

“Why Black History Matters to Us All.”

Black History Month Keynote Speech, Bora Laskin School of Law

Feb. 25, 2021

I want to provide a special thank you to Sharon, Tochie, Aaron, and the rest of the BLSA team at Lakehead. I wish I could have been with you in person in Thunder Bay this year, but it's a pleasure to deliver these notes here today regardless.

It's customary to start with a land acknowledgement.

Toronto, where I am located is in the 'Dish With One Spoon Territory'. The Dish With One Spoon is a treaty between the Anishinaabe, Mississaugas and Haudenosaunee that bound them to share the territory and protect the land. Subsequent Indigenous Nations and peoples, Europeans and all newcomers have been invited into this treaty in the spirit of peace, friendship and respect.

However, many of us are expanding on this to reflect the complex nature of the relationships we have with each other, and with the land.

We are all Treaty people. Many of us have come here as settlers, immigrants, newcomers in this generation or generations past. I'd like to also acknowledge those of us who came here involuntarily, particularly as a result of the Trans-Atlantic Slave trade. And so, we honour and pay tribute to the ancestors of African Origin and Decent.

This tribute is necessary because this relationship is a different one, with the land and all of the people who are on it.

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The Bora Laskin mandate is to ensure this law school focuses on the environment and natural resources; small and rural practice; and Indigenous law.

I take the controversial position that you cannot fully understand Indigenous Law without also studying Black History. And that focusing on anti-Black racism enhances and enriches the focus on environmental law and small and solo practices as well.

My hope is that we spend the next few minutes exploring how that might be.

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Black history does not of course start with slavery. Far too often Black history is confined to this alone, which only serves to reinforce a narrow and restrictive understanding. When people of African descent speak of Black history though, it is a far more robust and vibrant story.

Africa is where the world’s first people and the first civilizations emerged. All of the civilizations of the Western world owe in some part their knowledge and understanding of the world to Ancient Egypt.

The modern boundaries of the continent did not form an impenetrable barrier between Africa and Europe or Asia. The New Kingdom in Egypt (c. 1550 BCE – c. 1077 BCE) ruled all the way to the Euphrates River. The Kingdom of Axum (c. 80 BC – c. 940 AD) spanned both sides of the Red Sea.

The straight between Africa and Arabia is literally called “Bab Al-Mandeb,” meaning a door or a gate between the two land masses. Many countless people passed through this gate over the millennia, including the first humans who populated the Earth.

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Yet this history remains controversial, even in Africa. Last week, a Dutch photographer named Bas Uterwijk released these images Pharaoh Akhenaten (aka Amenhotep IV) and Queen Nefertiti. He created them using artificial intelligence and historical sculptures and engravings to produce them.

There was enormous backlash, and not even from white supremacists, though they weighed in as well. The greatest opposition came from modern Egyptians, many of them descendants of these ancient rulers, albeit with many successive waves of immigration from Europe and Asia. The effect and legacy of colonialism also means a denial of the Black ancestry for these Africans as well.

Arab history itself attests to its “Black origins,” as the Arab al-Ba'ida (العرب البائدة) are acknowledged as having a dark complexion, and features similar to modern Somali, Eritrean, and Ethiopian populations. Their descendants can still be found throughout the Arabian Peninsula.

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Shade-ism and colourism can be found throughout the world, in Latin America and Asia, where darker skin is routinely perceived negatively. A study of Black history also helps to ail these unfortunate maladies.

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We cannot talk about Black history without at least considering the effect of Trans-Atlantic slavery on Africa. Some estimates suggest that the countries where the most slaves had been taken are the poorest today. The 72% average income gap observed between Africa and the rest of the world would not exist without slavery. Today, Africa would have a similar level of development as other parts of Asia or Latin America.

On top of this, an estimated \$45 trillion dollars was taken by the British from India.

Western civilization as we know it today would not be possible without this widespread exploitation of people, resources, and the land.

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It’s tantalizing to consider how Africa would look today if it wasn’t for slavery and colonialism. But it also speaks to much more important issues, the stereotypes and prejudices that exist around race.

The socio-economic situation of Africa, and for many Black people in the African diaspora, is a direct function of history. It is not something that is endemic or intrinsic to a people or a culture. That means that we have an opportunity to change it in the future.

You’ll note that this map depicts the Iberian Peninsula as part of Africa. These lands were ruled for centuries by Africans. Some of these were sub-Saharan Black Africans, hailing from the Kingdom of Tekrur, in what is now Senegal and Gambia. They joined the Murabitun (al-Moravid) movement, where they formed part of the ruling class, during a time known as the Golden Age of Judaism in Spain. This time gave us some of the greatest rabbinical minds, such as Maimonides (Rambam).

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When Black people ruled in the West, it was a time of prosperity, tolerance, pluralism, and inclusion. The European Renaissance could not have occurred without this history.

