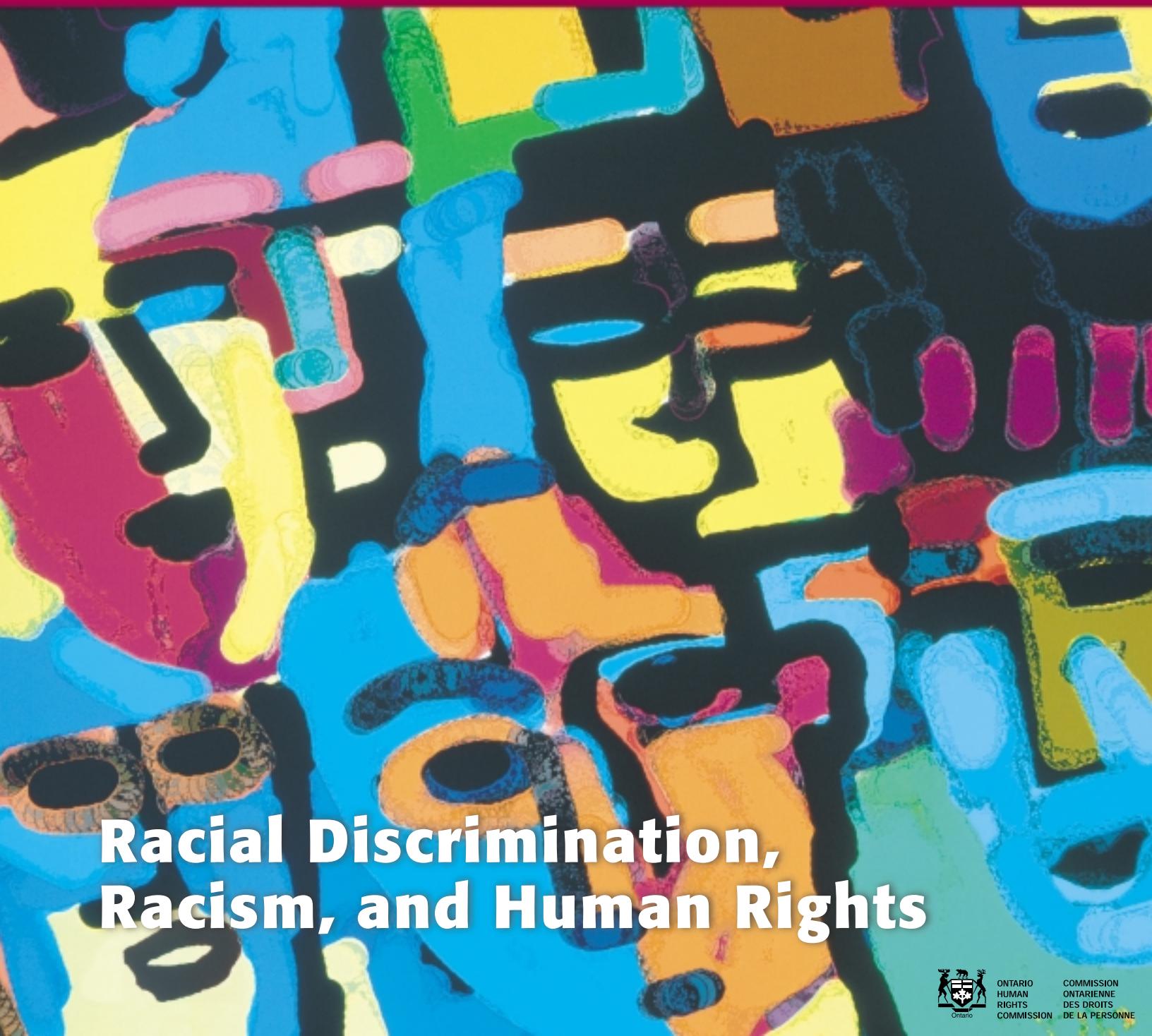


CANADIAN DIVERSITÉ CANADIENNE

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Racial Discrimination, Racism, and Human Rights



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Message from Keith C. Norton, Chief Commissioner Ontario Human Rights Commission

In keeping with its mandate to eliminate discrimination through enforcement, promotion and advancement of human rights, the Ontario Human Rights Commission recently concluded a Policy Dialogue on Racial discrimination and racism. The Commission is pleased to have worked in partnership with the Association for Canadian Studies on this initiative, and to have the Association include a number of the papers presented at the Dialogue in this edition of *Canadian Diversity*. It is partnerships such as this one that enhance the Commission's own efforts in promoting understanding of human rights issues.

The three-day Dialogue, held in Toronto, gave experts and key stakeholders involved in dealing with race issues a unique opportunity to consult and exchange ideas with Commission staff on social, legal and policy trends and developments at the domestic and international levels. The discussions and debates that took place provided valuable information that will help the Commission in formulating its policy on racial discrimination and race.

The Dialogue session is another step in the Commission's recent work in the area of racial discrimination and race, which includes an inquiry into racial profiling, the publication of a consultation report entitled, *Paying the Price: The Human Cost of Racial Profiling*, a submission and report on the *Ontario Safe Schools Act: School Discipline and Discrimination*, and the discussion paper *An Intersectional Approach to Discrimination Addressing Multiple Grounds in Human Rights Claims*.

Developing policies and guidelines are a key function for the Commission in advancing human rights protections for everyone. They set out the Commission's interpretation of the *Human Rights Code*, offer recent case law and provide principles and standards to ensure that individuals, employers, service providers and policy makers comply with human rights law. They also help the Commission deal with cases in a consistent and informed manner.

Each one of us has an important responsibility in protecting and promoting human rights. The Commission's new policy on racial discrimination and racism is, therefore, intended to serve as a practical tool that the public, human rights practitioners and advocates can refer to and apply in addressing issues involving race and racial discrimination.

The Commission plans to release its policy on racial discrimination and racism later in 2005. We welcome your views on the issues raised in this edition of *Canadian Diversity*. Please visit our Web site at www.ohrc.on.ca for details on how to make a written submission.

*Keith C. Norton, Q.C., B.A., LL.B.
Chief Commissioner*

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LETTERS/LETTRES

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Racial Discrimination, Racism, and Human Rights

On an annual basis complaints that cite race or race-related grievances represent about a third of all complaints filed with the Ontario Human Rights Commission (OHRC). Many other instances of racial discrimination, however, never come forward as complaints to the Commission and many manifestations of racism that are beyond the enforcement jurisdiction of the Commission are evident.

Responding to the significant presence of racism in our society, the OHRC has focused increased attention on better understanding the contemporary current face of racism and on developing more effective ways to respond to it within the human rights legislative framework that includes aspects of enforcement, education, and promotion.

In this context, the OHRC has embarked on a number of initiatives including the development of a policy statement on racial discrimination and racism. With the direct aim of developing this policy the OHRC convened a Policy Dialogue on October 6-8, 2004. Researchers were approached to develop and present discussion papers on a number of key theoretical and practical themes for the Policy Dialogue, based on their own independent views and perspectives. This dedicated issue of Canadian Diversity presents most of these presentations in article format.

The collection of articles presented identifies and explores key themes and initiatives that need to be considered in developing the OHRC policy statement on racial discrimination and racism. They also represent a significant contribution to the public discussion of the important role that human rights principles and legislation could and should play in the ongoing struggle to overcome racism.

The first two conceptual articles explore understandings of race, racial discrimination, and racism. Henry outlines historical, definitional, and conceptual meanings of 'race' and "racism". She focuses primary attention on contemporary theories of racism that highlight ideological notions of the 'Other', the role of "difference" and "othering" and their representation in terms of whiteness and blackness. Rummens defines key race-related prohibited grounds identified in the Ontario Human Rights Code and outlines the ways in which identification euphemisms, proxies, slippages and conflations underwrite racial discrimination as a form of identity negotiation.

The following three articles explore key aspects of the legal framework of human rights work in Canada. Hadibhai provides a broad overview of the case law from Ontario and other Canadian jurisdictions over the last 10 years where discrimination was alleged on the basis of race or other related grounds. Gall examines the utility of existing anti-discrimination legislation in redressing racially motivated

wrongs and explores whether concepts of accommodation can be applied to redress these historical disadvantages. Mégret reviews which international conventions relate to the experience of racism in Ontario, how international law defines racial discrimination, and discusses the applicability of international instruments that deal with racism in the development of the human rights policy work of the Ontario Human Rights Commission.

The next three articles identify challenges and possible solutions to difficulties faced in human rights responses to racial discrimination. Black identifies some of the reasons why complaints of race discrimination to human rights commissions have a lower success rate than complaints on other grounds, and presents a variety of options that might be considered at different stages of the complaints process. Agocs identifies difficulties human rights agencies have had in advancing credible evidence that speaks to systemic racial discrimination in employment, and in response proposes a diagnostic framework for developing evidence that highlights numerical representation and distribution, employment systems, and organizational culture, using research approaches borrowed from the social sciences, employment equity and pay equity. Tator analyzes the significant barriers that should be considered in developing policies and change initiatives that address issues of racial discrimination and racism.

The last four articles provide practical examples of the operation of racial discrimination and racism in key contemporary social contexts. Smith explores how increasing tuition fees create barriers for Aboriginal and subordinate racialized group members seeking to pursue legal education in Canada. The history of racial discrimination in legal education in Canada is briefly reviewed to illustrate the roots of these barriers. Niemi indicates that law enforcement agencies have addressed systemic discrimination by giving priority to quantitative representation goals at entry-level positions, but argues that such efforts neglect issues of occupational segregation and other barriers to advancement and integration such as racial harassment. James explores how stereotyping and racial profiling structures the experiences of racial minority youth, and how the resulting differential treatment limits youth opportunities and often operates to their detriment. Kafele focuses on the impact of racism on mental health and mental health services for racialized and Aboriginal communities and proposes human rights policy initiatives to address these impacts.

Shaheen Azmi
Senior Policy Analyst
Ontario Human Rights Commission

Concepts of Race and Racism and Implications for OHRC Policy

Frances Henry

Frances Henry is one of Canada's leading experts in the study of racism and anti-racism. She has authored or co-authored a number of leading books dealing with racism and Caribbean anthropology. She has been a member of the prestigious Royal Society of Canada since 1989.

ABSTRACT

Frances Henry reviews the origins of the concept of race and reviews models of racism. She focuses primary attention on contemporary theories of racism that highlight ideological notions of the 'Other', the role of "difference" and "othering" and their representation in terms of whiteness and blackness. She argues that human rights commissions need to recognize newer theories in their enforcement and policy work.

Although 'race' as a description of the physical condition probably dates back to the dawn of the human species, most scholars agree that it was primarily through European expansion in the 16th to the 19th century that the front and centre position of 'race' as a physical descriptor emerged. It was when European colonizers, whose aim was mainly to seek out valuable primary products such as sugar, tin, rubber and the like, came into contact with 'native' populations who were 'people of colour' that racism became a dominant force in western society. In order to maintain hegemonic control of these populations, they were defined as inferior human beings primarily because of their different cultural practices as well as their not being White, the desired and 'normal' European colour. Pushing such people to the margins did not, however, stop European men from sexually mixing with local women producing, wherever colonialism prospered, a so-called 'mixed' race of people. Thus, race, the biological descriptor was constructed in racism and became a major factor in discriminating between people. Colonial ideology was rapidly disseminated through Europe and other Europeanized areas such as North America thereby spreading the doctrines of alleged racial inferiority.

Definition of Race

In attempting to define "race", Dobzhansky (1946) states that:

"Races are defined as populations differing in the incidence of certain genes but actually exchanging or potentially able to exchange genes across the boundaries (usually geographic) that separates them."

Here race refers to the inherited characteristics in a common gene pool or mating population. Race is conceived as a biological, genetically determined concept. However, this scientific concept has been increasingly challenged. First, it has been argued that the continued use of the term 'race' exacerbates the problems of racism. As a result, some African Americans want to substitute colour or 'colourism' because skin colour is the most obvious sign of difference. Second, others challenge race from the perspective of the increased 'hybridity' (Bhabha, 1994) or racial mixing brought about by increasing globalization and the migration of people. In this context identity becomes very subjective especially because racism denies such people their white parentage or heritage. Since mixed race persons are defined by their darker skin colour not their ethnicity the concept of 'race' loses much of its validity. Lastly, the most important challenge to the use of the concept of race is, however that it is not biological difference as such that creates racism but its social construction.

Despite these challenges the concept of race is still useful mainly because it promotes racism – which is what the Ontario Human Rights Commission (OHRC) and anti-racists the world over are trying to control. 'Race' is a biological reality which leads to the perception of difference which leads to racism. The theoretical underpinnings of the relationship between race and the construction of racism are complex and have important policy implications.

Models of Racism

There are basically three models of how race came to be constructed as racism

a) Origin Model

The first model goes back to the origin: that is, the relationship to capitalist expansion and European colonialism and the meeting of people other than Europeans. While it is not necessary to dwell in detail on these historical factors, it is

critically important to consider that it was primarily in these earlier centuries that the construction of ‘difference’ became an issue.

b) Individual and Institutional Models

This model is the most closely related to the work of the OHRC because it deals with forms of racial discrimination in institutions and especially the workplace. Ideas about individual, structural, and cultural disadvantage have become more and more central in the discourse of ‘race relations’, especially in the United States. These are also the forms of racism that frame the background to the Ontario Human Rights Code that regulates the OHRC’s work and are the forms of racism that are most often accepted as indicators of discrimination.

It will be useful therefore to review in some detail some of the forms of racism that are implied in this model.

Individual Racism

Individual racism involves both the attitudes held by an individual and the overt behaviour prompted by those attitudes. The attitudes are often obvious: extremely intolerant, bigoted individuals tend to be proud of their attitudes and articulate them overtly and publicly. However, in a society such as Canada’s most people are uncomfortable about expressing their attitudes openly because these attitudes run counter to prevailing norms. But, they may show their attitudes by practicing racial discrimination.

The Forms of Racism	
Type	Manifestations
Individual	Attitudes, everyday behaviour
Institutional/systemic	Policies and practices of an organization, rules woven into a social system
Cultural/ideological	Values embedded in dominant culture

From Henry, Tator, et. al. *The Colour of Democracy: Racism in Canadian Society*. 2002, Harcourt, Toronto. 3rd edition in press

Everyday Racism

Everyday racism involves the many and sometimes small ways in which racism is experienced by people of colour in their interactions with the dominant White group. It expresses itself in glances, gestures, forms of speech, and physical movements. Sometimes it is not even consciously experienced by its perpetrators, but it is immediately and painfully felt by its victims — the empty seat next to a person of colour, which is the last to be occupied in a crowded bus; the slight movement away from a person of colour in an elevator; the over-attention to the Black customer in the shop; the inability to make direct eye contact with a person of colour; the racist joke told at a meeting; and the ubiquitous question “Where did you come from?”

Institutional and Systemic Racism

Institutional racism is manifested in the policies, practices, and procedures of various institutions, which may, directly or indirectly, consciously or unwittingly,

promote, sustain, or entrench differential advantage or privilege for people of certain races.

Institutional racism generally encompasses overt individual acts of racism to which there is no serious organizational response, such as discriminatory hiring decisions based on the employer’s bias. It also includes organizational policies and practices that, regardless of intent, are directly or indirectly disadvantageous to racial minorities, such as the lack of recognition of foreign credentials or the imposition of inflated educational requirements for a position.

Systemic racism, although similar to institutional racism, refers more broadly to the laws, rules, and norms woven into the social system that result in an unequal distribution of economic, political, and social resources and rewards among various racial groups. It is the denial of access, participation, and equity to racial minorities for services such as education, employment, and housing. Systemic racism is manifested in the media by, for example, the negative representation of people of colour, the erasure of their voices and experiences, and the repetition of racist images and discourse.

Ideological Theories of the ‘Other’

For many modern neo-Marxist theorists, especially those influenced by postmodernist and poststructuralist paradigms, racism is best understood by theorizing about ‘difference’ and ‘othering’. In fact, “the construction of difference” and the “process of assigning value to difference” are central to the understanding not only of racism, but many other forms of oppressive beliefs (Rothenberg, in Harris: 1998:281).

Difference can be expressed in several ways. For example, the most common is the belief that the ‘races’ or ‘sexes’ differ in their essential natures – this basically biological influenced belief leads to the common stereotypes that Blacks, for example, are less intelligent, are by nature lazy, and other such stereotypes. Another form is the notion that ‘races’ differ by morality and ethics, which lead to stereotypes that Blacks are promiscuous and, more recently, are disposed to criminal activity. Finally, difference can be defined by culture, values, and norms, which lead to the stereotype that Blacks come from inferior cultural backgrounds. Needless to say, all of these notions of difference are based on the erroneous belief in what has been called ‘essentialism’ – namely that differences in the human species are natural, biological, immutable and that they form the ‘essential’ nature of various groups.

Difference as it relates to racism (and sexism) is founded on the biological paradigm, but there have been several attempts to mitigate its effects. For example, the notion of ‘separate but equal’ that structured race relations in the U.S. for many years contends that providing separate facilities carries no evaluative judgments but is simply an attempt to provide equal facilities for everyone. More serious attempts to reduce emphasis on the role of biology have led to the pre-eminence of ethnicity/ethnic origin as a theoretical paradigm. This was and to a considerable extent still is prominent in many social scientific thinking.

Another major ideological component of racism relates to the ways in which people perceived to be ‘different’ are also constructed as ‘the Other’. The concept originated in

the interaction between colonizer and colonial and is prominent in the literature on post-colonialism (Said, 2003; Bhabha, 1994). In many ways, the concept of the Other is similar to stereotyping but it carries larger and more symbolic meanings. Jordanova provides an all-encompassing definition of the process of othering in stating that it is: “the distancing of what is peripheral, marginal and incidental from a cultural norm...” (in Pickering, 2001). The process of othering is also a denial of history; it presents a barrier to change and can be understood as a myth. Marginalizing others places them out of the bounds of mainstream history; it mythologizes them as culturally, intellectually and morally inferior and so robs millions of people of their identities and their very personhood.

Thus one of the most critical components of modern or new racism is that it is based on an ideological construction of difference and othering. In combination with prevailing dominant white hegemonic power, racism becomes a commanding strategy for maintaining asymmetrical power relations or the status quo.

The Role of Representation

How is difference and othering manifested in contemporary societies that are regulated by human rights codes and charters, anti-hate legislation and the like, and whose governments at least nominally subscribe to values of equity, equality and justice?

Hall and his colleagues as early as 1978 recognized that representation and meaning was the key to understanding how difference was conceptualized in post modern societies. Systems of representation are the cultural circuits through which meanings are transmitted. The practice of representation means to embody concepts, ideas and emotions in a symbolic form that can be transmitted and meaningfully interpreted. Some important systems of representation include the media in all its forms; especially television and the print media; films and videos, music lyrics, museum exhibitions and, in fact, in all areas of society characterized by ‘text and talk’. White people, their attitudes and behavior are represented as normal and natural whereas people of colour and other disadvantaged groups are often represented in negative and even hostile ways. Thus, in all forms of representation, whiteness is normative whereas blackness is marginalized and ‘othered’. Racialized ideologies and representations are reflected in the collective belief systems of the predominantly white hegemonic culture; they are woven into the laws, language, rules, norms and values of Canadian society (Goldberg, 1993; Henry et al, 2000; Dei, 2004).

Implications for the OHRC

The OHRC needs a more sophisticated understanding of how racism works in postmodern societies like ours, and this enhanced understanding should be used to frame a policy statement. Simply basing its work on the presence or absence of racism as usually defined in very overt ways is no longer sufficient. Jokes, offensive language, physical assaults and the like are still very important indicators of racism and it remains important to continue investigating and solving issues around structural and systemic racism as discussed above. However, as racism is now manifested in so many coded and subtle forms, the OHRC must extend

its understanding to comprehend these new forms. Racism needs to be understood not as an aberrant behaviour or set of deviant attitudes on the part of a deviant individual within a system – a rotten apple supervisor or manager – but as a far more complex set of behaviours. Subtle forms of racism exists in the normative belief system of society as represented by, for example, the use of language and visual images in the print media.

The OHRC and other commissions like it throughout the country are mandated and directed by human rights legislation, but even within that framework, they should be able to re-organize policy so that more subtle aspects of racism are recognized and given weight in investigating cases. The denial of racism used by so many whites in positions of authority ranging from the supervisor in a work place to the chief of Police and ministers of government must be understood for what it is: an example of White hegemonic power over those considered ‘other’. Commissioners, investigative staff, legal staff and, in fact, all employees of human rights commissions should have a deeper appreciation of this social phenomenon. The new OHRC policy needs to recognize the role that difference and othering and their representation in terms of whiteness and blackness play in the social and cultural institutions of modern societies.

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“It would be interesting if the powers that be would at least listen ... An entire community cannot have the same impression and ... all [be] deluded.” (R.M.)

Presentation at the racial profiling inquiry

December 9, 2004, marks one year since the Ontario Human Rights Commission released its public inquiry report *Playing the Price: The Human Cost of Racial Profiling*. For more information, please visit our website at www.ohrc.on.ca.

Racial Profiling: we can't afford to shelve the issue.

Aussi disponible en français.

