

Professor Constance Backhouse
“History Will Judge”
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Call to the Bar - London, Ontario

There are some moments that are such important life-markers that we remember them all our lives. The call to the bar is surely one of them. I suspect every single lawyer on the stage today can recall distinctly what it felt like to wear the barristers’ robes for the first time. To be inducted into membership in the Law Society of Upper Canada. To come to the end of such a long, expensive, hard road of education and begin the journey into this exhilarating new career.

I know I can remember vividly being seated in the Toronto auditorium where I was called almost 25 years ago. There was a real sense of elation at having arrived. I don’t remember who received the honorary doctorate that year. However, I believe he spoke about the responsibilities and obligations that came with membership in the bar and about the nobility of the profession. I think I disagreed with a good part of what he said, as his politics were very different from mine. It was an era when young new lawyers wanted to challenge the system, not uphold it. But I have never forgotten the moment.

And so it is a wonderful privilege to be here today, with you at your call to the bar, sharing another special life-marker. It is a great honour to be the recipient of an honorary doctorate, and it is very important to me that it is being bestowed in London, where I lived and taught for so many years, in a community I continue to prize, and where I had the marvellous good fortune to become close to so many incredible colleagues and friends.

As I reflected upon what I should say today, I decided I should speak as an historian. That will seem odd to some of you. You are about to embark upon fresh new directions as lawyers. You are looking forward into the future. And here I am, turning back to the past. But it is not quite so odd as it may seem at first, because at the end, I am going to ask you to reflect on what historians might say about your careers one hundred years from now.

I have spent much of my career looking back into the 19th and 20th centuries, searching legal records for evidence of people who tried to use law to eradicate discrimination, to expand opportunities for oppressed communities.¹ There is much you might recognize as familiar. There were lawyers and judges who wielded law as a club to protect the powerful. There were others who tried to use law to hold the powerful to

¹ These examples are drawn from my books, Petticoats & Prejudice: Women and Law in Nineteenth-Century Canada (Toronto: Women’s Press, 1991) and Colour-Coded: A Legal History of Racism in Canada, 1900-1950 (Toronto: University of Toronto Press, 1999).

account. And still others who attempted to chip away at inequalities through legal challenge.

One of the things that is most startling is how many choices there were.

* When Delos Rogest Davis, an African-Canadian man from Amherstburg, Ontario, sought admission to the bar in the early 1880s, none of the white lawyers in the province would hire him as an articling student. He was forced to secure his call to the bar through two separate acts of the Ontario Legislature, rather than through the Law Society. One wonders what those white lawyers and benchers made of the fact that Davis went on to establish a highly successful practice, which his son later joined.

* In 1891, at the age of seventeen, Clara Brett Martin began her six year battle to become the first woman lawyer in the British Commonwealth. Called to the bar in February 1897, she braved the hostility of the public, the legal profession, the benchers, the legislature, and the media to do so.

* There was enormous resistance from Clara Brett Martin's peers. Some of the male law students expressed this by hissing loudly when she entered the classroom. Other male articling students made Clara Brett Martin's articling experience so difficult that she was forced to switch firms mid-stream.

* Nicholas Awrey, an Ontario politician, opposed her call to the bar and argued in the Ontario Legislature that if women were allowed to practise law, no less than the "homes and womanhood of Ontario" would be at risk.

* Despite achieving so much on behalf of women, Clara Brett Martin participated in acts of anti-Semitism along with many other members of the profession. There is evidence that she lobbied the Attorney General to have restrictions placed on those she referred to as "foreign Jewish realtors." Her acts underscore the complexity of discrimination and remind us that proponents of equality do not always get it right.

* Chief Justice William Campbell's name may be more familiar than some of the others I mention today, as his family home was moved to downtown Toronto, just across the street from the Law Society's Osgoode Hall. Now known as "The Campbell House," it houses the current-day Advocates Society. In 1826, Chief Justice Campbell heard a family law dispute in which a husband had brandished a whip over his wife in front of multiple witnesses, after beating his wife repeatedly for a long period of time. Justice Campbell declared that "a man had a right to chastise his wife *moderately*," and ruled that the wife had had no justification in leaving the marital home. This legitimization of wife-battering stood for years as the prevailing Canadian judicial edict on husband's rights.

* E. Lionel Cross, the only African-Canadian lawyer called in Ontario between 1900 and 1924, was practising in Toronto when word spread throughout the province that 75 Ku Klux Klan members had marched through the town of Oakville on a February night in 1930. The gowned and hooded Klansmen were protesting the pending marriage

of an African-Canadian man to a white-Canadian woman. They set wooden crosses ablaze on Oakville's main street, as well as in front of the African-Canadian man's home and forcibly abducted the young woman. E. Lionel Cross mobilized the Black, Jewish and trade union communities in Toronto to protest the intrusion of the KKK into Canada, and successfully pressured the Attorney General into prosecuting the Klan leaders.