It is also no coincidence that the European exploration of the Americas from Iberia coincided with the Spanish Inquisition. The Trans-Atlantic slave trade grew directly out of the mis-named “Reconquista,” as Spanish and Portuguese conquistadores raided the West African coast.

This was a holy war that turned into an economic windfall.

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The religious and economic prerogative continued with British Imperialism, on both the American shores and in Africa. Cecil Rhodes emphatically declared the supremacy of the White race, and believed in a divine mandate to populate the world.

“The native,” he said, speaking of the Africans in this context, “is to be treated as a child and denied franchise. We must adopt a system of despotism, such as works in India, in our relations with the barbarism of South Africa.”

The process of enslavement, dispossession of the land, and exclusion/discrimination is a pattern in Canada that the Crown explicitly intended to replicate in Africa and Asia. The notion of liberty and determinism as understood in the common law is experienced very differently by the descendants of Europeans than it is those who descend from those who they ruled over.

The writings of Thomas Hobbes (1588-1679) and John Lock (1632-1704) were always intended to apply to the former, and not the latter. The racialized people of the world, and especially Black people, did not have “privity” to the social contract with the state, for the majority of Western history.

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It was not until the *Charter of Rights and Freedoms* in 1982 that all of the diverse people of Canada were truly held in the same estimation and esteem as each other

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in the eyes of the law. The liberty of these people was not primarily of the state, but from the oppression imposed by their fellow citizens.

This historical backdrop creates a very different understanding of the rule of law, the role of the courts, and how governments and regulation should be involved in addressing equity issues.

It was not until the *Charter* that we really became Canadians.

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On June 2, 2020 when there were protests in the US over George Floyd’s killing by a white police officer in Minneapolis, Premier Doug Ford claimed that Canada doesn't have the "systemic, deep roots" of racism the United States does.

[\[play video\]](#)

I love being Canadian too. But it’s because of who we are trying to become, and not because of our history.

The very next day the Premier recanted this position, saying, "Of course there's systemic racism in Ontario," and "There's systemic racism across this country." He announced \$1.5 million to organizations that support black families and youth. But this was the same Premier that had scrapped the Minister Responsible for Anti-Racism, and gutted Anti-Racism Directorate.

Performance activism is evident in politics as well.

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Ontario does have a very long history of anti-Black racism. The first known Black person in Canada in the early 1600s was Mathieu Da Costa, who was a free African man that acted as a translator for Samuel de Champlain, but he was soon followed by enslaved people. The first named African slave in Canada was Olivier Le Jeune, brought to Canada in 1628. But it wasn’t just Africans who were enslaved.

In 1757, the French Admiral Louis Antoine de Bougainville, who fought in the Seven Years War in Canada, considered that Indigenous slaves play “the same role in America that [Blacks] do in Europe." An estimated 2/3 of all slaves in New France

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were Indigenous, and their ownership was explicitly continued in the 47th Article of Capitulation of Montreal, signed Sept. 8, 1760.

The only thing the British changed was that they preferred and increased the number of African slaves, up until the time when slavery was abolished in 1834.

The belief that all non-White people were sub-human did not disappear at this time, or any time soon after.

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It's into this context that we find Canada's first Black lawyers.

Robert Sutherland, born in Jamaica, was the first known racialized graduate of a Canadian university, and the first to qualify as a lawyer in 1855 under the apprenticeship system. On his death in 1878, Sutherland left his entire estate to Queen's University, saving it from a financial crisis.

Abraham Beverly Walker was the first Canadian-born Black lawyer in Canada, called to the Bar in 1882. He was the *only* Black lawyer for the next 122 years in New Brunswick. He was largely shunned by the white legal community, and denied a QC and KC based on their protests.

Delos Rogest Davis, was the third Black lawyer in Canada in 1886. He was an escaped slave via underground railroad. He became a lawyer through the passage of special legislation. He became the first Black KC on his retirement in 1910.

It's tough to commemorate this year though, because 1910 was also the year the *Immigration Act* was introduced, allowing the prohibition of certain immigrants (“belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character”). You can guess which races were targeted as unsuitable.

Real estate provisions prohibiting the sale, lease, or rent of a house to anyone of “Jewish, Hebrew, Semitic, Negro or coloured race or blood” only ended with an amendment in 1950 to the *Conveyancing and Law of Property Act*. Legally segregated public schools continued in Ontario until 1965, and in Nova Scotia until 1983.

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The collective experience of these three lawyers, and the lawyers that followed them, is a troubling one. They experienced enormous challenges and widespread discrimination, not only in the society at large, but specifically within the legal industry.

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For years, racialized lawyers in Ontario have been flagging widespread discrimination, and barriers in the legal community. It has even been the subject decisions like *McSween (Law Society of Upper Canada v Selwyn Milan McSween, 2012 ONSLAP 3)*, which noted the disproportionate number of black men in sole practice, and the disproportionate amount of discipline doled out on them. Disproportionate to the approximately 3% of lawyers who identify as Black in Ontario (LSO, [2018 Snapshot](#)).