Operationalizing Race and Its Related Grounds in Ontario Human Rights Policy¹

Joanna Anneke Rummens

Dr. Anneke Rummens, Psychiatry, Faculty of Medicine, University of Toronto, is a multilingual anthropologist/sociologist whose research focuses on identity processes and explores in particular links to health and well being. She served as Member of the Advisory Committee of the Ethnic Diversity Survey (Statistics Canada and Canadian Heritage) from 2000-2003.

ABSTRACT

Clarity regarding the very concept of race remains rather elusive, as does the nature of its connections with related Ontario Human Rights Code grounds such as colour, ethnicity, ancestry, place of origin, creed and citizenship. Dr. Rummens defines these terms and outlines the ways in which identification euphemisms, proxies, slippages and conflations underwrite racial discrimination as a form of identity negotiation.

Efforts to investigate and judge human rights race cases and to develop a racial discrimination policy are stymied by two key questions. *First*, what exactly are the grounds that can be used for determining whether racial discrimination has occurred? *Second*, how might we best use these grounds to ascertain that unfair treatment has indeed occurred?

At the core of the impasse lies the following query: What exactly is race? What is the nature of the phenomenon to which we seek to refer? Closely intertwined with this inquiry is a second: What are the connections between race and the various related grounds – colour, ethnicity, place of origin, ancestry, creed and citizenship – also enumerated in the Code? In brief the issue becomes this: what exactly are the various *types of identifications* to which we are referring? How are they interrelated? What are the connections – the *overlaps* and *intersections* – among them?

Different Types of Identity

Social actors organize themselves into social categories and groups using a wide range of identifying criteria that sort similarities and distinctions deemed socially and/or culturally relevant. Such recognition of similarities and differences constitutes the very cornerstone of social interaction and forms the basis for self-definition as well as for group formation and boundary maintenance. The ensuing *personal* (of self by self) and *social* (of self by other) identifications help to inform individuals' life opportunities, experiences and outcomes.

The specific identity criteria used in these *identification processes* vary from culture to culture, and are directly informed by the historical, societal, situational and interactional context in which they occur. There are thus different *types* of identity (ie. identity criteria) employed in these processes, each of which result in a number of associated *specific identities* (ie. identification labels) (Rummens 2004b, 2003, 1993; see Figure One).

Figure 1

Types of Identity Specific Identities	
Sex, gender	Male/female, man, woman
Age	Child, teenager, adult, senior
Socio-economic (class)	Lower, middle, upper
Sexual orientation	Homo-/hetero-/bi-/trans-sexual
Dis/ability	Able-bodied, x-challenged
Cultural	Haitian, Korean, Canadian
Ethnic	Italian-Canadian
'Racial'	'Black,' 'Asian,' 'White'
Religious	Christian, Muslim, Jewish
Linguistic	Francophone, anglophone
Territorial	Quebecer, Western Canadian
Indigenous/newcomer	Aboriginal, immigrant/refugee

While as concepts these different types of identity are clearly distinct, in actual practice they may overlap or even intersect both for groups and individuals (*Ibid* 2004b, 2003). Identities may be said to *overlap* when there is no significant interactive effect between them (Figure Two). They may be said to *intersect* when interactive effects are clearly present (Figure Three).

Figure 2 – Overlapping Identities

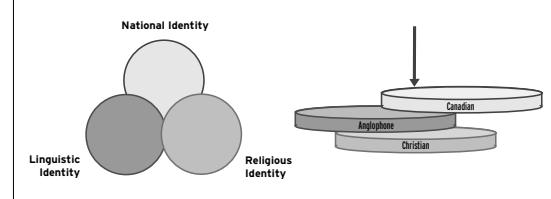
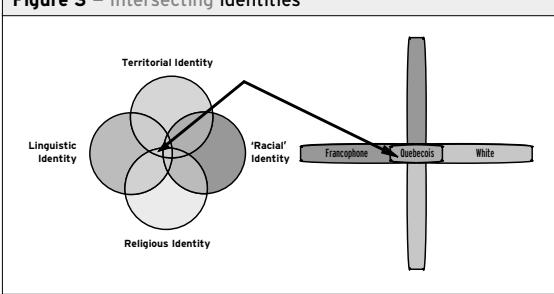


Figure 3 – Intersecting Identities



Race, colour, ethnicity, ancestry, place of origin, creed and citizenship are all different types of identities. Some of them overlap with each other, while others intersect. Some also intersect with minority status.

Race is a type of identity based on physical appearance that is used to construct a subjective system of visual social classification. When expressed as a specific identity, it refers to the end result of a personal and/or social identification based on observable biological criteria in the form of physical traits and/or genetic indicators for particular physical features. Frances Henry *et al* define race as “a category used to classify humankind according to common ancestry and reliant on differentiation by such physical characteristics as colour of skin, hair texture, stature, and facial characteristics” (1995: 328). Evelyn Kallen indicates that any scholarly definition of race must include two important points: “First, race refers to an *arbitrary* social *category* (*not* a social group);” and “second, [these subjective] racial categorizations are based solely on [perceived] *biological differences* between human populations (*not* on cultural differences)” (1995: 19; emphasis added).

A *racial group* is thus essentially a categorical distinction based on a single identity criterion (race) socially deemed relevant within the context of a given society. It is important to note that scientists have not found any biological validity to the concept of racial categories based on genetic grounds: there is more genetic variability within so-called ‘racial’ populations than across them. Despite this it remains an established *social fact* that people act as though individual and group variations in physical appearance are a meaningful way of separating individuals and social groups from one another in their social interactions with one another.

Colour, like race, is a type of identity based on references to physical appearance, in this case specifically to skin colour. It may be used to refer to a particular combination of skin hue and depth of colour gradation that is drawn from along a continuum of shadings deemed socially salient; specific combinations will vary in significance depending on the historical, societal, situational and interactional context in which the identification takes place. As such, colour identities readily intersect with notions of race as a basis for both personal and social identification.

In order to fully understand what is meant by *ethnic origin* it is necessary to first define culture, and then minority status. *Culture* refers to the totality of beliefs, values, knowledge, traditions, symbol systems and way of life shared by a group of people. It is reinforced through social interaction, transmitted from generation to generation, and changes over time. *Minority status* refers to a disadvantaged social position characterized by inequitable access to scarce social

resources such as wealth, power, and prestige. This designation is used in opposition to the term *majority* (*or dominant*) *status*. These terms do not – as is often thought – refer to relative numbers but rather to power dynamics and concomitant differential access to key resources and rewards. Minority status may be based on a wide variety of criteria, including gender, socio-economic status, race, and culture. *Ethnic origin* is thus a type of identification defined by the intersection of cultural practice and/or affiliation, with minority status.

Place of origin is a geographically-based type of identity that seeks to sort individuals according to the part of the world from which they come. Associated specific identities consequently largely reflect country, national or regional designations. Clues to an individual’s ‘place of origin’ may include physical appearance, language, cultural practices, and religious observances; more often than not, they entail specific combinations thereof. As such, this identification readily overlaps – and sometimes intersects – with racial, linguistic, cultural and religious identities. Place of origin is most often operationalized as ‘place of birth’ – understood in terms of country – and is thus commonly, though not exclusively, expressed in terms of first (or ‘primary’) nationality.

Ancestry is a genealogically-driven type of identity by which individuals are sorted according to the cultural and/or racial backgrounds of their parents and/or grandparents. It is an identification that seeks to emphasize generational continuity. Specific identifications may reflect cultural, ethnic, national, linguistic, racial, religious and/or place of origin identities. As such, the particular operative identity criterion must necessarily be articulated (Figure Four). Ancestry is thus an identification explicitly based on the social and/or personal identification(s) of the designated individual’s ancestors.

Figure 4

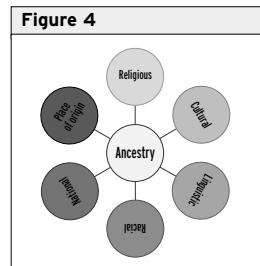
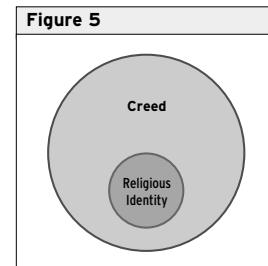


Figure 5



Creed refers both to a specific body of beliefs, values, rituals, and practices, and to the objective association and/or subjective affiliation with them. It is in essence a religious and/or spiritual identification. As a term it is rather inclusive: it moves well beyond the more formally established religious traditions to include a complete absence of creed or religion, and embraces both individual and collective expressions (Figure Five). In brief, creed is a type of identity that is based on felt and/or expressed association with an identifiable belief system.

Finally, *citizenship* refers to an identity based on common allegiance and responsibility to a particular semi-autonomous, socio-political entity that has relative sovereignty over a given territory. Such civic identification is most often associated with a specific country, although it can be articulated on regional, provincial, municipal and local levels as well. When operationalized within the context of a particular society, references to citizenship may furthermore be used to simply determine the presence/lack of salient citizenship

status of any given individual. As such it serves to distinguish majority citizens from minority non-citizens within that social context, thereby effectively reaffirming existing status differentials and concomitant resource allocations.

Racism as Identity Negotiation

While conceptual clarity is critical to a clearer understanding of discriminatory phenomenon, it is also important to examine these identification processes in actual practice. While the emphasis is often placed on *identity formation and development* – namely ‘the cognitive developmental processes that each individual undergoes throughout the maturation process as s/he explores his or her place in the world and develops a unique sense of self’ (Rummens 2003), – it is equally important to consider identity construction and identity negotiation. *Identity construction* refers to ‘the creation, formulation and expression of personal and/or social identities for the self, either by individuals or by groups;’ *identity negotiation* refers to ‘the political nature of personal and social identification of self and/or other, among and by or within groups’ (*Ibid*).

Racial discrimination is an example of identity negotiation. The logical reasoning runs as follows: ‘you are different, you are not ‘one of us,’ therefore you do not have the rights and responsibilities that we do.’ This basic argument effectively controls access to scarce social rewards including power, wealth, opportunities and high social prestige. In terms of identity processes, we are thus dealing with *exclusionary* rather than inclusionary *identifications*. Discrimination is indeed unfair treatment based on a particular ground enumerated in human rights legislation. It is, moreover, also a very effective mechanism aimed at social, economic and/or political exclusion. Effective exclusion is the goal, identification the tool, and discrimination the end result.

In reality, there are many different ways of effectively differentiating among individuals and groups. Race and its various related grounds identified in the Ontario Human Rights Code, are each but one type of identities that may be used; there are other possibilities as well including age, gender, sex, socio-economic status, etc. Any one of these various identity criteria can be selected to effectively include or exclude both individuals and particular social groupings.

Euphemisms, Proxies and Slippages

There are also specific negotiation techniques.

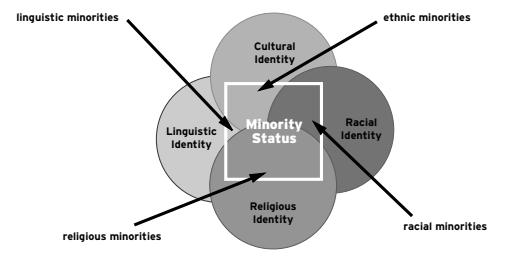
Both race and colour are highly stigmatized concepts. As such, most individuals are well aware that they cannot readily use these concepts or concomitant identifications, even though in actual practice it is clear that people continue to judge others using criteria based on physical attributes. Because of this, related grounds such as place of origin, ancestry, citizenship (both nationality and citizenship status) are regularly used as more ‘neutral’ – and thus acceptable – referents. This is possible because these related grounds are often strongly correlated with physical differences. While conceptually distinct as overlapping identities, in practice they readily intersect.

The same phenomenon can occur with other types of identity as well. For example, place of origin, ancestry and citizenship/nationality often become effective *euphemisms* or attempted *proxies* aimed at determining or attributing

creed or religious identity. Similarly place of origin or citizenship can serve as a euphemism for non-Canadian. Such euphemisms entail the use of a more socially acceptable term where another meaning is in fact intended. In contrast, proxies involve the use of a particular designation in order to estimate, approximate or substitute for another.

Identifications can also ‘slip’ from one specific identification and/or status to another, even across different types of identity. So for instance, while race and culture overlap conceptually, in practice their intersection with each other and separate intersections with minority status allow for multiple possible ‘slides.’ In short, since race intersects with minority status, it permits a slide from race to ethnicity on the basis of common minority designation; a second slide from ethnicity to culture subsequently connects the double intersections and two identities (Figure Six). Such *slippage* can simply be conceptual in nature; it can also be a strategic move as an integral part of identity negotiation.

Figure 6



Common Links and Identity Conflations

Euphemisms, proxies and slippages are not mutually exclusive; rather they readily reinforce and buttress each other. More often they simply present different identity negotiation alternatives. In each case the intent is the same, namely to locate a *common link* between one type of identity and/or status and another. Note the three *levels* and increasing *degrees* of intersections theoretically possible between racial, cultural and religious identifications and minority status:

- race and minority status
- culture and minority status
- religion and minority status
- [race plus culture] and minority status
- [race plus religion] and minority status
- [culture plus religion] and minority status
- [race plus culture plus religion] and minority status

It is such common links that permit the most effective identification slippage. In other cases two different types of identities are simply *conflated*. This is most common in instances where conceptually distinct identities largely overlap, particularly when articulated as specific identifications. Race and culture are often erroneously conflated in this way. This occurs where in practice the respective specific identifications associated with two or more different types of identities overlap (particularly if the same terms are used), as is the case for individuals from more traditionally ‘homogeneous’ societies (eg. Japanese, Korean). A similar

conflation can also occur between overlapping ‘racial’ and religious identities: most, but not all Arabs are Muslims; most, but not all, ‘Causasians’ are Christian.

In brief, when it comes to the connections between race and each of its related grounds – colour, ethnic origin, ancestry, place of origin, creed and citizenship – what we are really talking about are existing overlaps among these different types of identities, possible intersections among them, plus common intersections with minority status. When it comes to instances of alleged racial discrimination, it is particularly significant to note that race and each of its related grounds can all readily intersect with minority status, and to consider the possibility of multiple minority statuses.

Toward Possible Solutions

These overlaps, intersections and identity negotiation techniques combine to make it difficult to clearly establish race or colour as the basis for alleged unfair discriminatory treatment. The challenge exists primarily due to the continued social salience extended to particular permutations of visible physical traits (skin, hair and eye colour; relative shape and size of physical features) in social interaction, despite the highly stigmatized nature of such criteria as a basis for social classification. In sharp contrast, ‘related grounds’ such as culture and religion reflect actual values, beliefs, ideas, traditions that are more likely to be reflected in actual *practices* and/or associated *behaviours*. Behavioural patterns are much easier to ascertain, and more importantly, more socially palatable as a basis for social differentiation among individuals and groups. Similarly, related grounds such as ancestry, place of origin, ‘nationality’, citizenship, are in turn more likely to be related to *demonstrable facts*, and thus more neutral and less refutable in social discourse.

Given these realities, is important to use a more multi-dimensional intersectional perspective (see Rummens 2003) as a tool to move beyond current single-ground approach in human right policy development, implementation and enforcement, even in dealing ‘within’ a single protected ground such as race. It is critical to ensure that all applicable grounds – main, related, and others – are included for examination, investigation and decision. Race and each of its related grounds should be equally weighted, the possibility of multiple related grounds examined, and other enumerated grounds considered in parallel fashion. As well, the various overlaps and intersections among race, its related grounds and other enumerated grounds protected under the Code should be fully explored and taken into consideration. Such efforts are central to any attempt to establish the grounds of alleged discrimination based on race, as well as to determine possible links between racial oppression and other forms/grounds of oppression. The goal should be a determination of *sufficient* grounds, whether determined singly or in combination with one or more related or other grounds. While stronger human rights case files may entail more than one protected ground, in the end a single race or related ground should suffice to determine the basis for alleged human rights violations based on racial identifications.

Alleged incidents of racial discrimination should not need to have to be pinned to a highly stigmatized and scientifically discredited social classification scheme. Race, colour, ancestry,

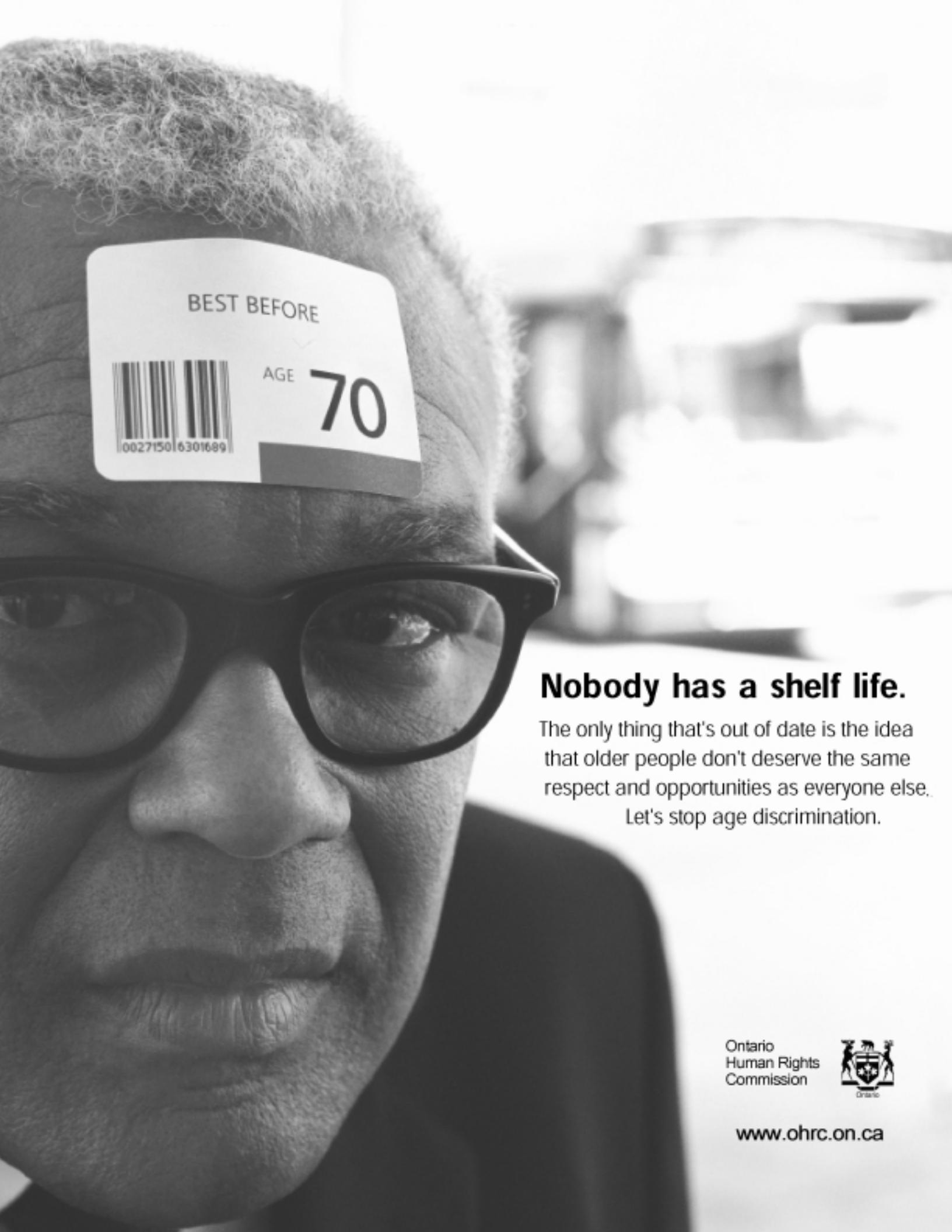
place or origin, creed/religion, citizenship/nationality – are all equally valid as prohibited grounds for discrimination. One should not have to conclusively establish that discriminatory behaviour is based strictly on race or colour, especially since covert racism doesn’t readily express itself in those terms but rather uses proxies, euphemisms, slippages through common linkages and conflations wherever possible. Does it really matter that we establish that unfair treatment occurred on the basis of such a highly amorphous, socially stigmatized, scientifically invalid, notion such as race, when unfair treatment based on any of the other related grounds has much the same intended effect? Regardless of the particular ground used or articulated in its expression, the unfair treatment that demeans the inherent dignity of the racialized individual and restricts rights of access to social resources remains. In juggling the legalistic logistics of matching grounds to injury, it is this that needs to be remembered.

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Endnote

¹ A more comprehensive version of this conference paper has been submitted for journal publication. To obtain a copy contact the author directly via anneke.rummens@utoronto.ca



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Human Rights Legislation and Redress for Past Wrongs

Gerald Gall

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ABSTRACT

This paper examines the utility of existing anti-discrimination legislation in redressing racially-motivated wrongs and explores whether concepts of accommodation can be applied to redress these historical disadvantages. The paper also reviews the history of voluntary redress on the part of government in attempting to remedy past discrimination based on race.