* C.W. Reid Bowlby, a white lawyer from Hamilton acted as defence counsel for the KKK. He argued in court that his clients had only been doing the "human and decent thing," that they had "conducted themselves as gentlemen," and that he was sure that there were "hundreds of parents throughout the Dominion of Canada who would be eternally thankful that such a step had been taken." Every accused person deserves a defence. But I think defence lawyers need to be held responsible for the sorts of arguments they fashion and the strategies they pursue. But there are arguments that are blatantly racist, and sometimes also sexist, classist, homophobic, discriminatory towards those with disabilities and so on. Lawyers who pursue these arguments deserve to be critiqued because of it. Bowlby chose badly.

* Andrew Chisholm, another white lawyer who practised as a sole-practitioner in London, Ontario for over 50 years until his death in 1943, represented eight Aboriginal nations before the courts during his career. There would be no Aboriginal lawyers until the 1970s, and Aboriginal communities usually found it impossible to secure counsel who would make legal arguments that fully reflected Aboriginal perspectives. Chisholm distinguished himself in not only comprehending Aboriginal claims of sovereignty, but actually conveying this to the courts. In 1924, he appeared before the Ontario Supreme Court to argue that the Six Nations at Grand River were independent, sovereign nations that had possessed the right to self-government from the time of earliest contact to the present. He lost. But he was the first and only lawyer I have found in that era who was able to articulate fully, without condescension, patronization, or misinterpretation, what the First Nations themselves have understood to be their status for centuries. Chisholm was later recognized by the Aboriginal community as an honorary chief.

* Justice William Renwick Riddell, who heard Chisholm's argument in court that day, was a powerful white judge who had written articles about Aboriginal peoples in which he described them as having "savage appetites" with "little conception of government by law." He dismissed Chisholm's claim with a decision dripping in sarcasm instead of reasons. He was also a former bencher who had adamantly opposed Clara Brett Martin's admission to law.

* William Turgeon was the Attorney General of Saskatchewan who dreamed up the racist statute titled the "White Women's Labour Bill." First passed in Saskatchewan in 1912, and later adopted in Ontario, Manitoba and BC, the law prohibited Asian men from hiring white women. Turgeon defended the necessity for the law on the ground that it was "morals legislation"! A series of Asian employers - Quong Wing, Quong Sing, Mr. Yoshi and Yee Clun - challenged the law in court, almost always unsuccessfully. There were no Asian-Canadian lawyers at the time, and only one white lawyer recorded

his outrage over the situation. Regina City solicitor George Blair told his fellow citizens that they had “no right in the world to discriminate.”

* Viola Desmond was an African-Canadian businesswoman who operated a beauty salon and beautician school in Halifax. In 1946, almost a decade before the world had heard of Rosa Parks, Viola Desmond refused to sit in the segregated balcony of a movie theatre in NS, and took a seat in the whites-only main floor. The white theatre manager called upon white police officers to arrest Mrs. Desmond, and she was held overnight in the city jail. In the morning, white Nova Scotia magistrate Roderick MacKay fined her for tax evasion. There were no laws enforcing racial segregation in theatres, so Magistrate MacKay pressed into service a theatre taxation statute, which required that an amusement tax should be calculated on the price of tickets. The downstairs tickets cost 40 cents, but the theatre had refused to sell Mrs. Desmond anything but a balcony ticket for 30 cents. She was one cent short on tax. Her conviction was upheld by the full bench of white judges sitting on the Nova Scotia Supreme Court.

We could go further, and explore the many more occasions on which Canadian lawyers and judges took action to enforce discrimination or resist it. The record is rich with the stories of those who have gone before us. Some will argue that I have been harsh on those who displayed sex and race bias, that I have judged them out of the context of their times. Yet what fascinates me is that neither sexism, racism, nor any other form of discrimination has ever been monolithic or omnipresent. It was not like the air we breathe. There were always pockets of resistance and dissenting voices. There were lawyers who tilted at windmills. They lost more often than not. But their's is the legacy that shines out from the past, far overshadowing the lawyers and judges who used their power to accentuate gender, racial and class privilege.

And there is always the example of Clara Brett Martin, to remind us that even though we may personally experience one form of discrimination and fight to eradicate it, we may deeply misconceive other forms and serve to perpetuate them. We need to keep searching intensely for the richest, fullest understanding of equality that we can find, so that we do not duplicate her failures.

History will judge us all. It is never too early to take stock of that. To face up to the fact that our legal careers matter in the most significant of ways. We have the knowledge, the status and the power to try to achieve meaningful change in our world. There are no innocent bystanders here.

I hope that the historians of the 21st century search through the records we leave behind, and subject us all to the most searching criticism possible. And I hope that the lawyers you will become and the careers you create for yourselves will be cause for acclaim and pride in this remarkable profession we share.