



**Ontario
Human Rights Commission**
**Commission ontarienne des
droits de la personne**

Policy and guidelines on racism and racial discrimination

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Purpose of OHRC Policies

Section 30 of the Ontario *Human Rights Code (Code)* authorizes the Ontario Human Rights Commission (OHRC) to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*.¹ The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to ensure compliance with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.* Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (the Tribunal) may consider policies approved by the OHRC in a human rights proceeding before the Tribunal. Where a party or an intervenor in a proceeding requests it, the Tribunal *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject-matter of a human rights application, parties and intervenors are encouraged to bring the policy to the Tribunal's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the Tribunal is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the Tribunal to have the Tribunal state a case to the Divisional Court to address this inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and Tribunal,** applied to the facts of the case before the court or Tribunal and quoted in the decisions of these bodies.***

¹ The OHRC's power under section 30 of the *Code* to develop policies is part of its broader responsibility under section 29 to promote, protect and advance respect for human rights in Ontario, to protect the public interest and to eliminate discriminatory practices.

* Note that case law developments, legislative amendments and/or changes in the OHRC's own policy positions that took place after a document's publication date will not be reflected in that document. For more information, please contact the OHRC.

** In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

*** Recently, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45. See also *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which the Court applied the OHRC's *Policy and Guidelines on Disability and the Duty to Accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2.

Part 1 – Setting the context: understanding race, racism and racial discrimination

1. Introduction

1.1. The Code context

The *Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the *Code* are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

Every person in Ontario has a right to be free from racial discrimination and harassment in the social areas of employment, services, goods, facilities, housing accommodation, contracts and membership in trade and vocational associations.

The *Code* evolved in part from the *Ontario Racial Discrimination Act* of 1944. But, despite laws to address racial discrimination having existed for over 60 years, racial discrimination and racism persist in Ontario. The OHRC received a significant number of complaints of racial discrimination and harassment when it was handling complaints. On average, about 30% to 40% of the complaints filed with the OHRC cited race and related grounds. Race continues to be a ground cited often in applications to the Human Rights Tribunal of Ontario (Tribunal). Many other instances of racial discrimination never come forward as applications to the Tribunal and there are manifestations of racism that are beyond the jurisdiction of the Tribunal, for example hate crimes perpetrated by individuals.¹

There are numerous other indicators of the reality of racial discrimination in Canada. Racialized persons experience disproportionate poverty, over-representation in the prison population, under-representation in the middle and upper layers of political, administrative, economic and media institutions and barriers to accessing employment, housing and health care to name just a few.² Courts have recognized that racism exists in Canada.³

It is all too easy for those who do not experience it to deny the reality of racism. This is counterproductive and damaging to our social fabric. Racial discrimination and racism must be acknowledged as a pervasive and continuing reality as a starting point to assessing how the *Code* applies and what can be done to address them.

While our province's statutes exclude racial discrimination from any legal acceptance, racism and racial discrimination remain widespread and even socially accepted among many people. The *Code* therefore compels the OHRC to face this challenge and calls on our leaders and people to develop an unconditional culture of rights. Racism and racial discrimination must become a regretted part of Ontario's past, not a tolerated part of its present and future.

1.2. The purpose and scope of this human rights Policy

This policy is based on extensive research and consultation. In 2003, the Commission conducted a province-wide inquiry into the effects of racial profiling, resulting in a report, *Paying the Price: The Human Cost of Racial Profiling*. In March 2004, the OHRC began a process of consultation specifically geared to developing this policy. Numerous focus groups were held with stakeholders representing a diversity of interests and perspectives. In October 2004, in partnership with the Association of Canadian Studies,⁴ the OHRC held a three-day Policy Dialogue with experts and stakeholders to identify and discuss trends and developments relevant to an OHRC policy on racial discrimination and racism.

In December 2004, papers generated by speakers at the Policy Dialogue were published in a dedicated issue of *Canadian Diversity* and posted on the OHRC's Web site in January 2005. The public was invited to comment on the issues and ideas presented in the papers. In addition, respondent-oriented stakeholders were asked for input on specific issues that would be addressed in the policy.

This policy sets out the OHRC's position on racism, racial discrimination and racial harassment, at the time of publication. It replaces the OHRC's 1996 *Policy on Racial Slurs and Harassment and Racial Jokes*. It deals with issues that fall within the OHRC's jurisdiction and which can form the subject matter of an application to the Tribunal. The policy is therefore bounded by the provisions of the Ontario *Human Rights Code* and Canada's legal framework for analyzing discrimination. At the same time, the policy interprets the protections in the *Code* in a broad and purposive manner. This is consistent with the principle that the quasi-constitutional status of the *Code* requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are attained.

In the policy, discrimination and harassment due to race are analyzed with an understanding of the pernicious influence of the wider social fact of racism. The policy highlights some of the broader issues of racism to create appropriate context. However, a detailed discussion of all manifestations of racism in Canadian society is beyond the scope of this policy. Indeed, there are many lengthy documents and reports dedicated to specific issues of racism such as the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*⁵, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income*⁶, the OHRC's Report *Paying the Price: The Human Cost of Racial Profiling*⁷ and the *Royal Commission on Aboriginal Peoples*⁸, to name just a few.

Several key themes have emerged from the OHRC's research and consultation and form the basis of this policy:

- Racism and racial discrimination continue to exist and to affect the lives of not only racialized persons, but also all persons in Canada. The reality of racism and racial discrimination must be acknowledged to take effective measures to combat them.
- Race is a socially constructed way of judging, categorizing and creating difference among people. Despite the fact that there are no biological "races," the social construction of race is a powerful force with real consequences for individuals.

- Racism operates at several levels, including individual, systemic or institutional and societal.
- Racial discrimination can be impacted by related *Code* grounds such as colour, ethnic origin, place of origin, ancestry and creed. In addition, race can overlap or intersect with other grounds such as sex, disability, sexual orientation, age and family status to create unique or compounded experiences of discrimination.
- Racial discrimination can occur through stereotyping and overt prejudice or in more subconscious, subtle and subversive ways.
- Racial discrimination also occurs in significant measure on a systemic or institutional level. Policies, practices, decision-making processes and organizational culture can create or perpetuate a position of relative disadvantage for racialized persons.
- Organizations have a responsibility to take proactive steps to ensure that they are not engaging in, condoning or allowing racial discrimination or harassment to occur. Obligations in this regard range from collecting numerical data in appropriate circumstances, accounting for historical disadvantage, reviewing policies, practices and decision-making processes for adverse impact and having in place and enforcing anti-discrimination and anti-harassment policies and education programs, to name just a few.

While the policy covers all of the social areas in the *Code*, it places a heavier emphasis on employment. This is due to the fact that a large proportion of applications to the Tribunal allege employment-related discrimination. Employment is also integral to socio-economic well-being, which in turn impacts on health, access to education and access to services more broadly. There is therefore an interrelationship between discrimination in employment and discrimination in other social areas covered by the *Code*.

In addition to, and to supplement, this policy statement, the OHRC is engaged in, and will continue to undertake, promotion and advancement initiatives to address broader human rights issues related to racial discrimination and racism.

OHRC policy statements contribute to creating a culture of human rights in Ontario. They educate the public about human rights and set out standards for how individuals, employers, service providers and policy makers should act to ensure compliance with the *Code*. OHRC policy statements must be understood in a wider context of Canada's global commitments.

1.3. International obligations

In 1948, the United Nations General Assembly adopted the landmark Universal Declaration of Human Rights, the foundation of international human rights law. The Universal Declaration established an international standard of non-discrimination on the basis of race, colour, language, national origin and a number of other grounds. The principles in the Universal Declaration were given force through various instruments⁹ including the *International Convention on the Elimination of All Forms of Racial Discrimination*¹⁰ (CERD). Canada ratified CERD in 1970 and in so doing accepted responsibility for respecting, protecting and fulfilling the rights contained therein.

Numerous other UN documents have addressed aspects of racial discrimination and racism.¹¹ In 2003, Canada hosted the UN Special Rapporteur on Racism, Racial Discrimination, Xenophobia and Related Intolerance who prepared a report on his visit.¹²

Some of the key highlights from the various UN documents and instruments include:

- Confirming that race is a social construct, related to geographic, historical, political, economic, social and cultural factors with no justification for notions of racial superiority or racial prejudice
- Urging public recognition that racism persists and of the continuing impact of the historical legacy of racism, such as the effect of colonialism and slavery, including the trans-Atlantic slave trade, on indigenous persons, persons of African descent and persons of Asian descent
- Creating a positive obligation on states to review policies, laws and regulations which create or perpetuate racial discrimination, to enact legislation to prohibit racial discrimination by any person, group or organization and to report on the realization of rights
- Affirming the importance of barrier removal and corrective measures to achieve equal participation in all aspects of society
- Recognizing the interrelationship between economic status, marginalization and social exclusion and racism and the intersectional nature of racial discrimination
- Promoting collecting, compiling and analyzing reliable statistical data, in accordance with privacy and human rights laws, to monitor the situation of racialized groups and to assess whether legislation, policies, practices and other measures have an adverse impact on racialized groups
- Emphasizing the particular and extreme marginalization of Aboriginal peoples, and the unique issues raised in relation to treaties and land disputes and the *Indian Act*.

The Supreme Court of Canada has indicated that the values and principles enshrined in international law constitute a part of the legal context in which legislation is interpreted and applied.¹³ Additionally, human rights commissions have been identified as key institutions in implementing and protecting international human rights standards. Accordingly, the OHRC uses applicable international standards in its policy development and to inform its application and interpretation of the *Code*. History shows, however, that while Canada has affirmed international instruments on racism and racial discrimination, many people have continued to tolerate both.

1.4. Historical context: the legacy of racism in Canada

A starting point of a policy on racial discrimination and racism is to provide a brief historical context of racial discrimination and racism in Canada. We must be aware of the events of the past in order to address contemporary manifestations of racial discrimination and racism. A review of the history of racism reveals that Canada has made progress. For example, laws such as the Canadian Bill of Rights, the Ontario *Human Rights Code* and the *Canadian Charter of Rights and Freedoms* have been enacted to provide protection against racism and racial discrimination.¹⁴ However, much work remains to be done.

It is no coincidence that communities which historically experienced racial discrimination continue to be placed on the lowest rungs of the social, economic, political and cultural ladder in Canada. The legacy of racism in Canada has profoundly and lastingly permeated our systems and structures.¹⁵ As such, it must be acknowledged in any policy statement, particularly when considering such matters as institutional or systemic discrimination, inclusive design, barrier removal and methods to respond to racism. What follows is a brief, non-exhaustive historical overview to promote an understanding of the context of racism and racial discrimination in Canada.***** Although many of the events described may appear to be in the distant past, it is important to note that there are many contemporary examples of racism.¹⁶

Historically, policies and practices towards Aboriginal persons¹⁷ have been based on assumptions that they are inferior and incapable of governing themselves. Other patterns of interaction were characterized by a desire to assimilate, displace or segregate Aboriginal persons, or to suppress Aboriginal cultures.¹⁸ While recent decades have seen progress in addressing Aboriginal rights in Canada, much remains to be done as illustrated by outstanding issues regarding land rights, residential schools restitution, self-governance as well as other issues identified in the *Report of the Royal Commission on Aboriginal Peoples*, and the *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*.

The *Indian Act*, first enacted in 1876, gave the federal government control over “Indian” political structures, landholding patterns, resource and economic development and almost every important aspect of Aboriginal peoples’ lives. Just a few of the racist features of the Act included prohibiting land ownership, rules on electing leaders, denial of the right to vote, prohibiting leaving reserves without a pass, preventing ceremonial festivals and events, and determining who was an “Indian.”

Aboriginal children were forcibly removed from their homes and communities and sent to residential schools operated by missionary societies where they were forbidden to speak their language, to practice their traditions and customs and to learn about their history. They were often given an inferior education and many experienced malnutrition, overcrowding, illness, harsh discipline and sexual abuse. Many of these schools were closed in the 1960s, with the last one closing in 1988.

The enslavement of Africans, racial segregation and discrimination are also part of Canada’s history. Black slavery was actively practiced in Canada. Between 1628 and the early 1800s, approximately 3000 people of African origin came to Canada and most were held as slaves. In 1793, the Parliament of Upper Canada (now Ontario) under Lieutenant Governor John Graves Simcoe passed an *An Act to prevent the further introduction of Slaves, and to limit the term of contracts for Servitude within this*

***** This summary is intended to concisely outline and show the commonalities of some of the most significant events of racism in Canadian history. It is not, and cannot be, a detailed or exhaustive review of the experience of every racialized community nor should it be considered a basis for comparing the degree of racism suffered by various communities.

Province, the first act to limit slavery in the British Empire.¹⁹ Ontario became a destination for those fleeing slavery in the United States via the “underground railroad.”²⁰ In 1833 the British Parliament's *Emancipation Act* abolished slavery in all parts of the Empire, including Ontario, but its legacy remained.²¹ Prejudice and discrimination would still constrict the opportunities of most Canadians of African ancestry.

African Canadians were excluded from schools, churches, restaurants, hospitals and public transportation. They were restricted to menial, low-paying and exhausting labour.²² Many African Canadians lived in segregated communities in Nova Scotia, New Brunswick and Ontario. In addition, residential segregation was perpetuated through racially restrictive covenants attached to deeds and leases.²³ The Ontario legislature established segregated schools, and legal challenges to these failed.²⁴ The legislation remained on books as late as 1964.²⁵

Prior to human rights statutes, court challenges to address racial discrimination were largely unsuccessful. In 1939, the Supreme Court of Canada rejected a lawsuit for humiliation brought by Fred Christie, a Black man who was refused service by a Montreal tavern. The Court declined to comment on the racial discrimination, instead concluding that freedom of commerce allowed a merchant to deal with the public in any way he may choose.²⁶

The experience of Chinese Canadians is similarly tainted by a history of racism. In the 1880s, labourers were recruited from China to take on the dangerous work of building the railway through the mountains. After being subjected to deplorable working conditions, once their labour was no longer needed, they were seen as a threat to society and an “alien race” and subjected to intense racial discrimination.²⁷

Laws were passed to limit Chinese immigration. The 1885 *Chinese Immigration Act* imposed a \$50 “head tax” on all Chinese persons entering Canada. In 1903, this amount was raised to \$500, a prohibitive amount of money.²⁸ In 1872, the right to vote in provincial and municipal elections was also taken away from Chinese Canadians in British Columbia (Japanese Canadians and South Asian Canadians were also disenfranchised in 1895 and 1907 respectively).²⁹ Chinese Canadians were also subjected to discriminatory laws and policies affecting their ability to own property, operate businesses, serve the public and enter certain professions. “In the interest of the morals of women and girls”³⁰, laws were passed to prevent Chinese men from employing White women.³¹

Many are familiar with the experience of Japanese Canadians in World War II. Twenty-three thousand Japanese Canadians living on the west coast of British Columbia were sent to relocation and detention camps in isolated areas in the interior of British Columbia, southern Alberta, Manitoba and northern Ontario. In addition to other violations and deprivations, Japanese Canadians were stripped of their property, businesses and savings. Towards the end of the war, Japanese Canadians were threatened with further expulsion. They were given the option for “dispersal” to towns east of the Rocky Mountains, or outright “repatriation” to Japan (by 1947, 4000 Japanese Canadians, half of whom were Canadian born, had left Canada). The Canadian government did not release them until 1947 and it

took a further two years before they were able to resettle on the west coast. In 1988, twelve thousand surviving Japanese Canadians were paid \$20,000 each as compensation and a formal apology was issued by Parliament.³²

Other groups have suffered from racism in Canada's history. For example, South Asian Canadians³³ were viewed with the same racial bias, hostility and resentment as was directed at other racialized groups and they had similar experiences with discriminatory laws, such as legislation to control their economic and social mobility and to remove their right to vote.³⁴ Like others, they were adversely impacted by immigration laws that preferred immigrants from northern and western European countries. In 1914 a shipload of 400 would-be immigrants from India were denied entry at Vancouver. They were held aboard the ship for nearly three months before being forced to return to India.³⁵

Islamophobia

A contemporary and emerging form of racism in Canada has been termed "Islamophobia." Islamophobia can be described as stereotypes, bias or acts of hostility towards individual Muslims or followers of Islam in general. In addition to individual acts of intolerance and racial profiling, Islamophobia leads to viewing Muslims as a greater security threat on an institutional, systemic and societal level.

Jewish Canadians have been subjected to anti-Semitism and legalized discrimination. "None is too many" was the response given by a high level Canadian government official when asked how many Jews should be accepted as immigrants, at the time of the Nazi persecution of Jews.³⁶ Signs posted along the Toronto beaches stated "No Dogs or Jews Allowed." Many hotels and resorts had policies prohibiting Jews as guests.³⁷ There were restrictions on where Jewish persons could live or buy property. In 1951, a Jewish man challenged one such restrictive covenant preventing property from being sold to anyone of "the Jewish, Hebrew, Semitic, Negro or coloured race or blood." The Supreme Court of Canada declared the covenant void on the basis it was overly broad.³⁸

More recently, immigration policies and practices have been informed by and have contributed to racism in Canada. A discussion of immigration is beyond the scope of this policy³⁹, however, at various times, Canada's immigration policies and practices have either directly or indirectly made it easier for some groups (such as northern and western Europeans) and more difficult for racialized groups, to gain entry.

The history of racism has had an enduring effect on racialized communities. For example, paternalistic and assimilationist policies and practices toward Aboriginal persons have had a devastating impact. Many Aboriginal persons experience profound disadvantage in all spheres of life including housing, employment, health and education. Aboriginal communities continue to struggle to assert their land and treaty rights. Racialized groups can all trace their continued experience of marginalization to the legacy of racism in Canada.

2. “Race,” racism and racial discrimination

2.1. “Race” - a social construct

Race is a prohibited ground in the *Code* that is not specifically defined. As the term is commonly used in the human rights context and society in general, it is important to clarify its meaning.