The resolution of discrimination complaints has always been the main focus of statutory human rights agencies throughout Canada. It is true that these agencies have an additional preventative mandate in relation to ongoing education promoting diversity and understanding, but the emphasis is essentially that of resolving complaints. Members of some minority groups, including racial minorities, have felt that this process is insufficient to redress egregious, historical wrongs suffered by members of those minorities. The central question here is whether existing human rights legislation (anti-discrimination and other quasi-constitutional instruments) are able to provide useful avenues to address these concerns and provide the redress and healing sought. The related issue is whether our courts are willing and/or able to utilize these various instruments to address these issues.

Can regular or quasi-constitutional anti-discrimination statutes address historical disadvantage?

Can regular or quasi-constitutional anti-discrimination statutes (with primacy over other laws) address historical disadvantage in response to particular contemporary complaints? The answer to this question has to be a qualified no. Anti-discrimination laws, federally and provincially, do not have a retrospective application. That is to say, like the Canadian Bill of Rights, they are frozen as to the day of their enactment. As a result, the Canadian Human Rights Act speaks from 1977 forward and provincial laws speak from their days of enactment forward. Even this conclusion is rigidly altered when one considers that most anti-discrimination laws have their own limitation periods. For example, under the Canadian Human Rights Act, the Canadian Human Rights Commission can only entertain a complaint where the cause of action giving rise to the complaint occurred within the previous year prior to the formal making of the complaint. Similarly, under section 34 (1)(d) of the Ontario Human Rights Code there is a six-month limitation period. But not all such acts have limitation periods, and even when they do, there is the difficult issue as to when a limitation period begins where the practice complained of is in the nature of a continuing breach. As indicated above, limitation periods notwithstanding, these acts are still restricted to complaints in relation to matters that have occurred since their enactments.

There is, however, a possibility that a board or tribunal might fashion a remedy that goes beyond a particular complaint and addresses historical disadvantage. That is why the answer to the earlier question as to whether human rights law can address historical disadvantage is a qualified no. The qualification relates to the possibility of a remedy that goes beyond the contemporary complaint and addresses past disadvantage. For example, one can refer to the 1987 case under the Canadian Human Rights Act, *Canadian National Railway Company v. Action Travail des femmes* 8 C.H.R.R. D/4210 (S.C.C.), where the Supreme Court of Canada upheld an order of a Tribunal to hire one woman for every four new hires into unskilled and blue-collar jobs. In effect, the Supreme Court of Canada was addressing here a past disadvantage based on gender in resolving a particular complaint. A note of caution, however, should be made with respect to this discussion since the case does not involve issues of racial discrimination and therefore might be limited in its application.

If, therefore, human rights legislation cannot generally address historical disadvantage with respect to 'old' complaints, or to use the popular jargon, in respect of 'cold case files', can these laws address disadvantage in other ways? With respect to the possibility of remedial creativity to redress past wrongs, can this so-called creativity provide the courts an opportunity to address disadvantage through the remedial institution of essentially mini-affirmative action programs?

In response, it should be noted that in some rare instances the courts and/or tribunals have recognized historical disadvantage in dealing with current complaints and have resolved those matters through the courts/tribunals' remedial authority. This remedial possibility has taken the form of imposing a limited or mini-affirmative action program as a means of resolving the current complaint. This possibility is illustrated in the important 1997 decision of a federal Tribunal under

the Canadian Human Rights Act in *National Capital Alliance on Race Relations v. Health Canada*. In this case, the Tribunal imposed a remedy in the nature of an employment equity remedy (or, if you will, an affirmative action remedy) in order to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices identified. In effect, it issued a “special corrective measures program.”

The objectives of the special corrective program are to:

- (i) Eliminate discriminatory employment barriers for visible minorities...
- (ii) Remove discriminatory barriers to the full participation of visible minorities...
- (iii) Ensure the maximum utilization of the knowledge, skills, and expertise of visible minorities;
- (iv) Redress the effects of past discrimination...¹

Can concepts of accommodation be applied to redress race-based historical disadvantage?

In addition to the foregoing, one should consider the notion of accommodation as a remedial possibility in dealing with race-based complaints. It is, at the outset, difficult to imagine many instances where accommodation would be an appropriate remedy to resolve a race-based complaint.²

The application of the notion of accommodation to racial discrimination has, however, been addressed specifically in a number of cases. In *Naraine v. Ford Motor Co.* [1996] O.H.B.I.D. No. 23, Ford was found to have discriminated against Naraine. It had neither acknowledged nor remedied an atmosphere of racial harassment/derogation and, when dismissing Naraine because of temper/outbursts, it did not take into account that these outbursts were the result of the adverse effect of a poisoned workplace atmosphere. This harassment took the form of graffiti, racial slurs and other incidents that constituted conditions of employment and were thus a violation of s. 4(1) of the Ontario Human Rights Code.³

The duty to accommodate arises most frequently with respect to employment and in respect of employees with disabilities, particular religious needs, pregnant women, employees with family responsibilities and employees with drug and alcohol dependencies.⁴ However, the duty to accommodate stops short of requiring undue hardship be placed upon an employer. The issue of undue hardship raises such issues as the cost of providing accommodation, the risk of accommodation to an employee's own health and safety and the risk to the health and safety of others.

It is difficult to foresee a complaint that is race-based that would be amenable to a resolution in the nature of reasonable accommodation. Accommodation, theoretically, applies to all grounds enumerated in the various statutes. In fact, in addition to the ‘common law’ or unwritten possibility of accommodation as a remedy, the Ontario Human Rights Code specifically provides for accommodation in section 17(2) in relation to disability and in section 24(2) in respect of employment. Under most anti-discrimination statutes, accommodation has been used in respect of employment and the provision of services but, theoretically, it is available in respect of any other area of activity covered by the acts.

The Supreme Court of Canada has held that in those cases involving indirect discrimination, the employer has a

reasonable duty to accommodate. As indicated in the *Meiorin* case⁵, the Supreme Court of Canada has now developed a unified approach to discrimination. As a result of the *Meiorin* case, once a complainant has established a *prima facie* case of discrimination, the employer must accommodate its employees in respect of a wide range of differences among its employees and cannot justify direct discrimination on the basis of a bona fide occupational requirement unless it satisfies other standards set out in this case. The notion of a bona fide occupational requirement is strictly defined in the case. Moreover, the case requires that accommodation must take place even if the employer suffers some hardship, as long as it does not constitute an ‘undue’ hardship as defined in the case.

The history of Charter jurisprudence under section 15 somewhat mirrors this same approach. In *Eldridge v. British Columbe (Attorney General)* [1997] 3 S.C.R. 624, Justice LaForest said:

This Court has consistently held, then, that discrimination can arise both from the adverse effects of rules of general application as well as from express distinctions flowing from the distribution of benefits. Given this state of affairs, I can think of no principled reason why it should not be possible to establish a claim of discrimination based on the adverse effects of a facially neutral benefits scheme...

If we accept the concept of adverse affects discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis, that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services. ... [I]f there are policy reasons in favour of limiting the government's responsibility to ameliorate disadvantage in the the provision of benefits and services, those policies are more appropriately considered in determining whether any violation of s. 15(1) is saved by s. 1 of the Charter.

Although the courts do not directly impose a duty to accommodate, Justice LaForest does employ the phrases “special measures” and “positive action” which are tantamount to the imposition of a duty to accommodate. As Chief Justice McLachlan stated in *Meiorin*, the approach taken in discrimination cases should essentially be the same as the approach taken under s. 15 of the Charter. The language of s.15 is broad and, taken together with the courts’ mandate under s.24(1), permits the court to impose remedies that incorporate the notion of accommodation.⁶

Returning now to the central question; namely, whether human rights legislation allows for redress of past discrimination – the answer was a qualified no based upon individual complaints. But through remedial measures that incorporate a notion of systemic accommodation, through court-mandated programs of affirmative action and/or through an application of s. 15(1) of the Charter, the answer looks more positive than appears at first glance. Legislated measures in the nature of employment equity, provide a fourth avenue of redress for past wrongs, although this avenue is, in contrast to the others, non-complaint based.

Voluntary Redress of Instances of Past Discrimination based on Race

What then of the final issue, namely, the seeking of voluntary redress for major egregious instances of past discrimination based on race? The major redress claims that have been advanced to date, relating to racial discrimination by past Canadian governments include the following.⁷

- a) 1847-1985: Forced Assimilation and Abuse of Aboriginal children in Residential Schools
- b) 1885-1946: Chinese Head Tax and Exclusion Acts⁸;
- c) 1891-1956: Imprisonment of Lepers, mostly Chinese, on two Victoria Area Islands;
- d) 1900-1932: Unjust Treatment of Blacks from the Caribbean;
- e) 1914-1920: Internment of Ukrainian Canadians during WWI;
- f) 1938-1948: Denial of Entry to persons of Jewish descent in Canada;
- g) 1940-1943: Internment of Italian Canadians during WWII;
- h) 1940-1943: Internment of German Canadians during WWII;
- i) 1942-1949: Internment of Japanese Canadians during and after WWII; and
- j) Post 1949: Denial of benefits to Aboriginal War Veterans.

Only two claims have actually led to compensation. One is a result of a comprehensive compensation and redress package for Japanese Canadians interned and stripped of their assets during and after the Second World War. The second involves litigation of individual cases arising from the Aboriginal Residential Schools, which are presently ongoing in the courts.

With respect to the Japanese Canadian internment, the 1988 landmark settlement was negotiated by the federal government with the National Association of Japanese Canadians.⁹ With respect to Aboriginal residential schools, an amendment to the Indian Act in 1920 made it mandatory for native children to attend these schools. Further, these children were subjected to cultural, physical, psychological and sexual abuse and indoctrinated into foreign religions.¹⁰ As a result of claims by Ukrainian, Italian and Chinese Canadians, an announcement was made in the House of Commons in September of 1994 that no redress of any kind would be offered to these groups.

It is also instructive to examine the last official statement of federal government policy of March 6-9, 2001 in this regard, effectively denying future compensation for past racial wrongs. This policy provides an acknowledgment that "human history has not been one of inclusion and respect, but rather has been and somewhat remains one often characterized by racism, racial discrimination, xenophobia and related intolerance" and that "Canada believes that acknowledging injustices in history ... essential to reconciliation". As well, it addresses redress and remedies and states that although work is needed to build a future free from racial (and other) discrimination, the government of Canada does "not believe that granting financial compensation for historical action is appropriate".

It should be noted that there have been redress claims at both the federal and provincial levels, for wrongs unrelated to race. Unlike race, however, these other claims have largely been successful. They include health related claims in relation to the drug Thalidomide, government misfeasance in the use of tainted blood when testing was available to detect with

HIV/AIDS and hepatitis C and compulsory sterilization of designated 'mentally retarded' persons in Alberta. Other redress claims relate to Canadian prisoners of war held in Hong Kong, compensation for wartime victims in Canada's merchant marine and persons wrongfully convicted of murder.

Clearly, the success story in respect of redress for past racial wrongs is somewhat limited. The redress movement, it appears, has made little gain in the courts. The essential element is that government policy is key to successful redress and it is doubtful that government has any great enthusiasm to re-visit the sins of the past. Perhaps, the best answer does lie in remedial creativity by tribunals and the courts in respect of existing human rights legislation together with legislative policy that continues to support notions of affirmative action and other programs akin to that of employment equity.

Endnotes

¹ The notion of affirmative action is codified in several pieces of Canadian legislation. Section 16 of the Canadian Human Rights Act (Cases under the Canadian Human Rights Act include *Roberts v. Ontario* (1994) 117 D.L.R. (4th) 297 (Ont CA), *Macnutt v. Shubenacadie Indian Band* (1997) 154 D.L.R. (4th) 344 (Fed T.D.), *Vermette v. CBC* (1994) 94 C.H.R.C. 17 (CHR Commission) and *Macnutt v. Shubenacadie Indian Band* (2000) 187 D.L.R. (4th) 741); The Ontario *Human Rights Code*, s. 14; *Manitoba Human Rights Code*, C.C.S.M. c. H175 s. 11; B.C. *Human Rights Code* RSBC 1996 Chapter 210 s.42; Nova Scotia's *Human Rights Act*, RS 1989 c. 214 s. 6(i); Newfoundland Human Rights Code s. 19; PEI Human Rights Code s. 20; New Brunswick Human Rights Act s. 13; Quebec Charter of Rights and Freedoms s.86 and Saskatchewan Human Rights Code s. 47.

² In the United States, one major case concerning the duty to accommodate and racial discrimination is *Bradley v. Pizzaco of Nebraska*, 939 F.2d 610.

³ Similar results occurred in the following cases: *Hinds v. Canada Employment and Immigration Commission* (1998) 10 C.H.R.R. D/5683 at D/5693; *Mohammad v. Mariposa Store Ltd. Partnership* (1991) 14 C.H.R.R. D/215 at D/218; and *Aluwalia v. Metropolitan Toronto Board of Commissions of Police* (1983), 4 C.H.R.R. D/1757 (Ont. Bd. Of Inq.) at D/1772. These cases are concerned with the workplace atmosphere. Although the relevant statutes do not specifically oblige an employer to maintain a "pristine working environment", they do nonetheless require the employer to maintain a healthy work environment and to take prompt and effective action to remedy racial harassment in that environment when the employer knows or should have known of the poisoned environment. The underlying notion is that the employer's passive inaction in such a racially poisoned environment is in effect a violation of the relevant statute. The employer has the obligation to take adequate measures to remedy the racially tainted atmosphere.

⁴ See Audrey Dean and Janice Ashcroft, "Duty to Accommodate", Alberta Human Rights and Citizenship Commission, 2002.

⁵ *B.C. v. BCGEU* [1999] 3 S.C.R. 3.

⁶ See the paper by Zinn and Brethour from the work *The Law of Human Rights in Canada* in which the "Duty to Accommodate" is discussed in Chapter 14. In addition, in August 2004, the Alberta Human Rights and Citizenship Commission published an Interpretive Bulletin entitled the "Duty to Accommodate Students with Disabilities in Post-Secondary Institutions".

⁷ For a fuller account of the redress movement, see Gall, Cheng & Miki, "Redress for Past Government Wrongs", a working paper prepared for the Government of Canada in preparation for the 2001 World Conference Against Racism.

⁸ See *Mack v. Canada* [2001] O.J. No. 2794; *Mack v. Canada* [2002] 217 D.L.R. (4th) 583; *Mack v. Canada* [2002] S.C.C.A. No. 476. These lawsuits were not successful. See also Beverly Baines, "When is Past Discrimination Un/Constitutional? The Chinese Canadian redress Case", (2002), 65 Sask. L. Rev. 573-585.

⁹ The settlement included a formal apology and acknowledgment of unjust treatment and violation of human rights, symbolic individual redress of \$21,000 for each Japanese Canadian eligible and a \$12 million payment to the Japanese Canadian community to undertake educational, social and cultural activities or programs that contribute to the well-being of the community or that promote human rights.

¹⁰ See *M.C. v Canada* (Attorney General) [2002] C.C.S. No. 2998; *Lafrance Estate v. Canada* [2002] C.C.S. No. 4990; and *W.R.B. v. Plint* [2001] B.C.J. No. 1446. See also *Re Indian Residential Schools* [2000] A.J. No. 638; *Re Indian Residential Schools* [2002] A.J. No. 482, and *Re Residential Indian Schools* [2002] A.J. No. 1265.

Surveying Racial Discrimination Cases

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ABSTRACT

This paper surveys a number of cases where discrimination was alleged on the basis of race. While the goal of the survey is not to itemize every race related case brought before a human rights tribunal, the paper does provide a broad overview of Ontario case law over the last decade. The paper also draws upon earlier cases and significant decisions from other Canadian jurisdictions where necessary.

In *R. v. Williams*, the Supreme Court of Canada recognized that “[r]acial prejudice and its effects are as invasive and elusive as they are corrosive”¹ and warned against underestimating its “insidious nature”². It therefore should not be surprising that investigating and litigating race-based discrimination complaints under provincial human rights statutes is often complicated and difficult.

The first section of this paper will survey cases of overt racial harassment in order to highlight the manner in which these cases have been treated by various human rights tribunals. In the second section, the paper will review cases where the complaint is not about specific overt acts of harassment, but rather where the complainant alleges there is a pattern of differential treatment.³

Racial Harassment

Some of the first human rights cases to examine racial slurs intimated that such activity may not constitute unlawful conduct and at times such slurs were dismissed as merely “shop talk” or “personal interplay” between employees. However, more recent cases have declined to follow reasoning that did not fully appreciate the impact that words can have in fomenting racial discrimination.⁴

Tribunals have now recognized that racial harassment is a significant matter that can seriously injure a complainant.⁵ In *Mohammed v. Mariposa Stores Ltd.*⁶, the British Columbia Council of Human Rights recognized that racial harassment, like sexual harassment, is a “demeaning practice” and constitutes a “profound affront to the dignity” of the employee. More recently, in *Fuller v. Daoud*,⁷ the Ontario Board of Inquiry, now the Human Rights Tribunal of Ontario (“Tribunal”),⁸ went further and accepted the Commission’s submission that when “white people in positions of power insult black or other racialized individuals in racially abusive terms their words reflect society’s judgments about the superiority of white people and inferiority of others. Racist language has this effect whether or not it is intended because these judgments are built into the meaning of the words.”⁹

Human rights tribunals have also extended liability for harassment not only to those who make racial slurs, but also to employers who have not seriously considered the impact of racial harassment on their employees. In *Mohammed v. Mariposa Stores Ltd.*, *supra*, the Council found that disciplining an employee that talked back to a customer who was hurling racial slurs was discriminatory as it condoned the discriminatory acts of the customer. The Council held that an employer has control over how it responds to discriminatory conduct in the workplace, regardless of how the conduct occurred.

Human rights tribunals have specifically recognized that employers have a duty to provide a working environment that is not poisoned by racial slurs, graffiti and other forms of harassment. In *Naraine v. Ford Motor Company*,¹⁰ the Tribunal found that Ford Motor Company discriminated against the complainant by permitting a racially poisoned environment to develop and persist at the Ford Windsor plant. The Tribunal held that the racial slurs and graffiti at Ford were so widespread and continuous as to become a “term or condition of employment.” In addition, the Tribunal also heard expert testimony that while some victims of racism “internalize the stress” through quiet acceptance and accommodation, others can be expected to respond with outbursts, becoming angry, using strong language and becoming emotional. The Tribunal used this evidence to conclude that the complainant’s participation in name-calling did not serve as a bar to his claim under the *Human Rights Code*.¹¹

Similarly, in *McKinnon v. Ontario (Ministry of Correctional Services) (No. 3)*¹² the complainant, an Aboriginal Canadian working as a correctional officer, successfully argued that his co-workers created a poisoned work environment in which racist slurs were the norm. A number of correctional officers, including supervisors, regularly called the complainant a series of racially charged names. The complainant was also removed from a more desirable posting to a less desirable one for making a mistake that was quite common. No one else had been reassigned after making the same type of mistake.

The Tribunal not only found that the personal respondents violated the *Code*, but also that the failure of the Ministry's managers to take appropriate measures to deal with the conduct complained of constituted an infringement by the Ministry of the complainant's right to equal treatment.¹³

Non-Overt Differential Treatment

While the impact on the complainant is anything but "subtle," non-overt forms of discrimination are often described as such because of the difficulty in proving such cases. While cases of overt racial harassment usually turn on the credibility of the parties and their witnesses, cases alleging more subtle forms of racism are, not surprisingly, contingent on inferring discrimination through circumstantial evidence.

The careful collection and analysis of disparate pieces of evidence is therefore needed to properly advance a case of non-overt discrimination. An obstacle often encountered in such cases is a general unwillingness to infer that an individual or organization has racial prejudices, even in the face of strong circumstantial evidence. For example, in *Smith v. Mardana Ltd. (No. 2)*,¹⁴ the Tribunal found that the complainant had been subjected to several overt forms of racial harassment. However, the Tribunal was unwilling to infer that the poisoned environment created by his co-workers and supervisors was a *factor* in the complainant's subsequent dismissal. The Tribunal separated the termination of employment from the poisoned environment by stating: "Why would the very people who hired him [the complainant], who were impressed by him, who promoted him, and who accommodated his school schedule in terms of working hours, suddenly make a decision against him based on his race?" The Tribunal's presumption discounts the effects that the poisoned environment had on management's actions and ignores the fact that management's view of the complainant may have changed once he began to object to the racial name-calling. This case underscores the difficulty in recognizing non-overt forms of racism that may operate in a workplace.

Circumstantial Evidence

Recently, in *R. v. Brown*¹⁵, the Ontario Court of Appeal dealt with the issue of using circumstantial evidence to prove cases of racial discrimination, in particular racial profiling. The Court in *Brown* recognized the inherent problem with evidence needed to prove a racial profiling case. The Court held that a racial profiling claim could rarely be proven by direct evidence and therefore if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence. In particular, with respect to police officers, the Court stated that where the evidence shows that circumstances relating to a detention correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling.¹⁶

The Ontario Court of Appeal's recognition of the importance of circumstantial evidence follows a line of cases that have held that circumstantial evidence may be used to prove the existence of discrimination. In *Grover v. National Research Council of Canada*¹⁷ the Canadian Human Rights Tribunal recognized that racial discrimination more often than not, is subtle and covert. In weighing evidence, the Court stated

that one often has to assess circumstantial evidence in order to identify "the subtle scent of discrimination."¹⁸ Similarly, in *Nelson v. Durham School Board of Education*¹⁹ the Tribunal found that an inference of discrimination may be drawn where the evidence that is offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.²⁰ As the Tribunal noted, the intention to discriminate is irrelevant and the complainant does not have to provide a motive for the discrimination.

