

Montreal, Fall 2012

Contours-

Voix de femmes en droit/Voices of Woomen in Law

Interview with Dr. Esmeralda M.A. Thornhill

Interview conducted by Lillian Boctor, Student at McGill Faculty of Law.

Lawyer and human rights and anti-racist educator, **Dr. Esmeralda M.A. Thornhill**, is a Professor at the Schulich School of Law at Dalhousie University and was the O'Brien Fellow in Residence at the McGill Centre for Human Rights & Legal Pluralism in November 2012. From 1996-2002, she was the first scholar to hold the James Robinson Johnston Endowed Chair in Black Canadian Studies. Professor Thornhill developed and taught *Black Women: The Missing Pages from Canadian Women's Studies* at Concordia University, which was the first accredited course in Black Women's Studies at a Canadian university. She is a member of the Barreau du Quebec and the Nova Scotia Barristers' Society.

R v. RDS is a 1997 Supreme Court decision that set out grounds for determining reasonable apprehension of bias in the court system by judges and establishing limits to the application of social context in judging. Marking the 15th Anniversary of the *R v. RDS* decision, **Dr. Esmeralda M.A. Thornhill** led a seminar at the McGill Faculty of Law on the continuing impact of this case on the legal community and its significance for students today.

McGill law student and freelance journalist Lillian Boctor spoke with Dr. Thornhill in November 2012 about *R v. RDS*, the unfulfilled promises that this case brought forth, race literacy, women in law, racism in Canada and in legal field, and the current state of legal education in Canada.

Lillian Boctor: Professor Thornhill, you led a seminar at the McGill Faculty on Law on the case *R v. RDS* and it was framed it within the concept of race literacy. What is race literacy and what does it signify within the legal profession and law school and why is the *R v RDS* case important for students to reflect upon?

Dr. Esmeralda M.A. Thornhill: I don't know what race literacy means in law school, because it has not yet been discovered. Race literacy means understanding the hard and durable grammar of race that textures people's lives day in and day out. It means that one grasps or comprehends the racial dynamics and how race operates in people's lives in terms of relationships, opportunities, or disadvantage, and it also means understanding the racial hierarchies often left in silence but which are set up and structured, not just in terms of who gets to be in positions of dominance and who gets to be the subordinated or the subaltern, but also, who gets to be the heroes and heroines

in the national narrative, who gets to be included front and center stage and who gets to be excluded, who is fit to be marginalized or left as the second, third rate position, and to understand that, all of that, to me, is part of race literacy. But even more so than that, for me it also means the understanding is such that the [race-literate] person realizes that they cannot either passively, either unwittingly or deliberately set about and do, pose, act or gesture that which is racist. There is an anti-racist commitment once you become race literate, there should be, if not, it's phony.

It has been 15 years since the Supreme Court handed down the *R v. RDS* decision, and I felt that it was fitting that students would first of all understand that 15 years already have passed and that there were promises held forth by that decision, promises which are far from being fulfilled. It was important also for students to understand the significance of *R v. RDS* in the Canadian context, because I believe that we should be educating for critical consciousness particularly when it comes to law. *R v. RDS* is a case that has such significance in the Canadian context, not only for people of African descent, but should be also be significant for all women; unfortunately it doesn't hold it, perhaps because the judge was a black woman, who knows. But the importance of that case is that it is the first time really that our Supreme Court of Canada was compelled to address the issue of racism and it would be interesting for students to do a scan and look critically and see how the Supreme Court of Canada did address it. Did they address it effectively? Was it in an open way, was it transparent, or was it reluctantly or grudgingly? I think that those are things we need to look at it because those insights give us the signposts, or indicators, to understand that change is happening, or not.

Lillian Bector: The dominant narrative in Canada is that racism doesn't exist and if it does, it is couched within terms of discrimination or prejudice. The imagery of the mosaic is used to describe cultural or racial difference in Canada, or the melting pot of the United States. What is your response to the claim that racism does not exist in Canada?