In the past, race was defined as a natural or biological division of the human species based on physical distinctions including skin colour and other bodily features. This notion of race emerged in the context of European imperial domination of nations and peoples deemed “non-white” and was used to establish a classification of peoples.⁴⁰ Some of the greatest atrocities in human history have been associated with notions of racial superiority.

There is no legitimate scientific basis for racial classification. Genetic science now tells us that physical characteristics and genetic profiles correlate more strongly *between* “races” than among them.⁴¹ It is now recognized that notions of race are primarily centred on social processes that seek to construct differences among groups with the effect of marginalizing some in society.

While biological notions of race have been discredited, the social construction of race remains a potent force in society. The process of social construction of race is termed “racialization.” *The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* defined racialization “as the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life.”⁴² Even groups and people that have only marginal physical distinctions from western European people have been racialized in Canada. For example, emigrants from southern or eastern Europe were deemed as “races” of less worth when they first came to Canada.

Racialization extends to people in general but also to specific traits and attributes, which are connected in some way to racialized people and are deemed to be “abnormal” and of less worth. Individuals may have prejudices related to various racialized characteristics. In addition to physical features, characteristics of people that are commonly racialized include:

- accent or manner of speech
- name
- clothing and grooming
- diet
- beliefs and practices
- leisure preferences
- places of origin
- citizenship.

Despite the fact that we know there are no “races,” the social construction of race is a powerful force in our society, with real consequences for individuals.⁴³ Therefore, the ground of “race” in the *Code* continues to be important to the discussion of racism and racial discrimination.

2.1.1. A word about terminology

There are inherent challenges in finding ways in which to best describe people. Terminology is fluid and what is considered most appropriate will likely evolve over time. Moreover, people within a group may disagree on preference and may choose to use different terms to describe themselves. However, it is useful to provide some general guidelines on terminology that the OHRC considers most inclusive at the present time.

When it is necessary to describe people collectively, the term “racialized person” or “racialized group” is preferred over “racial minority,” “visible minority,”⁴⁴ “person of colour”⁴⁵ or “non-White” as it expresses race as a social construct rather than as a description based on perceived biological traits. Furthermore, these other terms treat “White” as the norm to which racialized persons are to be compared and have a tendency to group all racialized persons in one category, as if they are all the same.

Where identification of individuals is necessary, allowing people to self-identify is always a preferred approach. If this isn’t possible, terms that are selected should be linked to the reason identification is required. For example, if intending to compare a group’s representation within an organization to its representation in the general population, terms used in the Canadian census would be a logical choice. It is generally better to avoid a broad term (e.g. Asian) where a specific term is available, such as one that refers to national origin (e.g. Chinese Canadian). Terms that are clearly considered inappropriate must be avoided and if an individual objects to a term, it should not be used.

The terms “Black” and “White”⁴⁶ are widely used to describe individuals, and may even be the terms people prefer to use in describing themselves. While at this time, these terms are not viewed by most as inappropriate, nevertheless, it is important to remember that they refer to racialized characteristics.

2.2. Understanding racism

Racism is a wider phenomenon than racial discrimination. While the *Code* seeks to combat racism through public education and the advancement of human rights, not every manifestation of racism can be dealt with through the current human rights complaint mechanism and process. Rather, it is only racially discriminatory actions in specified social areas that are prohibited by the *Code* (see section “2.3. The *Code* and Racial Discrimination”). Nevertheless, racism plays a major role in the social processes that give rise to and entrench racial discrimination. As such, acknowledging and understanding racism as a historical and current reality in Canadian society is critical for a human rights policy.

Many different definitions of racism exist. They differ in complexity and emphasis and can often be very difficult to understand. Therefore, what follows is a general discussion of the key elements for understanding racism.

Definitions of racism all agree that it is an ideology that either explicitly or implicitly asserts that one racialized group is inherently superior to others. Racist ideology can be openly manifested in racial slurs, jokes or hate crimes. However, it can be more deeply rooted in attitudes, values and stereotypical beliefs. In some cases these beliefs are

unconsciously maintained by individuals and have become deeply embedded in systems and institutions that have evolved over time.

Consider this:

In discussing racism, it is necessary to consider the unearned privileges, i.e. benefits, advantages, access and/or opportunities that exist for members of the dominant group in society or in a given context. This notion is often termed “White privilege.” While this notion may be controversial to some, consider the following statements that are helpful in understanding how experiences differ based on privilege.

1. If I want or need to move, I can be pretty sure that I will not be told that an apartment has already been rented when the landlord sees me.
2. If I talk to “the person in charge,” it is likely it will be a person of my “race.”
3. I can go shopping alone and do not expect to be followed. I do not have to think about how well I am dressed before I go to a high-end store.
4. When I use cheques or credit cards, I can count on my skin colour not to work against the appearance of financial reliability.
5. If I choose to openly discuss or display my religious beliefs, I do not worry that people will think I should “go back to where I came from.”

(Adapted from P. McIntosh, “White Privilege: Unpacking the Invisible Knapsack: online: www.case.edu/president/aaction/UnpackingTheKnapsack.pdf)

Racism differs from simple prejudice in that it has also been tied to the aspect of power, i.e. the social, political, economic and institutional power that is held by the dominant group in society. In Canada and Ontario, the institutions that have the greatest degree of influence and power, including governments, the education system, banking and commerce, and the justice system are not, at this time, fully representative of racialized persons, particularly in their leadership.

Racism often manifests in negative beliefs, assumptions and actions. However, it is not just perpetuated by individuals. It may be evident in organizational or institutional structures and programs as well as in individual thought or behaviour patterns. Racism oppresses and subordinates people because of racialized characteristics. It has a profound impact on social, economic, political and cultural life.

2.2.1. How racism operates

From the discussion above it is clear that racism exists at a number of levels⁴⁷, in particular (1) individual, (2) institutional or systemic, and (3) societal (also described as cultural/ideological).

At the individual level, racism may be expressed in an overt manner but also through everyday behaviour that involves many small events in the interaction between people. This is often described as “everyday racism” and is often very subtle in nature. Despite being plain to the person experiencing it, everyday racism by itself may be so subtle as to be difficult to address through human rights complaints. However, at other times, where it falls within a social area covered by the *Code*, there may be circumstances where everyday racism, as part of a broader context, may be sufficient to be considered racial

discrimination (please refer to section “3.3. Subtle Racial Discrimination” for a discussion of these situations). Either way, the cumulative effect of these everyday experiences is profound.

Canada is a country founded upon colonization and immigration. It is known for having one of the most diverse populations in the world. This mosaic of individuals and cultures presents unique and evolving challenges for human relations. Some human rights claims allege racism by, among or within racialized groups. The consequences of these situations, for example loss of a job, are every bit as serious as racism perpetuated by White persons against racialized persons and they should be dealt with equally seriously.

At the institutional or systemic level, racism is evident in organizational and government policies, practices, and procedures and “normal ways of doing things” which may directly or indirectly, consciously or unwittingly, promote, sustain, or entrench differential advantage for some people and disadvantage for others.

Everyday experiences of racism

Examples of everyday experiences of racism might include:

- **Speech:** When dealing with customers who are African Canadian, a salesclerk uses an unfriendly, curt or sarcastic tone of voice.
- **Glances:** Looks of contempt are given to a Muslim Canadian family post-9/11.
- **Actions:** When a Chinese Canadian takes a seat on the bus, passengers vacate the adjacent seat.

At a societal level, racism is evident in cultural and ideological expressions that underlie and sustain dominant values and beliefs. It is evident in a whole range of concepts, ideas, images and institutions that provide the framework of interpretation and meaning for racialized thought in society. It is communicated and reproduced through agencies of socialization and cultural transmission such as the mass media (in which racialized persons are portrayed as different from the norm or as problems), schools, universities, religious doctrines and practices, art, music and literature. It is reflected in everyday language; for example “whiteness” is associated with overwhelmingly positive connotations, while “blackness” is associated with negative connotations.⁴⁸ This form of racism is maintained through socialization as children begin to absorb these beliefs and values at an early age.⁴⁹

As mentioned above, any effective response to racism must clearly acknowledge that it persists in Ontario. However, as great stigma attaches to allegations of racism, there is a tendency to deny its existence generally or in a particular situation.

It is important to emphasize that racism in its more entrenched forms is often unconsciously applied and its operation is often unrecognized by even those practising it. In addition, as noted earlier in the Policy, while Canada has made much progress, racism remains a reality. It should not be treated as aberrant behaviour or a set of deviant attitudes on the part of a deviant individual - a so-called “rotten apple” within the system. Failing to recognize the complex, subtle and systemic nature of racism impedes effective action against it.

Finally, it is the OHRC's view that, except in the most obvious circumstances, such as where individuals clearly intend to engage in racist behaviour, it is preferable that actions rather than individuals be described as racist.

Did you know?

The UN Special Rapporteur Report on Racism in Canada recommended: "The Canadian Government should add credibility, trust, and recognition to its undoubted political commitment to combating racism, discrimination and xenophobia by recognizing, at the highest level, that such evils still persist, despite the efforts accomplished." (Report of the Special Rapporteur on Racism p. 24)

2.3. The Code and racial discrimination

2.3.1. Defining racial discrimination

The purpose of anti-discrimination laws, such as the *Code*, is to prevent the violation of human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice. While racism is a social phenomenon, it is racial discrimination that is a legally prohibited act.⁵⁰

There is no fixed definition of racial discrimination and society's understanding of what constitutes racial discrimination will continue to evolve over time. Several descriptions of racial discrimination have been offered which can be helpful in understanding and explaining it.

For example, in the international human rights context, it has been described as any distinction, exclusion, restriction or preference based on race that nullifies or impairs the human rights or fundamental freedoms afforded citizens.⁵¹ One approach in Canadian case law suggests that it may be described as any distinction, conduct or actions, whether intentional or not, but based on a person's race, which has the effect of imposing burdens on an individual or group, not imposed upon others or which withholds or limits access to benefits available to other members of society.⁵² Moreover, the case law has clearly stated that race need only be **a factor** for there to be a finding of racial discrimination.

The *Code* offers every Ontarian protection from racial discrimination specifically in the realms of employment, services, contracts, housing and vocational associations.

2.3.2. Racial discrimination and related Code grounds

In addition to race, the *Code* prohibits discrimination on several related grounds. These include primarily the grounds of colour, ethnic origin, ancestry, place of origin, citizenship and creed (religion).

Depending on the circumstances, discrimination based on race may cite race alone or may include one or more related grounds. However, as a social construct, the ground of race is capable of encompassing the meaning of all of the related grounds and any other characteristic that is racialized and used to discriminate.

In many instances of racial discrimination, the particular notion of race acted on is given specific meaning by related grounds. In such instances, it would be appropriate to cite these other grounds along with race. For example, when a man named Muhammad is screened from an employment competition on the basis of his name, it is appropriate to cite as grounds for discrimination race, ethnic origin, ancestry, place of origin and creed, as the name in question is racialized precisely because it is stereotypically connected to a specific origin and creed.

In other instances, indicators including the related grounds cited in the *Code* are employed as euphemisms or proxies for notions of race.⁵³ As most people have come to know that they cannot explicitly differentiate and judge people based on their race, racial discrimination often takes the shape of employing other less stigmatized notions and terms in the place of racial ones. Even those who experience racial discrimination often feel reluctant to employ explicitly racial notions and terms. For example, instances of racial discrimination may make reference to a person's accent or place of origin as a proxy for race. It is appropriate to cite related grounds of the *Code* together with race in instances where racial discrimination employs these descriptors as euphemisms or proxies for race.

In practice, it is often difficult to tell specifically what underlies racial discrimination. A First Nations woman may be discriminated against based on the colour of her skin or because of stereotypes associated with her ethnic origin or her ancestry, or with some distaste for the practices of her creed or by some combination of these factors. All are possibilities and it is difficult often to distinguish these in specific instances. In such situations, race, being a social construct, can encompass other related grounds within its meaning, but in practice it may be preferable to cite every ground which may have been a factor in an individual's experience.

2.3.3. Intersectional and overlapping grounds

Several prohibited grounds stipulated by the *Code* have less direct relationship with the ground of race including, for example, the grounds of gender, disability, age, family status and sexual orientation. Nevertheless, a person's experience of discrimination can be impacted by these other grounds.

Acts of discrimination often accompany people in relationship to overlapping and intersecting⁵⁴ identifications as much as to any single identification. Individuals, based on their unique combination of identities, may be exposed to unique forms of discrimination and may uniquely experience the personal pain and social harm that accompanies acts of discrimination.

Correspondingly, instances of racial discrimination may occur in intersection with other grounds of the *Code* to form unique and meaningful combinations. For example, a young Black man can be seen as a "Black person" or as a "young person" or as a "man." All these sources of identity overlap but, in addition, also intersect in a socially significant way. Such a person may be exposed to discrimination based on any of the grounds of race and/or colour, age and gender independently when these identifications

do not mix in specific circumstances in any significant way. However, such a person may also be exposed to an intersectional form of discrimination on the basis of being identified as a “young Black man” based on the various assumptions and/or stereotypes that are uniquely associated with this socially significant intersection.

The OHRC will look to all possible implications of intersecting and overlapping identities in its application of the *Code* and expects others in society to similarly recognize this diversity. Accordingly, it is important to consider possible intersections when allegations of racial discrimination are raised, and, when circumstances indicate it, to cite the prohibited ground of race along with other grounds when intersections are apparent.

2.4. Racism and racial discrimination – common “myths”

Discussions of racism and racial discrimination often evoke a different type of response than when other types of human rights concerns are raised. In fact, there is a set of common “myths” that frequently come into play when racism and racial discrimination are raised. These myths serve to silence persons who speak out against racism and racial discrimination, hamper efforts to combat racism and racial discrimination and even affect the ability of decision-makers to objectively deal with claims of racism and racial discrimination.⁵⁵

Some of the most common myths and misconceptions about racism and racial discrimination include:

- racism is exaggerated and that, except for exceptional cases or the actions of a “few bad apples” racism does not exist in Canada
- people in Canada are “colour blind” and do not even notice race
- mentioning the existence of racism or racial discrimination or taking proactive measures to address racism or racial discrimination constitutes reverse racism towards White people
- racialized people are less credible and their assertions must be more carefully scrutinized and investigated or must be corroborated
- racialized people play the “race card” to manipulate people or systems to get what they want
- racialized people are too sensitive, tend to overreact or have a “chip on their shoulder”
- racialized people themselves, and not racism or racial discrimination, are at fault for their disadvantage or state of “otherness,” commonly known as “blaming it on the victim”
- immigration is bad for Canada as immigrants take jobs away, commit more crime, are a drain on the system or do not fit into our society
- if a racialized person has been treated acceptably in the past, then discriminatory treatment cannot take place in the future.⁵⁶

These responses create a climate that prevents any kind of effective response to racial inequality.⁵⁷

Part 2 – The policy framework

3. Types of racial discrimination

It is not possible to slot people's experiences of racial discrimination into clear categories. Manifestations of discrimination blur together and overlap to a large degree. However, for the purposes of this policy, it is necessary to describe the different ways in which racial discrimination can take place. Therefore, what follows is a discussion of the main ways in which racial discrimination can occur that are helpful in understanding and addressing the experience of racial discrimination.

3.1. Stereotyping and prejudice

Although racial discrimination has become more subtle and concealed, stereotyping, prejudice and bias remain a reality in a variety of areas including but not limited to workplaces, housing accommodation, stores, malls, restaurants, hospitals, schools and the justice system.

One of the most obvious ways in which people experience racial discrimination is through stereotyping. Stereotyping can be described as a process by which people use social categories such as race, colour, ethnic origin, place of origin, religion, etc. in acquiring, processing and recalling information about others.⁵⁸ Stereotyping typically involves attributing the same characteristics to all members of a group, regardless of their individual differences. It is often based on misconceptions, incomplete information and/or false generalizations. Practical experience and psychology both confirm that anyone can stereotype, even those who are well meaning and not overtly biased. While it may be somewhat natural for humans to engage in racial stereotyping it is nevertheless unacceptable.

In most cases, stereotypes ascribe negative characteristics to a group. It is impossible to describe all the generalizations that people may reach about others. However, they tend to include assumptions that racialized persons as a whole, or specific racialized groups, are: unintelligent, lazy, unreliable, dirty, uncivilized, promiscuous, submissive, more likely to abuse drugs or alcohol, of questionable moral character, more likely to engage in criminal activity or alien (i.e. do not fit into Canadian society).

In some cases, "positive stereotypes" may be at play, e.g. generalizations that members of a particular group are math whizzes, great athletes, or dutiful employees. It is also important not to minimize the harmful effects of these types of "positive stereotypes" in that they can also result in unequal treatment. For example, an educator who encourages African Canadian students only towards sports and discourages academics, thinking that they will only go far in school as good athletes, may be, in fact, failing to support them in their educational interests and aspirations. The students may come to believe these stereotypes, thereby giving priorities to their athletic roles at the expense of their academic performance and educational achievements.⁵⁹

Stereotypes are insidious because they can be acted upon in a way that results in unequal treatment, but also because they may be internalized by their subjects who, as a result, believe or accept the stereotypes.

Many racial discrimination complaints allege that a respondent has relied, usually obliquely, on stereotypes.

Example: A landlord didn't rent an apartment to a Black woman, in part, because of a stereotype that Black people are indigent and noisy. A Tribunal held⁶⁰ that where racial stereotyping is one of the factors in a decision not to rent a residential unit, this would constitute a violation of the *Code*.⁶¹

Example: An Aboriginal woman was evicted from a hotel and denied service in the lounge. The tribunal found it particularly offensive that the hotel owner assumed that the woman was a prostitute because she was a single Aboriginal woman in a hotel by herself.⁶²

Racial discrimination also occurs because of overt prejudice, an antipathy or negative feelings held by someone about another person or a group.