Systemic Discrimination or Differential Treatment

Some of the most complex cases of non-overt discrimination before human rights tribunals are those complaints that allege that racial discrimination is built into an organization's structures and processes. An example would be a workplace that has policies, requirements or a culture that make it more difficult for a minority person to succeed relative to his or her white colleagues. Seemingly neutral rules can often act as barriers for racial minorities. In *Wong v. Ottawa (City) Bd. of Education (No. 3)*²¹ the respondents purported to make a determination of which teachers would be declared surplus based, in part, on the extra-curricular activities they were involved in at the school. The Tribunal, however, held that the narrow view of what activities qualified as "extra-curricular" operated in a discriminatory fashion. The narrow focus included activities that for cultural reasons Chinese immigrants, such as the complainant, would be unlikely to undertake and excluded legitimate activities they would be more disposed to engage in.

Differential treatment can occur when a service provider, landlord, or employer treats an individual differently because of his or her race. For example, in *Mitchell v. Nobilium Products Ltd.*²² a comparison of how employees were treated demonstrated that Black employees of West Indian origin were dismissed for poor work performance while other poor-performing employees, with different backgrounds, continued to be employed. The comparison enabled the Tribunal to conclude that the primary reason for the complainant's dismissal was the complainant's work performance, but went on to conclude that the complainant's race, colour and ethnic origin were also factors.²³

Another way to establish an inference that race was a factor in any particular decision is to see if the decision maker acted differently in similar past situations. In *Johnson v. Halifax (Regional Municipality) Police Service*²⁴ the Nova Scotia Board of Inquiry held that in deciding whether there has been a *prima facie* case of differential treatment, a board of inquiry must try to establish how events normally unfold in a given situation. Deviations from normal practice and evidence of courtesy or intransigence are grounds for finding differential treatment. In *Johnson*, the Board of Inquiry held that the unprofessional manner in which the complainant was treated during a traffic stop was based on the complainant's race and that it would be hard to imagine similar treatment of a white driver.

Respondent's Explanation for the Impugned Conduct

Examining the respondent's explanation for the impugned conduct is often the deciding factor in complaints of non-overt racial discrimination before human rights tribunals. In *Lasani v. Ontario (Ministry of Community and*

Social Services) (No. 2)²⁵ the Tribunal recognized not only that the discrimination need not be intentional, but also that no one is likely to admit to not hiring minorities. Therefore, the Tribunal held that it must look closely at the proffered explanation of not promoting members of ethnic communities who are qualified.²⁶

In *Quereshi v. Central High School of Commerce* (No. 3)²⁷, the lack of a credible explanation by the respondents figured prominently in the Tribunal's decision. The Tribunal found that the complainant was discriminated against because of his place of origin and his ethnicity when he was denied a teaching position at the respondent high school. Dr. Quereshi had four degrees, including a Bachelor of Education and a Doctor of Philosophy in Science. In 1982, he applied for a position as a teacher of mathematics and science at the Central High School of Commerce in Toronto. The position was awarded to a less qualified white woman of British ancestry. With no other available explanation from the respondents, the Tribunal, on the balance of probabilities, found for the complainant. While there was no evidence of intentional discrimination against Dr. Quereshi, the Tribunal concluded that the only available explanation for interviewers failing to give due consideration to Dr. Quereshi's qualifications was that they did not take into account cultural differences arising out of Dr. Quereshi's place of origin and ethnicity. The Tribunal noted that the hiring process was not objective and provided fertile ground for discriminatory factors to come into play.

The Commission when deciding whether to refer a case for a hearing must also be alive to the fact that there needs to be an examination of the reasons behind why a respondent acted in the manner alleged. In *Troy v. Kemnir Entrop Inc.*²⁸ the British Columbia Human Rights Commission's decision not to refer to a hearing a complaint against a gas station was successfully judicially reviewed. The case involved an attendant who called the police about a Black patron who was buying gas, making a call and waiting for a friend. The Court held that the Commission erred by determining the motivation for the call without resolving why the attendant stated to the police that the complainant was dealing drugs and was there for a few hours (when he was there for less than a half hour). In short, the Commission should have investigated why the attendant believed the individual in question was suspicious.

The Use of Statistics

One of the most powerful tools to establish an inference of discrimination is the use of statistical data. Statistics may be used either to show discriminatory impact or to discount a non-discriminatory reason offered to explain a situation. A *prima facie* case established through statistical evidence may be rebutted either by evidence which offers a non-discriminatory explanation of the specific situation or by challenging the statistical evidence. In sum, statistical evidence can provide another bit of circumstantial evidence, which may or may not be sufficient on its own to support an inference of discrimination.²⁹

Statistics are often used to demonstrate that systemic discrimination has resulted in racial minorities being under-represented in a workplace or in certain jobs within an organization. In *Nelson v. Durham School Board*³⁰ the Tribunal, in finding that the complainant was discriminated against in the promotion process based on his race, noted that 15%

of students were visible minorities in elementary schools and 7-10% of students were visible minorities in secondary schools, but that less than 0.6% of the Durham Board's four thousand employees (teachers and support staff) were visible minorities. This information was combined with the fact that the highest-ranking visible minority in the secondary schools was a classroom teacher and only three vice-principals in the elementary schools were visible minorities. The Tribunal also relied on the fact that so-called "treatment centre schools" were the entry point for the majority of Black teachers, but that treatment school teachers were stigmatized and presumed to be less competent than their counterparts in the regular schools.

Statistical data was also used prominently in *National Capital Alliance on Race Relations (NCARR) v. Canada (Health and Welfare)*³¹ where the Canadian Human Rights Tribunal accepted expert evidence that members of visible minorities were under-represented in senior management positions at Health Canada and instead were concentrated at the lower levels from which they were not promoted to management positions. The manipulability of statistical information should, however, always be remembered. In *Chopra v. Canada (Department of National Health and Welfare)*,³² much of the statistical evidence in the *National Capital Alliance* case was not accepted as the respondents successfully demonstrated that errors in methodology systemically affected the results of the Commission's experts.

Linking Statistical Evidence to the Individual Complainant

Even where there is solid statistical evidence demonstrating systemic discrimination, this may not be enough to establish discrimination against a particular complainant. In *Abdolalipour v. Allied Chemical Canada Ltd.* the Tribunal stated that a racially homogeneous work force is an indicator that racial biases and attitudes are present in the workplace. But, the fact of a disproportion should not by itself warrant a conclusion of racial bias. The Tribunal was not willing to accept the conclusion that a racial minority person in a racially homogenous work environment inevitably faces "massive exclusion, isolation and alienation within the work place."³³

Similarly, in *Chopra v. Canada (Department of National Health and Welfare)*, *supra*, the Canadian Human Rights Tribunal held that even if systemic barriers to the promotion of visible minorities were found to exist, the Commission would still be required to demonstrate a link between this evidence and the evidence of individual discrimination against the complainant in order for a *prima facie* case to be established. The Canadian Human Rights Tribunal did note, however, that the greater the disparity in the data between visible minorities and non-visible minorities, the less other evidence will be required to make out a *prima facie* case.³⁴

Racial Discrimination Intersecting with other Grounds

Another issue emerging in human rights litigation is the intersectionality between prohibited grounds of discrimination. For example, racial minority women may experience discrimination in a completely different way than minority men or other women. The combination of race and other prohibited grounds produces distinctive forms of stereotyping or barriers. In *Frank v. A.J.R. Enterprises Ltd.*³⁵ the British Columbia Council of Human Rights found that the

respondent hotel discriminated against the complainant because of her race, colour, ancestry and sex when on two occasions she was evicted from the hotel and on another occasion was denied service in the hotel lounge. The Council found that there was a distinct pattern of discriminatory conduct perpetrated by the respondent against Aboriginal women. The Council found it particularly offensive that one would assume that the complainant was a prostitute because she is a single native woman in a hotel by herself.

Recently, the Tribunal advanced the issue of intersectionality in *Baylis-Flannery v. Walter DeWilde c.o.b as Tri Community Physiotherapy* (No. 2)³⁶ by recognizing that the intersection of grounds can increase general damage awards. The Tribunal ruled that the respondent discriminated against the complainant because of her race and sex, sexually and racially harassed the complainant, made sexual advances, and ultimately terminated her employment because she objected to his conduct. The Tribunal held that while the findings of discrimination made in this case are of sufficient gravity that the complainant could succeed on either enumerated ground, the law must acknowledge that she is not a woman who happens to be Black, or a Black person who happens to be female, but a Black woman. The decision represents the first time the Tribunal explicitly recognized and applied the concept of intersectionality with respect to both liability and remedy and found that the intersectionality of the discrimination based on sex and race exacerbated the complainant's mental anguish.

Conclusion

While this survey could not comment on every race-based complaint in the province, it should provide an overview of the issues encountered when litigating racial discrimination cases. The survey reveals that racism in today's society is increasingly non-overt and factually complex, thus making the task of investigating, litigating and adjudicating such cases more challenging. The Commission's most recent initiative to create a new policy on racism is therefore extremely important; not only as a means to educate the public, but also as a tool to improve the Commission's ability to determine where racism is a factor in any given case.

Endnotes

¹ *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 22. In *Williams*, the Supreme Court of Canada permitted challenges to potential jurors on the ground of widespread racial prejudice against Aboriginal Canadians in the community.

² *Ibid.* at para 21.

³ In order to provide a broad overview of significant cases, especially before administrative human rights tribunals, cases in this paper were drawn from the results of numerous searches of online case law databases conducted primarily in July and August 2004. More importantly, cases included in this paper were the result of suggestions from colleagues throughout the Ontario Human Rights Commission. The author would particularly like to thank Nina Gandhi and Anita Balakrishna for their tremendous assistance and insights. Decisions as to which cases to include in this survey paper, given the limited space available, were the sole responsibility of the author and omissions and errors are his sole responsibility.

⁴ See the Tribunal decision in *Naraine v. Ford Motor Co. of Canada* (No. 4), *infra*, at paragraphs 48 through 51.

⁵ It should be noted that Tribunals have also ensured that the race related grounds of ethnic origin and place of origin catch harassment based on the language spoken by a complainant. See *Espinosa v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ont. Bd. Inq.). Similarly, in *Segula v. Ferrante* (1995), 27 C.H.R.R. D/412 (Ont. Bd. Inq.) the Tribunal held that a requirement to speak English where English is not the first language may amount to discrimination if the proficiency is not truly required by the particular job.

⁶ (1990) 14 C.H.R.R. D/215 (B.C.C.H.R.)

⁷ [2001] O.H.R.B.I.D. No. 19 (Ont. Bd. Inq.)

⁸ For ease of reference, this paper will refer to the former Ontario Board of Inquiry or the current the Human Rights Tribunal of Ontario as the Tribunal.

⁹ *Fuller v. Daoud*, *supra*, at paras. 84, 85

¹⁰ (1996), 27 C.H.R.R. D/230 (No. 4) (Ont. Bd. Inq.) aff'd (1999), 34 C.H.R.R. D/405 (Ont. Ct. (Gen.Div.)) Board of Inquiry's order upheld except with respect to the issue of reinstatement (2001), 41 C.H.R.R. D/349 (Ont. C.A.)

¹¹ See also *Gannon v. Canadian Pacific Ltd.* (1993), 22 C.H.R.R. D/97 (C.H.R.T.) where the Canadian Human Rights Tribunal held that the employer failed to exercise all due diligence to prevent racial slurs from being directed at the complainant.

¹² (1998), 32 C.H.R.R. D/1 (Ont. Bd. Inq.)

¹³ The Tribunal has also found organizations or individuals liable when they have condoned acts of discrimination that have already occurred. In *Payne v. Otsuka Pharmaceutical Co.* [2002] O.H.R.B.I.D. No. 19 (Ont. Bd. Inq.), the Tribunal held conference organizers liable for assisting a pharmaceutical company in locating other individuals to work at the company's booth without properly investigating Ms Payne's allegations of racial discrimination.

¹⁴ (2002), 44 C.H.R.R. D/142 (Ont. Bd. Inq.)

¹⁵ (2003), 64 O.R. (3d) 161 (C.A.)

¹⁶ Relying in part on the *Brown* decision, the Ontario Superior Court of Justice in *R. v. Khan* [2004] O.J. No. 3819 (S.C.) held that an accused's *Charter* rights were violated because he was stopped in his car as a result of racial profiling. Mr. Khan was a young Black man driving an expensive car when he was pulled over. In making a finding of racial profiling the Court commented on the consistency of the accused's testimony with the documentary record and the evidence of independent witnesses. However, the version of events of the two police officers in question was both inconsistent with the documentary evidence and defied "common sense".

¹⁷ (1992), 18 C.H.R.R. D/1 (C.H.R.T.)

¹⁸ The Tribunal was citing its earlier decision in *Basi v. Canadian National Railway* (No. 1) (1988), 9 C.H.R.R. D/5029 at D/5038 (C.H.R.T.).

¹⁹ [1998] O.H.R.B.I.D. No. 14 (Ont. Bd. Inq.)

²⁰ The Tribunal was citing B. Vizkelety's "Proving Discrimination in Canada" (Toronto: Carswell, 1987) at page 142.

²¹ (1994), 23 C.H.R.R. D/41 (Ont. Bd. Inq.)

²² (1981), 3 C.H.R.R. D/641 (Ont. Bd. Inq.)

²³ It should be noted that for the purposes of establishing discrimination, a prohibited ground of discrimination need only be a factor in the termination as opposed to the sole factor. See *Dominion Management v. Velenosi* (1997), 148 D.L.R. (4th) 575 at 576 (Ont. C.A.).

²⁴ [2003] N.S.H.R.B.I.D. No. 2 (N.S. Bd. Inq.)

²⁵ (1993), 21 C.H.R.R. D/415 (Ont. Bd. Inq.)

²⁶ In *Lasani*, the Tribunal accepted, at paragraph 54, the Commission's position that "where ethnic prejudice is a reality, but a secret, unadmitted reality, a board of inquiry should look very carefully at the proffered explanations for failure to hire or failure to promote members of ethnic communities who are otherwise qualified for a position, but are not hired or promoted." However, the Tribunal still found the Ministry's explanations sufficient based primarily on the relative qualifications of those applying for the positions Mr. Lasani was competing for.

²⁷ (1989), 12 C.H.R.R. D/394 (Ont. Bd. Inq.)

²⁸ [2003] B.C.J. No. 2933 (B.C.S.C.)

²⁹ *Angeconebe v. 517152 Ontario Ltd.* (1993), 19 C.H.R.R. D/452 (Ont. Bd. Inq.)

³⁰ [1998] O.H.R.B.I.D. No. 14 (Ont. Bd. Inq.)

³¹ (1997), 28 C.H.R.R. D/179 (C.H.R.T.)

³² [2001] C.H.R.D. No. 20 (C.H.R.T.)

³³ (1996), C.H.R.R. Doc. 96-153 at para. 191 (Ont. Bd. Inq.)

³⁴ The need to prove a connection between institutional racism and a particular situation recently arose at the Ontario Court of Appeal in *R. v. Hamilton* [2004] O.J. No. 3252 (C.A.). The Court of Appeal, in overturning lenient sentences, pointed out that neither accused tried to forge any evidentiary connection between institutional racial and gender inequality and their particular circumstances. Absent that kind of evidence, the trial judge could not find, according to the Court, that the women's difficult economic circumstances were the direct result of systemic racial and gender bias.

³⁵ (1993), 23 C.H.R.R. D/228 (B.C.C.H.R.)

³⁶ (2003), C.H.R.R. Doc. 03-296 (H.R.T.O.)

The Relevance of International Instruments

on Racial Discrimination to Racial Discrimination Policy in Ontario

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ABSTRACT

International law has a long history of dealing with problems of racial discrimination. In all likelihood, policies against racial discrimination in Ontario can only benefit from an opening to and interaction with the international debate, although too much should probably not be expected of international law.

The most important treaty when it comes to racial discrimination is the Convention on the elimination of racial discrimination (CERD) adopted in 1966, which is both quite universal (only 25 states are not party) and very specialized. However, it is worth noting that there are a number of international instruments, which although they do not deal exclusively with racial discrimination, also form part of the corpus of norms dealing with the subject. The most famous universal instruments are the Universal Declaration on Human Rights and the International Covenant on Civil and Political rights. Other much more specialized instruments exist, such as the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organization in 1958, and the Convention against Discrimination in Education adopted by UNESCO in 1960.

One should also be aware of various regional conventions to the same effect, including the Inter-American Convention on human rights and the European Convention on human rights. Although strictly speaking only the former is applicable to Canada, it helps to think of various regional treaties as being susceptible to influence each other. One should not discard, therefore, the possibility that concepts evolved in one regional context, might be applied in another.

Perhaps more importantly than the conventions themselves, most of which tend to be very general in nature, are the case law, reports, and resolutions of various bodies directly or indirectly entrusted with their implementation. The Committee on the elimination of racial discrimination is clearly the most famous and the one most directly entrusted with the application of CERD. Its case law is limited because few individual petitions have made it beyond the receivability stage, but its General comments and annual reports are worth keeping an eye on. The Human Rights Committee, which monitors the application of the Covenant on civil and political rights, has also issued one general comment on the right to be free from racial discrimination.

Paradoxically, however, it is the regional bodies that are the best source of international law on racial discrimination. Although their obvious limitation is that they are set in a regional context, they have the considerable advantage of hearing on average many more cases than the truly universal bodies. This means that each of the Inter-American and European Courts has decided two or three landmark cases on racial discrimination.

Finally, one would have to include a variety of organs that are not strictly courts or monitoring organs but that do have a role in shaping what international law has to say on racial discrimination. Examples include almost any UN human rights body (the Commission on human rights, the sub-Commission) or even not specifically a human rights body (the General Assembly). The output of such bodies tends to be quite general, but they have occasionally created sub-bodies with a more specific mandate relating to racial discrimination¹. Regional sources are too many to mention. The important thing to understand is that these bodies do not produce "hard law", but that they do concur to define broad trends relating to racial discrimination.

What is international law's definition of racial discrimination?

Racial discrimination occurs not simply when differences are made between certain racial groups, but when this differentiation adversely affects the enjoyment of rights otherwise protected by international human rights treaties by members of one group. Racial discrimination occupies a special status within the more general prohibition of arbitrary discriminations. It is worth noting that the European Court of Human Rights, for example, has come close to considering that in some cases racial discrimination, in addition to being a self-standing human rights violation, may as such involve a degrading treatment under Article 3 of the European Convention on Human Rights, because a particular form of offence to human dignity is involved.²

Racial groups should be defined objectively and states should not be allowed to “pick and chose” what is a racial group and what is not for the purposes of CERD. While the Universal Declaration and the ICCPR focused only on race, the CERD prohibits discrimination on the basis of “race, color, descent, or national or ethnic origin”. It is sufficient, according to the Racial Discrimination committee, that a particular group consider itself “subjectively” a racial group and be seen as one, for it to be considered as such.

Although CERD did not include any direct reference to indigenous peoples, the Racial Discrimination committee has since made it abundantly clear that discrimination against indigenous peoples is the functional equivalent of racial discrimination and prohibited as such.

A) Discrimination: Intention and Effect

One of the trickier issues when defining racial discrimination is defining discrimination itself. Relevant treaties do not give a definition, so it has been left to various organs’ interpretations of it. The easy case is one where discrimination is explicit, but proving that a measure’s purpose is discriminatory is considered sufficient. The European Court of Human Rights in a case opposing Greece to Turkey on the fate of Cyprus found that despite the fact that Greek Cypriots were not nominally designated in a series of laws, these laws were clearly destined to affect that community and no other.

However, even in cases where discrimination is neither explicit nor the provable purpose of a piece of legislation (for example because parliamentary records do not show any obvious discriminatory intent), it may still be possible to consider that a law violates the prohibition on racial discrimination if it “has an *unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin”.³ There have been a few examples of this in the case law. The Inter-American Court, for example, considered that while nominally non-discriminatory, a proposal that its naturalization law include a “comprehensive examination on the history of the country and its values” would in practice and given the context of Costa Rican society, have unfairly discriminated against the indigenous population (whose Spanish writing skills were generally not the same as the rest of the population’s).

There are obvious difficulties, however, with saying that discrimination can occur merely because of the effects that are bound to arise when dealing with economic and social rights. Effects can be hard and contentious to prove and may only appear long after a piece of legislation or practice has been adopted. Second, there is in theory no limit to how far an “effect approach” to racial discrimination might go. What if, for example, economic policies were adopted which were prejudicial to the poor in a society where certain racial groups constituted a disproportionate part of the poor (or where these groups were disproportionately represented among the poor)?

