possible within Ontario. Justice Cunningham for the majority notes the following:

> Arguably, minorities in Canada have suffered from intolerance and prejudice. Nevertheless, the trial process has prevailed. Needless to say, given the tragic events of September 11, 2001, and the subsequent terrorist attacks linked to radical Muslims, there may be a level of caution in Canada which may in some people have expanded to outright bias and prejudice.[159]

Justice Cunningham then overturned the trial judge's decision to take judicial notice of the anti-Muslim sentiments that were prevalent in post-9/11 Ontario. In using language like "arguably" and "may in some people have expanded to outright bias and prejudice," Justice Cunningham decides against the basic framework articulated in *RDS* that judges should be aware of their social context.[160] Justice Cunningham's reasons examine matters of widespread discrimination as if racism is conditional and in question, ignoring the long history of violence and settlement in Canada. Justice Cunningham's denial of racism against Arabs and Muslims fails to appreciate the social science evidence that was available at the time.[161]

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156 *Ibid* at para 6.

157 The Honourable Maryka Omatsu, *supra* note 5.

158 *Kayhan v Greve*, [2007] OJ No 3891 (QL) at para 17, 2007 CarswellOnt 6480 (WL Can) (Sup Ct).

159 *Kayhan*, *supra* note 76 at para 35.

160 *Ibid.*

161 Reem Bahdi, " Arabs, Muslims, Human Rights, Access To Justice and Institutional Trustworthiness Insights From Thirteen Legal Narratives" (2018) 96:1 Can Bar Rev 73; Reem Bahdi, "Narrating Dignity: Islamophobia, Racial Profiling, and National Security Before the Supreme Court of Canada (2018) 55:2 Osgoode Hall LJ 557; B.C Civil

Justice Cunningham achieves these results by focusing on the decision making process required in judicial notice set out in *R v Find* and relying on individualized manifestation of partiality to allow the appeal and remit the case to a different decision maker.[162]

R v Hamilton is another excellent example.[163] In this case, Justice Hill considered the race, socio-economic status, and the mental health of the accused. While relying on these social markers, Justice Hill made important connections between the lived experience and systemic racial and gender discrimination.[164] Using statistical and social science evidence, he suggested that Hamilton and Mason's subject position gave rise to limited culpability for international drug trafficking. This limited culpability would necessitate a conditional sentence. In arriving at his conclusion, Justice Hill conducted his own research, which he shared with the parties. [165] His reasoning and his conduct raised important questions about the judicial role within an adversarial system.

Justice Doherty of the Court of Appeal for Ontario allowed the appeal.[166] In his reasons, he initially suggests that the reasonable apprehension of bias argument is not persuasive and he was persuaded by the Crown's arguments that focused on the nature of the proceedings and role of the trial judge.[167] While Justice Doherty's analysis of the sentence and the use of social science evidence engages heavily with *RDS*, he identified specific concerns about the conduct of the trial and manner in which social science and statistical evidence were introduced. More importantly, Justice Doherty was worried about the level of weight afforded to these two types of evidence in a criminal trial.[168] In dealing with the fitness of the sentence, and in looking at the errors, Justice Doherty takes issue with the trial judge's use of statistical and social context evidence.[169] In fact, he goes back to *RDS*, and re-interprets *RDS* on social science evidence:

Liberties Association, "Racial Profiling" (2010), online (pdf): *BC Civil Liberties Association* <bccla.org>.

162 *Kayhan*, *supra* note 76 at para 26.

163 *R v Hamilton* (2004), 72 OR (3d) 1, 2004 CanLII 5549 (CA) [*Hamilton* CA cited to CanLII].

164 *R v Hamilton*, 2003 CanLII 2862, [2003] OJ No 532 (QL) (Sup Ct) [*Hamilton* SCJ cited to CanLII].

165 *Ibid* at para 52.

166 In a similar vein, see *Peart*, *supra* note 53 at para 43 where Justice Doherty did not accept the African Canadian Legal Clinic's argument that the reasonable person "share the race of the person alleging a reasonable apprehension of bias".

167 *Hamilton* CA, *supra* note 163 at para 64.

168 *Ibid* at paras 71–83.

169 *Ibid* at paras 114–115.