Example: An employer rejected a Black candidate for a job position after meeting her. He was visibly shocked and turned her down flat, without any inquiry regarding her credentials. When asked what was wrong he said something about maintaining the company image.⁶³

Example: Two women of Aboriginal ancestry were seeking to rent a house. Upon learning that they were Aboriginal, the owner's wife stated she didn't rent to "Indians" and made further disparaging comments. She then asked what the women did and when one of the women said she was on social assistance responded, "That's just as bad."⁶⁴

Racial stereotyping and prejudice can also lead to racial harassment (discussed below).

3.2. Racial profiling

The OHRC has defined 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. Its practice is not limited to any one group of people or particular institution.

The OHRC has stated that racial profiling is, at its heart, a form of stereotyping based on preconceived ideas about a person's character. As human rights are founded on the need to ensure individualized decision-making about individuals, instead of judgments based on presumed characteristics, racial profiling is a form of racial discrimination and can result in applications to the Tribunal.

The Ontario Court of Appeal has recognized the inherent problem with evidence needed to prove a racial profiling case. The Court has noted that racial profiling can 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.⁶⁵ Race only needs to be a factor in

the conduct alleged to constitute profiling. It need not be the main or major cause of the adverse treatment and racial profiling can be found to have occurred even if race was mixed in with other legitimate factors.⁶⁶

In order to prove an allegation of profiling, it must be shown that the person alleged to have profiled had some opportunity to observe or presume the race of the complainant.⁶⁷ If this is demonstrated, it is necessary to determine whether this knowledge led the person alleged to have profiled to act in a discriminatory way. The following considerations will be relevant to determining whether racial profiling was an element in a particular situation:

- Statements were made that indicate the existence of stereotyping or prejudice: racial slurs, statements suggesting that someone is viewed as “foreign” e.g. “In this country we don’t....,” “Do you speak English?,” comments that are indicative of stereotypes, e.g. “What are you doing in this neighbourhood?”⁶⁸, “You have to pay for this cab ride upfront.”
- Actions corresponded to the phenomenon of racial profiling.⁶⁹
- A non-existent, contradictory or changing explanation is given for why someone was subjected to greater scrutiny or differential treatment or an explanation is offered that does not accord with common sense.⁷⁰
- The situation unfolded differently than if the person had been White.⁷¹
- There were deviations from the normal practice.⁷²
- An unprofessional manner was used or the person was subjected to discourteous treatment.⁷³

Example: Two Black men in a Texas-registered black Ford Mustang were pursued by a Halifax Police Constable and stopped. The Constable asked for proof of insurance and vehicle registration but did not accept the validity of the documents offered or the explanations given. He ticketed the driver, and ordered the car towed. In fact, the documentation was valid under Texas law. The seizure was erroneous and the car was released the following day. In finding racial discrimination, the Board of Inquiry concluded that the Constable’s actions were influenced by a racial stereotype of Black male criminality. In addition to over \$15,000 in monetary damages and costs, the Board ordered institutional remedies. The Halifax Regional Police Service was required to hire consultants to assess the effectiveness of the Service’s anti-racism and diversity training policies, to make the report public and to publicly indicate what steps the Service has taken and will take in light of the report.⁷⁴

Finally, it is important to note that persons who reasonably believe they are being racially profiled can be expected to find the experience upsetting and might well react in an angry and verbally aggressive manner. A citizen who honestly and reasonably believes that he or she is being treated unjustly is entitled to protest vigorously, as long as there is no resort to threatening gestures to accompany the words. A Tribunal has stated that a person’s use of abusive language in these circumstances requires reasonable tolerance and tact and cannot form the basis for further differential treatment.⁷⁵

3.3. Subtle racial discrimination

While racial discrimination is sometimes displayed overtly, it is recognized that in many instances racial discrimination takes on more subtle and covert forms. Tribunals have frequently noted: “Discrimination is not a practice which one would expect to see displayed overtly”⁷⁶ and that it is “often subversive and subtle.”⁷⁷ It has long been established in Canadian law that intent or motive to discriminate is not a necessary element for finding that a discriminatory act took place. It is sufficient if there is a discriminatory effect to the conduct.⁷⁸ Racial discrimination need only be one of several reasons for the decision or treatment received.⁷⁹

Subtle forms of discrimination can often only be detected upon examining all of the circumstances.⁸⁰ Individual acts themselves may be ambiguous or explained away, but when viewed as part of the larger picture and with an appropriate understanding of how racial discrimination takes place, may lead to an inference that racial discrimination was a factor in the treatment an individual received.

Cases alleging subtle discrimination will therefore require an investigation and analysis that examines the total context of the behaviour, comment or conduct alleged, including the presence or absence of comparative evidence contrasting how others were treated in a comparable situation or evidence that a pattern of behaviour exists.

There are many examples of how subtle forms of racial discrimination may occur. It can be particularly difficult to determine whether racial discrimination was a factor in hiring. Where a racialized person is qualified and someone else, no better qualified, is selected, the organization will need to provide a non-discriminatory explanation for failing to hire the racialized person.⁸¹ Discrimination in the hiring process may be established even if the complainant would not have been the successful candidate in the absence of discrimination.⁸²

On-the-job, the following types of treatment may be indicative of racial discrimination:

- exclusion from formal or informal networks
- denial of mentoring or developmental opportunities such as secondments
- and training which were made available to others
- differential management practices such as excessive monitoring and documentation or deviation from written policies or standard practices when dealing with a racialized person
- disproportionate blame for an incident⁸³
- assignment to less desirable positions or job duties⁸⁴
- treating normal differences of opinion as confrontational or insubordinate when involved with racialized persons
- characterizing normal communication from racialized persons as rude or aggressive⁸⁵
- penalizing a racialized person for failing to get along with someone else (e.g. a co-worker or manager), when one of the reasons for the tension is racially discriminatory attitudes or behaviour of the co-worker or manager.⁸⁶

In some instances, a non-discriminatory explanation may be available for such treatment. However, subjective explanations such as “bad attitude” or undocumented “poor performance” will be received with caution. It is therefore in an organization’s best interest to engage in good human resources practices, such as documented progressive performance management of all employees. It has also been established that an individual’s behaviour may itself be a reaction to the experience of discrimination or the existence of a poisoned environment.⁸⁷

In housing accommodation, subtle screening methods may be used to deny racialized applicants equal access to housing:

- Racialized persons may be advised that an apartment has already been rented only to have a White friend inquire about the availability of the accommodation and be told that it is still available.
- Tenants may not be granted equal access to housing related services because of race and related grounds. This may be in the form of sub-standard living conditions or failing to carry out repairs.⁸⁸
- Discrimination may occur as a result of issues being made about the cultural practices of tenants.⁸⁹

Example: A Black man responded to an ad for an apartment and was invited to view it. After the viewing he was told that another person was coming to view the suite and that he would be advised if it would be available. On phoning the landlord he was told that the suite had been rented. However, when his girlfriend’s sister phoned back, she was told the suite was still available. The Tribunal rejected the landlord’s evidence that the man’s demeanour made her uncomfortable and the evidence of another tenant, a woman of Chinese origin, that the landlord could not have practiced racial discrimination vis-à-vis the Black man as she had rented a suite to her.⁹⁰

In the context of education services, subtle forms of discrimination can manifest in a number of ways including:⁹¹

- how educators treat racialized students
- whether racialized students are encouraged to pursue technical versus academic streams
- low teacher expectation of racialized students
- differential disciplinary action directed toward racialized students
- deviating from written policies or standard practices when it comes to dealing with racialized students
- failing to deal with racial incidents or bullying between children or downplaying the seriousness of such conduct
- treating a racialized student’s response to racial incidents or bullying as a disciplinary problem without dealing with the underlying incident or considering the underlying incident as a mitigating factor.

Issues can also arise in other service areas.

Example: An Aboriginal man reserved a room at an inn and was given a dirty, substandard room. There was statistical evidence drawn from the hotel's records that certain rooms were more often assigned to Aboriginal clients and that better rooms were more often assigned to non-native clients. In addition, a local police officer who phoned the hotel on behalf of people needing accommodation was asked whether the people were native "because all the native rooms were occupied."⁹²

It is not necessary for language or comments related to race to be present in the interactions between the parties to demonstrate that racial discrimination has occurred. However, where such comments are made, they can be further evidence that race has been a factor in an individual's treatment. Similarly, negative comments made about an individual advocating for human rights or equitable practices will tend to support an inference that race is a factor in an individual's or organization's interaction with that individual.⁹³

Example: A Black Vice Principal repeatedly tried to secure a promotion to the position of Principal. In looking at the totality of the evidence, the Tribunal found that irrelevant references to the race of the complainant and a Black teacher by management staff during interviews and/or discussions about transfer opportunities as well as admonishments to Black teachers who advocated for equitable practices "not to expect things to change overnight" supported an inference that transfer and promotion decisions were influenced by considerations of race.⁹⁴

Where racial discrimination prohibited by the *Code* is alleged, "everyday racism" can form part of the context in assessing whether subtle racial discrimination is at play. Such cases will normally require an element of recurrence and repetitiveness⁹⁵ as well as an examination of how others in comparable situations were treated.⁹⁶

Example: A manager frequently rolls his eyes or interrupts when a racialized employee speaks during staff meetings, even though nothing untoward is being said. The manager is not observed to do this with other employees. When the relationship between the employee and manager becomes excessively tense, the racialized person's employment is terminated. The explanation provided is his failure to get along with his manager.

Similar fact evidence will be used to support an allegation of racial discrimination where appropriate.⁹⁷ In addition, recognizing that most racialized persons are more likely to see discrimination that remains invisible to others, it is the OHRC's position that a perception of discrimination by others may have some relevance in a human right claim.⁹⁸

Evidence that an individual who shares the racialized characteristics of the complainant **has not** experienced discrimination may or may not have relevance, depending on the nature of the allegations of discrimination. General allegations of failing to promote

“minorities” may call for an examination of whether an organization has promoted other “minorities.” However, with regard to a specific allegation regarding the treatment of African Canadians, evidence regarding treatment of Chinese Canadians may be of little or no use. This is due to the fact that racial discrimination can manifest very differently based on each person’s racialized characteristics. This is particularly so among racialized groups but it can also be the case within a group. For example, a person who speaks with a South Asian accent and wears South Asian cultural clothing may have a very different experience than someone who is seen to be more “assimilated,” a light skinned person may have a different experience than someone with darker skin and a person may be singled out for harsh treatment while others are not because the person refuses to fit a stereotype or asserts his or her rights.

Since anyone can engage or participate in discrimination, asserting that racial discrimination could not have occurred because a person alleged to be involved is himself or herself a racialized person is also not necessarily a defence.

3.4. Racial harassment

3.4.1. Code protections for harassment

Section 5(2) of the Code provides that all employees have a right to freedom from harassment in the workplace by the employer, employer’s agent, or by another employee because of, among other grounds, race, colour, ancestry, place of origin, ethnic origin, citizenship and creed. This right to be free from harassment includes the workplace but also the “extended workplace,” i.e. events that occur outside of the physical workplace or regular work hours but which have implications for the workplace such as business trips, company parties or other company related functions.

Section 2(2) of the Code provides that every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of among other grounds, race, colour, ancestry, place of origin, ethnic origin, citizenship and creed.

The Code contains no explicit provisions dealing with harassment in the areas of services, goods and facilities (section 1 of the Code), contracts (section 3 of the Code) or membership in trade and vocational associations (section 6 of the Code). However, it is the position of the OHRC that racial harassment in such situations would constitute a violation of sections 1, 3 and 6 of the Code, which provide for a right to equal treatment without discrimination with respect to services, goods and facilities, contracts and membership in trade and vocational associations respectively.

3.4.2. What constitutes harassment

Harassment is defined in section 10(1) of the Code as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”

The reference to comment or conduct “that is known or ought reasonably to be known to be unwelcome” establishes a subjective and objective test for harassment. The

harasser's own knowledge of how his or her behaviour is being received is the subjective part of the test. The objective component considers, from the point of view of a "reasonable" third party, how such behaviour would generally be received. The determination of the point of view of a "reasonable" third party must take into account the perspective of the person who is harassed.⁹⁹

Tribunals have accepted the particular impact that racial terms have on racialized persons. 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 the inferiority of others. Racist language has this effect, whether or not it is intended, because these judgments are built into the meanings of the words.¹⁰⁰

In many situations it should be obvious that the racially based conduct or comments will be offensive or unwelcome. The following types of behaviours would in most instances be considered "a course of comment or conduct which ought reasonably to be known to be unwelcome":

- racial epithets, slurs or jokes
- being subjected to racial name calling or nicknames¹⁰¹
- racial cartoons or graffiti
- comments ridiculing individuals because of race-related characteristics, religious dress, etc.
- singling out an individual for teasing or jokes related to race, ancestry, place of origin or ethnic origin
- being subjected to inappropriate references to racist organizations such as the Ku Klux Klan
- circulating racially offensive jokes, pictures or cartoons by e-mail or having a racially offensive screensaver.

It is important to note that conduct or comments which involve a person's race may not, on their face, seem offensive. However, they may still be "unwelcome" from the perspective of a particular individual. If the individual objects and if a similar behaviour is repeated, it may constitute a violation of the *Code*.

In addition, the comments or conduct need not be explicitly racial in order to constitute racial harassment:

Example: In a workplace, only the Hispanic employees are made the brunt of demeaning practical jokes and teasing. An inference may be drawn from the particular circumstances that the treatment was racial harassment, even though the practical jokes and teasing contained no reference to race.

If an individual objects to behaviour, this will provide strong support for a conclusion that the behaviour was known or ought reasonably to have been known to be unwelcome. At the same time, however, it is important to recognize that persons experiencing racial

harassment may not object and may even appear to be going along with or participating in the comments or conduct.

Tribunals have recognized that this type of response is understandable and does not defeat a complaint of harassment. Some persons who are experiencing harassment do not object because they are in a vulnerable situation, are afraid of the consequences of speaking out, or because they are internalizing the stress through quiet acceptance. Others can be expected to respond with outbursts, becoming angry, using strong language, including retaliating with racial comments, and becoming emotional.¹⁰²

It is not possible for an individual to contract out of his or her human rights. As well, employers, landlords and service providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects. Therefore, arguing that a racialized person accepted, condoned or participated in harassment or discrimination will not provide a defence.

3.4.3. Harassment based on multiple grounds

As with racial discrimination, people sometimes experience racial harassment in complex ways based on the intersection of multiple grounds. For example, the experience of racial harassment will often differ for men and women. This is because people often experience distinctive forms of stereotyping based on the combination of race and gender. Similarly, factors such as sexual orientation, disability, age, language¹⁰³ and religion can give rise to a unique and complex experience of racial harassment.

Racial stereotypes about the sexuality of women have played a part in a number of sexual harassment complaints. Women may be targeted because of a belief that based on racialized characteristics, they are more sexually available, more likely to be submissive to male authority, more vulnerable, etc.

Example: A woman of mixed Métis and Black ancestry was subjected to a serious course of sexual comments by her employer that repeatedly referenced his preference for Black women and the physical characteristics of Black and African women. She was also subjected to physical touching and pornography. The Tribunal found that her employer sexually and racially harassed her because she is a young Black woman over whom, as her employer, he could assert economic power and control. He repeatedly diminished her because of his racist assumptions about the sexuality of Black women. Separate monetary damages were awarded for each of the racial and sexual harassment. The tribunal also found that the intersectionality of the harassment and discrimination exacerbated her mental anguish.¹⁰⁴

It is the OHRC's position that where multiple grounds intersect to produce a unique experience of discrimination or harassment, this must be acknowledged to fully address the impact of discrimination or harassment on the person who experienced it. Where the evidence indicates that harassment occurred on the basis of multiple grounds, it is the OHRC's position that the Tribunal should apply the concept of intersectionality with

respect to the issue of liability and the remedy available to the applicant.

3.5. Poisoned environment

The *Code* definition of harassment refers to more than one incident of comment or conduct. However, even a single statement or incident, if sufficiently serious or substantial, can have an impact on a racialized person by creating a poisoned environment.¹⁰⁵ A consequence of creating a poisoned environment is that certain individuals are subjected to terms and conditions of employment, tenancy, services, etc. that are quite different from those experienced by individuals who are not subjected to those comments or conduct. Such instances give rise to a denial of equality under the *Code*.

In the employment context, tribunals have held that the atmosphere of a workplace is a condition of employment just as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace.¹⁰⁶ Management personnel who know or ought to know of the existence of a poisoned atmosphere but permit it to continue thereby discriminate against affected employees even if they themselves are not involved in the production of that atmosphere.¹⁰⁷ While the notion of a poisoned environment has predominantly arisen in an employment context, it can apply equally where it results in unequal terms and conditions in occupancy of accommodation, the provision of services, contracting or membership in a vocational association.

A poisoned environment can specifically arise in the context of educational services. Schools have a duty to maintain a positive non-discriminatory learning environment.¹⁰⁸ Students are entitled to be free from a poisoned educational environment created either by inappropriate behaviour of an education provider or by other students. Education providers have a responsibility to take immediate steps to intervene in situations where racial teasing, bullying or harassment may be taking place.

A poisoned environment is based on the nature of the comments or conduct and the impact of these on an individual rather than on the number of times the behaviour occurs. As mentioned earlier, even a single egregious incident can be sufficient to create a poisoned environment.¹⁰⁹

A poisoned environment can be created by the comments or actions of any person, regardless of his or her position of authority or status in a given environment. Therefore, a co-worker, a supervisor, a co-tenant, a member of the Board of Directors, a service provider, etc. can all engage in conduct that poisons the environment of a racialized person.

Behaviour need not be directed at any one individual in order to create a poisoned environment. Moreover, a person can experience a poisoned environment even if he or she is not a member of the racialized group that is the target.