The extent to which international law makes such “accidental” or unintentional discrimination illegal is not entirely clear. The European Court of Human Rights has provided some elements of interest. In the case of Abdulaziz, Cabales and Balkandali, for example, it was determined that UK immigration laws, even though they “differentiated on the

basis of people’s nationality, and indirectly their race, ethnic origin and possibly their colour”, were not racist because there was “no evidence of an actual difference of treatment on grounds of race”. In fact, to the extent that the applicable rules included a “specific instruction to immigration officers to carry out their duties without regard to the race, colour or religion of the intending entrant” and were “applicable across the board to intending immigrants from all parts of the world, irrespective of their race or origin”,⁴ the Court was satisfied that their purpose was to curtail immigration and not to discriminate as such.

B) Legal differentiation vs. illegal discrimination

There really is no exception to the prohibition on racial discrimination. However, it is true that certain types of state practice are considered to be outside the ambit of racial discrimination strictly construed. International sources have come strongly in favor of so-called positive discrimination. Article 4 of the race convention notes that “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms *shall not be deemed racial discrimination*”. In fact, the Committee on Human Rights has gone further, by pointing out that “(...) the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”.⁵ This makes it legitimate for the state to grant part of a population “certain preferential treatment in specific matters as compared with the rest of the population”. The legality of positive discrimination, however, is submitted to two conditions: first, such measures must not “as a consequence, lead to the maintenance of separate rights for different racial groups”; second, such measures as are taken for the purposes of positive discrimination “shall not be continued after the objectives for which they were taken have been achieved”.

One question that arises, however, is whether there might ever be any other differentiation on racial grounds that would be considered legal. The issue arises particularly in connection with the practice of “racial profiling” which involves targeting certain communities for the purposes of law and order. As is well known, racial profiling threatens to become an endemic problem, in Ontario as elsewhere, as a result of efforts to curb terrorism.

It is worth pointing out that the international law of racial discrimination might be seen as providing a loophole in that respect. Under international law, an otherwise unlawful discrimination may be lawful, according to the Racial Discrimination committee itself, if the criteria for a given differentiation “judged against the objectives and purposes of the Convention, are legitimate”.⁶ It is likely that proponents of racial profiling would seize on this wording to defend the practice. However, one should be wary of such arguments. According to the Inter-American Court, one of the essential requirements for discrimination to be valid is that it be “reasonable”. Reasonableness refers to both ends and means, but when it comes to means it remains “impermissible to subject human beings to differences in

treatment that are inconsistent with their unique and congenerous character".⁸ This seems to suggest that racial discrimination is probably unique in relation to all other possible forms of discrimination in that it can never be made legal by the pursuit of a "legitimate" social goal.

The applicability of international instruments in Canada

Although it is far from being alone in doing so, Canada is not explicit about the applicability of international human rights instruments domestically. The Canadian Human Rights Act does not refer to Canada's international obligations, including CERD.

Because Canada's is a so-called "dualist" system, CERD would in theory have to be directly "incorporated" into Canadian law before it becomes applicable. There is however a good case that even short of incorporation, Canada's international obligations should have some value in Canadian Courts. In the Baker case, for example, Justice L'Heureux-Dubé argued (and this was supported by a majority of the Court) that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."⁹ Arguably, this should be the minimal role assigned to international norms on racial discrimination.

Another route for the applicability of international norms concerning racial discrimination is customary international law. The advantage of arguing for the customary international law status of CERD is it obviates the need for incorporation. There is a very good case that the international community's norms on racial discrimination have acquired just such a status (almost universal ratification would be a good indicator).

What can an OHRC policy on racial discrimination learn from these international definitions and conventions?

Apart from the issue of racial profiling which I have already hinted at and which has attracted very widespread and unambiguous international condemnation, one area where the Ontario debate might benefit from attention to international law is that of economic and social rights. The Committee on Racial discrimination has repeatedly stressed that economic discrimination is as much a form of racial discrimination as discrimination affecting the enjoyment of civil and political rights. Some of the primary areas in which the issue of protecting economic and social rights will arise are employment, housing, health-care and education, where many contemporary modes of discrimination occur. Proving discrimination in such cases can be hard, but the Committee has made it clear that it is ready to rely on various structural indicators (e.g.: differentials in the employment rate) to uncover systemic practices of racial discrimination.

A related issue of current interest to international organs is the possibility that private actors rather than simply the state might violate the human right to racial discrimination. At the very least, it has been argued that the State should uphold a normative environment where private discrimination may not occur. Appropriate remedies should be provided to those whose rights have been violated.

Finally, much of the Racial Discrimination committee's recent work has been devoted to the protection of migrants,

refugees and asylum seekers' protection against radical discrimination. CERD is quite clear about the fact that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens", but the Durban Declaration has insisted that discrimination against non-nationals is often one of the main sources of contemporary racism. This issue is the object of the Committee's latest general comment.¹⁰ Undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live are another related matter of concern. The Committee has pointed out that although distinctions between citizens and non-citizens are legitimate they should be confined to the minimum. For example according to the Committee, "Although some (...) rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, *human rights are, in principle, to be enjoyed by all persons*".¹¹ It follows that states should ensure that "legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status".¹²

Conclusion

The international law of discrimination provides us with a fairly rich and varied material on the nature of racial discrimination. Even if not directly applicable, its definitions should at the very least inform the Ontarian debate.

Endnotes

¹ Examples include the Special Rapporteur on Contemporary forms of racism, racial discrimination, xenophobia and related intolerance, the Working Group on the effective implementation of the Durban Declaration and Programme of Action, and the Working Group of Experts on People of African Descent.

² East African Asians v UK [1973] 3 EHRR 76, para. 207.

³ General Recommendation XIV, Definition of discrimination (Art. 1, par.1), para. 2.

⁴ East African cases, *supra* note 2, paras. 84-85.

⁵ General Comment No. 18: Non-discrimination: 10/11/89.

⁶ *Id.*

⁷ General Recommendation XIV, Definition of discrimination, para. 2.

⁸ 55.

⁹ [1999] 2 S.C.R. 817, para. 70.

¹⁰ General Recommendation 30, Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3.

¹¹ *Id.*, para. 1. 3.

¹² *Id.*, para. 2. 7.

The Human Rights Process and Race Discrimination Complaints

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ABSTRACT

This paper identifies some of the reasons why complaints of race discrimination have a lower success rate than complaints on other grounds. It then presents a variety of options that might be considered at different stages of the complaints process, with the goal of improving the success rate.

Studies in many jurisdictions have indicated that complaints alleging discrimination on the basis of race and related grounds have a lower success rate than cases considering other grounds.¹ The fact that similar results occur in different jurisdictions suggests that the causes go deeper than some simple error in handling such cases. The purpose of this paper is to try to identify some of those causes and to present possible strategies for increasing the success rate. My goal is to identify as many strategies as possible, rather than to try to identify some new solution that has eluded everyone else. I simply want to start the discussion.

Causes of the lower rate of success

There does not seem to be any single cause for the lower success rate of complaints of race discrimination. Ana Mohammed, who is now a member of the B.C. Human Rights Tribunal, prepared a report in 2000 comparing a selected sample of race complaints (all of which included racial harassment) with a comparable sample of sexual harassment complaints. She concluded that the lower success rate of race complaints was due to a combination of two factors. The first was that, on average, complaints of race discrimination were more difficult to substantiate. The second was that the procedures for processing complaints are not always well suited to the nature of complaints of race discrimination. Donna Young reached similar conclusions in her 1992 study for the Ontario Commission. I agree that both factors have an effect on the success rate.

Mohammed found that complaints of race discrimination are more likely to involve an ongoing course of conduct, rather than a specific incident. She also found that the discrimination often takes more subtle forms in race cases than in sexual harassment cases. In addition, a respondent is unlikely to admit that race played any part in a decision. In contrast, in cases involving other grounds such as disability, for example, a respondent will sometimes admit that the events took place but argue that a defence is available.

Ironically, the fact that race discrimination may attract a higher degree of social stigma than discrimination on some other grounds, such as age, may make it harder to prove a case in two ways. The first is that perpetrators are more careful to hide race discrimination than other forms of discrimination. The second is that there may be an unconscious tendency of decision makers (whether intake officers, investigators, Commission members or tribunals and courts) to apply a higher standard of proof to allegations of race discrimination than to other grounds.

Another factor may be that the strongest cases do not necessarily result in a complaint to the Commission. Some of those who experience the discrimination may accept the situation as a coping strategy.² Moreover, if racial discrimination is an ongoing feature of a workplace, it may seem futile to file a complaint about any particular incident. It seems likely that these tendencies would be more common in situations of serious ongoing discrimination than when the discrimination is less prevalent. The result would be that the complaints process may tend to exclude a disproportionately high percentage of the most serious cases.

A final factor may be that the human rights enforcement system has not yet fully applied an adverse effects analysis. The Supreme Court of Canada recognized adverse effects discrimination almost twenty years ago.³ However, most cases classified as adverse effects cases involve facts bordering on intent, such as the maintenance of certain business hours, even after being informed that they will interfere with the religious beliefs of some employees.⁴

A broader adverse effects analysis would start from the assumption that if a group is not represented in a workplace or other establishment in the numbers one would expect on the basis of availability, that this alone is enough to create a presumption that the selection system incorporates some discriminatory barrier. Such an analysis would, of course, be relevant to any ground of discrimination. But it may be especially relevant to complaints of race discrimination, because they are often more difficult to prove by other means.

Strategies

This section lists different possible strategies for handling complaints. As mentioned in the introduction, my aim is to raise possible options for the purposes of discussion rather than to identify some optimal mix of strategies.

Attracting the strongest complaints

In a complaints-based system, the Commission has limited power to influence what complaints are filed. However, the following steps might help to bring serious instances of race discrimination to its attention:

- The educational efforts of the Commission play an important part, and it may be useful to consider ways in which these efforts could be as effective as possible in reaching racialized groups who experience discrimination.
- Liaison between the Commission and community groups and unions that have first-hand information about instances of race discrimination could be useful. Similarly, it could be useful to indicate to such groups that the Commission would welcome third-party complaints and to provide training to help such groups to assess potential complaints.⁵
- Community groups could also carry out “testing” in appropriate circumstances. If, for example, a person has been told that a job or an apartment is no longer available and suspects being excluded because of race, it may be useful to have a person from a different group make an application to see if they are given the same information. Testing has been effective in gathering information of discrimination in the past, and tribunals have upheld its use. Perhaps this strategy should be revived.
- When the complaint concerns specific conduct of a particular person it may be useful to encourage complainants to name that person as well as their employer as a respondent.⁶ If the person is not named, the complainant may feel that the central issues in the complaint have not been fully canvassed, whether or not that is in fact true. Also, the corporate respondent may be more responsive to an allegation of discrimination by a particular employee than to what it perceives as a more general allegation of racism against the entire company.
- Expanding individual complaints into systemic complaints (or filing a separate systemic complaint on the basis of the investigation of an individual complaint) may be useful. Sometimes, it may be easier to demonstrate a discriminatory effect against the group than to show that a particular individual has been harmed.
- Commission instigated complaints could play a part. Commission complaints could be especially helpful in circumstances in which information is publicly available regarding discrimination (for example, news reports) but

no complaint is received. Commission complaints may also be useful where, during the investigation of an individual complaint, evidence of wider systemic discrimination comes to light.⁷

- Ensuring that the complaint is well drafted can be important. The Mohammed study concluded that race complaints were inappropriately drafted more frequently than complaints on some other grounds because of factors such as limited fluency in English.⁸ In this regard, it may be useful to monitor the Commission’s “self-draft” policy to ensure that it maintains the quality of complaints.⁹
- Recognizing the intersectionality of race discrimination with other grounds also can be useful. The Commission’s Discussion Paper, *An Intersectional Approach to Discrimination*, shows that the Commission has recognized the value of an intersectional approach.¹⁰

Screening of Complaints

Because complaints of race discrimination often involve subtle and hidden sources of discrimination, there is a danger that a disproportionate number will be screened out prior to a full investigation. I recognize that screening is needed, but such screening should take account of the fact that further investigation may reveal evidence that would support a complaint that on its own seems weak:

- It may be useful to adopt a presumption against screening out complaints of race discrimination prior to an investigation to take account of the fact that many complaints of race discrimination involve subtle discrimination that may not be apparent without an investigation.
- In assessing a complaint, it may be useful to consider carefully what proactive steps could be taken during a future investigation that might reveal discrimination, to avoid a focus limited to the complaint form itself (or even to the complaint and the response alone).
- Consideration of the past record of the respondent with regard to race discrimination (or discrimination in general) may also be relevant to the screening process. If the complaint, on its face, seems borderline but there have been other similar complaints in the past, further investigation may be warranted.

Mediation

I have no specific suggestions regarding the mediation process other than to try to guard against power imbalances in the process. Also, if there are indications that a respondent is willing to offer a generous settlement to a complainant with a strong case in order to avoid systemic change, the Commission might consider a separate complaint regarding the systemic aspects of the situation.

There is some controversy about mediation as part of the human rights process. Some critics question the compatibility of the process with the public interest obligations of human rights commissions.¹¹ On the other hand, mediation can have positive benefits to the parties and can help reduce the backlog problem. It also may sometimes serve public interest concerns in a way that would be difficult to achieve at a hearing.¹²

Investigations

One key to a fair and effective investigation is to avoid any unconscious tendency to apply a higher standard of

proof to complaints of race discrimination than to other grounds. A second goal should be to tailor investigative techniques to the particular challenges of race complaints. Some more explicit strategies are listed here. Many of these strategies also apply to other stages of assessing a complaint (for example, intake and consideration whether to refer the complaint for hearing):

- Perhaps the best strategy for avoiding the application of a higher standard of proof is to consciously take account of that risk and to ask oneself if the appropriate standard is being applied. A second strategy is to avoid the assumption that race discrimination is an aberration in our society rather than a common part, whether intended or not, of ordinary operations.¹³ Widespread systemic discrimination based on race is the most convincing explanation for the patterns of inequality that exist. Unfortunately, such inequality is far from rare, and that fact should be considered.
- Because race complaints are often subtle and hidden, a more proactive investigation plan than usual may be appropriate. Though I have no direct knowledge of the investigation plans used by the OHRC, I am aware that in other jurisdictions, there is sometimes a tendency to limit the investigation to the specific allegations made in the complaint (and responses in the response), and to interview only the witnesses proposed by the parties. Such a strategy may exclude other evidence of broader systemic barriers.
- It may be useful for the investigator to collect, where possible, statistical information about the composition of the workforce within the organization and to try to identify policies of the organization that may constitute barriers to racialized groups, in addition to investigating the specific instances alleged in the complaint.
- It may also be useful to consider “similar fact” evidence. In other words, the existence of a pattern of similar discrimination against persons other than the complainant may be relevant to the investigation.
- Respondents sometimes rebut allegations of discrimination by citing the fact that they knew the race of the complainant when he or she was hired, or that the organization’s workforce includes other racialized groups. In my opinion, such evidence should be treated as having little or no weight. To draw conclusions based on the presence of other racialized groups in the workforce wrongly assumes that prejudice either applies to all such groups or to none. Even the presence of members of the same group may not be of much weight if it is influenced by intersectionality of grounds or by job segregation.
- In cases alleging ongoing discrimination, there may be a tendency to focus on the most recent incidents, to the exclusion of other earlier incidents.¹⁴ Doing so may fail to fully assess the cumulative effect of a pattern of discrimination.
- When a response is based on allegations such as the “poor attitude” or work record of the complainant, one should note the danger of relying on vague and subjective evidence. One should also consider the possibility that the behaviour of the complainant was a reasonable reaction to past discrimination.
- It is useful to keep in mind that a complaint is established if a discriminatory factor was one of several reasons for

making a decision about the complainant, even if the other factors would, in the absence of the discriminatory factor, have provided justification for the decision. Human rights legislation should protect all persons, not just those with a perfect performance record.¹⁵

Commission Consideration of Complaints

I have no specific options to raise concerning this stage of the process. However, many of the items listed with respect to investigations (e.g. the unconscious tendency to apply a higher standard of proof to race complaints) may also be a risk at this stage.

Hearings

I cannot consider hearings in detail here. My one comment is that it would be useful to argue for a body of law that takes account of the prevalence of race discrimination and the special challenges of proving such discrimination. An appropriate standard of proof is key. Recognition of the legitimacy of statistical evidence and similar fact evidence would also be useful.

Endnotes

¹ See, e.g., Ana Mohammed, *Report on the Investigation of Race Complaints at the B.C. Human Rights Commission*, (2000) unpublished report; Errol Mendes, ed. *Complaint and Redress Mechanisms Relating to Racial Discrimination in Canada and Abroad* (Ottawa: Human Rights Research and Education Centre, 1994); Donna Young, *The Handling of Race Discrimination Complaints at the Ontario Human Rights Commission* (Toronto: unpublished paper for Commission, 1992).

² Ian Mackenzie, “Racial Harassment in the Workplace: Evolving Approaches” (1995) 3 C.L.E.L.J. 287, at 291.

³ *Ontario Human Rights Commission v. Simpsons-Sears* [1985] 2 S.C.R. 536.

⁴ See Mackenzie, above note 4 at 297 citing a tendency to focus on intent or malice.

⁵ Mohammed, above note 1 at 26.

⁶ Mohammed, above note 1 at 25, recommends this step.

⁷ It is possible that respondents would object to such a policy, but I do not think that it is unfair to use the results of one complaint as the basis for filing a broader complaint.

⁸ Mohammed, above note 1 at 17.

⁹ News Release, Commission to Implement New Self-draft Complaint Process, Sept. 29, 2004, online: http://www.ohrc.on.ca/English/news/e_pr_2004-complaint-process.shtml, accessed Nov. 1, 2004

¹⁰ Online: <http://www.ohrc.on.ca/English/consultations/intersectionality-discussion-paper.shtml>, accessed Nov. 1, 2004.

¹¹ See Philip Bryden and William Black, “Mediation as a Tool for Resolving Human Rights Disputes: An Evaluation of the B.C. Human Rights Commission’s Early Mediation Project”, (2004) 37 U.B.C. L. Rev. 73 at 86-91 discussing the different views about this issue.

¹² Interview with members of the B.C. Human Rights Tribunal, Aug. 31, 2004, in which it was said that mediators were sometimes able to achieve agreement on systemic changes during mediation that would have been difficult to achieve as a result of a Tribunal order after a hearing.

¹³ See Frances Henry and Carol Tator, “Myths and Realities of Racism in Canada” in Beinvenue and R. Goldstein, *Ethnic Groups in Canada* (Toronto: Butterworths, 1985) 321, at 328; Constance Backhouse, *Colour-Coded, A Legal History of Racism in Canada 1900-1950* (Toronto: Osgoode Society for Canadian Legal History, 1999) at 15; Young, above note 1 at 6-10.

¹⁴ Mohammed found such a tendency in the files she assessed; above note 1 at 18. I have no information about whether this applies to O.H.R.C. investigations.

¹⁵ Mohammed, *ibid.* refers, at 20-21, to the “Squeaky Clean Complainant Syndrome.”

Surfacing Racism in the Workplace:

Qualitative and Quantitative Evidence of Systemic Discrimination

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ABSTRACT

Few complaints of systemic racial discrimination in employment have been heard and substantiated by human rights tribunals and boards of inquiry, in part because of the challenge of gathering persuasive evidence. A three-dimensional diagnostic framework is proposed, highlighting numerical representation and distribution, employment systems, and organizational culture. For each dimension, examples of types of qualitative and/or quantitative evidence are suggested, using research approaches borrowed from the social sciences, employment equity and pay equity.

The Canadian human rights community is grappling with the need for effective approaches to challenging racism that is institutionalized within our workplaces. Few race-based employment-related complaints are referred to tribunals, and of those, few have addressed systemic discrimination and/or entailed systemic remedies. Our study of 135 cases concerning complaints of racial discrimination in employment heard by boards of inquiry or tribunals from 1980 through 1998 across Canada found that less than half of decisions favoured the complainant. Race complaints are said to be difficult to prove because evidence of direct discrimination is rarely present, forcing reliance on circumstantial evidence; clearly this situation characterizes systemic complaints.

Most race-based cases dealt with by human rights commissions are individual complaints that, if substantiated, result in individualized remedies such as compensation for lost pay or small monetary awards for pain and humiliation. Yet individual stories are situated in an organizational context and suggest a need for a systemic analysis of the social and cultural environment of the workplace in which these events occurred. How widespread was the pattern of racism, over what length of time, and what forms did it take? What policies, practices and behaviours encouraged, permitted and condoned racism? How did the workplace culture encourage and validate the expression of racist assumptions and attitudes?

My working definition of systemic or institutional discrimination is that it consists of patterns of behaviour that are part of the social and administrative structures of the workplace, and that create or perpetuate a position of relative disadvantage for some groups and privilege for other groups, or for individuals on account of their group identity. Systemic discrimination is multi-dimensional and may entail separate and cumulative impacts on grounds of race, gender, disability and other identities. Our study of race-based cases found that 80 percent of complainants were men. Assessing systemic discrimination means considering the interacting and cumulative impacts of discrimination on multiple grounds. Some diagnostic approaches may address this issue better than others.

The purpose of the discussion that follows is to introduce conceptual lenses useful in seeing systemic racism, and that may assist in identifying credible evidence of systemic race discrimination in the workplace. Three analytical dimensions of the workplace can be a starting point:

1. *The numerical representation and distribution* of members of racialized minorities;
2. *Employment systems* – the policies and decision making processes and practices that affect all aspects of people's careers in organizations; and
3. *Organizational culture* – patterns of organizational behaviour involving communication, informal social relations, decision-making behaviour, norms, and employers' response to concerns about discrimination and/or harassment.