> The limits on judicial fact-finding based on prior judicial experience and social context are necessary for at least two reasons. *First, fact-finding based on a judge's personal experience can interfere with the effective operation of the adversary process*. It is difficult, if not impossible, to know, much less explore or challenge, a trial judge's perceptions based on prior judicial experiences or his or her appreciation of the social issues which form part of the context of the proceedings. *Second, fact-finding based on generalities developed out of personal past experience can amount to fact-finding based on stereotyping*. That risk is evident in this case. The trial judge appears to have viewed all poor [b]lack single women who import cocaine into Canada from Jamaica as essentially sharing the same characteristics. These characteristics describe individuals who, because of their difficult circumstances, have virtually no control over their own lives and turn to crime because they are unable to otherwise provide for their children. While this may be an apt description of some of the individuals who turn to cocaine importing, it is stereotyping to assume that all single black women who import cocaine into Canada fit this description.[170]

By cautioning against judicial fact finding that is intrinsically connected to lived experience, Justice Doherty is advocating for a colour blind judging.[171] More importantly while both *Kayhan* and *Hamilton* concern different legal issues, these decisions nonetheless allude to the manner in which predisposition to an outcome have been deployed. In *Kayhan*, Justice Borkovich's use of judicial notice to recognize the possibility of anti-Muslim sentiment amongst the jury is overturned on the fact that even though racialized communities may face discrimination, the "trial process has prevailed."[172] While Justice Doherty in *Hamilton* may have been correct in finding that the trial judge had assumed the role of advocate, witness, and judge,[173] his decision leaves open questions about the appropriate use of social science evidence within the adjudicatory process as it relates to bias and predisposition. Much more importantly, Justice Doherty's decision questions, and in fact confronts, the image of the judge in our multiracial society set out in the minority reasons in *RDS*. These questions are particularly germane to cases that deal with predisposition to an outcome based on race and Indigeneity.

These two cases, along with the reasons of Justices Major and Cory in *RDS* in fact seek to punish judicial attempts to pursue antiracism. There is evidence of the judicial backlash to the inclusion of various perspectives within the judiciary dating back to *Dulmage v Ontario (Police Complaints*

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170 *Ibid* at para 128 [emphasis added].

171 See also *Peart*, *supra* note 53.

172 *Kayhan*, *supra* note 76 at para 35.

173 See e.g. *ibid* at paras 72, 93, 117.

Commissioner).[174] Such a backlash then is part and parcel of the Canadian judiciary's colour blindness.

4. Conclusion: Settler Colonialism and the Way Forward?

The following observations can be made based on preceding analysis of the surveyed caselaw: First, the evidentiary threshold to establish bias based on a predisposition to an outcome is high, even though the evidentiary standard is a balance of probabilities. Second, judges that adopted an antiracist perspective face judicial backlash. This survey of the post *RDS* caselaw confirms the embedded colour blindness of the concurring and dissenting opinions in *RDS*. This colour blindness, as I have set out in this paper, is evident in the jurisprudence following *RDS*. More precisely, the views of five male, white judges about predisposition to an outcome based on race and Indigeneity remains the *modus operandi* for the lower courts since the Supreme Court decided this case in September 1997.

Leaving aside recommendations on how to transcend these limitations for another intervention, the preceding analysis must be placed in the correct historical context. Importantly, it must be acknowledged that the Canadian legal system is one that was built by, and for, the European settlers on this land.[175] Subsequent settlers that have settled in Canada continue to benefit from this colonial infrastructure. This is a system that has had, and continues to have, difficulties in adopting to the changing demographics. These demographics encompasses descendants of former enslaved peoples and new arrivants along with the descendants of the original settlers and the First Peoples. It is a legal system that continues to struggle with inclusion.[176]

My claim is rooted in the foundations of the settler colonial Canadian legal system. The origins of this legal system are tied to a legacy of unifying a vast and disparate territory. Canadian political leaders, starting with Sir

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[174] *Dulmage v Ontario (Police Complaints Commissioner)* (1994), 21 OR (3d) 356, 120 DLR (4th) 590 (Ct J (Gen Div)); The Honourable Maryka Omatsu, *supra* note 5 at 9-12.

[175] Constance Backhouse, "What is Access to Justice?" in Julia Bass, WA Bogart & Frederick H Zemans, eds, A*ccess to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada/Irwin Law, 2005) 113 at 118 [Backhouse, Access to Justice]; *TRC Report*, *supra* note 21; Sujith Xavier, "False Western Universalism in Constitutionalism? The 1867 Canadian Constitution and the Legacies of the Residential Schools" in Richard Albert et al, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 270 [Xavier].

