Systemic Barriers to Racially Representative Law Enforcement Agencies

Fo Niemi

Fo Niemi is Executive Director of the Montreal-based Center for Research-Action on Race Relations (CRARR). A member of the Quebec Human Rights and Youth Rights Commission from 1991 to 2003, he also served on committees and boards of agencies such as the RCMP, the Canadian Race Relations Foundation and the Canadian Broadcast Standards Council.

ABSTRACT

This paper indicates that partly in response to public pressure, law enforcement agencies have addressed systemic discrimination in law enforcement agencies by giving more priority to quantitative representation goals. However, by focusing on entry-level positions, most employment equity efforts neglect issues of occupational segregation and other barriers to advancement and integration such as racial harassment.

In the last two decades, the following five important national developments have affected the debate on racially representative police services:

- The enshrinement in s. 15(2) of the *Canadian Charter of Rights and Freedoms,* which helps shield affirmative action programs from legal challenges of reverse discrimination;
- The release of *Equality Now,* the report of the parliamentary committee on the participation of visible minorities in Canadian society (1983)[1], which "nationalizes" the concept of visible minorities and the imperative need for racially representative law enforcement and justice institutions;
- The holding of the national conference on policing a multicultural and multiracial society by the Canadian Association of Chiefs of Police (1984), which created a consensus, albeit fragile, among police chiefs across Canada on the importance of positive police race relations and a representative police service;
- The release of the report of the Royal Commission on Equality in Employment (1984)[2], which formalizes the concept of employment equity in Canadian public policy and
- A series of police fatal shootings of racial minority and Aboriginal men in different cities that sparked public outcries and forced authorities to act through the creation of numerous public inquiries and eventually institutional equity measures.

The adoption of a federal *Employment Equity Act* in 1986 finally established a national statutory as well as social foundation from which measures should be enacted in most government and business organizations to ensure their representativeness and responsiveness to a changing population.

Policing in Ontario

Despite the setback in Ontario experienced in the mid-nineties, engendered by the Common Sense Revolution where employment equity was systematically removed from or even forbidden in provincial laws, it has become accepted by most police managers as well as political authorities responsible for policing, that a multicultural, multiracial and diverse police department makes good "business" sense, in the name of efficiency in police service delivery and good community or public relations.

As a result, conventional criteria and procedures for police employment have been gradually replaced as they are increasingly viewed as barriers that directly and/or adversely impact upon members of racial minorities and Aboriginal peoples. Some of these barriers include:

- Canadian citizenship requirements;
- Height and weight requirements;
- Successful credit, background and investigation checks;
- Selection tests that were culturally biased,
- Negative image, fear, and distrust that deterred minorities and Aboriginal peoples from joining the police profession and service; and
- A restrictive selection pool engendered by the requirement for pre-employment police technology training (as in Quebec), where the same employment criteria exist.

Mostly as a result of human rights complaints, public inquiries and other public pressures, these conventional criteria and procedures have gradually been corrected.

For instance:

- To overcome a restrictive selection pool of police recruits where minorities and Aboriginal people are underrepresented, alternative selection, or fast-track employment measures are now established to allow for more mature candidates with pertinent and related social science backgrounds to be selected, sent to the police academy for training, and hired upon graduation;
- Selection panels for interviews are now more diversified to include civilians coming from under-represented groups;
- Pro-active community outreach and advertising campaigns are now developed to attract the attention of equity group members and to overcome negative images of law enforcement; and
- Permanent residents are allowed to enroll in pre-employment training during the process of their citizenship application.

Lingering Barriers

While existing equity efforts have led to a greater number and percentage of racial minorities and Aboriginal people being employed within police services, serious barriers of exclusion and discrimination remain. The experience of civil actions before human rights commissions and tribunals has helped to identify at least six remaining barriers that need to be addressed in efforts to further address systemic racism in police employment[3]:

1. A quasi-exclusive focus on entry-level constabulary positions at the expense of integration and promotion and of the diversification of civilian employees;
2. Job ghettos;
3. Racial harassment in the workplace;
4. Supervisor's support as a condition for promotion;
5. Security requirements and
6. The lack of police union support.

1. A Limited Focus on Constabulary Hiring

Often, employment equity is limited to recruiting and hiring, i.e. increasing the number of entry-level police candidates with the overriding purpose of meeting quantitative objectives, at the expense of fair representation throughout all levels of the organization. As a result, turn-over and occupational segregation are often overlooked and under-reported. A racial vertical mosaic still exists in many police departments, despite two decades of employment equity.

Since departure is often a persuasive indicator of an organization's general equity performance, public appraisal or an independent audit of a police service's equity record should no longer be solely or principally based on numbers at the selection and hiring levels alone. An equal degree of scrutiny should be placed on the overall internal workforce representation, including civilian employees, since one of the fundamental objectives of employment equity is to change conventional organizational values and standards.