This three-dimensional framework was developed with employment equity diagnosis and planning in mind. Employment equity entails the analysis of numerical representation and employment systems using approaches that may also be useful in human rights systemic cases. Numbers continue to be the primary criterion for assessing results under employment equity, and the diagnosis of discrimination in organizational culture remains part of the unfinished business of employment equity.

However, the analysis of systemic racism should address all three dimensions of organizational behaviour: systems and culture as well as numbers. Examining numerical representation and distribution alone is insufficient because it deals with symptoms, not causes and mechanisms of systemic racism: but it is an important beginning.

Quantitative Approaches: Numerical Representation and Distribution

An analysis of systemic discrimination generally includes evidence concerning the access of minorities to employment, and once hired, their representation across the vertical ranks and horizontal job categories. Such "stock" data showing a cross-sectional snapshot is accompanied by "flow" data showing minority representation among those hired, promoted and terminated during the time period under study.

Employment equity analysis compares representation and distribution in a workplace with availability of workers in relevant labour markets in order to investigate under-representation. Internal availability data may show whether qualified and interested members of under-represented groups are present in the organization but have not been promoted. External availability data may disclose the presence of qualified persons in labour markets from which the employer might reasonably draw in hiring. In a human rights context, availability analysis demonstrates whether the organization could have made staffing decisions that would produce a more representative workforce, but did not.

The choice of a comparator group is important in establishing a *prima facie* case of adverse impact or systemic discrimination. The comparator group must be relevant to the specific complaint and to the period under study, and should be at an appropriate level of detail. Availability data should report minority representation in the specific labour market from which applicants would be drawn.

An issue arises in specifying a standard for determining when under-representation is serious enough to be deemed evidence of systemic discrimination, unless there are zeroes, or near-zeroes, of minority group members in the category in question. If there is some representation, then it is necessary to present an argument as to why the existing level of representation should be considered discriminatory. In the United States, an 80 percent rule has long been used although this standard has been contested. It suggests that there is *prima facie* evidence of discrimination if the hire or promotion rate of the plaintiff's group is less than 80 percent of the rate for the successful comparison group. The 80 percent rule was used by the Canadian Human Rights Tribunal in *National Capital Alliance on Race Relations (NCARR) v. Canada Health and Welfare* (1997).

There is also an important role for statistical analysis in determining appropriate remedies when systemic discrimination is substantiated. What is the appropriate level of representation to be sought and attained? The answer has generally been based on availability data, as in the systemic cases of *Action Travail des Femmes* (1987) and NCARR (1997). This imposes a conservative standard, since the representation of racialized minorities in comparator groups may itself reflect systemic discrimination.

Delays in the human rights process also introduce bias, as in the NCARR case, in which court-ordered remedies to be implemented by 2003 were based on 1993 data on under-representation.

Data deficiencies often pose constraints in using statistical

evidence. Relevant organizational data may not be available. Since the repeal of the *Ontario Employment Equity Act* in 1995, Ontario employers have not been required to collect such data, and the repeal legislation was interpreted as requiring the destruction of data collected under the Act. There may also be a lack of relevant external availability data, which are typically drawn from the census. Timeliness is an issue, and since data related to race are based on samples, they may not be readily available in sufficient detail, for example, disaggregated to a local labour market or to a particular occupational category.

Employers covered by federal employment equity legislation, who are required to maintain workforce data and make them publicly available, are limited in number. Even if such data are available, revisions to the *federal Employment Equity Act* and the *Canadian Human Rights Act* in 1995 disallowed the use of data collected under the Act as the basis for a human rights complaint. Moreover, the use of statistical evidence as the sole basis for a complaint under the *Canadian Human Rights Act* is not permitted. Prior to these revisions the Canadian Human Rights Commission used these data as a basis for negotiating voluntary agreements with employers that contained significant equity-related pro-

visions. Perhaps it remains for human rights adjudication to clarify circumstances in which workforce data generated under employment equity requirements may be used in human rights proceedings. It seems clear that a systemic complaint based on statistical under-representation alone will not succeed: analyses of employment systems and/or workplace culture are also needed.

Another example of quantitative analysis relevant to systemic cases is found in applications of regression analysis in pay equity contexts and in analyses of employment discrimination. Multiple regression analysis of data on hiring and promotion can help to determine whether under-representation occurs for reasons that are not explained when the effects of seniority, qualifications and other legitimate factors are taken into account. Multiple regression can also

reveal whether salary differences between groups can be substantially accounted for by characteristics such as education or seniority, or whether a salary gap remains that is not explained. The gap may be attributed to discrimination, provided that the job-related factors expected to determine salary have been included in the analysis. This kind of analysis uses the organization's own compensation data without the need for external comparative data. Multiple regression analysis may assist in identifying discrimination on more than one ground, for example both gender and race. However a lack of data on the racial identity of the workforce may be an impediment.

Since the mid-seventies there has been a substantial increase in the complexity and rigour of statistical evidence and expertise used in employment discrimination cases. Yet it would be unfortunate to refrain from pursuing such cases because of these challenges. It is important to creatively exploit the possibilities for using statistical evidence when it is available, even under less than ideal conditions, and to seek to advance case law by pursuing systemic complaints.

Identifying Systemic Racism in Employment Systems

Identifying and proving systemic race discrimination in human rights cases entails documenting the job barriers contained in organizational policies and/or practices. The three-step guide to analysis set out in the *Meiorin* decision of the Supreme Court of Canada [*British Columbia Public Service Employee Relations Commission v. BCGSEU*, 1999] now serves as a guide to identifying systemic barriers and their adverse impacts. The NCARR case also provides analyses of how employment policies and practices, both formal and informal, create barriers in hiring, job assignment, promotion and terms and conditions of employment. Evidence in these cases came from the insider knowledge of employment practices provided by advocacy organizations and unions that represented the complainants as well as employees who participated in surveys and interviews.

A review of employment systems, a core requirement of employment equity implementation, depends on the employer to scrutinize its own practices and uncover its own job barriers, in consultation with employees. This approach has the advantage of tapping organizational knowledge and minimizing employers' resistance. But self-monitoring has also contributed to the widespread failure of employers to implement employment equity requirements, as seen in the delays and perfunctory effort identified in compliance audits by the Canadian Human Rights Commission.

Field trials using paired actors have been used in human rights as well as research contexts, such as the well-known 1985 Toronto study by Frances Henry and Effie Ginzberg, to identify direct but covert race discrimination in hiring. Employment testing compares hiring outcomes for minority applicants with outcomes for majority group applicants when

the two groups of testers are given matching qualifications and apply for the same job vacancies. Useful evidence may include interview records and testers' narratives in addition to the success ratios for the two groups. The U.S. Equal Employment Opportunity Commission and the Office of Federal Contract Compliance have authorized use of testing to uncover discrimination.

Although employment testing is not often used in litigation, it can provide evidence that is seen as objective and has persuasive power. It can lend itself to experimental designs involving more than one ground of discrimination, such as both gender and race. Testing could assist in cases where data on under-representation point to the need for evidence of discrimination, or where there have been several

complaints against an employer but evidence adequate for developing a case is lacking. Though the use of testing may be limited to hiring, and to lower-ranking positions, in these contexts testing could be useful. Discrimination in hiring is difficult to substantiate because applicants may not be aware of discrimination against them, or may lack insider information allowing them to challenge it.

The analysis of employment systems and the use of field trials can reveal mechanisms of discrimination by showing how decision-making processes that may appear neutral actually result in adverse impact. However it may be difficult or impossible to gain access to knowledge about how some employment decisions are made, especially for senior level positions, and employees rather than applicants. Insiders who know the organization's actual employment practices may suffer retaliation if they disclose information useful in a human rights context. Human rights cases typically do not have access to the

kind of evidence used in the Texaco case in the United States, where tape recordings captured senior executives making racist comments.

Identifying Systemic Racism in Organizational Culture: Qualitative Approaches

Organizational culture encompasses shared patterns of informal behaviour, such as communication, decision making and social interaction, which are the observable evidence of deeply held and largely unconscious values, assumptions and norms. Prevailing organizational values and norms are socially constructed by dominant groups and typically reflect the standpoint of members who are white, male, heterosexual and able-bodied. In workplaces where whiteness is constructed as normative, informal social behaviour may harass, exclude or marginalize members of racialized minorities and/or Aboriginal people. The culture of an organization or department may render minority group members invisible, create a glass ceiling, or perpetuate a poisoned environment that is intimidating, abusive, hostile, humiliating or offensive. Evidence of discrimination in organizational culture in human rights cases usually

comes from individual testimony and occasionally from corporate documents and employee surveys, as in the NCARR case.

Systemic racial discrimination in organizational culture takes different forms depending upon the groups that are represented. Issues may differ for Aboriginal people, Blacks, and people of Asian and South Asian ancestry, as well as for immigrants as compared with Canadian-born persons, and women as compared with men. With research-based tools to assist in the diagnosis of organizational culture, some of these differences can be identified and examined. Perhaps systematic assessment of organizational culture could provide useful evidence in human rights contexts, and could supplement individual testimony, which may not reveal patterns.

In research designed to develop an assessment tool useful in diagnosing systemic racism in the culture of the workplace, we reviewed employment-related human rights cases to identify specific behaviours that had been found discriminatory on the basis of race. To gain an understanding of everyday discrimination we also conducted focus groups with 106 working people who identified themselves as Black, Aboriginal, South Asian or Asian. Men and women were interviewed in separate focus groups, as were each of the four identity groups, by trained facilitators of similar background. Using an interview protocol, the groups discussed systemic racial discrimination that participants had experienced or observed according to several dimensions of workplace culture, including communication, informal social behaviour, decision making, norms, and employers' response to concerns about racism or sexism.

Analysis of the interviews and cases yielded an inventory of specific behaviours that members of each identity group and gender had identified as discriminatory. These behaviours that had occurred in workplace culture were used as the basis for developing a diagnostic questionnaire that was field-tested on a small scale in a public sector workplace. A statistically significant difference was found between white and racial minority respondents in the degree to which they had observed or experienced racism in their workplace on each of the dimensions of organizational culture.

Perhaps such a diagnostic tool, or at least the methodology used to produce it, might have a place in a human rights context where there are allegations of systemic racism in organizational culture but evidence is difficult to acquire. It might also be used to monitor a workplace over time to identify impacts of remedies or anti-racism interventions.

Individual human rights complaints often refer to racial slurs, jokes or other behaviours that constitute racial harassment, sometimes in combination with sexual harassment. Less frequently, allegations of poisoned environment harassment

are made. Some individual complaints contain descriptions of behaviours that reflect a racist workplace culture as well as adverse impacts of employment systems, and under-representation of racial minorities. Yet often the dots are not connected and an underlying pattern of systemic discrimination is not made explicit. Perhaps if assessment tools helpful in identifying systemic racism and sexism in organizational culture were available, more vigorous and successful efforts could be made to advance systemic complaints.

Conclusions: Using Social Science Approaches in Systemic Discrimination Cases

In pursuing systemic human rights cases alleging race discrimination in employment, a broad and strategic approach encompassing numbers, systems and culture is necessary to advance the case law. Successful pursuit of systemic cases requires that racist patterns of organizational behaviour be brought to the level of awareness of decision-makers and adjudicators so that their existence cannot be denied or illegitimately explained away. Obviously the collection, analysis, interpretation and presentation of information that contributes to a diagnosis of systemic race discrimination need to be rigorous and to employ credible methodologies. The development of diagnostic methods and applications is a work in progress and will evolve as they are tested and revised in the context of human rights cases. Such an evolution presupposes that all parties to the human rights decision-making context – investigators, lawyers, subject matter experts, judicial decision-makers, arbitrators and mediators, advocates for equality-seekers, and others who make the human rights system work, are aware and knowledgeable about the use of methods and concepts borrowed from the social sciences. Training and professional development will be needed to support this.

The spread of knowledge about successful systemic cases beyond human rights specialists to the general public would help to build knowledge about systemic discrimination, as well as understanding and support for the human rights process. Perhaps most important, learning from successful cases would build awareness that systemic discrimination can be identified and addressed in practical ways that improve the workplace for everyone.

Advancing the Ontario Human Rights Commission's Policy and Education Function

Carol Tator

Carol Tator's field of study has been an analysis of racism in Canadian society. She has published widely including co-authoring three books, *The Colour of Democracy: Racism in Canadian Society* (3rd Edition, 2005), *Challenging Racism in the Arts: Case Studies of Controversy and Conflict* (1998), and *Discourses of Discrimination: Racial Bias in the Canadian English-Language Press* (2000). She has taught at York University for over a decade.

ABSTRACT

This paper analyzes the significant barriers that should be considered in the process of developing a policy that addresses the issues of race and racism. These include a deeply entrenched ideology and system of White dominance that ensures a backlash to racial equity policies, programs and practices.

The starting point for the development of a policy on systemic racism must be based on an acknowledgement of the powerful but invisible presence of dominant White racialized ideology that is embedded in organizations, institutions, and systems. If we do not understand the nature of institutions developed out of the belief systems of this racialized society we are more apt to be blindly integrated into them; consistently excluded from them or find ourselves at some point in between, rather than achieve the quality of access, participation and equity it takes to truly transform them (Giroux, 1988; Lee, 1995).

One of the important characteristics of organizations is that they resist change of any kind, but as the overwhelming body of scholarship demonstrates, there is deep resistance to anti-racism approaches to social change (Dei, et al, 2004; Razack, 1998; Bannerji, 2000). The mantras of "I am not a racist"; "she/he is not a racist," "this is not a racist institution," "Canada is not a racist society" are familiar refrains to those who study institutional and systemic racism or work in any area of anti-racism.

Fundamental racial inequality continues to affect the lives of people of colour and Aboriginal peoples in Canada. Racial prejudice and discrimination is systemic in Canadian workplaces. However, it is also manifested in other domains. The racialized assumptions and practices of the print and electronic media marginalize racial minorities by portraying them as invisible and by depicting them as outsiders. Arts and cultural organizations ignore and exclude the creative images, words, and voices of people of colour. Patterns of policing and the attitudes and behaviour of police officers are marked by prejudice and the differential treatment of people of colour, particularly Blacks and Aboriginal peoples. The school and university are sites of struggle and inequity for ethno-racial minority students and staff. The justice system fails to give fair and equal treatment to Aboriginal peoples and people of colour. Eurocentric barriers impair the delivery of accessible and appropriate services by social and health-care agencies. The state, through its legislation and public policies, further reinforces racist ideology and practices (Dei, et al, 2004; Henry, et al, 2000; Bannerji, 2000; Li, 1999).

Racism as a commanding force in this country is constantly challenged and denied by applying the arguments of democratic liberalism. In a society that espouses equality, tolerance, social harmony, and respect for individual rights, the existence of racial prejudice, discrimination, and disadvantage is difficult to acknowledge and therefore remedy. Canadians have a deep attachment to the assumption that in a democratic society individuals are rewarded solely on the basis of their individual merit and that no one group is singled out for discrimination. Consistent with these liberal, democratic values is the assumption that physical differences such as *skin colour* are irrelevant in determining one's status. Therefore, those who experience racial bias or differential treatment are considered somehow responsible for their state of "otherness," resulting in a "blame it on the victim" syndrome.

This conflict between democratic liberalism and the collective racism of the dominant culture creates a dissonance in Canadian society. There is a constant and fundamental moral tension between the everyday experiences of people of colour and Aboriginal peoples and the perceptions of those who have the power to redefine that reality — politicians, bureaucrats, educators, judges, journalists, and the corporate elite. While lip service is paid to the need to ensure equality in a pluralistic society, most Canadian organizations and institutions and the individuals working within them, are far more committed to maintaining existing power relations.

While resistance is generic to all large-scale change initiatives, a major factor of resistance to anti-racism is rooted in the extent to which organizational leaders believe that racial equity is a legitimate force to motivate change. Denial of racism operates as the unseen but ubiquitous force, which ensures that substantive change is deflected and deterred. The following

are some of the challenges in the development of a policy on racism and anti-racism, as well as a discussion of factors that directly impact on the role of the Commission in addressing other areas of activity that are related to protection of the rights of people of colour and First Nations people. It is important to emphasize that these indicators of resistance apply not only to external organizations and institutions but also to the Commission itself.

Individual, institutional, and organizational resistance is most clearly demonstrated by the kind of everyday narratives and discourses that operate within organizational systems and their cultures. Rhetorical strategies are wittingly or unwittingly used to establish, sustain, and reinforce inequalities and oppressive power relations. Institution by institution, the power of Whiteness is established, maintained, and reinforced through a set of racialized discourses that are framed in everyday commonsense notions of “normality.” In this discursive framework minorities are often essentialized, stigmatized and marginalized (Razack, 1998; Dei and Calliste, 2000; Dei et al., 2004). Discourses of dominant or democratic racism include explanations, accounts, rationalizations, justifications, and hidden codes of meaning about the “other.” These discursive tactics serve to mask the reality of how the ideology of Whiteness manifests itself.

Therefore, the need for a clear, concrete and comprehensive vision statement and policy is critical to the success of any anti-racism policy. A vision statement sets out the organization’s goal and binds it and its members to work toward achieving that goal. However, very few of organizations or institutions have explicitly incorporated anti-racism or racial equity in their vision statements or their policies. When an organization consciously omits anti-racism from its agenda, it is a sign of a reactive stance. Even if the organization has progressive programs, the absence of a vision statement shaped by anti-racism and equity principles and goals results in an inadequate framework for the changes required. When an organization responds purely on the basis of political or social pressures, it is often unwilling to link the change process to its mandate. On the other hand, anti-racism as a guiding organizational framework suggests a commitment to examine not only programs and practices but also the ideology motivating those programs and practices. A commitment to anti-racism is a desire on the part of decision-makers and power brokers to act consistently and systematically to challenge and redress racism. Lack of commitment is illustrated in many ways; for example, many organizations embark on anti-racism initiatives only under coercion rather than by design – that is, only when forces either within the organization or outside it demand a response in order for the organization to maintain its credibility.

Often, vision statements are vague, “motherhood” statements of high-sounding principles that are difficult to put into practice. The intent of the organization, that is, to maintain the status quo, is often masked in the vision statement or policy document. In the new millennium organizations have mastered the discourses of multiculturalism and diversity. Phrases such as “We respect diversity,” “We are an equal opportunity employer,” and “Tolerance in our organization is a core value,” become empty promises, no more than symbolic gestures. Multicultural approaches suggest that acquiring “sensitivity” to “cultural differences” is sufficient to combat

racism. Diversity labels cushion the organization by allowing it to hide behind the rationalization that managing diversity is all that is required (Bannerji, 2000). Such a view implies that racism results from diversity, and that it can be managed.

To understand the weaknesses in many race related policies, it is important to begin with a brief discussion of key elements in any anti-racism process of change. Anti-racism is an action-oriented approach to identifying and counteracting the production and reproduction of all forms of racism. It addresses the issues of racism and the interlocking systems of social oppression (Dei and Calliste, 2000; Dei, Karumanchery, and Karumanchery-Luke, 2004). Anti-racism implies a goal of producing an understanding of what racism is and how it can be challenged.

No institution can address the issue of systemic racism without a system of both individual and organizational accountability. A powerful example of the impact of a lack of accountability is identified by Verma and Wente (no date)¹ in the case of *McKinnon v. Ontario (Ontario Ministry of Correctional Service)*. The lack of accountability is reflected in the total absence of management action against the racial discrimination experienced by a correctional officer of Aboriginal descent employed at the Metro Toronto East Detention Centre. In the initial decision in 1998, the Board found that there were several factors contributing to a poisoned work environment and that management at every level failed to seriously investigate allegations of racial discrimination or to take measures to avoid their repetition. Mr. McKinnon was “bullied” by management when he raised the complaints. The complainants were subject to reprisals from other employees with no response from management. Despite the order of the Board to implement action toward systemic change in the Ministry of Corrections, by 2002 it was clear that the Ministry had failed to comply fully with the orders; and the environment of the workplace and organizational continued to remain poisoned. The new orders were based on an acknowledgement by the Board that the redress of institutional racism rests with every level of an institution.²

Anti-racism emphasizes a holistic approach to the development of anti-racist ideologies, goals, policies, and practices. As an organizational response it requires the formation of new organizational structures; the introduction of new cultural norms and value systems; changes in power dynamics; the implementation of new employment systems; substantive changes in services delivered; support for new roles and relationships at all levels of the organization; new patterns and more inclusive styles of leadership and decision-making; and the reallocation of resources. Strategic planning, organizational audits and reviews, monitoring and accountability systems and training are all considered an integral part of the management of anti-racist change.

Of prime importance in the anti-racist institutional process is a commitment to the empowerment of racial minorities both within the organization, institution, and system and outside of these structures (Dei et al., 2004). Policy development and new mission statements are not considered ends in themselves; adequate attention, priority, and resources are given to implementation strategies and programs. Effective monitoring mechanisms are put in place to ensure accountability throughout the organization. Evaluation of the change

effort is an ongoing process. Resistance to change is anticipated, analyzed, and strategies to overcome it are planned.