[176] Law Society of Upper Canada Challenges Faced by Racialized Licensees Working Group, "Working Together for Change: Strategies to Address Issue of Systemic Racism in the Legal Professions".

John A. Macdonald, sought to remove Indigenous Peoples from their lands and limit their mobility.[177] The Truth and Reconciliation Commission pointed to a cultural genocide that was inflicted on Indigenous Peoples through the residential schools' complex. A similar finding was made by the *National Inquiry Into Missing and Murdered Indigenous Women and Girls*.[178] The broader policies and goals followed, by what is now known as Canada, sought to eliminate for example, the "Indian from the child."[179] These efforts have been chronicled by Indigenous scholars,[180] who argue that we are witnessing the effects of a settler colonial imperative. This imperative is ongoing and inherent to the foundation of the Canadian legal system.[181] The legal system, for a long time, has functioned to oppress those who are not male, white, able-bodied, and heterosexual.[182]

Onto this tapestry of historical dispossession of Indigenous Peoples, we must overlay the experience of the various communities of colour that were brought onto the shores of Turtle Island by force.[183] This was followed by the 'new arrivants' that came to Canada fleeing persecution or to find economic prosperity.[184] More recently, migrant workers have arrived in Canada on temporary foreign worker visa permits.[185] In each instance, the legal system functioned, and continues to function, as a means to exclude

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177 See *The Pass System*, 2015, DVD (Toronto: Tamarack, 2015).

178 *National Inquiry*, *supra* note 21.

179 *TRC Report*, *supra* note 21 at 2.

180 Bonita Lawrence, "Rewriting Histories of the Law: Colonization and Indigenous Resistance in Eastern Canada" in Sherene Razack, ed, *Race, Space and the Law* (Toronto: Between the Lines, 2002) 21; Glen Coulthard, *Red Skins White Masks: Rejecting the Colonial Projects of Recognition* (Minneapolis: University of Minnesota Press, 2014); Eve Tuck & K Wayne Yang, "Decolonization is not a metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1.

181 Xavier, *supra* note 175.

182 Backhouse, Access to Justice, *supra* note 175 at 118.

183 Barrington Walker, "Introduction: From a Property Right to Citizenship Rights—The African Canadian Legal Odyssey" in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto, 2012) 3 at 15; Afua Cooper, *The Hanging of Angelique: The Untold Story of Canadian Slavery and the Burning of Old Montreal* (Toronto: HarperCollins, 2006).

184 I refuse to use the term newcomer as a descriptor and I instead adopt the term arrivant. Arrivant is much more historically accurate. For greater discussion, see Jodi Byrd, *The Transit of Empire: Indigenous Critique of Colonialism* (Minneapolis: University of Minnesota Press, 2011) at xxvi–xxix. See also Manu Vimalassery, Juliana Hu Pegues, & Alyosha Goldstein, "On Colonial Unknowing" (2016) 19:4 Theory & Event.

185 Smith, *supra* note 74; Vasanthi Venkatesh, "Mobilizing Under 'Illegality': The Arizona Immigrant Rights Movement's Engagement with the Law" (2016) 19 Harvard Latino L Rev 165.

racialized people.[186] Given this reality, can decision makers be impartial in a structure built on settlement and conquest?

The expansive Canadian state apparatus and the enabling laws have worked in tandem with these forces to exact these results of exclusion. Colour blindness is part of the various technologies of power that is used to enforce exclusion. The findings that reviewing and appellate courts have deployed a two-pronged colour blind approach to avoid findings of predisposition to an outcome neatly fits into this narrative of settlement and colonialism.

One may want to argue that the best way to usher in change in bias determinations is to rethink impartiality and independence. Perhaps it would be best to move beyond simple assertions of inclusion. Ultimately, in rethinking impartiality as the "cardinal virtue"[187], there is a need to incorporate and address the challenges to impartiality into daily judicial thinking and incorporate a race conscious awareness. By doing so, we can begin the process of removing the colonial vestiture's within doctrines like reasonable apprehension of bias and bring about an age of judicial decision making that is more relevant to the experiences of all of the inhabitants of what is now known as Canada.

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186 Backhouse, Access to Justice, *supra* note 175 at 118.

187 Jeremy Webber, "The Limits to Judges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr. Justice Berger" (1984) 29:3 McGill LJ 369 at 389; *Brouillard Also Known As Chatel v The Queen*, [1985] 1 SCR 39, 16 DLR (4th) 447.