2. Job Ghettos

In law enforcement, it is well known that most minority and Aboriginal officers (not to mention women) are still largely concentrated at the constable level, but that few are found at the higher levels of sergeants/detectives, lieutenants, inspectors, and superintendents, or in more specialized, powerful or prestigious sectors such as drugs, organized crime, or internal affairs.

Most equity efforts tend to ignore obstacles for retention, advancement or career progression, factors that play a powerful gate-keeping function to access to influence within and outside the organization. Therefore, qualitative representation issues need to be raised as quantitative data often mask and even perpetuate the existence of race-based occupational segregation.

For this reason, human rights investigators involved in employment discrimination cases need to accept less readily employers' arguments or overall equity data that are based mostly on entry level alone as a legitimate defense or proof of non-discrimination. Familiarity with the paramilitary and highly hierarchical culture and the glass ceiling for career progression within the police culture can also help.

Once hired, a racial minority or Aboriginal constable enters the daily life of a police organization and culture known to be historically the domain of white heterosexual Christian males. Police organizations are often called the Blue Wall behind which certain rules of conduct cannot be trespassed, such as challenging authority, or formally complaining against a colleague for violating police ethics or civil rights.

3. Racial Harassment

Once hired, a racial minority or Aboriginal constable enters the daily life of a police organization and culture known to be historically the domain of white heterosexual Christian males. Police organizations are often called the Blue Wall behind which certain rules of conduct cannot be trespassed, such as challenging authority, or formally complaining against a colleague for violating police ethics or civil rights. Racialized minority, women, and gay constables who experience subtle or explicit offensive jokes and slurs, pictorial representations, and other degrading acts complain at their own peril.

Power or hierarchical relationships infused with racial and related bias can produce a destructive work climate. Racial minority or Aboriginal officers may be constrained both personally and professionally when a law enforcement workplace has no effective policy and mechanism to address race-based harassment, especially where it practices what the Commission of Inquiry

into Systemic Racism in Ontario's Criminal Justice System qualifies as passive toleration, collusive toleration, or plain disregard of racial harassment.[4]

There is a special challenge for victims of racial harassment. Generally, human rights investigators unfamiliar with racism tend to confuse the dynamics of racial harassment at work with those of sexual harassment. Their investigation focus is often erroneously placed on explicit words or gestures of harassment and differential treatment, despite clear jurisprudential guidelines that indicate that racial harassment is often more systemic and more subtle than sexual harassment. Investigators who are untrained on racial harassment often tend to omit more subtle, unspoken elements of harassment by unconsciously focusing instead on a person's so-called faulty performance or personal deficiency, particularly in the absence of racial jokes, slurs, or other open biased conduct.

4. Supervisor Evaluation as a Barrier to Promotion

The traditional performance appraisal method of according great weight to one's supervisor's opinion about a candidate for promotion can be fraught with arbitrariness and racial bias. As previously indicated, one of most formidable barriers to fair representation in the upper echelons of law enforcement agencies is the police organizational and professional culture, where the old-straight-white-boy mentality often operates at the exclusion of the "others." The requirement of positive evaluation or approval by one's (often white) local commander or supervisor may become an obstacle. Without objective appeal procedures this method constitutes one of the most evident barriers for many and also one of the most elusive to human rights investigators untrained in systemic racism in police employment. Once again, the risk of victimizing the victim is omnipresent as investigators may inadvertently focus on the victim's personal history and performance instead of organizational practices and norms.

5. Security Requirements

Security requirements still remain largely unchanged despite general legislative prohibitions of discrimination based on previous criminal records for which a pardon has been granted. The *Oakes* test allows police employers to resort to strict or absolute security clearance as a condition of hiring by claiming that that it is a fair criterion that is rationally connected to or essential to determining candidate suitability.[5]

This poses major problems for groups that are highly criminalized and economically disadvantaged, as it reduces the pool of available candidates from which the selection is made. For some inner-city racial minorities in particular that are often stereotypically associated with "gangs" and highly vulnerable to racial profiling, the current standard background and credit check, or the use of certain new and vague criteria such as "being associated with or frequenting criminalized persons", can adversely impact upon minority representation within law enforcement agencies.

Human rights investigators thus need to pay special attention to the rejections of applicants or the suspension and dismissal of officers from racial minorities on the basis of security. Particular vigilance is needed in rejections of racial minorities whose levels of criminalization are associated with systemic racism in the criminal justice system, or with the widespread but often secret use of information related to juvenile misconduct and less serious penal charges such as violations of city ordinances. Similarly, vigilance is needed where racial minorities are subjected to excessive background checks and surveillance due to origins from countries arbitrarily linked to terrorism.