Racism appears in many guises – constantly mutating into new forms – speaking in different voices, operating using different discursive strategies, codes and expressions, symbols, and images. Therefore, it is important to stress that each manifestation requires different approaches and strategies.

Finally, anti-racism recognizes that no institution operates in isolation from other institutions and that racism in one arena of social life, such as education, will affect others, such as employment; that racism in police forces can be promoted by the media and in turn that the media can be influenced by market forces and government “propaganda.” Thus, the anti-racist approach to systemic racism seeks to encourage and facilitate linkages and partnerships among institutions in order to identify and dismantle racial barriers and racial inequalities. (For more detail on diagnosing and removing institutional racism see Henry et al 2000, Henry and Tator 2005),

In each of the institutional sectors we and other scholars have critically examined (Henry and Tator, 2005), the various forms of racism have been shown to influence the manner in which organizations are structured and services are delivered. The ideology of democratic racism reinforces and reproduces racial inequality in these institutions. Each of the institutions is a discursive space that intersects with the others, and broader societal discourses that function to categorize, inferiorize, marginalize and exclude racialized populations. These systems and structures are not only interconnected but also interlock. The approach taken in this analysis underscores the fact that racialized individuals and communities, often simultaneously, experience individual and collective forms of racism.

There is a cohesiveness of ideologies found in the discourses, unwritten policies, and everyday practices of educators, journalists, human service practitioners, politicians, judges, and other public authorities. The same cohesiveness of beliefs and assumptions about the “others” exist in the private sector workplaces. The discourses of denial, tolerance, equality of opportunity, reverse discrimination, and colour-blindness constantly conflict with the realities of pervasive injustice, inequity, and racial discrimination. These rhetorical strategies create a climate that prevents any kind of effective engagement with racial inequality.

Public Education

One of the most powerful examples of public education initiatives is the recent public inquiry carried out by the Commission on racial profiling. The report, *Paying the Price: The Human Cost of Racial Profiling* is based on more than four hundred personal narratives documenting the nature and impact of racism on the lives of people of colour across Ontario. It was a timely and important process, which functioned to “connect the dots” between the staggering body of evidence of the pervasive and intractable reality of racism, and the lived experience experiences as told through the personal narratives of hundreds of men, women and youth.

There are several important learning outcomes from such an inquiry. First, is that it reinforced the power of personal narratives or counter-hegemonic stories to “break the silence” and, to “bear witness to what is unimagined and unexpressed.” (Ewick and Silbey, 1995: 220). Such personal and collective narratives provide a primary way of uncovering

the myths, assumptions and habits of thinking that make up the commonsense understandings about the role of race and racism in society (Bourdieu, 1999). These narratives create a link between personal experience and broader societal systemic patterns. Thus, the gathering and disseminating of personal accounts of racism also represents a powerful organizing tool in the process of social change. Narratives of social injustice (especially when contested) can expose complex social conflict and ruptures underlying everyday policies and practices of institutions (Oman, 2003: 18).

This leads to the second powerful learning that emerged from the Commission’s study and that is the role and power of dominant discourse to deny, deflect, and silence those who dare to speak out against racism. Indeed, the Commission found out that it is “risky business” to identify that racism exists, except of course for the occasional “bad apple.” Following the release of the report, there was an immediate and sustained attack by numerous White public authorities, disparaging both the Commission’s findings and the process. The central narrative incorporated into these discourses was denial that racial profiling exists. The second rhetorical strategy employed was to dismiss all of the recommendations, as “junk science.” Both these responses are commonly found within White institutional discursive spaces.

Perhaps, one of the unexpected learning outcomes from this inquiry was that the Commission raised the level of its own critical awareness about the nature, extent and impact of systemic racism in Canadian society. Now the Commission must translate this new collective reflexivity into a radical new policy that incorporates daring vision and bold strategies to address racism in both its overt and more insidious systemic manifestations.

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Endnotes

¹ (No 3) (1998), 32 C.H.R.R. D/1 (Ont Bd. Of Inq.) and unreported decision of the Ontario Board of Inquiry, Decision No. 02-022-1M (November 29, 2002).

² Verma and Wente’s paper includes a variety of mechanisms available to employers/managers in order to address and prevent individual, institutional and systemic racism in the workplace (www.cavalluzzo.com/publications).

Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education

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ABSTRACT

This paper explores how increasing tuition fees create barriers for Aboriginal and subordinate racialized group members seeking to pursue legal education in Canada. The history of racial discrimination in legal education in Canada is briefly reviewed to illustrate the roots of these barriers.

In April 2003, two Ontario law schools approved significant increases to their tuition fees, marking a rise from approximately \$2,451 in 1995 to \$16,000 for the 2003-04 at the University of Toronto and from \$3,228 in 1997 to approximately \$8,961 in 2003 at Queen's University. Further, the University of Toronto intends to increase tuition fees until they total \$22,000 and Queen's University has projected to increase its fees to \$12,856 by 2005. Concerns regarding the impact of tuition fees on individuals from historically subordinate communities have been addressed by a number of organizations. For example:

- Statistics Canada data indicates that 38.7% of youth aged 18-21 years from wealthy families attended university compared to 18.8% of youth from poorer families.
- In the Canadian Centre for Policy Alternatives' *Missing Pieces IV* it is suggested that higher tuition fees result in lower participation and that "Researchers at the University of Guelph found that 40% fewer students from low-income families were attending University after tuition fees rose."
- The Canadian Association of University Teachers suggests that, if current trends continue, access to post-secondary education will be increasingly divided along income lines.
- Recent census data indicates that Aboriginal peoples and individuals from subordinate racialized groups tend to fall below the Low-Income Cut Off (LICO) more so than others. The result of this is lowered earnings, leaving them less able to support the educational advancement of their children.

Racial Discrimination in Legal Education: A Brief History

Concerns on the education of subordinate groups have been emerging over a considerable period of time. Discrimination in education is mirrored and reinforced by discrimination in society, e.g. through statutes, social policy, institutional practices or individual and community actions. This has been a continuous part of Canadian history and is critical to any understanding of access to law school. For example, shortly after the end of slavery in 1833 the Nova Scotia *Education Act* of 1836 allowed for the establishment of separate schools for 'Blacks or People of Colour'. In 1842 and 1843, New Brunswick established two statutes explicitly recognizing the existence of Black schools as a means of segregating Black and white students.

In 1850, the Upper Canada Common Schools Act was adopted to provide separate schools for the Black community. In 1870, the Halifax City Council passed a by-law excluding students of African descent from common schools. In 1886, the Province of Ontario amended the *Common Schools Act* and "clarified that schools for 'coloured people' were to be set up only after an application had been made by at least five Black families in the community."

Relations between Canadian government and Aboriginal peoples entered a new phase following the *Indian Act* which entrenched in Canadian law the government's intent to assimilate Aboriginal peoples, making it necessary to eliminate their cultures and customs. In 1894, the Government of Canada amended the *Indian Act*, adding Sections 137, 138 and 139 which not only made attendance at school compulsory but, additionally, spelled out consequences for both parents and children who failed to comply.

Following the completion of the trans-Canada railway, anti-immigrant sentiment, particularly directed toward people of Chinese origin, was pervasive in Canada. In particular, in 1914 the Vancouver City Council adopted a resolution

requiring the removal of Chinese students from public schools because “association of the two races must result in a condition detrimental to the future welfare of our children who have nothing to gain, either mentally or morally, by daily association with Orientals.”

In Ontario, separate schools for Blacks continued until 1891 in Chatham, 1893 in Sandwich, 1907 in Harrow, 1917 in Amherstburg, and 1965 in North Colchester and Essex counties. In 1940, Black children were barred from attending the only public school in Halifax County and, “until 1959 school buses would stop only in white sections of Hammonds Plains. In 1960, there would still be seven formal Black school districts and three additional exclusively Black schools in Nova Scotia.” The repeal of the Ontario and Nova Scotia statutes authorizing racial segregation in education did not occur until the mid-1960s.

In terms of legal education, in *Common Law Legal Education in Canada's Age of Light, Soap and Water* W. Wesley Pue summarizes the ethnocentric and racist values that contributed to the establishment of common law legal education in Canada. Pue describes efforts by the Manitoba Law Society to stop the development of proprietary schools which “(j)udging by U.S.A experience ... would also almost certainly have opened the door to legal careers for much larger numbers of young men (and women?) of working class or minority ethnic background. This prospect would not have been viewed with equanimity by Manitoba’s Anglo élite, who were embedded in a culture which was fiercely pro-British and hierarchical, nativist, even xenophobic”. He also notes “... the most vigorous proponents of what might be called a ‘cultural’ agenda in legal education were prominent, energetic, busy, successful practicing lawyers. All were either born into the Anglo élite or thoroughly integrated into it. All were active in matters in law society governance or in the activities of bar associations.”

Mirroring Pue’s comments, in *The Law Society of Upper Canada and Ontario’s Lawyers: 1797-1997*, Christopher Moore notes that “[t]he vast majority of nineteenth century Ontario lawyers were English, Scots, or Irish in origin and Protestant in religion, and they tended to take in students of their own class and kind ...”. It was not until 1855 that Robert Sutherland was called to the Bar in Ontario, becoming the first Black Canadian lawyer. This was followed by Delos Rogest Davis in 1885 whose call to the Bar required a special act of the Ontario Legislature to which the Law Society of Upper Canada protested. While information on other Blacks called to the practice of law is difficult to ascertain, it appears certain that the effects of discrimination in education combined with racism in society generally limited the number of Blacks who entered into law school and, further, those who did faced

barriers in undertaking legal education, particularly in attracting articling positions.

Chinese, Japanese, South Asian and Aboriginal peoples were prohibited from becoming members of the Law Society of British Columbia until 1947, and 1948 for people of Japanese descent. Further, until it was amended in 1951, the *Indian Act* required Aboriginal peoples to relinquish their status if they were to pursue higher education. This prevented many Aboriginal peoples from entering university and considering legal education.

The Era of Change

After the 1948 United Nations Declaration of Human Rights, human rights statutes became more established in

Canada within both federal and provincial governments. As part of this process of change, a series of statutes and policies were then enacted to promote recognition of diverse groups and a more inclusive polity.

Following an attempt to further entrench the assimilation of Aboriginal peoples through the 1969 *White Paper on Indian Affairs*, in 1973 the Federal government officially endorsed the National Indian Brotherhood’s (predecessor to the Assembly of First Nations) *Indian Control of Indian Education*. This policy document called for Native control over education and that “Band councils should be given total or partial authority for education on reserves, depending on local circumstances, and always with provisions for eventual complete autonomy, analogous to that of a provincial board *vis-a-vis* a provincial Department of Education.”

Throughout the 1980s, most school boards in Ontario and in urban centres across Canada established multicultural and race relations policies and programs. In 1988, the Ontario Government established a *Race and Ethnocultural Relations Policy* and mandated that all school boards adopt such a policy and program.

In 1994, following a period of intense lobbying by educators and community activists, the Ontario Ministry of Education established the Anti-Racism and Ethnocultural Equity Unit to provide advice and guidance to school boards to enable them to develop similar policies and programs (later repealed). Colleges, universities and law schools were moving in the same direction and examples of such approaches are evident in law schools at York, University of Toronto, Queen’s, Ottawa, Windsor, and Western Ontario.

Despite these changes, there has been little research on the content or effects of these policies. More needs to be known about how racism affects education and the impact of antiracism policies and programs. Further, evidence of discrimination and disadvantage persist. Across Canada, particularly in Toronto, the country’s most densely populated as well as racially and culturally diverse urban centre, the

In 1994, following a period of intense lobbying by educators and community activists, the Ontario Ministry of Education established the Anti-Racism and Ethnocultural Equity Unit to provide advice and guidance to school boards to enable them to develop similar policies and programs (later repealed).

failure of mainstream educational institutions to respond effectively to non-dominant groups has been repeatedly discussed and analyzed.

As if capturing evidence of this resistance, in *Rethinking 'African-Centred' Schools* George Dei writes, "I need not reiterate here the reasons behind the push for such [Afrocentric] schools. In fact, one only has to read the countless research reports, academic studies and anecdotal accounts on the education of African youths in Euro-American/Canadian contexts to understand the frustrations that had led to the cry for African-centred schools."

Dei further reveals that "(i)n a 1991 high school survey by one board of education in Toronto, it was revealed that African-Canadian youth were not achieving as well as other students in terms of credit accumulation. It was shown that 36% of all Black students were 'at risk' of dropping out because of failure to accumulate sufficient credits to graduate within six years. This compared with 26% for whites and 18% for Asians ... This survey also confirmed '... that 45% of Black high school students were enrolled in Basic and General level, as compared to 28% of the entire student body...' {and} the board of education's study of high school students enrolled in 1987 showed that by 1991, 42% of Black students (compared to the overall student population of 33%) dropped out of school" (1996: 33-34).

In *Post-Colonial MikMaq Languages Development Strategies*, the plight of Aboriginal peoples is summarized by Marie Batiste:

Education has not been benign or beneficial for Indians. Rather through ill-conceived federal government policies and plans, Aboriginal youth were subjected to a combination of unquestionably powerful but profoundly debilitating forces of assimilation and colonization. Through various systems of boarding schools and educational institutions, the Aboriginal world view and the people who held them were ignored, while the nurturing and health of the nation were disrupted.

Although educated by Catholic and Protestant clerics in almost all the schools, Aboriginal children were subjected to persistent violence, powerlessness, exploitation and cultural imperialism only to become marginalized in both their own communities and in urban areas. The outcome was the gradual loss to their aboriginal world views, languages, cultures and the creation of widespread social and psychological upheaval in Aboriginal communities.

This matter is compounded when considering the social significance of attaining a legal education. On the importance

of subordinate groups entering into the study of law, equity and diversity issues are well articulated in the University of Windsor study on law school admissions criteria. In introducing the report *The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law*, the authors write:

By necessity, the nature, quality, and effectiveness of the legal system are greatly dependent on the types of individuals who receive a formal legal education. As lawyers, judges, educators, administrators, and legislators, legally trained persons control or materially affect the majority of decision-making and law-enforcement processes in society. Law school graduates continue to develop careers

in many non-traditional occupations requiring legal expertise; this broadens the profession's sphere of influence. Thus, the legal system, intended for the benefit of all members of society, reflects in some measure the cultural, social, and economic views of the legally trained. To the extent that the legally trained influence the organs of government, access to formal legal education can also be viewed as an important determinant of the political, social, and economic reality. Yet, legal education has traditionally been accessible only to majority groups in Canada. Therefore, minority perspectives concerning our societal choices may have had only limited influence.

There have been numerous concerns raised about the LSAT, what it measures, its relevance and effectiveness in determining success in legal education. The Canadian Bar Association's report *Racial Equality in the Canadian Legal Profession* cites several arguments and statistical data on this matter.

Regrettably, barriers to legal education for these very groups continue to exist. Despite the models discussed earlier regarding law schools implementation of program initiatives promoting equity and diversity, it is apparent that there are several areas requiring attention in legal education. There have been numerous concerns raised about the LSAT, what it measures, its relevance and effectiveness in determining success in legal education. The Canadian Bar Association's report *Racial Equality in the Canadian Legal Profession* cites several arguments and statistical data on this matter.

University of Toronto Faculty of Law

One area where the potential impact of increasing tuition fees has been explored is by the University of Toronto. As the basis for increasing its law school tuition fees to \$22,000, the University initiated a study to demonstrate that there would be little, if any, negative impact. This study was completed by the University's Provost and released to its Board of Governors. The points noted immediately above are critical to examining the U. of T. Provost's study on accessibility. However, the Provost's study ignores the well-known history of disparate outcomes in legal practice,

including articling, for specific groups. This masks deeply entrenched societal and systemic inequalities and evades a critical point on the likely deleterious impact increasing tuition fees will have.

The Provost's report makes it difficult to assess whether or not the offering of financial aid will ensure accessibility and whether or not potential students are willing to invest in an educational career at such a high cost when their career opportunities may be limited. While the report contains some data on the financial needs of 'Blacks' and Aboriginals, the study itself identifies that the numbers for these groups are quite small and, as such, any statistical inference is unreliable. The fact that the number for each group is actually very small and statistically unreliable should mean something about current accessibility.

In terms of students from families with low incomes, the report indicates that the numbers are small in the low-income areas with 17.3% of students compared to 33% of students with family incomes above \$90,000 and 33.5% of students who have not reported their family income. Given that individuals from this latter group do not seek financial assistance, it is likely safe to assume that these individuals are financially well-off. As such, this indicates that over 66% of students in the Faculty of Law come from families with incomes above \$90,000 per year as compared to 17% with incomes less than \$60,000 per year. This data supports the concerns expressed earlier, specifically that 38.7% of youth aged 18-21 from wealthy families attend university compared to 18.8% of youth from poorer families and, further, that if such trends in increasing tuition fees continue, post-secondary education will be increasingly divided along class lines. Given the intersections between race and family incomes, these divisions will likely be along the lines of race as well.

While the Provost's study cites the importance of providing financial aid to ensure that educational opportunities in the Faculty of Law are accessible, there is no data in the report which identifies the level of financial aid that will be needed to support students who cannot afford the increased tuition; nor is there any comment on the proposed targets for how these funds will be attracted and secured.

Conclusion

The issue of accessibility is now being studied by law schools across Ontario with a report to be released soon. As with the University of Toronto, this cannot be discussed in a vacuum. There are societal pressures and realities, which, along with increased tuition fees, may have the cumulative effect of impeding diversity within legal education and within the legal profession.

Recent studies of the legal profession in Canada indicate that it is predominantly white and male with only 5% of individuals from subordinate racialized groups and 0.8% of Aboriginal peoples. There is also evidence in the public

domain on the barriers individuals from these groups face in attracting lucrative articling and associate positions as well as becoming partners and receiving comparable remuneration after lengthy years in practice.¹ In some cases, a significant number of students have complained about the inaccessibility of lucrative positions in large law firms while others have questioned the rate of call back based on Aboriginal and racial characteristics. These concerns are also supported in a recent article by Michael St. Patrick Baxter *Black Bay Street Lawyers and Other Oxymora* which provides evidence on the barriers faced by African Canadian lawyers in securing opportunities in large firms. Further, there is evidence of significant earning differentials between white lawyers and those

from subordinate racialized groups. For example:

- White lawyers between the ages of 25-29 earn approximately \$6,000 per year more than lawyers from subordinate racialized groups (\$28,000 v. \$33,900). This gap increases to approximately \$33,000 for lawyers between the ages of 35-39 (\$58,000 v. \$91,200) and to \$40,000 for lawyers between the ages of 40-49 (\$70,000 v. \$110,000); and
- Wage differentials between white lawyers and those from subordinate racialized communities are quite dramatic in the peak earning years of 50-54 with whites earning \$70,000 more.

Recent studies of the legal profession in Canada indicate that it is predominantly white and male with only 5% of individuals from subordinate racialized groups and 0.8% of Aboriginal peoples.

Given that the number of individuals from Aboriginal and subordinate racialized groups studying law is very low and, at the same time, they face barriers to articling and limited employment opportunities, finances for these individuals to pay down increasingly high student debts appears to be an insurmountable obstacle. These current factors rest upon a history of racial discrimination that was both overt, active and continued over a long period of time. The fact that increasing tuition fees may erect barriers to Aboriginal peoples and individuals from subordinate racialized groups from entering the study of law simply resurrects the old outcomes – a legal profession that is overwhelmingly white.

Endnote

¹ See Concerns Regarding Discrimination in Attracting Articling Positions, August 2000, and Articling Student Feedback Report 2001.

Systemic Barriers to Racially Representative Law Enforcement Agencies

Fo Niemi

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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 employment³:

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.

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

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.

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.

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Stereotyping and its consequence for racial minority youth

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ABSTRACT

With reference to media reports and studies of racial minority youth in areas of justice and education, this paper explores how stereotyping/racial profiling, as an aspect of racialization, structures the experiences of racial minority youth. The resulting differential treatment limits the youth's opportunities and often operates to their detriment.

In 'completely clearing' a young Black man of a drug charge recently, an Ontario Superior Court judge, Molloy, ruled that the two Toronto police officers had no reasonable grounds for stopping the accused in the first place. The judge wrote that the officers singled out the accused and decided to search his car "because he was a Black male driving an expensive Mercedes" (*The Globe and Mail*, September 17, 2004, p. A1). This was yet another case in which an Ontario judge concluded that race played a role in the police action toward the accused. In 2003, in a case involving an 18 year old Black male, the Ontario Court of Appeal ruled that when sentencing a defendant, it is appropriate for courts to take into account the role that systemic racism might have played in the defendant's action. Judge Rosenberg noted, "Systemic racism and the background factors faced by black youths in Toronto are important matters" (*The Globe and Mail*, February 13, 2003, p. A1). In citing the relationship of individuals' actions and systemic racism, as exemplified through racial profiling/stereotyping, these judges underscore the fact that racism is not merely a case in which police officers independently come to perceive Black young men as likely trouble-makers and law breakers hence the need for them to be targeted by the police (James, 1998; Wortley & Tanner, 2004); but that these perceptions are informed by a system of policies and corresponding practices which are to be found within institutions. In other words, racism is not simply a reflection of individuals' negative attitudes toward racial minority members of society (i.e. individual racism), but also a reflection of how the policies, regulations, programs, values, norms, sanctions and practices of institutions within society inform and structure individuals' attitudes and practices towards those considered subordinate or inferior (i.e. systemic racism).