Dr. Esmeralda M.A. Thornhill: First of all, it is kind of seductive to use the mosaic or melting pot metaphors or imagery. While they use the melting pot in the US, well there are pretty big lumps and everything hasn't melted up together. And in Canada, by contrast, while we say mosaic, the black tiles stick out and they are usually on the periphery or on the bottom.

The proximity of the United States to Canada is a blessing and a bane at the same time, it is like a *benediction, malediction*, in the sense that we Canadians tend to self righteously pat ourselves on the back and point with indignant outrage to the U.S. and proclaim we are not like the big bad U.S. So in that sense, because of the proximity of the US, a so-called greater evil, we have not been forced to look in the mirror at ourselves. The consequence of that is that the national narrative or myth is a discourse that says instinctually, with a knee jerk reaction, "no racism here." However, that discourse is belied not only by the demographics of the country and the images of what or who gets exported as a Canadian, just in the most simple things, but it is also belied or betrayed by the fact that, for example, there is a legal vacuum in terms of Canadian pedagogy, in the teaching and learning of law. We do not address race and the majority of us do not know how to address race. All of these reasons or factors inform my decision to do this seminar with students on *R v. RDS*.

Lillian Boctor: What was your experience as a young black woman starting law school and how was it different or similar to someone starting law school today?

Dr. Esmeralda M.A. Thornhill: Everything has changed and nothing has changed. What I mean by everything has changed is that it is not necessarily only or exclusively a community of one, there are others, not only that, there are others out in the field as practitioners, advocates, researchers and jurists, so that is a significant change. In terms of legal culture, nothing much has changed, because the same kind of daily micro-aggressions happens to students [of colour] and the curriculum is still conspicuously silent on issues of race. What I find is more than irritating, it is really almost indecent, is that we educate students, our future lawyers-to-be; our bar societies and professional corporations license them; they proceed to take a professional oath to provide the best possible defense and then they go forth presumably equipped to deal with and offer these services to the public. But there have been great seismic shifts in the demographics of Canada. It is a multiracial country, it is not the colony of the 1800s. So when a lawyer sits in front of me, or a client that looks like me, and takes a retainer to provide the best possible service, there's a presumption of competence. If it is someone that looks like me, there's an assumption that you understand how race plays out as a material reality in my life, that you will understand that if it is a legal problem where race figures, that you will understand that there has to be some corrective. If not, we keep re-inscribing and regenerating epistemological violence. For example we do not have collective remedy for collective relief for racial invective or racial vilification. I am thinking of the *Bou Malhab v. Diffusion Metromedia CMR inc*, which took thirteen years to get to the Supreme Court of Canada. A well-known broadcaster in Montreal riled with racial invective against Arab and Haitian taxi drivers over the air, live, during one of his shows. Every level of the courts said what the broadcaster actually did was wrong and racist. The action before the court was a class action suit for damage and injury because at the time there were eleven hundred Arab and Haitian taxi drivers in Montreal. Six out of the seven judges of the Supreme Court of Canada, the last authority in the land, said no injury had been done, and had there been injury, the group was so large that any injury would have been diluted. One justice, Rosalie Abella, disagreed and she dissented. If we talk about context and justice from an African descendant point of view, that decision was very damning because it was a cancellation of everything that is a reality. If we cannot find reparation, relief or remedy from the law for the material racism in our lives then what is left to us? I think that is important for students to understand the promise of RDS, of social context, because it ushered in social context training for judges, but then when you look at the treatment of RDS by scholars in subsequent years, you wonder, do they really understand what social context is or is it just another phrase we can use to camouflage the real issue, which we are really not prepared to address or we are too uncomfortable to deal with? That is why we have words like diversity, even multiculturalism. There's nothing wrong with multiculturalism in and of itself, however it's practice in Canada is creating more deficits than correcting them.

Lillian Boctor: What hope do you have that this lack of racial literacy and acknowledgement of race in Canada can change and what form would that take?