Example: A Chinese Canadian woman worked in a bakery where racial slurs and stereotypical language were common in the kitchen. Although none of these

remarks were directed specifically to her, but rather to her Black co-workers, a Board of Inquiry found that she had also been subjected to a racially poisoned environment.¹¹⁰

Examples of situations which could be viewed as a violation of the *Code* by creating a poisoned environment include the following:

- A supervisor or landlord saying to an employee or tenant “I don’t know why you people don’t go back where you came from because you don’t belong here.”
- Comments, signs, caricatures, or cartoons displayed in a service environment such as a store or restaurant, in a work or tenancy situation which show racialized persons in a demeaning manner.
- Racial graffiti which is tolerated by an employer, a landlord or a service provider who does not act promptly to have the racial graffiti removed.
- Racial remarks, jokes or innuendo about an employee, client, customer or tenant. In addition, racial remarks, jokes or innuendo made about other racialized persons or groups may create an apprehension that similar views are held about the employee, client, customer or tenant.

Where an employee is terminated within a poisoned work environment, a proper consideration of whether the termination was discriminatory requires that it be examined in the context of the poisoned work environment.¹¹¹

Inappropriate comments or conduct not only poison the environment for racialized persons, they affect everyone’s environment and are disruptive. It is the responsibility of every employer, landlord or service provider to ensure that its environment is free from this sort of behaviour, even if no one objects.

3.6. Language-related discrimination

While the *Code* does not include “language” as a prohibited ground of discrimination, language can be an element of a complaint based on the grounds of ancestry, ethnic origin, place of origin and race. As noted in the OHRC’s *Policy on Discrimination and Language*, a person’s accent is related to his or her ancestry, ethnic origin or place of origin and as discussed earlier in this policy, accents or manners of speech can be racialized characteristics.

There can be situations where the issue of the fluency of language or a person’s accent can be used to mask discrimination based on race.

Example: An African Canadian woman who is involved in a disagreement with a co-worker over the phone is told by a manager that her accent can be interpreted to be “hard and rude” on the ears. The African Canadian woman is very offended by this characterization of her accent and the fact that her accent is being blamed for provoking the disagreement. When she insists on an apology from the manager, she is perceived by management to be “volatile,” “difficult” and “aggressive” and singled out for performance management.

Example: Workers from Ecuador and other Central and South American countries were treated differently and ridiculed for their use of the Spanish language, and for their inability to speak English consistent with their recent arrival in Canada.¹¹²

Example: A subsidized housing provider does not add an applicant to its waiting list because she is not fluent in English and will be hard to communicate with.

At the same time, it is recognized that in some circumstances proficiency in a certain language may be a reasonable and *bona fide* requirement.¹¹³

Example: An immigrant settlement agency that serves persons from South Asian countries requires support workers. Most of its clientele has recently arrived in Canada. Fluency in one or more South Asian languages in addition to English (or French) would likely be considered a *bona fide* requirement for the position.

3.7. Association

The *Code* provides protection to persons who experience discrimination or harassment because of their association, relationship or dealings with a racialized person or persons.¹¹⁴ This form of discrimination often arises in the context of inter-racial relationships and can manifest in several ways:

- experiencing workplace harassment or a poisoned environment because of a relationship with a racialized person, e.g. inappropriate sexual comments being made to a woman who is dating a racialized man¹¹⁵
- unsolicited warnings being offered to a woman that her racialized boyfriend will treat her badly because of a stereotypical assumption that “men from his part of the world are sexist”
- experiencing differential treatment in services, e.g. being stopped by police when in a car with a racialized man because of an assumption that a woman with a racialized man must be a prostitute¹¹⁶
- being subjected to discrimination or harassment in housing because a landlord doesn’t want a tenant’s racialized friend visiting.

Racial discrimination because of association in the housing context can also arise where landlords prevent tenants from subletting to racialized persons.

Example: A landlord was found to have discriminated against a tenant when he prevented him from subletting his apartment to a couple of Aboriginal ancestry.¹¹⁷ In another case, a landlord was found liable for discrimination when he refused to allow assignment of a lease to persons of “East Indian” or Pakistani origin.¹¹⁸

Actions taken against persons who object to racist comments aimed at another group have been found to be discrimination because of association.

Example: A woman who was a member of a club confronted other members about racist comments they made about “niggers” and “Indians.” The Tribunal

found that having spoken out against racism, the woman clearly associated herself with First Nations and racialized people and that actions taken by the club, because she stood up to racist comments, amounted to a breach of the *Code*.¹¹⁹

3.8. Special interest organizations

In certain circumstances, the *Code* permits certain types of organizations to limit participation or membership based on *Code* grounds including race and related grounds:

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Example: A legal clinic that is primarily engaged in serving the interests of members of a specific racialized community only accepts members of that community as clients.

Similarly a religious, philanthropic, educational, fraternal or social institution that is primarily engaged in serving the interests of persons identified by their race and related grounds can give preference in employment to persons similarly identified if the qualification is reasonable and *bona fide* because of the nature of the employment (section 24(1)(a)).

An organization that wishes to rely on these defences must show it meets all of the requirements of the relevant section.

4. Systemic or institutional dimensions

Racial discrimination exists not just in individual behaviour but can also be systemic or institutionalized. Systemic or institutional discrimination is one of the more complex ways in which racial discrimination occurs. Organizations and institutions have a positive obligation to ensure that they are not engaging in systemic or institutional racial discrimination.

Systemic or institutional discrimination consists of patterns of behaviour, policies or practices that are part of the social or administrative structures of an organization, and which create or perpetuate a position of relative disadvantage for racialized persons.¹²⁰ These appear neutral on the surface but, nevertheless, have an exclusionary impact on racialized persons. However, systemic discrimination can overlap with other types of discrimination that are not neutral. For example, a discriminatory policy can be compounded by the discriminatory attitudes of the person who is administering it.

Systemic or institutional discrimination is a major barrier to racialized groups, particularly in the employment context, in education and in the criminal justice system. The impacts

of systemic racial discrimination can be experienced differently based on intersection with other grounds of discrimination such as gender, disability, place of origin, etc. For example, in a workplace that relies heavily on culturally and gender specific sporting activities to build informal networks, which, in turn, lead to promotions, a racialized woman with a disability could find herself at a triple disadvantage. A man who has recently emigrated from Africa may face similar barriers in networking and ultimately advancing in this organization. Therefore, addressing systemic discrimination requires sensitivity to the interacting and cumulative effects of discrimination on multiple grounds.

As discussed in section “1.4. Historical context: the legacy of racism in Canada,” the history of racism in Canada continues to have a significant impact on affected communities. Disadvantage in many communities has accumulated as a result of past and present discrimination. For example, the economic disadvantage apparent in First Nations and African Canadian communities may be related to discriminatory practices of the past that limited economic opportunities of members from these communities.

The combined impact of current and historical disadvantage is reflected in statistics regarding unemployment, underemployment, low wage jobs, low education, poverty and inadequate housing. For example, in the 2001 census, the median income of the total Canadian population aged 15 years and over was \$22,120 compared with \$17,610 of the total “visible minority” population. With regard to low-income families, the incidence of low income was 12.9% for the total population compared with 26.0% of the total “visible minority” population.¹²¹ The situation is even more serious for Aboriginal persons.¹²² For example, in 1996 Census data showed that Aboriginal peoples in urban areas were more than twice as likely to live in poverty as non-Aboriginal people and data from the 2001 census shows that the median income of all persons indicating Aboriginal identity is \$13,526, or 61% of the median income for all Canadians.¹²³

In some situations, the existence of historical disadvantage is a factor that gives rise to or contributes to systemic discrimination. It is therefore necessary to consider an individual or group’s already disadvantaged position in Canadian society as part of any analysis of whether systemic or institutional discrimination is taking place. For example, health services that are not as readily available to lower income individuals or in lower income areas may result in a systemic barrier for racialized persons who, by virtue of historical disadvantage, are more likely to be poor.

4.1. Identifying systemic discrimination

The following three considerations can be employed for identifying and addressing systemic discrimination:¹²⁴

1. Numerical data
2. Policies, practices and decision-making processes
3. Organizational culture

The OHRC expects organizations and institutions to use these three considerations as a basis for proactively monitoring for and, if found to exist, addressing systemic discrimination internally, i.e. with regard to human resources and employment or

externally, for example in their service delivery. In addition, if an application is filed with the Tribunal, the Commission's position is that these considerations should guide the Tribunal in its assessment of whether systemic discrimination exists within an organization or institution.

1. Numerical data

Numerical data that demonstrates that members of racialized groups are disproportionately represented may be an indicator of systemic or institutional racism. Numerical data can be evidence of the consequences of a discriminatory system in the following ways:

- Under-representation in an organization relative to the availability of qualified individuals in the population or in the applicant pool suggests systemic discrimination in hiring practices or may be indicative of on-the-job discrimination resulting in a failure to retain racialized persons.
- Unequal distribution of racialized persons in an organization (for example, high concentration in entry-level positions and low representation in managerial positions) may demonstrate inequitable training and promotion practices.
- Over-representation of racialized persons in police stops, jails and in other areas of the justice system may be indicative of the practice of racial profiling or other forms of racial discrimination. Similarly, evidence of racialized children and youth being disproportionately disciplined, suspended or expelled under "zero tolerance" school safety policies may be suggestive of discriminatory effects of these policies.

Except in the most obvious circumstances (for example, where the data shows gross disparities in treatment that are unlikely to be the result of random selection), numerical data alone will not be proof of systemic discrimination.¹²⁵ However, it will constitute strong circumstantial evidence of the existence of inequitable practices. An organization can challenge the statistics and their validity or can demonstrate a non-discriminatory reason for disproportional representation.

It is important to note that numerical data can be evidence of both systemic discrimination and more overt forms of discrimination. For example, numerical data showing an under-representation of qualified racialized persons in management may be evidence of employment systems that have the effect of discriminating and/or of decision-makers having an overt bias toward promoting White candidates into supervisory roles.

As discussed in detail in section "6. Collection and analysis of numerical data," it is the OHRC's position that data collection and analysis should be undertaken where an organization or institution has or ought to have reason to believe that discrimination, systemic barriers or the perpetuation of historical disadvantage may potentially exist. In addition, whether or not data collection has taken place, an organization or institution must be conscious of issues of representation and cannot choose to remain unaware of disparities that exist.

2. Policies, practices and decision-making processes

In addition to or apart from numerical data, evidence of systemic discrimination may be found in the policies, practices and decision-making processes. These may be either formal or informal in nature.

The Supreme Court of Canada has made it clear that systems must be designed to be inclusive of all persons.¹²⁶ It is no longer acceptable to structure systems in a way that assumes that everyone is a member of the dominant group and then try to accommodate those who do not fit this assumption. Rather, the racial diversity that exists in Ontario should be reflected in the design stages of programs so that barriers are not created.

As a corollary to the notion that inclusive design should be used from the outset, where barriers already exist within systems and structures, they should be actively identified and removed.

Therefore, an organization has a responsibility to ensure its practices create inclusiveness, and not merely to make exceptions to allow individuals to fit into an existing system. Barriers should be prevented at the design stage and where systems already exist, organizations should be aware of the possibility of systemic barriers and actively seek to identify and remove them.

Example: Employment systems reviews to identify barriers to recruitment, retention and advancement are a core requirement of federal employment equity legislation. These reviews involve looking at written policies and also informal practices that are in use in recruitment, selection and hiring of employees, the development and training of employees, the promotion of employees and the retention and termination of employees. The process of an employer self-monitoring its own practices and addressing any barriers identified is a best practice for any organization, whether or not it is governed by employment equity legislation in addition to human rights legislation.

Example: The language and content of questions on a standardized test are based on mainstream White culture and have the effect of screening out racialized persons and recent immigrants. Recognizing this, an organization modifies the content of the test to reduce racial bias or adopts alternative means of academic assessment.

Several major types of barriers can lead to disadvantage for racialized persons. One of the most obvious ones is the use of informal or highly discretionary processes for decision-making. The less formal the process, the more likely that subjective considerations or differing standards will be applied and the more opportunity there is for unconscious or conscious biases to come into play.¹²⁷ In some situations, formal policies exist but are not always applied or are applied unevenly, thus leading to barriers for some. Another pitfall is failing to account for difference in standardized procedures and evaluating people using the dominant culture as the norm. For example, testing or

evaluation that fails to account for cultural difference can be a barrier to racialized persons or immigrants. Historical disadvantage poses a major barrier in many contexts.

Issues in education

Numerous studies and reports have identified systemic barriers in educational services affecting racialized children, particularly African Canadian and Aboriginal children. Concerns that have been identified include streaming, bias in testing and evaluation, a monocultural and exclusionary curriculum, unfair and unusual discipline, low expectations, failing to deal with racial incidents and bullying, lack of role models, negative attitudes and stereotypes and a lack of programs that support the needs and concerns of racialized students.

See *Racism in our Schools: What to Know About It; How to Fight It* prepared for the Canadian Race Relations Foundation (June 2000).

For guidance on workplace policies, practices and decision-making processes that can lead to systemic discrimination, see the Appendix.

3. Organizational culture

Organizational culture can be described as shared patterns of informal social behaviour, such as communication, decision-making and interpersonal relationships, that are the evidence of deeply held and largely unconscious values, assumptions and behavioural norms. An organizational culture that is not inclusive can marginalize or exclude racialized persons.

Specific aspects of an organizational culture that tend to be socially constructed by dominant groups include communication styles, interpersonal skills and leadership abilities. These are highly subjective qualities that are influenced by cultural differences as well as the process of racialization. As such, racialized persons can run into difficulties when assessed against these dominant norms.

Example: A White woman's straightforward communication style leads co-workers to appreciate her as a "straight talker." An African Canadian woman's similar style results in her being characterized as "abrupt."

Example: A Pakistani Canadian man was not given a teaching job for which he was the most qualified candidate because a White woman was perceived to be more enthusiastic and to have greater potential to motivate students. In fact, the Pakistani Canadian man was extremely enthusiastic about teaching and had great potential to motivate students but demonstrated this in a different manner. The Tribunal found discrimination because of the employer's failure to take into account cultural differences.¹²⁸

Example: A senior manager in an organization noted in a memo that cultural differences were minimized in technical positions but that "soft skills" such as communicating, influencing and negotiating were affected by cultural differences.

The Tribunal found that “visible minorities” were viewed by senior management as culturally different and not considered suitable for managerial positions.¹²⁹

A related issue can be an organization’s tendency to undervalue the strengths and contributions of racialized employees.

Example: A Chinese Canadian teacher was placed on a surplus list because the school principal took a narrow view of what types of activities qualified as “extra-curricular.” Activities that for cultural reasons Chinese immigrants would be unlikely to undertake were included while legitimate activities that they would be more disposed to engage in were excluded.¹³⁰

Social relationships and networks are also an important part of organizational culture. These networks can allow some people to know what is required for success in an organization, with others being excluded from this critical knowledge. In addition, social relationships can result in perceptions about whether a person “fits” within an organization or is seen as an outsider.

Example: A company emphasizes evening social events outside of the workplace as an important part of team building. Racialized employees who do not participate for cultural or religious reasons are seen as not being team players and miss out on significant networking opportunities.¹³¹

4.1.1. Establishing a Link between the system and the individual

One of the challenges in addressing systemic discrimination is that there may be little or no evidence of individual discrimination. In other words, it is a system, which may on its face appear completely neutral, that is conveying certain privileges for some groups and having an adverse impact on others. There may be nothing to suggest that the individual was singled out for adverse treatment. In fact, it may seem as though the individual was treated in a fair manner and failed due to his or her own shortcomings.¹³²

Example: A racialized person is not awarded a promotion due to poor performance during the interview. Nothing is said or done to suggest that her race was a factor in the assessment. However, on closer examination, it becomes apparent that a significant component of the interview process involved assessing “presence” and “confidence.” Moreover, the successful candidate had been coached on what to expect during the interview by a manager who really wanted to see her get the job, while the racialized person was not offered the same opportunity.

It can be very difficult for an individual to demonstrate that a discriminatory system had a discriminatory adverse effect on him or herself. This is particularly so as the individual will not likely have access to all of the information regarding how the system operates.

Example: An independent school whose student population is predominantly White selects prospective students based, in part, on a “trial day” which involves a child attending the school for a day to see if the child “fits in.” Parents of a

racialized child who doesn't get offered a spot are simply told that there is a long waiting list and they choose the students who are "most suitable." There is no way for the parents to know why their child was not "suitable."

Accordingly, it is the OHRC's position that if evidence of systemic discrimination is found to exist, the organization or entity responsible for the system is required to produce information to show that this system did not contribute to an individual's experience of discrimination.

4.2. Reasonable and *bona fide* requirements

There may be some instances where a policy, practice or decision-making process is neutral on its face but leads to systemic discrimination against racialized persons or groups. The organization or institution may nevertheless seek to justify or maintain the policy, practice or decision-making process by demonstrating that it is reasonable and *bona fide* in the circumstances.

In the context of claims of racial discrimination, it is the OHRC's position that it will be rare that a policy, practice or decision-making process will be found to be *bona fide*. To date, this defence has been arisen primarily in three situations: (1) income requirements in housing accommodation, (2) language requirements (see section "3.6. Language-Related Discrimination"), and (3) access to professions and trades.

With respect to income requirements, there have been several decisions in Ontario, beginning with the landmark decision in *Kearney v. Bramalea Ltd. (No. 2)*,¹³³ that have confirmed that the use of minimum income requirements and rent-to-income ratios result in discrimination on the basis of a number of grounds in the *Code* including race.

Statistical evidence showed that the landlords' use of such criteria had a disparate impact on individuals based on their sex, race, marital status, family status, citizenship, place of origin, age and the receipt of public assistance. The landlords could not establish a defence, as they could not demonstrate that the use of the criteria was reasonable and *bona fide* or that stopping the use of the criteria would cause undue hardship.¹³⁴

The significance of these decisions from a racial discrimination perspective lies mainly in their recognition of the link between socio-economic status and race. They represent a successful challenge of a policy that affected low-income individuals because of the relationship between poverty and historical disadvantage experienced by racialized groups.