For racial minority members, this subordination is evident in differential treatment as a result of racial profiling (or stereotyping). The Ontario Human Rights Commission (2003, p. 6) defines racial profiling as

any action undertaken for reasons of safety, security, or public protection that relies on stereotypes about race, colour, ethnicity, ancestry, religion, or place of origin rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment. The Commission has noted that profiling can occur because of a combination of the above factors and that age and/or gender can influence the experience of profiling.

In this paper, I explore how stereotyping or racial profiling informs, structures, limits and motivates racial minority youth in their educational, social and cultural pursuits. I reference my experience as an educator and educational researcher, to show how stereotyping operates to limit the performances, opportunities and achievements of racial minority youth. I examine how they use their understanding of the limits that stereotyping places on them to navigate and confront the structures in order to ensure participation in school and society in terms that address their interests, location and aspirations. Finally, I discuss the concept of stereotyping and minority youth's experiences with stereotyping in the judicial system and schools.

Stereotyping and Canada's multicultural discourse

For this discussion, stereotypes are taken to mean simplistic and uncritical judgements of people based on such characteristics as gender, age, race, ethnicity and skin colour ascribing to them attributes learnt early in life from society (Paul, 1998). As such, there is a tendency to believe in the 'correctness' or 'truth' of the judgements with disregard for evidence to the contrary. Stereotypes not only serve to categorize, organize and simplify the amount of complex information that we

receive, they also operate to essentialize people – attributing sameness to them, as well as evaluating and generalizing about them as a group.

In Canada, stereotyping is practised in a context informed by a multicultural discourse that tends to mask the fact that race, ethnicity, language, accent, religion and other demographic factors are used to ascribe particular cultural practices to various members of society. Such practices are not viewed as stereotyping, but as a reflection of the principles of multiculturalism at work. But as critics point out, multicultural discourses contribute to the ways in which “ethnic Other Canadians” (those who are not British or French) are categorized and homogenized with likeness or sameness based on identifiable characteristics, “foreign” heritages, and static cultural values and practices (James, *in press*). In such a context, stereotyping, rooted as it is in the hegemonic ideology and discourses of racism, is likely to find support as it operates at the individual and structural levels in the racialization of individuals. In some cases, racialization takes the form of what some people consider to be “positive” stereotypes. What is wrong, they might ask, with the stereotype of, for example, an ethno-racial group as good scholars, or as good athletes? Pon (2000) points out that the seductive nature of such “positive stereotypes” has the effect of masking the racism and structural inequalities that exist in society, and as such “is often quite harmful.”

Racial profiling/stereotyping and the judicial system

Let us return to the case of stereotyping or racial profiling in the policing of people of colour. The above examples demonstrate that courts (at least some judges) accept that racial profiling goes on among police officers. Nevertheless, some people argue that the attitudes and actions of police officers are not based on race, but on police officers’ skills, training, knowledge and experiences whereby they are able to “recognize” and “know” potential criminals and lawbreakers. But the fact that the targets of police gaze and surveillance tend to be people of colour and in many cases Blacks, is, to some extent, evidence of racial profiling (James, 1998; Wortley & Tanner, 2004), for as Comack (1999) indicates, not even the law and by extension its enforcers are “impartial, neutral, and objective” (p. 56).

When I studied the experiences of Black youth’s encounters with police on the streets – where they were frequently under suspicion, or perceived as “up to no good” – a number of respondents, particularly males, reported that they were often stopped, questioned, searched and harassed by police and security officers; and they were often perceived to be working class, immigrants and/or refugees. They said that it was not their clothes or hairstyles that contributed to this treatment by police; rather, as one respondent put it, “It’s your colour, your colour, and it’s your colour” (James, 1998, p. 166).

Schooling, stereotyping and the limits to educational opportunities

Studies of the experiences of marginalized students – i.e. immigrants and racial and ethnic minorities – within the Ontario school system and Toronto in particular, indicate that students find the school system oppressive, specifically with regard to stereotyping by educators (Dei et al, 1997). Consequently, students’ interactions in schools reflect their recognition of, and resistance to, the oppressive ethos of the system. With this in mind, I talked with a group of six new teachers to explore their experiences with high school students in downtown Toronto (James, 2002, p. 12-14).

These teachers reported that students in the racially, ethnically and linguistically diverse “inner city” schools in which they taught, were often described by educators or labelled as at risk, low achievers, learning disabled, drop-outs, disruptive, trouble-makers, problem-students, rebellious, and individuals who are likely to get into illegal activities. Students were also described as coming from “working poor” families who *“lived in government housing.”* Some students were thought to be *“growing up in immigrant, blue collar and/or single-parent households on special assistance.”* In a few cases, the schools that the students attended were located in what were described as white and middle class neighbourhoods, with tree-lined streets and expensive homes. This contributed to schools policing the students to protect the neighbourhood. The act of policing involved police officers, security guards, hall monitors and teachers patrolling the school and its grounds. One

reading of educators’ practices in these schools is that they were more concerned with the reputation of the schools and about being safe and free of gangs and drugs. In this regard, disruptive students were disciplined and managed, not merely to protect teachers and students from physical harm, but to protect students from the social influence of those labelled as potential law-breakers.

The oppressive school contexts elicited a number of paradoxical responses from students who, while to an extent conforming, simultaneously resisted the hegemonic discourses which academically, socially and culturally constructed them as, among other things, low achievers and trouble-makers. In conforming, they continued to be registered as students but would attend school and classes as they wished, and if interested in the course material, would participate in classes and complete assignments. At the same time, they demonstrated their resistance by their high rate of absenteeism, lateness, talking (including gestures), walking out of classes whenever they chose, and congregating in particular areas of the school. Many students also conformed by wearing their uniforms (if uniforms were involved), but in communicating their resistance to the oppressive school space, would engage in practices such as wearing jewellery, caps and bandanas, decorate their

school uniforms with accessories, and congregate in defiance of the rules.

Clearly, these marginalized students negotiated the tension-ridden space of schools and classrooms, conscious of the power relationships between themselves, their teachers, administrators and other dominant peer group members. In this regard, they actively used the real and imagined spaces of schools and classrooms to resist, confront, antagonize and contest the school authorities and their constructed labels or images, hence making these spaces self-validating, relevant, safe, different, unifying and empowering. The irony here is that teachers used the actions of these students to support their stereotyping. And given the ways in which zero tolerance is practised, these actions become the basis for suspensions and/or expulsions from schools; rather than the starting point for understanding and addressing the students' needs, concerns and interests.

The limitations and absurdity of "positive" stereotypes

In discussing his experience with the "model minority" stereotype, Pon writes that during high school his English teachers often queried whether or not he had done his essay assignments himself; and despite his assuring them that it was his work, they seemed unconvinced. Nevertheless, because of his teachers' continuing suspicions, he never received grades higher than an A-. He continues:

"It took me years beyond high school to figure out that my essay-writing skills, which were strong for my grade level, raptured the dominant stereotypes of Chinese students, particularly the belief that we are all math whizzes. Stereotyping particular groups such as Chinese places limits on what is expected of them and inhibits an understanding of the complex differences among the members of the group. Thus, the stereotypes my English teachers held of Chinese people resulted in an expectation that I was supposed to be good at math, not English" (Pon, 2000, p. 224).

In the case of Black youth, athletics is perceived to be a positive force in their lives: keeping them in school, learning needed skills, and as a mechanism for upward social mobility. The accompanying view about the athletic abilities, talent and skills of Blacks are supported by coaches and educators, as well as by media images of successful Black student athletes (James, in press). Kai James (2000, p.54) writes, "Gym teachers are perhaps the most overt in their interpretations of the stereotypes. I remember the track coach coming into my grade nine class and asking all the Black students if they would be participating in the track meet." And drawing attention to the different ways in which students were treated by teachers, James, who was about six feet then, goes on to write that "I was recruited by a coach who had no knowledge of my athletic ability or my interests. At the same time, an Asian friend was being encouraged by the math department to write the math contests." In another instance involving a tall Black student who was a friend, he added: "On the first day of school his social studies teacher, a complete stranger to the student greeted him [saying]: 'I hope you are not one of those basketball players that's gonna show up for class once a week, because if you do you can just leave right now.'"

The experiences of athletically stereotyped Black students indicate that while there is little evidence to support the claims of their innate superior athletic abilities and skills, the stereotypes persist. Educators continue to encourage them toward sports, thinking that in doing so they are supporting them in their schooling; but in fact, they are failing to equally support them in their academic interests and aspirations. In some cases, not only do Black students come to believe or internalize the stereotypes, they give priorities to their athletic roles at the expense of their academic performance and educational achievements.

Conclusion

Stereotyping is a major issue that young people confront. The evidence indicates that because of stereotyping, assumptions and expectations are made of individuals sometimes resulting in false charges, differential treatment, and conflicts. Stereotyping influences the ways in which young people are dealt with by authority figures and adults in general. In a context of racism, stereotyping/racial profiling and discrimination thrive and limit the opportunities and possibilities of young racial minority people. It is incumbent on our institutions to pay attention to the conditions – the policies, practices, programs and individuals carrying out these policies – which perpetuate stereotyping, and in so doing build conditions that facilitate respect and appreciation for the human rights of our young minority people.

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Racial Discrimination and Mental Health: Racialized and Aboriginal Communities

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ABSTRACT

Kwasi Kafele indicates that various social and economic impacts of racism have a negative impact on mental health prospects for racialized groups and Aboriginal communities. In addition, he reviews how racism affects the mental health system and severely impedes the availability of appropriate mental health services for these populations.

Many studies confirm that one of the cumulative outcomes of social inequities, systemic racial discrimination, sexism, poverty and marginalization of Aboriginal peoples and members of racialized groups (including immigrants and refugees) is the debilitating impact on the mental health prospects for members of these communities, including the multidimensional impact of intersections of poverty, race, gender and sexual orientation (*Across Boundaries: 1997; Surgeon General's Report: 1999; Report of the Canadian Task Force, 1988; Report of the Royal Commission on Aboriginal People: 1999; Krieger: 1991*).

Poverty and associated conditions such as unemployment, underemployment, low wage jobs, low education and homelessness, are more widespread, increasing and persistent in Canada, when related to race (*Galabuzi: 2001*). Socio-economic factors, such as high rates of poverty, low levels of education, limited employment opportunities, inadequate housing, and deficiencies in sanitation and water quality, also affect a disproportionately high number of Aboriginal people.

According to a number of studies (*Across Boundaries: 1997, Surgeon General's Report: 1999; Cummings: 1993, Fernando: 1991*), some of the specific mental health concerns for members of racialized groups and the Aboriginal community include:

- Higher levels of anxiety, stress and stress-related illness like high blood pressure, heart disease and nervous system problems
- Higher risk of depression and suicide
- Feelings of helplessness, hopelessness, fear, mistrust, despair, alienation and loss of control
- Damaged self-esteem, higher risk of addiction and violence

In addition, Aboriginal peoples specifically suffer from a range of mental health problems that have been well documented (*Royal Commission Report, 1999; Kirmayer, 1994, et al*). Extremely high rates of suicide, alcoholism and substance abuse, violence and demoralization have links to the history of land displacement, oppression, marginalization and social/cultural dislocation that so significantly define much of the Aboriginal reality (*Richardson, 1991; Royal Commission Report, 1999*). Some studies of Aboriginal people who have committed suicide have found that as many as 90% of victims had alcohol in their blood. Brain damage or paranoid psychosis as a result of the chronic use of solvents is reported as a major factor in suicides by youth (*Royal Commission Report, 1999*).

Gaps in Services

Culture, broadly defined as a body of common held world-views, belief systems, values and behaviours, influences many aspects of mental illness and mental health. It has an impact on how clients seek help and communicate, how symptoms get manifested, coping mechanisms and what the roles of family and community supports are. However, a history of racial discrimination, social exclusion, and poverty can combine with mistrust and fear to deter members of racialized groups and Aboriginal communities from accessing services and getting culturally appropriate care.

Although racialized groups and members of Aboriginal communities have mental health needs and issues that are extremely serious and warrant significant attention, few psychiatric services respond specifically with research, clinical support, programming, organizational change, health promotion or community collaboration that indicate cultural competence, understanding or awareness in a systemic manner¹. In a psychiatric system that is still Eurocentric² in values, worldview and practice, it follows that there are systemic challenges at every stage of the system's interaction with people from racialized groups or the Aboriginal community.

Recent conferences on mental health and racialized communities (*Kafele: 2003; Hong Fook: 2000*) as well as a major community-based study (*Building Bridges, Breaking Barriers: 2003*) detail concerns regarding the lack of access, poor culturally appropriate access, services and low commitment to meaningful organizational change within the sector.

Most members of these communities have no knowledge of, or relationships with mainstream mental health services. Few programs provide any *culturally specific clinical support* reflecting specific needs and issues of particular communities. There are few staff from racialized groups in senior, decision-making positions to influence or impact the kind of broad organizational changes needed to make the system more responsive. A diversity report commissioned by Toronto's Centre for Addiction and Mental Health in 2000³ identified racism (against both staff and clients) as one of the most significant diversity challenges at the Centre.

Anecdotal evidence in Ontario indicates that a disproportionately high number of those in our psychiatric forensic system are poor, immigrant men from racialized groups. According to Across Boundaries (1996a), failure to effectively diagnose and treat members of racialized groups and Aboriginal populations can increase health care costs through repeat visits to care facilities and unnecessary hospitalization. Workplace costs, which include low morale, reduced productivity, high staff turnover, time lost at work, and poor public relations, could be increased. This is money that could go to direct services.

Systemic Barriers to Equitable Services

Institutional Issues:

Often the leadership of psychiatric institutions does not fully recognize racism as a systemic problem in organizational culture, human resources, clinical services, research and community partnerships. This is often part of a larger problem: the lack of coherent, comprehensive strategies, plans and resources, which address equity and access as a demonstration of serious commitment. This problem is also reflected in a culture of denial and avoidance. For example, staff complaints against racism and racist abuse by white clients to staff from racialized populations are often cited anecdotally as persistent problems that go largely unaddressed. As well, staff complements at the most senior decision-making levels are usually not representative of the broad diversity of communities.

Access:

According to the study *Building Bridges, Breaking Barriers* (2003), there are many issues, which affect equitable access to

mental health services for members of racialized communities. These include:

- Information only in English and French.
- Few culturally specific outreach initiatives or service promotion to Aboriginal or racialized communities.
- Poor referral relationships with community agencies.
- Problematic physical location
- Lack of awareness of community and community needs and issues by mainstream institutions

These problems not only reinforce and exacerbate negative relationships between institutions and communities, but also create a greater service burden on community-based agencies with limited resources.

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Pathway Problems: Intake, Assessment, Diagnosis

Racial profiling, racist assumptions and stereotyping in psychiatry are often believed to be strong determining factors in intake, assessment and diagnosis and misdiagnosis. Misdiagnosis includes underdiagnosis and overdiagnosis. This can account for the non-delivery of appropriate treatments because of an erroneous diagnostic label (*Fernando, 1991; Wilson 1997; Bui, 2002*). In some instances this leads to a deferred intervention, or in some groups, help-seeking is delayed for unnecessarily long periods. For example, culturally inappropriate instruments used by clinicians at intake and exceedingly high rates of diagnosis for schizophrenia for members of racialized communities are fairly common issues identified by anti-racism mental health advocates.

Treatment Planning and Treatment

While many front-line mental health service providers come from diverse backgrounds, the issue of cultural awareness and sensitivity continues to pose a significant challenge, given the usually limited cross cultural/diversity clinical training experience available, the lack of rigorous cultural competence standards and tools and often poor, uneven relationships with diverse communities. Some examples include:

- Staff not culturally competent or racially aware.
- Treatment services often not culturally relevant/appropriate.
- Counseling, family therapy, occupational therapy very difficult to organize.
- Higher doses of medication.
- More likely to be medicated intra-muscularly

Health Promotion

For anti-racist mental health promotion strategies and initiatives to have value with racialized and Aboriginal

communities they must involve members meaningfully at every stage. Health promotion priorities have to be seen in the context of community development, enhancing resilience and capacity, mental health advocacy, equitable partnerships and local leadership. This has been a particular challenge for most mainstream agencies where racism has not been identified as an important problem, where there are no processes to identify specific mental health issues in different racialized and Aboriginal communities, and where racism is not recognized or validated as a critical determinant of health.

Research

There is an increasing acceptance that mental health research generally should be more inclusive, accountable and relevant. Mental health research should also be more deliberately linked to clinical needs generally and in particular, with those related to racism (*Bui, 2002; Fernando, 2003*). There is a paucity of research on mental health and racism in Canada. Research has some specific challenges including:

- Orientation is generally Euro-centric
- Research focus is often on race, *not* racism in mental health
- Research methodologies are often blind to culture and effects of racism
- Assumptions made that data are “value free” and “objective”
- Racialized groups and Aboriginal Communities have little or no role in identifying issues, framing questions, designing instruments, collaborating meaningfully, transferring knowledge or building capacity

Addressing Serious Gaps in Psychiatric Services

The following are some of the critical issues to be addressed by the mental health system for Aboriginal community and racialized groups:

- Development of a provincial strategy specifically focused on improving the mental health outcomes for racialized and Aboriginal communities
- In mental health institutions, greater emphasis on anti-racist organizational change that is comprehensive (human resources – e.g. equity in hiring, clinical work, partnerships, resource allocation, systems support, public policy), transparent and accountable. This includes aggressive equity hiring practices, which target clinical and management staff from racialized and Aboriginal communities, who are culturally competent;
- Consistent monitoring and assessment of the mental health needs of the most vulnerable in these communities: the poor, women, youth and children and seniors;

- Research that is more respectful, culturally appropriate, equitable, inclusive, participatory (and has members of both racialized communities and Aboriginal populations involved at every stage) and; that builds community capacity, transfers new knowledge and leads specifically to better mental health care for community members;

- Culturally competent clinical care that incorporates:
 - Anti-racist/anti-oppression standards and Clinical Performance Accountabilities
 - The use of cultural brokers to support cultural interpretation and enhance service delivery where language support is an issue;
 - Acceptance of alternative and complementary care as legitimate and appropriate options for clients;

- Services that more fully reflect the needs and wishes of the community;
- Innovative and creative health promotion strategies which reflect the need to address issues like stigma, shame in association with mental illness that affects all racialized groups and the Aboriginal community;
- Access that is informed by the best and most effective partnerships and collaboration with community agencies, organizations and key stakeholders;
- Vigorous sectoral leadership in addressing and challenging racism in psychiatric services, programming, research and public policy development;
- Greater systems advocacy and public policy pressure in addressing the devastating impact of poverty and racism on the mental health of the community;
- Commitment to ensuring that mental health systems integration fully and carefully considers the range of options for engaging racialized and Aboriginal communities.

For anti-racist mental health promotion strategies and initiatives to have value with racialized and Aboriginal communities they must involve members meaningfully at every stage. Health promotion priorities have to be seen in the context of community development, enhancing resilience and capacity, mental health advocacy, equitable partnerships and local leadership. This has been a particular challenge for most mainstream agencies.

- Service provision guidelines should be stringent and clearly articulate expectations related to issues like access and cultural competence in *clinical care*. **Basic Standards of Cultural Competence** should be referenced.
- Strategically, the policy framework might also frame accountability for equitable service delivery

- in the context of patient safety and risk and liability management.
- The framework might also consider how strategic levers in the system could be aligned in order to ensure meaningful accountability and transparency by health institutions in addressing racism in service delivery, research and working with communities. For example, obligations/criteria of health/research funders, augmentation of the accreditation process to include specific anti-racism/equity metrics, alignment with provincial funding guidelines, etc, might be worth considering.
 - Finally, clear guidelines and examples should be identified about what constitutes poor, inequitable care and what excellent care would look like (including best practices models and references) in order to provide clear expectations and references for institutions.

Conclusion

Because of disparities and racial discrimination in mental health services, a disproportionate number of racialized groups and Aboriginal populations with mental illnesses do not fully benefit from, or contribute to, the opportunities and prosperity of our society. Preventable disability from mental illness affects all of us and exacts an increasing economic and social toll.

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Endnotes

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- ¹ A Diversity Health Practitioners' Network in the GTA was developed in 2002 with diversity and Aboriginal health experts working to develop Anti-Oppression Accountability Frameworks for health institutions in addition to organizational change tools and resources to support clinical work that is equitable and appropriate for clients from of racialized groups and other marginalized populations.
 - ² "Eurocentric" refers to an orientation centred in an ideology, which asserts (implicitly and explicitly) that European-derived values, assumptions and worldviews generally have primacy over all others. This is reflected in Western institutions (including academia, science, law, medicine/health, media, literature, etc) in the construction, ownership and dissemination of knowledge and in popular culture
 - ³ Diversity Plan, Centre for Addiction and Mental Health, 2000