Dr. Esmeralda M.A. Thornhill: I think that law is too important a tool to abandon ever. So we have no choice but to make the law responsible to us. And that's why its important for students to be critical, to develop that sense of critical thinking. It doesn't matter what colour they are, it

doesn't matter what persuasion they may be, but that critical understanding is the kind of professional rigour and ethical commitment that one should bring to the profession because law should be liberatory and emancipatory for everyone. It should uplift us and it should somehow nurture us in terms of saying "Yes, you exist, you are real, and when wrong has been done to you, we as a society, using the arm of law, we will affirm you and we will check whatever wrong is happening." When for example racism rums untrammled through a society wrecking lives and cancelling out the belief that young people should have in themselves, we have to impute, for example, legal education, because law is the panacea; if we go forth as professionals of law we should have a higher understanding of how to use the law and not to use it unwittingly or in ignorance or unconsciously to create more harm, and that where the ethical commitment comes in. To date, this might sound harsh, but it's an objective description, I would say there is an institutional disregard in general when it comes to race on the part of our institutions of learning, and not just law. I am talking about all the the university, post secondary, and collegiate levels, but there is also an institutional disregard in terms of professional corporations. Why is it that there are not standards set, a baseline that people need to know? How can we accept that there is the promise upheld that of representation before the courts but the lawyer may not even understand or may be fearful? You may have sympathy, but sympathy is not what we go to court with. We go to court with rigour, skills and cold hard facts. I do believe in law, and the possibilities of law. As an educator, I also believe profoundly in the possibilities of education but I am also acutely mindful of the limitations. So when it comes to something like race, we cannot say academic freedom or collegiality and I'm sure people will be of good faith. We are not talking good faith here, we are talking about what is necessary in order to do a good job. We do not talk good faith when it comes to teaching children in kindergarten or elementary about the computer and the keyboard. We have passed that stage. When we discovered the world was round we abandoned teaching the world was flat. We need to wake up, we know demographics have changed, we know that there's a need, there are societal problems that hinge on race, we know that law has yet to really address it, if we are truthful with ourselves, and we need to understand that we have to start addressing it, and that comes with a whole other slew of implications in terms of whose perspective gets called in with the intimate knowledge of what x, y and z is really about.

Lillian Boctor: Why did you become a lawyer and what advice to you have for women of colour starting law school today?

Dr. Esmeralda M.A. Thornhill: What I have found in my own personal career are layers upon layers upon layers: you realize, I need another tool from the toolbox. So you go get another tool from the toolbox. And then you go on and you realize, I need another tool from the toolbox. And that is basically how it has happened with me. I did human rights education for a long time and I have always said to young women no matter what racial group, there are several things that every women should have: a course in physical self-defense; a course in technology; mathematics to be able to manage the math and the money; and finally law courses, in order to understand what your rights are and how you invoke rules and recognize when procedure is being distorted or not followed. And all of that would make for a well-rounded human being who could hold abusive authority accountable.

I personally do not have a problem with hierarchy; the issues begin when hierarchy and power are not exercised in a proper or fair-minded way, when it is exercised in biased ways, in underhanded or unfair ways. What I would say particularly to women is, yes, we are all oppressed, but not all women are equally oppressed. Apart from the common denominator of being women we have to leave off essentializing and understand that everybody comes with their identity. intersected in different ways with different priorities, different experiences and different values. If we are both sitting as we are right now in this room, and I can see what is behind you and you can see what is behind me, and we share the same common denominator, our spatial reality, however your vantage point and therefore your perspective differs from my vantage point and perspective. Once we understand that truth then we will stop believing that any one individual group, nation or collectivity can sit forever unchallenged at the center of scrutiny and basically that is the challenge for those at the center of scrutiny who so feel entitled, and who have dressed-up what is being done there in robes of formality, to give it some kind of tradition or some kind of unshakeable unchallengeable quality, which is wrong. Your vantage point is just as good as mine and if we respect that we come from different spaces and we are occupying different locations, then there is an immediate respect that happens and I will listen patiently to what you say to me. We may still differ but we will at least listen, instead of one of us thinking we have the entitled right to impose our view on somebody else.

Lillian Boctor: Thank you so much Professor Thornhill.

Dr. Esmeralda M.A. Thornhill: You are very welcome.