Judicial definition of new parameters for security requirements is therefore welcome.

The removal of a discrimination-based concept in equity measures, which is designed to overcome deep-rooted obstacles of race-based exclusion in law enforcement, tends to ignore the reality of racism and other forms of discrimination, especially intersectional discrimination.

6. The lack of police union support

Racial minority and Aboriginal workers who encounter racial discrimination and harassment in the workplace often find their unions to be less than supportive. This is partly due to the lack of knowledge of racism on the part of labour officials, and partly due to evident bad faith and discrimination in fulfilling the union's duty of fair representation.

Even if racial minority and Aboriginal workers succeed in convincing their union to file grievances, a host of other problems emerge: poor representation; conflict of interest (especially in cases where the alleged harassing person also belongs to the same union as the victim); and delays (some grievances can take more than a year to be heard).

The catch-22 is that many human rights laws and regulations require that complainants file grievances first and also give human rights commissions the discretionary power to reject a civil rights complaint on the grounds of double recourse. As experiences have indicated, a labour arbitration process is seldom the ideal venue to address race-based discrimination in any act deemed to violate a collective bargaining clause. In the grievance process, the protection against retaliation offered to a victim, a victim's assistant or a witness is less than the protection offered by human rights legislation.

Management or union tacit disapproval or explicit refusal of racial minority or Aboriginal police associations is another barrier that needs to be considered as a systemic barrier to the integration of racial and ethnic integration into police organizational and occupational cultures.

A Word of Caution on Employment Equity

The removal of a discrimination-based concept in equity measures, which is designed to overcome deep-rooted

obstacles of race-based exclusion in law enforcement, tends to ignore the reality of racism and other forms of discrimination, especially intersectional discrimination.

By erasing race and by lumping all diversity forms and groups together under the category of 'Diversity', members of racial minorities and Aboriginal nations continue to be ghettoized at the bottom of the vertical mosaic ladder. Although it tends to be hidden, internal or intragroup racial prejudice and barriers still exist. In other words, employment equity measures do not take into account the racial stratification that still operates within the vertical mosaic.

Consequently, the real extent of the barriers commonly referred to as "systemic discrimination", tend to be obscured. A false impression of success has been created with the implementation of employment equity and other proactive measures like "best practices." It has been assumed that barriers have been overcome, but in reality the solutions that have been offered have only been for superficial barriers. Underlying barriers remain unchallenged.

Thus, what can be done? A radical change in mentality and practice, which includes employment equity auditing and investigative practices, is necessary. Adopting a critical race analysis of discrimination, be it in its direct, systemic or intersectional form, is a compulsory first step towards a more successful attack on the barriers to having a racially representative organization.

Reviewing how human rights commissions and investigators operate is the next step. Issues such as those identified by Sangha and Tang (2003) on race discrimination and the human rights process must be confronted to prevent personalizing systemic racism and erasing race from a complaint.[6] Ensuring that investigators are familiar with the law enforcement professional and organizational cultures also helps.

Finally, where law enforcement is concerned, a sustained and more critical demand for accountability, on both a quantitative and qualitative level, with a principal but not exclusive emphasis on race, is necessary. Accountability can and will contribute to the achievement of not only a racially representative organization, but one that reflects a diversity of values, customs and characteristics both at the personal and institutional levels.

Endnotes

1 *Equality Now!* Report of the Special Committee on the Participation of Visible Minorities in Canadian Society, House of Commons, Ottawa: 1983.

2 *Equality in Employment,* Report of the Royal Commission on Equality in Employment, Ottawa: October 1984.

3 Conclusions and examples referred to in this present are drawn from cases involving both police and other law enforcement agencies at the federal level, in Ontario and in Quebec.

4 *Report of the Commission of Inquiry into Systemic Racism in Ontario's Criminal Justice System,* Queen's Printer of Ontario, December 1995, Chapter 3: "Understanding Systemic Racism".

5 *R. v. Oakes* [1986] 1 S.C.R. 103. In this case, the Supreme Court outlines several essential conditions that must be met in any case of limitation on a Charter right by the party seeking to uphold the limitation on the basis of s. 1: First, the objective must be sufficiently important to warrant overriding a constitutionally protected right or freedom and must relate to societal concerns which are pressing and substantial in a free and democratic society. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components: the measures must be fair, not arbitrary, and rationally connected to that objective; the means should impair the right in question as little as possible and lastly, there must be a proportionality between the effects of the limiting measure and the objective.

6 Sangha, Dave and Tang, Kwong-Leung, Race *Discrimination and the Human Rights Process,* Paper presented to the Canadian Critical Race Conference 2003, May 2, 2003, University of British Columbia.