The issue of access to professions and trades is of significant concern to foreign-educated and trained persons who seek to practice their profession or trade after their arrival in Ontario.¹³⁵ While it is an issue that is based primarily on the ground of "place of origin" it also has intersectional implications for racialized persons. The intersection of "place of origin" with race, colour or ethnic origin appears to compound the barriers to employment integration and intensify economic and social vulnerability for foreign educated and trained persons.¹³⁶

4.2.1. The three-step test

The Supreme Court of Canada has set out a three-step test for determining whether a standard, factor, requirement or rule can be justified as a *bona fide* one. The organization or institution must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.¹³⁷

The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship.

In this analysis, the procedure used to assess and achieve accommodation is as important as the substantive content of accommodation. The following non-exhaustive factors should be considered in the course of the analysis:

- whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect
- reasons why viable alternatives were not implemented
- ability to have differing standards that reflect group or individual differences and capabilities
- whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory manner
- whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies
- whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.¹³⁸

5. Organizational responsibility

The ultimate responsibility for a healthy and inclusive environment rests with employers, landlords, unions, service providers and other organizations and institutions covered by the *Code*. There is an obligation to ensure that environments are free from discrimination and harassment.

As discussed earlier in this policy, organizations and institutions have an obligation to be aware of whether their practices, policies and programs are having an adverse impact or resulting in systemic discrimination vis-à-vis racialized persons or groups. It is not acceptable from a human rights perspective to choose to remain unaware of the potential existence of discrimination or harassment, to ignore or to fail to act to address human rights matters, whether or not a complaint has been made.

An organization violates the *Code* where it directly or indirectly, intentionally or unintentionally infringes the *Code* or does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code*.

In addition, there is a human rights duty not to condone or further a discriminatory act that has already occurred. To do so would extend or continue the life of the initial discriminatory act. The obligation extends to those who become involved in a situation that involves a discriminatory act, who, while not the main actors, are drawn into the matter nevertheless, through contractual relations or otherwise.¹³⁹

Consider this:

Strong policies and programs that prevent human rights violations make good business sense. A positive work environment contributes to workplace productivity. Taking proactive measures to avoid human rights issues and having policies and programs in place that allow issues that may arise to be dealt with promptly and effectively saves time and money. Letting people know the rules and defining acceptable forms of behaviour makes it possible to avoid costly and disruptive hours in the courts or before specialized administrative bodies. Persons outside of an organization, such as the general public or prospective clients, also appreciate an organization's commitment to equity.

Example: A pharmaceutical company refused a Black woman employment in an exhibit booth at an International Congress of Ophthalmology. The woman informed the company that was organizing the Congress and which had nominated her for the job. This company was found to have a relationship with the woman with respect to employment. As such, it had a duty to investigate the refusal of employment and arrive at a reasonable conclusion, although not necessarily a correct one, as to whether discrimination occurred. However, the Tribunal found that the investigation was "barebones" and the conclusion that there was a "misunderstanding" unreasonable. The company's assistance to the pharmaceutical company in finding other candidates for the booth condoned or furthered the pharmaceutical company's discriminatory act.¹⁴⁰

Unions, vocational and professional organizations are responsible for ensuring that they are not engaging in discrimination or harassment vis-à-vis their membership. They are also responsible for ensuring that they are not causing or contributing to discriminatory actions in a workplace. A union can be held liable for policies or actions that are discriminatory to the same extent as an employer. This will include negotiating a term in a collective agreement that results in racial discrimination or failing to take reasonable measures to address workplace harassment or a poisoned environment.¹⁴¹

Failing to fulfill the duty to ensure that an organization is not engaging in or condoning discrimination or harassment has serious repercussions. Human rights decisions are full of findings of liability and assessments of damages that are based on, or aggravated by, an organization's failure to appropriately address discrimination and harassment.¹⁴²

A few examples include:

- A company was found to have discriminated against an “East Indian” Canadian by permitting a racially poisoned environment to develop and persist at the facility where he worked and by disciplining and eventually discharging him without taking into account the racially hostile environment in which he worked. The company should have undertaken systemic efforts to develop and advocate company policies against racist language, to root out offenders and to implement serious and effective measures of deterrence.¹⁴³
- The owner of a company threatened to dismiss an African Canadian employee because of his strained relationship with his manager. The triggering event for this threat was the manager’s report to the owner of the employee’s reaction to being called “Kunta Kinte” (a slave name). The Court did not accept the company’s argument that the owner was oblivious to the racial poison in the workplace. The company, through its directing mind, was *at least* reckless in failing to do anything. Based on the poisoned environment, race was found to be a factor in the African Canadian man’s dismissal.¹⁴⁴
- An organization that disciplined an employee for reacting to racial harassment by a customer was found liable for how it responded to the customer’s discriminatory conduct. The employer had no control over the customer’s conduct, but by disciplining the employee in such circumstances an employer is condoning the discriminatory conduct and allowing such conduct to invade the workplace.¹⁴⁵

The following factors have been suggested as considerations for determining whether an organization met its responsibilities to respond to a human rights claim:

- procedures in place at the time to deal with discrimination and harassment
- the promptness of the institutional response to the claim
- the seriousness with which the claim was treated
- resources made available to deal with the claim
- whether the organization provided a healthy work environment for the person who complained
- the degree to which the action taken was communicated to the person who complained.¹⁴⁶

5.1. Vicarious liability

Section 46.3(1) of the *Code* provides for vicarious liability for breaches of the sections of the *Code* dealing with discrimination. This means that a corporation, trade union or occupational association, unincorporated association or employers’ organization will be held responsible for any act or omission done in the course of his or her employment by an officer, official, employee or agent. This applies not only to human rights violations in the workplace but also in housing accommodation, goods, services and facilities, contracting and membership in unions and vocational associations.

Simply put, it is the OHRC’s position that vicarious liability automatically attributes responsibility for discrimination to an organization for the acts of its employees or agents, done in the normal course, whether or not it had any knowledge of, participation in or control over these actions.

Vicarious liability does not apply to breaches of the sections of the *Code* dealing with harassment. However, in these cases the “organic theory of corporate liability” may apply. In addition, since the existence of a poisoned environment is a form of discrimination, it is the OHRC’s position that when harassment amounts to or results in a poisoned environment, vicarious liability under section 46.3(1) of the *Code* is restored.

5.2. “Organic theory” of corporate liability

While section 46.3(1) of the *Code* exempts an organization from liability for harassment, courts and tribunals have recognized that there are additional circumstances in which an organization will be held liable for the acts or omissions of its employees. The acts or omissions of an employee who is part of the “directing mind” of an organization will engage the liability of the organization where:

- a. the employee who is part of the “directing mind” engages in harassment or inappropriate behaviour that is contrary to the *Code*; or
- b. the employee who is part of the “directing mind” doesn’t respond adequately to harassment or inappropriate behaviour of which the employee is aware, or ought reasonably to be aware.

Generally speaking, an employee who performs management duties is part of the “directing mind” of an organization. Employees with only supervisory authority may be viewed as part of an organization’s “directing mind” if they function or are seen to function as representatives of the organization. Even non-supervisors may be considered part of the “directing mind” if they have de facto supervisory authority or have significant responsibility for the guidance of employees. For example, a member of the bargaining unit who is a lead-hand may be considered to be part of the “directing mind” of an organization.

Finally, persons who are central decision-makers in an organization, such as members of the Board of Directors, may be seen as part of the “directing mind.”

5.3. Accounting for historical disadvantage

We all have a shared responsibility for addressing historical disadvantage. Therefore, it is the OHRC’s position that all organizations, institutions and levels of government should take steps to address historical disadvantage. This expectation is even higher for public bodies as they are more likely to have contributed to the causes of historical disadvantage in the first place¹⁴⁷ and because government has an enhanced responsibility to ensure that everyone can benefit equally from its services. This was discussed by the Supreme Court of Canada in a disability accommodation case:

*...to promote the objective of a more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.*¹⁴⁸

There are several approaches to addressing historical disadvantage which can be implemented, alone or in combination. These are discussed in section “7. Preventing and responding to racism and racial discrimination.

“Reverse discrimination”

Unfortunately, measures to address historical disadvantage, such as through special programs under s. 14 of the *Code*, may sometimes be characterized as “reverse discrimination” or “tokenism.” Persons who receive the benefit of the measures are thereby stigmatized as being undeserving or receiving special treatment.

It is important to emphasize that the purpose of these measures is not to give racialized persons an advantage but to place them on the same footing as persons who have not experienced historical disadvantage. These measures can open the doors of education, employment, housing and business development that would otherwise be shut to racialized persons. And while remedying past acts of discrimination, these measures also contribute to the prevention of future acts of discrimination, for example by increasing diversity which, in turn, promotes organizational change. Therefore, society as a whole benefits from removing barriers preventing each member from achieving his or her full potential.

As is the case with human rights related accommodations, organizations and institutions that are implementing measures to address historical disadvantage should foster a positive environment and deal with negative responses that may arise.

5.4. Public interest remedies

In addition to the ability to award monetary remedies, human rights tribunals are granted broad remedial powers to direct a party found responsible for discrimination to do anything that, in the opinion of the tribunal, the party ought to do to achieve compliance with human rights codes, both in respect of the complaint and in respect of future practices (section 45.2(1)3 of the *Code*). Public interest remedies that have been ordered by tribunals are wide-ranging and have included requiring an organization to cease or change practices that have resulted in discrimination, to conduct internal or third-party monitoring, to implement comprehensive anti-discrimination and anti-harassment policies and to engage in widespread training of staff and management, to name a few.

In addition, there are several decisions in which human rights tribunals have sought to use their remedial authority to require measures that will account for historical disadvantage. In such cases, the decision-maker has ordered corrective measures designed to remove barriers to full participation and redress the effects of past discrimination.

One of the most significant corrective programs ordered by a tribunal was in a gender discrimination case. A major Canadian employer that was found to have systemically discriminated against women was ordered to hire one woman for every four new hires into unskilled and blue-collar jobs until the representation of women reached the national percentage for women working in equivalent jobs.¹⁴⁹

This type of program was more recently ordered in a racial discrimination case. The tribunal imposed a “special corrective measures program” to prevent future systemic discrimination and to eliminate past barriers arising out of the discriminatory practices

that were identified. The program entailed seven permanent corrective measures targeted at changing aspects of the systems and organizational culture that were found to pose barriers to racialized persons. As well, 18 temporary corrective measures were identified including hiring “visible minorities” into various levels of the organization at a particular rate (e.g. 18% per year) for a certain number of years, outreach measures, mentoring programs and setting aside a percentage of positions in training programs for “visible minorities.”¹⁵⁰

In the past, tribunal decisions have ordered an organization to provide the OHRC with sufficient information on employment practices and statistics to permit the OHRC to monitor the employment practices of the organization for a period of time.¹⁵¹ Under section 29 of the amended *Code*, the OHRC no longer performs this role, but other forms of monitoring may be ordered by the Tribunal, pursuant to its powers under s. 45.2(1) 3.

Organizations and institutions should proactively adopt measures to address disadvantage. However, where they fail to do so, an applicant can pursue public interest remedies aimed at correcting systemic discrimination and historical disadvantage in settlements and in decisions before the tribunal.

Part 3 – Guidelines for implementation: monitoring and combating racism and racial discrimination

6. Collection and analysis of numerical data

It is a common misperception that the *Code* prohibits the collection and analysis of data identifying people based on race and other *Code* grounds. Many individuals, organizations and institutions mistakenly believe that collecting this data is automatically antithetical to human rights.

In fact, the OHRC has stated that not only does the *Code* permit the collection and analysis of identity data based on enumerated grounds for *Code* legitimate purposes, but also appropriate data collection is necessary for effectively monitoring discrimination, identifying and removing systemic barriers, ameliorating historical disadvantage and promoting substantive equality.¹⁵² It is the collection or use of data for improper purposes that further contributes to discrimination or stereotyping that is antithetical to human rights.

All individuals, organizations and institutions in Ontario are responsible for upholding human rights within their respective environments. Individuals, organizations and institutions can be held liable for actions that are discriminatory or harassing but also for failing in their duties to take appropriate action to address human rights issues of which they are aware, or ought to be aware. In other words, in keeping with the preventative and remedial purpose of the *Code*, there is a positive duty to take corrective action to ensure that the *Code* is not being and will not in future be breached. Just as organizations and institutions have an obligation to conduct an investigation once aware of an allegation of racial harassment, awareness that racial discrimination may exist may call for an investigation that involves the collection of data.

Did you know?

Since 1989, the Law Society of Upper Canada has undertaken and reviewed studies that are indicative of inequality within the legal profession. Among other initiatives, in 2001 the Law Society commissioned Michael Ornstein, the Director of the Institute of Social Research of York University, to prepare a demographic study of the legal profession in Ontario. Using the 1996 census, the report showed that 7.3% of lawyers in Ontario are “non-white” compared to 17.5% of the population. The report also notes that the mean earnings of “non-white” lawyers are generally much lower than that of White lawyers.

In light of this and other studies, the Law Society has undertaken initiatives to promote equality within the legal profession.

See Law Society of Upper Canada www.lsuc.on.ca/about/b/equity/promotingequity-and-diversity/.

In the context of racial discrimination, data collection is a necessary and in some cases essential tool for assessing whether rights under Part I of the *Code* are being or might potentially be infringed and for taking corrective action. It is therefore the OHRC’s position that data collection and analysis should be undertaken where an organization or institution has or ought to have reason to believe that discrimination, systemic barriers or the perpetuation of historical disadvantage may potentially exist.

Whether an organization or institution has or ought to have reason to believe data collection is necessary will be assessed on a subjective and objective basis. First, the organization or institution’s actual knowledge of a problem will be considered. Second, from the point of view of a reasonable third party, whether the organization or institution should have been aware of a problem necessitating data collection will be considered. The concept of the reasonable third party will take into consideration both the perspective of the organization or institution and racialized communities.

Some situations in which there will be a reasonable basis to believe that rights under Part I of the *Code* are being or might potentially be infringed and a determination can best be made through data collection and analysis include:

- persistent allegations or complaints of discrimination or systemic barriers; for example, an organization that receives multiple claims under an internal human rights policy, through applications to the Tribunal or using another process that deals with human rights issues such as labour arbitration
- a widespread public perception of discrimination or systemic barriers; for example, public concern with the phenomenon of racial profiling
- observed unequal distribution of racialized persons; for example, a clear discrepancy in the number of racialized persons holding low-level positions as compared with those in senior positions
- objective data or research studies demonstrating the existence of discrimination or systemic barriers; for example, studies that show increased drop-out rates in education

- evidence from other organizations or jurisdictions that a substantially similar policy, program or practice has had a disproportionate effect on racialized persons; for example, evidence that “zero tolerance” school discipline policies have adversely affected racialized students in the United States and United Kingdom.

There are other situations where an organization or institution may not have reason to believe that a problem exists within its own area of responsibility but may nevertheless wish to voluntarily collect data for the purposes of advancing the objectives of the *Code*.

- census data demonstrating under-representation of Aboriginal persons in a profession is used as the basis of a special program to encourage Aboriginal persons to pursue the profession
- a survey of its clientele allows an organization to better ensure that their needs are being met, for example by issuing brochures in multiple languages, providing cross-cultural training to staff and tailoring its services to recognize the diversity of needs of its clientele
- an organization that is instituting a new policy or program or embarking on significant organizational change wants to monitor the impact of this initiative on racialized persons to ensure that no adverse effects occur

6.1. Consequences of a failure to collect and analyze data

A failure to collect and analyze data does not, in and of itself, form the basis for an application to the Tribunal. Rather, the collection and analysis of data may be a component of the duty to take action to prevent violation of the *Code*. Therefore, where a *prima facie* complaint of discrimination is made out, the a decision-maker should consider the failure to collect and analyze data as part of its analysis of whether the respondent has met its duty to ensure it is not in violation of the *Code*.

Example: School discipline policies appear to be having a disproportionate impact on racialized students and students with disabilities, and to be further exacerbating their already disadvantaged position in society. Empirical research from the United States and United Kingdom demonstrates that racialized students and students with disabilities are disproportionately affected by the application of suspensions and expulsions. The responsible authorities’ failure to take this into account and to take steps to monitor for and prevent a disproportionate impact, in part, forms the basis of a human rights claim.

Moreover, in cases where the collection of data was clearly warranted, the failure to collect accurate and reliable data may foreclose a respondent from making a credible defence that it did not discriminate. In addition, where systemic discrimination is alleged and the organization or institution has chosen not to collect data, the Tribunal may need to rely on qualitative evidence of disproportionate representation to determine whether racialized groups are experiencing disadvantage. Finally, where appropriate, the OHRC will seek, and the Tribunal may order, data collection and analysis as a public interest remedy in litigation and settlements.

Conversely, if an organization or institution collects and analyzes data it may also show that discrimination or systemic barriers do not exist. As well, efforts to monitor for discrimination or systemic barriers will assist an organization or institution to show that it has met its duty to protect and uphold human rights.

Example: A perception exists that a program is having a disproportionate effect on racialized persons. However, data reveals that racialized persons are affected the same as others.

Example: An organization is concerned that its workforce is not representative of the population it serves. It collects data to monitor whether its policies could be having a discriminatory effect as well as conducting an employment systems review to remove any barriers that may exist.

6.2 Data collection and analysis methodology

In order to fulfill its purpose, data collection should be done in good faith with the purpose of producing accurate, good-quality data rather than attempting to achieve a particular outcome. Efforts should be made to collect data that will shed meaningful light on the issues and to gather it in a way that is consistent with accepted data collection techniques.