The dissent noted that the social isolation and lack of supports explained the phenomenon. Perhaps this pandemic has forced us all to understand what true social isolation can feel like, but the problem still remains.

The law society finally attempted to address this through the recommendations in the Challenges Faced by Racialized Licensees report, in 2017. However, a widespread backlash from the legal profession resulted in an anti-EDI slate of Benchers being elected to the law society, by a vast majority of votes.

Yet it's the law society that is supposed to be at the forefront of promoting diversity and inclusion, and has a long history of doing so. The Divisional Court in *Trinity Western (Trinity Western University v The Law Society of Upper Canada, 2015 ONSC 4250 (CanLII))*, dealing with a religious covenant regarding sexual orientation, provided an overview of how the law society was years ahead of progress in society, breaking down barriers for Catholics, Black people, and women.

This was all done in the public interest.

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Unfortunately, I have to tell you, all of you, that we do not have a welcoming profession for diverse lawyers in 2021. We will fall on the wrong side of history, especially the history as it is revised by Black history.

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The problems of our past are still with us today. And that is only because we haven't spent enough time with our history.

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Last week, the retirement of Justice Rosalie Abella was announced, effective July 1, 2021. I'm sure Lakehead students enjoy reading Justice Abella's decisions as much as the rest of us, especially her dissents. Like Chief Justice McLaughlin, and Chief Justice Bertha Wilson before her, we know that having women on the bench enhances our jurisprudence.

However, on Feb. 19, 2021, Official Languages Minister Mélanie Joly also noted she intends to introduce a bilingualism requirement for all Supreme Court judges. Of course, I support French language rights. *Mais oui, je parle aussi un peu français.*

The initiative is likely unconstitutional, given the Court's decision in *Nadon*, (*Reference re Supreme Court Act*, ss. 5 and 6, 2014 SCC 21 (CanLII), [2014] 1 SCR 433), but it is also likely to exclude all Black and Indigenous candidates, who are far less likely to speak a second colonial language.

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The Canadian Bar Association's president, Brad Regehr, and past president, Vivene Salmon, the first Indigenous and Black people, respectively, to hold that role, wrote an open letter to Prime Minister Trudeau and Minister of Justice David Lametti last year stating,

Between 2016 and 2019, only three percent of federal judicial appointees self-identified as Indigenous [and] only eight percent identified as visible minorities.

Legal decisions affecting BIPOC communities are made by an overwhelmingly white judiciary with no first-hand experience of the racism and systemic challenges these communities face. BIPOC judges would offer perspectives grounded in lived experience.

We have never had a Black, Indigenous, or racialized judge on the country's highest court.

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On Feb. 23, 2021, Jody Wilson Raybould, the first and only Indigenous Justice Minister in Canada, wrote in the *Globe*:

Trauma and marginalization are the legacy of colonial and racist policies. And there is a clear link between that fact and the overrepresentation of Indigenous people and Black Canadians in our justice system – as victims, as accused, or as prisoners. Indeed, the percentages of prisoners who are Indigenous or Black continue to escalate at an alarming rate.

At the same time, the issues before the Court are increasingly complex from a social and diversity perspective. In 2019, the Court tackled the tricky issue of racial profiling in *Le (R. v. Le, 2019 SCC 34 (CanLII))*. There are few racialized lawyers who can claim that they have never been racially profiled in their lives, but these experiences are devoid from the bench.

The Court of Appeal’s decision in *R. v. Morris (2018 ONSC 5186)*, exploring systemic oppression in sentencing, is likely to be appealed. We are at a time in our history when these issues are finally in the forefront of our jurisprudence.

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We can even find relevance in the Court’s contemporary decisions in environmental law. It is not a surprise that the Court’s decision last year in *Nevsun (Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (CanLII))* involved a mining operation in Eritrea, in northeastern Africa, by a Canadian mining company. The same demonstrations of power and approaches towards exploitation are with us today. And they’re still with us because we haven’t spent enough time learning about our history, and specifically, our Black history.

Contemporary narratives of white supremacy are premised on the notions that Western civilization is inherently superior, and is superior specifically because of who they suggest are solely responsible for it. Black history is the antidote that we all need to fight this scourge that is spreading across North America, and around the world.

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Bora Laskin, the school is taking concrete steps to adopt a new equity and inclusion policy, and even to change the application process. These are necessary transformations for the school to fully achieve its 3 mandates, and for us to build a Canada without impenetrable barriers today.

Racialized law students, and in particular Black law students, have a different experience and perspective as it relates to Indigenous law, small and solo practice, and environmental law.

Critical discussions about how Black history fits into these themes are only possible with a diverse enough student body to allow for them, and a faculty willing to create a welcoming enough setting. The school does a disservice to all of its students if it fails to provide them this insight in the 21st century.

The administration should be commended for having these conversations, but know that there is always a long way to go.

When we study Black history, we're studying our shared history. Just as black history represents the beginning of all history, so to is it a significant part of who we are as Canadians today, and the shared history we will build together tomorrow.