How data collection and analysis should be conducted is dependant on the context, including the issue that requires monitoring, the purpose of the data collection and the nature and size of the organization. Effective data collection and analysis in complex situations will generally require the use of proper research and design methodologies as well as training of staff who are collecting the data. Unless an organization has the relevant internal expertise, it is likely to require assistance from an expert such as a social scientist.

Example: A police force concerned about the perception that racial profiling is a problem initiates a project to collect data about police stops. Through consultation with an expert who has a background in research methodologies and data analysis, a data collection program is designed. Officers are required to record all stops on a standard form, including the reason for the stop, the outcome and the perceived ethno-racial identity of the person stopped. A copy of the form is given to the person stopped and he is asked to verify the information recorded.

Conversely, a small organization that has basic data collection needs may be able to rely on existing resources.

Example: A non-federally regulated company sees a problem in its staffing and decides to use existing employment equity resources as a resource to implement its data collection and analysis program.¹⁵³

It is important to note that special studies where data is only collected for a limited period of time may be less accurate. Firstly, the data may only provide a snapshot of a situation

and not assess changes over time. Moreover, short-term studies may be affected by the normal human tendency to modify behaviour while under scrutiny. Data gathered in a time-limited study will, therefore, have to be considered with this in mind.

As stated earlier, data should only be used for *Code* legitimate purposes and should not be used to perpetuate discrimination or stereotyping about a group. Public disclosure of the data should be carefully considered to ensure that adverse consequences will not result.

The individuals involved in the collection of data must be informed why such information is being collected and the use to which it will be put. The reason for data collection, as well as how the collection and use of such data will assist to relieve disadvantage or discrimination and achieve equal opportunity, should be explained. This will help alleviate the concern that may exist about being asked to self-identify. Privacy of individuals must be assured and data collection, storage, access and disclosure must be carefully controlled.

As stated earlier, numerical data can be a strong indicator of inequitable practices. Therefore, if the data reveals that there is a problem an organization or institution must be prepared to act.

Please consult the OHRC's publication *Guidelines for collecting data on enumerated grounds under the Code* for further information about data collection and analysis methodologies.

7. Preventing and responding to racism and racial discrimination

Organizations and institutions operating in Ontario have an obligation to have in place measures to prevent and respond to breaches of the *Code*. They have a duty to take steps to foster environments that are respectful of human rights. This takes commitment and work. However, this is part of the cost of doing business in a jurisdiction that is committed to the goal of equality, as a matter of public policy expressed through the *Code*.

Measures to respond to racism and racial discrimination have been referenced throughout this policy. To summarize, a solid organizational anti-racism¹⁵⁴ program will contain the following components:

1. a comprehensive anti-racism vision statement and policy
2. proactive, ongoing monitoring
3. implementation strategies
4. evaluation.

7.1. Anti-racism vision statement and policy

In addition to addressing obligations under the *Human Rights Code*, the adoption and implementation of an effective anti-racism vision statement and policy has the potential of limiting harm and reducing liability. It also promotes the equity and diversity goals of organizations and institutions and makes good business sense.

A clear, concrete and comprehensive anti-racism vision statement and policy is critical to the success of any anti-racism program. The OHRC's publications *Guidelines on developing human rights policies and procedures* and *Human rights at work* discuss what should be contained in a general anti-discrimination and anti-harassment policy which covers all the grounds in the *Code*. However, there are some additional measures that are important to address the specific complexities of racism and racial discrimination.

An anti-racism model of social change

An anti-racist organization, institution or system is not one in which racism is absent. Rather, it takes a proactive stand against racism in all its forms. Commitment in anti-racist organizations is based on an acknowledgement that racism exists, that it manifests itself in various forms at the individual, institutional and systemic levels and that it is embedded in the mass culture of the dominant group. An anti-racist approach begins by acknowledging that the perceptions and experiences of racialized persons are real and that there may be a multiplicity of realities in one event.

Anti-racism emphasizes a holistic approach to the development of anti-racist ideologies, goals, policies and practices. It calls for 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.

From C. Tator "Advancing the Ontario Human Rights Commission's Policy and Education Function" in (2004) 3:3 *Canadian Diversity* 29-31.

It is essential that all key stakeholders in an organization be involved in and committed to the development of a strong anti-racism vision statement and policy. In addition, strong support from key leadership, such as senior management, the head of a union, etc. is essential for the policy to be successful. The membership of the team responsible for developing the policy should be diverse. Ideally, a consultative process involving all persons within an organization should be used, for example by surveying all staff, holding staff discussion groups or circulating a draft policy to staff for comment.

A strong anti-racism policy should have a strong vision statement. The absence of a vision statement shaped by anti-racism principles and goals can result in an inadequate framework for an anti-racism program. Vision statements should be concrete, address racism specifically and demonstrate the organization's leadership in and commitment to addressing racism.

Sample vision statement

We endorse the following anti-racism principles:

1. We recognize that racism exists in Canadian society and in its institutions, and therefore affects _____ itself.
2. We recognize our role in combating racism in _____ itself.
3. We assert our commitment to implement specific measures to combat racism, and to engage in actions to eliminate it.
4. We recognize and value the racial diversity of Ontario and of our own workplace.
5. We strive for equality of results in our employment practices and delivery of services.
6. We recognize and respect the unique identities of Aboriginal peoples and the need for a distinct approach to anti-racism measures for Aboriginal peoples.

Therefore, we will:

1. Actively identify and challenge individual or systemic acts of racial discrimination in our workplace and service delivery.
2. Ensure that management and all employees are responsible for challenging racial discrimination in our workplace and service delivery.
3. Equip management and all employees with knowledge and skills to recognize and challenge racial discrimination in our workplace and service delivery.
4. Foster respect on a daily basis amongst management and all employees.
5. Ensure that any employee's, or client's report of discriminatory treatment will be investigated and the employee or client will be protected against reprisals.
6. Ensure that management staff understand their legal responsibilities as "directing minds" to act immediately to deal with situations of potential harassment or discrimination.
7. Continually monitor and assess progress in challenging racial discrimination in our workplace and service delivery.

In addition to a list of prohibited grounds of discrimination under the *Code*, an explanation of racism and racial discrimination will assist everyone within an organization to understand what constitutes racism and racial discrimination and how they manifest and operate. In addition, definitions of harassment and a poisoned environment should be provided.

Examples of racial discrimination, harassment and a poisoned environment that are meaningful in that organization's particular context will be helpful in illustrating the types of behaviour that will not be tolerated. The consequences for engaging in harassing or discriminatory behaviour, up to and including termination, should be clearly indicated.

The policy should contain an effective internal complaint resolution procedure. It should indicate how internal complaints will be handled with details regarding:

- to whom a complaint is made
- confidentiality and protection from reprisal
- assistance that is available for parties to a complaint
- the availability of Alternative Dispute Resolution, such as mediation to resolve a complaint
- how the complaint will be investigated
- how long the process will take
- disciplinary measures that will be applied if the complaint is substantiated
- remedies that will be available to the person who complained
- the right to file an application with the Tribunal, along with an explanation of the one-year time requirement under the *Code*.

In practice, it is very important that all human rights claims be taken seriously, the complaint mechanism be applied, and that persons making complaints not be subjected to discipline or reprisal for raising the issue of racial discrimination.¹⁵⁵ It is often the experience of persons raising claims of racial discrimination, in particular, to be told that the allegation is inappropriate and unfounded without any investigation taking place. There may be a tendency to want to protect persons against such allegations because of their perceived seriousness, rather than to consider the perspective of the person making the claim.¹⁵⁶ Persons alleging racial discrimination may even be accused of “reverse discrimination.”

Example: A group of racialized employees nominates a spokesperson to raise concerns that they have that a particular manager is treating them in a discriminatory fashion. When she speaks to the head of human resources, she is told not to “go there” and that what she is raising is going to “damage the reputation of a good man.”

7.2. Proactive, ongoing monitoring

An important measure in addressing discrimination relates to simple awareness and monitoring. All too often, policies and programs are put into place without due consideration of the effect that they may have on racialized persons. Even where information comes to the attention of the responsible organization or institution that would suggest that the program is perpetuating disadvantage or causing discrimination, the organization may choose not to act, adopting instead a “head in the sand” approach.

This is neither productive nor acceptable from a human rights perspective. It is the OHRC’s expectation that where there is concern expressed that policies or practices are having a discriminatory effect on racialized persons or groups, the responsible organization or institution will take steps to assess whether this is, in fact, the case.

Monitoring will often involve the collection of data and production of statistics. However, other measures such as consulting with affected communities, systems reviews and research, including reviewing research available in other jurisdictions, are also important aspects of monitoring. Monitoring will consider the effects of the past, i.e. historical

disadvantage, the effect of systems currently in place and the potential impact of new initiatives.

Of course, monitoring alone is not sufficient. Steps must be taken to change policies and practices that are perpetuating historical disadvantage. Therefore, if a problem is revealed through monitoring or otherwise comes to the attention of an institution or organization, steps should be taken to remove systemic barriers, ameliorate disadvantage and promote substantive equality.

Example: A school board recognizes that its discipline policies are having an adverse impact on racialized students. It revises its policies so that there is more room for an assessment of the individual circumstances of each student. In addition, it assigns support persons who can assist racialized youth at risk, establishes programs that emphasize conflict resolution and peer mediation and takes steps to ensure there is no loss of education where there is no alternative to suspension.

7.3. Implementation strategies

Anti-racism requires fundamental changes to the structures and systems of organizations. For an anti-racism policy and program to be effective, attention, priority and resources must be given to implementation strategies.¹⁵⁷ A variety of measures may be needed, such as:

- organizational change initiatives such as the formation of new organizational structures, the introduction of new cultural norms, implementation of new systems, removal of old practices or policies that give rise to human rights concerns, use of more formal, less discretionary processes, focus on more inclusive styles of leadership and decision-making
- special programs, corrective measures or outreach initiatives to address inequity or disadvantage
- internal and external surveying to receive feedback on issues of racism and racial discrimination; for example, exit interviews or surveys help determine whether racial discrimination or harassment was a factor in a person's decision to leave; employee or client satisfaction surveys can help assess whether employees or clients believe they are receiving equal treatment
- empowerment of racialized persons within an organization or institution and outside it; for example, through formal mentoring arrangements, internal committees to address equality issues, community consultation, etc.
- anticipating resistance to change and developing strategies to overcome any opposition that may arise
- seeking partnerships with others, including other institutions of a similar nature, to identify best practices
- mandatory education, training and development initiatives, including effective training of all staff on the anti-racism vision statement and policy and developing specific skills and knowledge of those with additional responsibilities for human rights including any part of the "directing mind" of the organization, human resources staff and human rights advisors. Additional training should also be

made available to those in the organization responsible for proactive, ongoing monitoring or implementing organizational change

- dissemination of information about the anti-racism vision statement and policy, human rights decisions and new OHRC publications to existing and new staff
- retaining outside expertise to assist with any of the above.

“Tokenism”

Tokenism is the practice of hiring a few members of racialized groups for relatively powerless positions in order to create an appearance of having an inclusive and equitable organization. In reality, these individuals have little voice in the organization. At the same time, they are seen as representative of the group to which they belong and, as a result, their thoughts, beliefs, and actions are likely to be taken as typical of all in their group. Token measures to promote organizational diversity do not work and circumvent substantive change.

It is important to set specific timelines and identify an individual within the organization with accountability and responsibility for each measure as well as for the overall anti-racism goals of the organization. This person should have full powers, backing and resources to make sure that the measures can be effectively carried out. Progress in implementation should be tracked and reported back to senior management.

7.3.1. A Word about training

Training is often seen as a panacea to all human rights problems. However, training in isolation from other initiatives is unlikely to succeed in fostering a non-discriminatory environment. Similarly, inadequate training is not likely to be effective in bringing about a change in attitudes or behaviour. Training that emphasizes “cultural sensitivity,” “race awareness” or “tolerance” or that only seeks to deal with issues through promoting the value of “multiculturalism,” such as through potluck lunches, does not lead to meaningful change as it fails to address the dynamics of racism and reduces racial discrimination to “cultural misunderstandings.”

Effective training should not avoid the use of anti-racism terminology. Anti-racism training implies a goal of producing an understanding of what racism is and how it can be challenged. Anti-racism training aims to achieve not only a change in individual attitudes, but also a transformation of individual and collective practices.

It is therefore important to take steps to ensure that training will be effective, appropriate and timely. It helps to engage experts, do research into effective anti-racism training techniques, set goals for the training and then evaluate people’s learning against those goals. For example, a training program for an organization that is seeking to address the phenomenon of racial profiling might include the following specific goals:

- that local racialized communities be involved in the design and delivery of the training
- that training is conducted by trainers with sufficient expertise in the subject area

- that training will develop a full understanding that good community relations are essential to the organization's mandate
- that training will develop a full understanding of what racism is and how it can be challenged
- that training will develop a full understanding of what constitutes racial profiling, racial discrimination and harassment or any other violations of the Ontario *Human Rights Code*
- that training will develop a full understanding that racial profiling, racial discrimination and harassment or any other violations of the Ontario *Human Rights Code* are unacceptable and will be dealt with seriously by the organization
- that training will develop a full understanding that a respect for human rights is aligned with and not contrary to the organization's objectives
- that negative reactions to perceived racial profiling by racialized persons are contextualized so that employees of the organization understand why racialized persons may react negatively and how to respond to such reactions in a manner that is professional and not contrary to the *Human Rights Code*.

Ideally, the organization would also engage in regular, independent monitoring to assess whether the training program is adequate, effective, appropriate and timely to meet the objectives described above. The monitoring could include consultation with local racialized communities as well as a survey of the attitudes of staff receiving the training to assess whether the training has been effective in increasing understanding or changing attitudes about racial profiling, racial discrimination and racial harassment.

7.3.1. Special programs

The *Code* recognizes the importance of addressing pre-existing hardship and disadvantage in the section dealing with special programs. Section 14 of the *Code* allows for programs to alleviate hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve, or attempt to achieve, equal opportunity.¹⁵⁸

Therefore, it is the OHRC's position that organizations and institutions should endeavour to undertake special programs where hardship or disadvantage exist. To clarify how section 14 of the *Code* works, the OHRC has adopted *Guidelines on special programs*.

Some examples of the types of special programs that alleviate historical disadvantage for racialized persons include:

- Hiring – special programs that address under-representation of racialized persons in an organization, profession, or job category
- Housing – programs that assist communities which have historically had difficulty finding housing, such as Aboriginal persons and new immigrants
- Health – special strategies to improve mental health outcomes for racialized and Aboriginal communities¹⁵⁹
- Education – initiatives which support racialized persons in school or in gaining admittance to programs from which they have been historically excluded¹⁶⁰

- Contracting – schemes which assist community businesses and businesses run by racialized persons to have access to business opportunities, contracts and procurement by governments.

7.4. Evaluation

Ongoing evaluation of an organization's or institution's anti-racism program is important to ensure its effectiveness. As with the other aspects of an anti-racism program it is important to devote resources to ongoing assessment. An internal review committee can be appointed for the purposes of conducting ongoing evaluation. However, the use of independent consultants or outside expertise can be particularly helpful in conducting this type of review and reporting back to senior management.

A review, evaluation and revision of an organization or institution's vision statement and policy should occur on a periodic basis, with input from those affected by it. It is also prudent to conduct a review of situations in which complaints have been raised under the policy, how they were handled and where improvements can be made.

For more information

Please visit www.ontario.ca/humanrights for more information on the human rights system in Ontario.

The Human Rights System can also be accessed by telephone at:

Local: 416-326-9511

Toll Free: 1-800-387-9080

TTY (Local): 416-326 0603

TTY (Toll Free) 1-800-308-5561

To file a human rights claim, please contact the Human Rights Tribunal of Ontario at:

Toll Free: 1-866-598-0322

TTY: 416-326-2027 or Toll Free: 1-866-607-1240

Website: www.hrto.ca

To talk about your rights or if you need legal help with a human rights claim, contact the Human Rights Legal Support Centre at:

Toll Free: 1-866-625-5179

TTY: 416-314-6651 or Toll Free: 1-866-612-8627

Website: www.hrlsc.on.ca

Appendix – Workplace policies, practices and decision-making processes and systemic discrimination

There are many tools available to assist employers in engaging in employment systems reviews to identify systemic barriers to racialized persons as well as others identified by Code grounds such as women and employees with disabilities.

The following is a non-exhaustive summary of workplace policies, practices and decision-making processes that can lead to systemic discrimination.¹⁶¹

Recruitment, selection and hiring	
<p>In a best-case scenario, racialized persons would be hired at a rate that reflects their representation in the qualified external workforce. However, in many situations this is not the reality. Employers who do not have a representative workforce may cite the failure of racialized persons to apply for the jobs, or the fact that the jobs were given to the most qualified candidate who happened not to be a racialized individual. In some cases the above explanations will hold true. However, in others it is the recruitment, selection and hiring process itself that is impeding access to employment opportunities. Recruitment methods have a strong influence on the pool of candidates available to the employer. Moreover, some policies and practices tend to inappropriately screen out racialized persons, making them seem unqualified for the job. The following is a list of common barriers that can result in systemic discrimination and best practices to avoid systemic racial discrimination.</p>	
Barriers	Best practices
<p>Use of personal networks (e.g., the recruiter's hockey team), social relationships (e.g., friendships) and word-of-mouth referrals to recruit for vacancies. These types of informal processes tend to exclude those who do not share the same ethno/racial characteristics as the recruiter.</p>	<p>Formal job postings, which clearly describe the position and qualifications, are widely circulated, e.g., through ads placed in newspapers, internet web sites and through the use of employment agencies, so that they can readily come to the attention of racialized persons.</p>
	<p>Some employers who are actively seeking to increase their diversity specifically advertise in ethno/racial newspapers. Others undertake outreach initiatives and go to places with a high representation of racialized persons to encourage applications from these individuals.</p>
<p>Staffing decisions based on informal processes are much more likely to lead to subconsciously biased decision-making. For example, conducting an interview by chatting with the applicant to see if he or she shares similar interests and will "fit" into the organizational culture may present a barrier for persons who are or appear different than the dominant norm in the workplace.</p>	<p>Use of formal interviews conducted by multiple-person interview panels that use preset questions and score the answers against a pre-determined answer guide is a fair process that focuses on the ability to perform the essential duties of the job. Ideally, an interview panel should reflect the diversity available in the organization. The questions asked should be tailored to the objective requirements of the job, and not be based on subjective considerations such as whether the person exhibits "confidence" or is "suitable." The employer should be prepared to explain why a particular candidate was chosen. Written records from the interview and the entire job competition should be kept for at least one year if no complaint about the process is made, and longer if an application to the Tribunal is filed (until final resolution of the application).</p>
<p>Inflated job requirements (e.g., a Masters degree when a Bachelors is all that is really required for the job), "Canadian experience" and specifying desirable personality traits, e.g., "aggressiveness" can screen out or discourage racialized persons.</p>	<p>Job requirements should be reasonable and <i>bona fide</i> (see discussion of <i>bona fide</i> requirements). All prior experience should be assessed, regardless of where it was obtained. Culturally neutral qualifications, e.g., the ability to plan a project and complete it to required timelines, should be sought.</p>

Policy and guidelines on racism and racial discrimination

<p>Testing and simulations should be reasonable and <i>bona fide</i> to be reliable indicators of job performance. For example, psychometric and psychological testing may favour the dominant culture. A written test for a job that does not require written skills may screen out persons for whom English or French are a second language.</p>	<p>Testing should only be administered after a conditional offer of employment is made. It should only be used where the test can be shown by the employer to be a reasonable and <i>bona fide</i> method of assessing an applicant’s ability to do the job. Testing that assesses personal interests, attitudes and values should be avoided altogether or, if legitimately required for assessing ability to perform a job, should be used with great care to ensure it does not favour certain cultures.</p>
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<p><i>Training and development</i></p>	
<p>Training and development is integral to an employee’s performance in the current job as well as to qualify an employee for future opportunities. The ability to engage in continuous learning is also a significant factor for employee morale. Some training and development practices may exclude racialized employees. This has a direct impact on their careers, especially their upward mobility within the organization. It is prudent for organizations to monitor whether racialized persons are participating in training and development opportunities at the same rate as other employees and to address any differences.</p>	
<p>Barriers</p>	<p>Best practices</p>
<p>Training opportunities that are limited to senior employees may exclude racialized persons who may tend to be concentrated in lower level positions. In other cases, training for those at lower levels may be focused on current job skills, while training for more senior level employees may prepare them for promotion.</p>	<p>Organizations should make appropriate training available to all employees. Training should enhance current job skills as well as prepare employees for different or more advanced jobs.</p>
<p>Informing employees of training opportunities in an informal manner such as word of mouth or selecting employees for training based on the discretion of supervisors can result in discrimination.¹⁶²</p>	<p>Training information needs to be widely disseminated through formal means such as e-mails, memos and posting on bulletin boards so it can reach all staff. Employers should allow employees to nominate themselves for training or should encourage all employees to seek out training, instead of selecting some for these opportunities. Fair, objective and clearly articulated criteria for deciding who receives the training should be used.</p>
<p>Lack of appropriate mentoring has been identified as a major barrier to training and development on the job. Informal mentoring that has managers selecting employees to “take under their wing” can result in racialized persons being left out.</p>	<p>Formal mentoring programs can ensure that all employees receive mentorship. In addition, participation of senior racialized persons in mentoring programs should be encouraged to provide role models.</p>
<p>In an organization that does not provide training in anti-racism and human rights, managers may be unaware of what constitutes discrimination or harassment and how barriers operate to exclude people.</p>	<p>Ongoing training in human rights and anti-racism should be an integral part of training for all employees, but particularly those who act in a supervisory capacity. It should be made clear that human rights are part of the organization’s culture and goals and that the training is not simply “window dressing” to comply with human rights laws.</p>

Policy and guidelines on racism and racial discrimination

Promotion and advancement	
Studies on employment equity consistently show that racialized persons are still largely concentrated in lower level positions within organizations and that upward mobility continues to be a problem. This is reflected in the number of human rights complaints that relate to promotion and advancement. It is therefore important for organizations to be aware of how systems for promotion and advancement may result in obstacles for career progression. Some of the barriers and best practices in hiring (for example, in the interview process) are also applicable to promotions. And, as with all other decision-making, the use of informal guidelines rather than written or circulated policies is likely to attract concerns, even more so if informal approaches are applied inconsistently. ¹⁶³	
Barriers	Best practices
Acting assignments as a stepping-stone to promotion can result in significant barriers if the process for awarding acting positions is informal, as is often the case. Even where there is a formal process for awarding acting assignments, an employer must be careful to ensure that all employees are equally aware of these opportunities. ¹⁶⁴	Acting assignments are awarded through a formal process that includes circulating information about acting opportunities to all eligible staff, using a clearly set out process for selection that is based on objective criteria such as a written test, a formal interview and written performance appraisals.
Organizations that rely on management identifying people who are “promotable,” approaching certain employees to encourage them to bid for higher-level jobs, or assisting a favourite employee prepare for the selection process run the risk of human rights complaints.	Opportunities to move up in an organization should be openly publicized with the pre-requisites for eligibility and the process that will be used to select the successful candidate clearly identified. Moreover, as employees tend to watch for signals from management that if they bid for a higher-level position, they will be given fair consideration, it is therefore prudent not to encourage only certain employees to apply. Of course, any assistance with the process (for example, mock interviews, background reading materials, etc.) should be provided on an equal basis to all candidates.
Performance appraisals and progressive performance management are important tools for avoiding issues of discrimination. However, it is also a good idea for organizations to be aware that in some instances they can pose a barrier. For example, some performance evaluation systems have the employee rate him or herself and then discuss this with the manager. This may affect some racialized persons, due to past experiences of discrimination or to cultural differences in selling oneself. As well, certain appraisals can inadvertently have an impact on an employee later seeking promotion. For example, emphasizing an employee’s “ability to follow instructions” may pose a barrier to a promotion where “ability to take initiative” is being sought.	All employees should be measured against the same criteria. Managers should be sensitive to whether the performance appraisal methodology or the specific evaluation given could be having an unintentional adverse impact.
The clustering or concentration of racialized persons in certain jobs or categories, such as technical positions, can result in dead-ends to advancement, particularly into management. This can be compounded where subjective criteria, such as “communication skills” are emphasized in assessing suitability for a promotion.	Persons with strong technical skills should have the same opportunity to demonstrate the skills for other jobs. If necessary, training should be made available to bridge between technical and other jobs. An organization should acknowledge that there is more than one way to perform a job successfully and that requirements like “communication skills”

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	may result in culturally non-neutral criteria being applied.
Retention and termination	
A barrier-free workplace will help reduce the turnover rate for racialized employees. In addition, appropriate procedures contribute to fewer human rights complaints arising from layoff, disciplinary action and termination.	
Barriers	Best practices
Racialized employees may leave an organization for reasons related to discrimination, harassment or perceived unfairness.	Organizations should have in place anti-discrimination and anti-harassment policies, including a mechanism to address any complaints. In addition, exit interviews can assist in determining whether human rights considerations are a factor in employees leaving.
Undefined policies for discipline or uneven application of discipline are a common basis for human rights complaints. Similarly, layoff and termination decisions that are not based on clearly defined, job-related, objective criteria are problematic.	An organization that has a well-documented progressive performance management process in place and that applies it evenly to all staff is engaging in good human resources practices as well as avoiding human rights concerns. If termination becomes necessary, this organization is better placed to demonstrate a legitimate basis for the termination.

¹ Hate crimes continue to occur in Ontario and Canada and have an impact on the victim, his or her community and wider society that is disproportionate and longer lasting than that of most other crimes. Despite the fact that it is estimated by the police that hate crimes are reported in only 10-15% of cases, the Toronto Police recorded a total of 163 hate crime occurrences in 2004 against a variety of groups; see Toronto Police Service Hate Crime Unit, 2004 *Annual Hate/Bias Crime Statistical Report*, online: <www.torontopolice.on.ca/publications/files/reports/2004hatecrimereport.pdf>. B'nai Brith's League for Human Rights notes that anti-Semitism in Canada continues to escalate and that the year 2004 was characterized by a surge, for the fourth year in a row, in the number of reported anti-Semitic incidents; see League for Human Rights of B'nai Brith Canada, *Audit of Antisemitic Incidents: Patterns of Prejudice in Canada* (Toronto: League for Human Rights, 2005), online: www.bnaibrith.ca.

² See reports on racial inequality as well as the *Report of the United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Commission on Human Rights, E/CN.4/2004/18/Add.2 (1 March 2004) [hereinafter *Report of the Special Rapporteur on Racism*].

³ For example, in *R. v. Parks* (1993), 15 O.R. (3d) 324 at 342 the Ontario Court of Appeal stated: *Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism.*

See also, *R. v. Williams*, [1998] 1 S.C.R. 1128, and *R. v. Hamilton*, [2004] O.J. No. 3252 (C.A.). For cases concerning racial profiling see *infra*, note 66.

⁴ The Association for Canadian Studies is a voluntary non-profit organization. It seeks to expand and disseminate knowledge about Canada through teaching, research and publications.

⁵ *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: D. Cole & M. Gittens).

⁶ *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income*, Report Prepared for the Canadian Race Relations Foundation by the Canadian Council on Social Development (Toronto: Canadian Race Relations Foundation, 2000).

⁷ Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Queen's Printer, 2003).

⁸ *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996) (Co-Chairs: R. Dussault & G. Erasmus).

⁹ For example, the *International Convention on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [hereinafter the *ICCPR*] and the *International Covenant on Economic Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 03 January 1976, accession by Canada 19 August 1976) [hereinafter *ICESCR*].

¹⁰ 21 December 1965, 660 U.N.T.S. 195 (entered into force 04 January 1969, accession by Canada 14 October 1970) [hereinafter *CERD*].

¹¹ For the purposes of this policy, the most relevant are the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights, UN Doc. A/CONF. 157/23 (1993), endorsed GA Res. 48/121, UN Doc. A/RES/48/121 (1993), the *Declaration on Race and Racial Prejudice*, adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) 27 November 1978, E/CN.4/Sub.2/1982/2/Add.1, annex V, 1982 and most recently the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance *Declaration and Programme of Action*, 25 January 2002, A/CONF.189/12.

¹² *Report of the Special Rapporteur on Racism*, *supra*, note 3.

¹³ See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70-71.

¹⁴ In 1960, Canada enacted a declaratory statement of human rights in the Canadian *Bill of Rights*, S.C.1960, c. 44. While the bill was cast as a constitutional document, it was a statute that could be overridden by other laws. It did not apply to provincial legislation. Courts tended to interpret it narrowly and the bill was considered a disappointment by those who wanted to see a truly constitutional *Bill of Rights*; see *McLachlin*, *infra*, note 22 at paras. 37-38. In 1962, the Ontario Human Rights Commission, the first of its kind in Canada, was established to administer and enforce the Ontario *Human Rights Code*, which was enacted in 1962. The Canadian *Charter of Rights and Freedoms* came into force in April 1982, although the equality rights provisions in section 15 came into effect three years after the rest of the *Charter*. It is a constitutional document and federal and provincial laws and state actions are required to conform to it. The *Charter* is founded on the rule of law and entrenches in the Constitution of Canada the rights and freedoms, including equality rights, that Canadians believe are necessary in a free and democratic society.

¹⁵ *Report of the Special Rapporteur on Racism*, *supra*, note 3 at paras. 68-9.

¹⁶ See statistics on hate crimes, *supra*, note 2. A recent Ipsos-Reid survey commissioned by the Dominion Institute found that one in six Canadian adults report that they have personally been the victims of racism. Moreover, approximately one in ten Canadian adults would not welcome people from another race as next-door neighbours; see Ipsos-Reid, "March 21st, International Day for the Elimination of Racial Discrimination: One in Six Canadians Say They Have Been the Victim of Racism" (21 March 2005), online: www.dominion.ca/Downloads/IRracismSurvey.pdf. See also the *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Commission on Human Rights, E/CN.4/2005/88/Add.3 (02 December 2004) [hereinafter *Report of the Special Rapporteur on Indigenous People*].

¹⁷ This brief history of the Aboriginal experience of racism is based on more detailed discussions in: F. Henry, C. Tator, W. Mattis & T. Rees, *The Colour of Democracy: Racism in Canadian Society*, 2d ed. (Toronto: Nelson, a division of Thompson Canada Ltd., 1998) at 119-142; M. Jacko, "The Experience of Aboriginal Peoples in Canada" Paper for the International Council on Human Rights Policy (2001).

¹⁸ For a detailed discussion of the various events that have had such a profound impact on Aboriginal culture that they have sometimes been described as "cultural genocide," see *Report of the Royal Commission on Aboriginal Peoples*, *supra*, note 9 at Part One, Chapter 6 "Stage Three: Displacement and Assimilation."

¹⁹ See Archives of Ontario www.archives.gov.on.ca/english/exhibits/humnrts/slavery.htm and Ontario Heritage Foundation www.heritagefdn.on.ca/userfiles/HTML/nts_1_2724_1.html.

²⁰ See Archives of Ontario, *ibid.*

²¹ The Rt. Hon. Beverly McLachlin, “Racism and the Law: The Canadian Experience” (2002)

1 J.L. & Equality 7-24 at para. 18, online: QL (JOUR).

²² *Ibid.*

²³ Henry, Tator, Mattis & Rees, *supra*, note 18 at 71-72.

²⁴ *Stewart and School Trustees of Sandwich* (1864), 23 U.C.Q.B. 634 at 638 (where no separate school was in existence, attendance at common school could not be denied); *Hutchinson and School Trustees of St. Catharines* (1871), 31 U.C.Q.B. 274 at 277-279 (application to compel school trustees to admit Black student dismissed because common school over-crowded, but court held refusal to admit Black student on account of the child’s colour was unjustified); *Re Hill v. School of Trustees of Camden and Zone* (1874), 11 U.C.Q.B. 573 at 578-579 (application to compel school trustees to admit Black students dismissed because establishment of a separate school for coloured students precluded their parents from choosing the common school); *Dunn v. Board of Education of Windsor* (1884), 6 O.R. 125 at 127-128 (Ch. Div.) (application to compel school trustees to admit Black student dismissed because no prior request had been made to school inspector and because common school was over-crowded).

²⁵ Henry, Tator, Mattis & Rees, *supra*, note 18 at 72 and C. Smith, “Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education” (2004) 3:3 Canadian Diversity 32-35 at 33.

²⁶ McLachlin, *supra*, note 22 at para. 21.

²⁷ Henry, Tator, Mattis & Rees, *supra*, note 18 at 72-73.

²⁸ A class action lawsuit against the Canadian government to seek compensation for the effects of the head tax has been unsuccessful; *Mack v. Canada (Attorney General)* (2001), 55 O.R. (3d) 113 (Sup. Ct.), *aff’d* (2002), 60 O.R. (3d) 737 (C.A.), leave to appeal denied [2002] S.C.C.A. No. 476.

²⁹ McLachlin, *supra*, note 22 at para. 13.

³⁰ *Quong Wing v. The King* (1914), 49 S.C.R. 440 at 444, Sir Charles Fitzpatrick C.J.C.

³¹ McLachlin, *supra*, note 22 at para. 14.

³² Henry, Tator, Mattis & Rees, *supra*, note 18 at 76-77. See also Canadian Race Relations Foundation, “From Racism to Redress: The Japanese Canadian Experience,” online: www.crr.ca/EN/MediaCentre/FactSheets/eMedCen_FacShtFromRacismToRedress.pdf.

³³ This term encompasses persons originating from India, Pakistan, Sri Lanka, Bhutan, Nepal and Bangladesh; Henry, Tator, Mattis & Rees, *supra*, note 18 at 76.

³⁴ *Ibid.* at 76-77.

³⁵ *Ibid.* at 79.

³⁶ For a detailed discussion see: I. Abella & H. Troper, *None Is Too Many: Canada and the Jews of Europe, 1933 to 1948* (Toronto: Lester & Orpen Dennys, 1982).

³⁷ Henry, Tator, Mattis & Rees, *supra*, note 18 at 80.

³⁸ *Noble v. Alley*, [1951] S.C.R. 64.

³⁹ Such federal immigration policies are matters within the jurisdiction of the Canadian Parliament and consequently not subject to provincial human rights codes.

⁴⁰ F. Henry, “Concepts of Race and Racism and Implications for OHRC Policy” (2004) 3:3 Canadian Diversity 4.

⁴¹ Robert Miles & Rudy Torres, “Does “Race” Matter? Transatlantic Perspectives on Racism after “Race Relations”,” in V. Amit-Talai and C. Knowles, eds., *Re-Situating Identities: The Politics of Race, Ethnicity and Culture* (Peterborough: Broadview Press, 1995) 24-46:

...earlier this century, the biological and genetic sciences established conclusively in light of empirical evidence that the attempt to establish the existence of different types or “races” of human beings by scientific procedures had failed. [at 25]

⁴² *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, *supra*, note 6 at 40-41.

⁴³ M. Castagna & G.J.S. Dei, “An Historical Overview of the Application of the Race Concept in Social Practice,” in A. Calliste and G.J.S. Dei, eds., *Anti-Racist Feminism* (Halifax: Fernwood Publishing, 2000) 19-37 at 35.

⁴⁴ Words that describe racialized persons as a “minority” assume that White people are the predominant population group which is an inaccurate portrayal of most countries in the world and, increasingly, of many areas in Canada.

⁴⁵ A term which applies to all people who are not seen as White by the dominant group, generally used by racialized groups as an alternative to the term visible minority. It emphasizes that skin colour is a key consideration in the “everyday” experiences of their lives; Canadian Race Relations Foundation, Glossary of Terms (April 2005). However, the term is imprecise and not all racialized people would describe themselves in this way.

⁴⁶ The Commission has chosen to capitalize the terms “Black” and “White” although with a recognition that whether these terms should be capitalized is a matter open to debate.

⁴⁷ Please see for greater detail F. Henry, “Concepts of Race and Racism and Implications for OHRC Policy,” *supra*, note 41.

⁴⁸ A review of a thesaurus or dictionary makes this clear. For example, consider the positive connotation of the terms “white lie” and “white knight” compared with the negative meanings of “blacklist,” “blackmarket” and “blackmail” and many other words beginning with “black.”

⁴⁹ Henry, Tator, Mattis & Rees, *supra* note 18 at 56-7.

⁵⁰ This distinction was succinctly acknowledged by the Nova Scotia Board of Inquiry in *Johnson v. Halifax (Regional Municipality) Police Service* (2003), 48 C.H.R.R. D/307 (N.S. Bd. Inq.).

⁵¹ Adapted from the definition in the CERD, *supra*, note 11 Article 1:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.

⁵² *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174.

⁵³ See for greater detail J. A. Rummens, “Operationalizing Race and Its Related Grounds in Ontario Human Rights Policy” (2004) 3:3 Canadian Diversity 7.

⁵⁴ The OHRC has repeatedly recognized the importance of applying an intersectional approach to discrimination involving multiple grounds as well as the particular relevance of the intersectional approach for racial discrimination complaints. See Ontario Human Rights Commission, *An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims* (October 2001), online: www.ohrc.on.ca.

⁵⁵ For a discussion of five assumptions that have played out in human rights tribunals’ analysis of race cases, see R. Dhir, “Common Myths and Misconceptions about Racial Discrimination: A Case Study” (2nd Annual Human Rights Symposium: Focus on Racial Discrimination, May 2003).

⁵⁶ In particular, see *Smith v. Mardana*, *infra*, note 79. The Tribunal had reasoned, “[w]hy would the very people who hired him, 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 on his race?” at para. 23. However, the Divisional Court recognized this as a common myth and one that inappropriately focused on the motivation of the respondents, which does not properly form part of the analysis of whether racial discrimination occurred.

⁵⁷ See also Henry, Tator, Mattis & Rees, *supra*, note 18 at pp 384-5.

⁵⁸ *Paying the Price: The Human Cost of Racial Profiling*, *supra*, note 8 at 6.

⁵⁹ C. James, “Stereotyping and its consequence for racial minority youth” (2004) 3:3 Canadian Diversity 40 at 42.

⁶⁰ *Richards v. Waisglass* (1994), 24 C.H.R.R. D/51 (Ont. Bd. Inq.).

⁶¹ See also *Fuller v. Daoud* (2001), 40 C.H.R.R. D/306 (Ont. Bd. Inq.) where the Tribunal found that the respondent, a White woman, falsely accused her Black male tenant of threatening to rape her. The Commission argued that this allegation had particularly serious consequences for the complainant because it “mobilized a history of racist views about white fear of Black men to white womanhood” at para. 78.

⁶² *Frank v. A.J.R. Enterprises Ltd.* (1993), 23 C.H.R.R. D/228 (B.C.C.H.R.).

⁶³ In *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.), a pharmaceutical company did not allow the complainant, after meeting her, to act as their receptionist at an exhibit booth during a conference for Canadian ophthalmologists. The Tribunal concluded the complainant was rejected because she was Black and accordingly held the company liable. The Tribunal, however, also held the conference organizers liable for assisting the pharmaceutical company in locating other individuals to act as the pharmaceutical company’s receptionist without properly investigating Ms Payne’s allegations of racial discrimination.

⁶⁴ *DesRosiers v. Kaur* (2000), 37 C.H.R.R. D/204 (B.C.H.R.T.).

⁶⁵ *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.). See also, *R. v. Richards* (1999), 120 O.A.C. 344 (C.A.), *Peart v. Peel (Regional Municipality) Police Services Board*, [2003] O.J. No. 2669 (Sup. Ct.) and *R. v. Khan* (2004), 244 D.L.R. (4th) 443 (Ont. Sup. Ct.).

⁶⁶ *Johnson v. Halifax (Regional Municipality) Police Service*, *supra*, note 51 at para. 8.

⁶⁷ *Ibid.* at para. 10.

⁶⁸ For a discussion of stereotypes that have triggered heightened scrutiny of Black men, see D.M. Tanovich, "E-Racing Racial Profiling" (2004) 41 Alta. L. Rev. 905-933.

⁶⁹ *R. v. Brown*, *supra*, note 66 at 174 (C.A.).

⁷⁰ In *R. v. Khan*, *supra*, note 66 the police officers' explanation for why they stopped Mr. Khan and searched his car was found to be inconsistent with the documentary evidence and to defy common sense. Accordingly, the Court concluded that the reasonable inference was that Mr. Khan was stopped because of racial profiling, because he was a young Black male driving an expensive Mercedes.

⁷¹ "In order to consider if differential treatment has occurred, the board must necessarily hypothesize about how events would have unfolded if the driver and passenger of the vehicle had been white rather than black. ... I find it difficult to imagine that these events would have unfolded the same way if a white driver from Texas had been involved in this stop." *Johnson v. Halifax (Regional Municipality) Police Service*, *supra*, note 51 at para. 51 and 57.

See also *Hum v. Royal Canadian Mounted Police* (1986), 8 C.H.R.R. D/3748 (C.H.R.T.): "Although Mr. Hum was quite legitimately pulled over and asked for his license, registration and insurance slip, there was no warrant for asking him questions about his citizenship and place of birth in circumstances in which a Caucasian exhibiting the same conduct and speaking and dressed in the same way would not have been so challenged." [at para. 29697].

⁷² In *Johnson v. Halifax Regional Police Service*, *ibid.* at para. 57, 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 discourtesy or intransigence are grounds for finding differential treatment.

⁷³ *Ibid.* The Board of Inquiry found 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.

⁷⁴ *Ibid.*

⁷⁵ See *Johnson v. Halifax (Regional Municipality) Police Service*, *ibid.* at para. 41 and 60. Also, in *Hum*, *supra*, note 72 at para. 29696 and 29697, the Tribunal recognized the broader social and historical context that informed the complainant's feelings of concern, hurt and resentment when he was pulled over and asked questions about his citizenship and place of birth.

⁷⁶ From *Basi v. Canadian National Railway Co. (No. 1)* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.) at para. 38481.

⁷⁷ *Raheja v. Newfoundland (Human Rights Commission)* (1997), 155 Nfld. & P.E.I.R. 38 at para. 32.

⁷⁸ *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536. This was again confirmed in *Smith v. Mardana Ltd.* (2005), CHRR Doc. 05-094 (Ont. Div. Ct.), rev'g in part (2002), 44 C.H.R.R. D/142 (Ont. Bd. Inq.).

⁷⁹ *Gray v. A & W Food Service of Canada Ltd.* (1994), CHRR Doc. 94-146 (Ont. Bd. Inq.), *Dominion Management v. Velenosi* (1997), 148 D.L.R. (4th) 575 at 576 (Ont. C.A.), *Smith v. Mardana Ltd.* (Div. Ct.), *ibid.* at para. 22.

⁸⁰ In *Grover v. National Research Council of Canada (No. 1)* (1992), 18 C.H.R.R. D/1 (C.H.R.T.), the Tribunal recognized that in weighing the evidence, one often has to assess circumstantial evidence in order to identify "the subtle scent of discrimination" [at para. 158].

⁸¹ The precise test is set out in *Lasani v. Ontario (Ministry of Community and Social Services) (No. 2)* (1993), 21 C.H.R.R. D/415 (Ont. Bd. Inq.) at para. 50. The Tribunal also stated:

I entirely accept the view urged upon me by the Commission 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. [at para. 54]

⁸² *Abdolalipour v. Allied Chemical Canada Ltd.* (1996), C.H.R.R. Doc. 96-153 at para.188 (Ont. Bd. Inq.).

⁸³ See *Smith v. Mardana Ltd.* (Div. Ct.), *supra*, note 79 at paras. 15-16. Also, in *McKinnon v. Ontario (Ministry of Correctional Services)* (No. 3) (1998), 32 C.H.R.R. D/1 (Ont. Bd. Inq.), the complainant was moved to a less desirable posting for making a mistake that was quite common. No one else had been reassigned after making the same type of mistake.

⁸⁴ In *Nelson v. Durham Board of Education* (No. 3) (1998), 33 C.H.R.R. D/504 (Ont. Bd. Inq.), the Tribunal found that taking away the complainant's "release time," time away from teaching to allow administrators to focus on administrative skills to prepare for non-classroom roles within the school board, constituted direct discrimination:

The unfavourable proposals of release time appeared to have been an effective tool to stifle the ambitions of a dedicated qualified teacher who, because of his race, was unwelcome in the upper echelons of the Durham School Board. [at para. 136]

⁸⁵ In *Nelson*, *ibid.* at para. 131, the Tribunal found that an interviewer's conduct during an interview was "egregious and created a climate of racial hostility, that was tolerated by other Durham Board officials." The interviewer had turned his back to the complainant throughout the interview except to admonish the complainant for being "aggressive" in response to an interviewer's oversight of his Masters degree.

⁸⁶ In *Smith v. Mardana Ltd.*, *supra*, note 79, the owner of the company had threatened to dismiss the complainant because of his strained relationship with an acting-manager. However, this relationship was tainted by the acting manager's racist attitudes.

⁸⁷ *Naraine v. Ford Motor Co. of Canada* (No. 4) (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.), leave to appeal denied [2002] S.C.C.A. No. 69.

⁸⁸ A landlord may discriminate by failing to carry out repairs for a single tenant or for failing to carry out repairs throughout a building that is predominantly rented to a racialized group:

In my opinion, the utterances and conduct of Mr. Elieff as reported by Mr. Van Moorsel in the London Free Press created a poisoned environment. By implying that Cambodians did not deserve decent living conditions, he infringed the rights of Cambodians under s. 2(1) of the Code...because of race or place of origin, even though all other tenants who were not Cambodian were subject to the same deplorable conditions. [*Ontario (Human Rights Commission) v. Elieff* (1996), 37 C.H.R.R. D/248 at para. 16 (Ont. Gen. Div.)]

⁸⁹ For example, cooking odours have been the subject of two Tribunal decisions. In one case, the Tribunal found that South Asian tenants were denied an apartment because of stereotypes regarding cooking odours; *Fancy v. J & M Apartments Ltd.* (1991), 14 C.H.R.R. D/389 (B.C.C.H.R.). In another, the complainant was found to have cooked foods in her home that were an expression of her ethnicity and ancestry which produced odours. She experienced differential treatment when she was ordered to cease producing these odours or face eviction. The right to express and enjoy one's ethnicity and ancestry was found to be central to one's dignity. Moreover, the landlord was not found to have a reasonable and *bona fide* justification for its conduct; see *Chauhan v. Norkam Seniors Housing Cooperative Association*, 2004 B.C.H.R.T. 262.

⁹⁰ *Wattley v. Quail* (1988), 9 C.H.R.R. D/5386 (B.C.C.H.R.); see also *Grant v. Wilcock* (1990), 13 C.H.R.R. D/22 (Ont. Bd. Inq.). In that case Mrs. Grant who was White went to view a cottage she and her husband were interested in purchasing. When Mr. Grant, who was Black, attended to view the cottage, the respondent said he was probably going to sell the cottage to his brother and that he would let the Grants know. Mrs. Grant phoned several times but did not receive a satisfactory answer regarding the cottage. Her mother phoned and was told that the cottage was still up for sale. The respondent told the mother that a man had been interested in purchasing it but he was Black and the respondent would not sell to him.

⁹¹ For a discussion of racism in education see *Racism in our Schools: What to Know About It; How to Fight It*, Report prepared for the Canadian Race Relations Foundation (June 2000), online: www.crr.ca/en/Publications/ePubHome.htm. Also, with regard to educational issues for Aboriginal students, see *Report of the Special Rapporteur on Indigenous People*, *supra*, note 17.

⁹² *Angeconeb v. 517152 Ontario Ltd.* (1993), 19 C.H.R.R. D/452 (Ont. Bd. Inq.).

⁹³ Refusing to hire someone because they are perceived as a "troublemaker" as a result of having made a previous human rights complaint against the respondent or other organizations, has also been found

tobe discriminatory; see *Abouchar v. Toronto (Metro) School Board (No. 3)* (1998), 31 C.H.R.R. D/411 (Ont. Bd. Inq.). It could also constitute a reprisal under s. 8 of the *Code*.

⁹⁴ *Nelson, supra*, note 85.

⁹⁵ See P. Essed, “Everyday Racism: A New Approach to the Study of Racism” in P. Essed & D.T. Goldberg, eds., *Race Critical Theories* (Malden: Blackwell Publishers Ltd., 2002) 176 at 177 and 190. “The fact that it concerns repetitive practices indicates that everyday racism consists of practices that can be generalized.” at 177

⁹⁶ It is important to note that it is very difficult to determine “objectively” the nature of everyday interactions between non-racialized and racialized persons. A variety of studies show that the perspectives of those who experience everyday racism are very different than that of White persons who have not themselves experienced these daily slights; see Henry, Tator, Mattis & Rees, *supra*, note 18 at 55 and 61. While the case law in this area is still in a state of development, it generally adopts an approach to discrimination that looks at the action or conduct from both a subjective and objective perspective. This analysis takes into account the claimants' or the groups' traits, history, and circumstances to determine whether a reasonable person or people comparably situated would find the treatment demeaning; see *Pringle v. Alberta (Human Rights, Multiculturalism and Citizenship Commission)* (2004), CHRR Doc. 04-430, 2004 ABQB 821 at para. 46; *Gwinner v. Alberta (Minister of Human Resources and Employment)* (2002), 44 C.H.R.R. D/52, 2002 ABQB 685 at para. 112, affirmed (2004), CHRR Doc. 04-151, 2004 ABCA 210, leave to appeal denied [2004] S.C.C.A. No. 342. However, only in rare cases is differential treatment based on a *Code* ground not discriminatory; see *Pringle* at para. 49. This may be particularly so where the differential treatment is based on “race” and related grounds.

⁹⁷ Similar fact evidence has been used in a number of race cases. For example, in *Nelson, supra*, note 85, similar fact evidence concerning the treatment of a Black teacher was found to be supportive of the complainant's testimony as the details of his experiences mirrored those of the complainant. In *Dhillon v. F.W. Woolworth Ltd.* (1982), 3 C.H.R.R. D/743 (Ont. Bd. Inq.), a complainant of “East Indian” ancestry alleged racial name calling by White co-workers and racial discrimination in the allotment of holidays, the distribution of workload and rates of dismissal. He was permitted to introduce evidence of co-workers of “East Indian” background who had also experienced racial name-calling and of the demotion of another worker of “East Indian” ancestry.

⁹⁸ In finding that a co-worker's perception of racism provided some evidence of discrimination, a Tribunal noted:

It is widely accepted that discrimination has an invisible face. Those who discriminate usually fail to see that they are discriminating. This does not mean that it is invisible to others...It would be a mistake to reduce the process of adjudication to a contest between the perceptions on either side of the case. I nevertheless think that impressions, even mere impressions, may have some probative value. [*Brooks v. Canada (Dept. of Fisheries and Oceans) (No. 2)* (2004), CHRR Doc. 04-384, 2004 CHRT 36 at paras. 109 to 111.]

⁹⁹ *Dhanjal v. Air Canada* (1996), 28 C.H.R.R. D/367 (C.H.R.T.).

¹⁰⁰ *Fuller v. Daoud* (2001), 40 C.H.R.R. D/306 at para. 84 (Ont. Bd. Inq.).

¹⁰¹ *McKinnon v. Ontario (Minister of Correctional Services)*, *supra*, note 84, *Naraine v. Ford Motor Company, supra*, note 88, *Smith v. Mardana, supra*, note 79.

¹⁰² *Naraine v. Ford Motor Company* (1996), *ibid*.

¹⁰³ *Etienne v. Westinghouse of Canada Ltd.* (1997), 34 C.H.R.R. D/45 (Ont. Bd. Inq.). The Board found that the complainant was repeatedly harassed by his co-workers because he is a Francophone and a Black person of Haitian origin.

¹⁰⁴ *Baylis-Flannery v. Walter DeWilde c.o.b as Tri Community Physiotherapy (No. 2)* (2003), C.H.R.R.Doc. 03-296 (H.R.T.O.).

¹⁰⁵ *Dhanjal v. Air Canada, supra*, note 100.

¹⁰⁶ *Dhillon v. F.W. Woolworth* (1982), *supra*, note 98; *Naraine v. Ford Motor Company of Canada* (Ont.Bd. Inq.), *supra* note 88 at paras. 50 & 54.

¹⁰⁷ *Ghosh v. Domglas Inc. (No.2)* (1992), 17 C.H.R.R. D/216 at para. 76 (Ont. Bd. Inq.).

¹⁰⁸ See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 25 C.H.R.R. D/175; *Quebec (Comm. Des droits de la personne) c. Deux-Montagnes, Comm. Scolaire*, (1993), 19 C.H.R.R. D/1 (T.D.P.Q.); *Jubran v. North Vancouver School District No. 44*, (2002), 42 C.H.R.R. D/273, 2002 BCHRT

10. In *Jubran*, the Tribunal held that the School Board (i) had a duty to provide an educational environment that did not expose students to discriminatory harassment, (ii) knew that students were harassing another student, and (iii) was liable for failing to take adequate measures to stop that harassment. The B.C. Supreme Court quashed the Tribunal's decision on the basis that the harassment was not linked to a protected ground under the legislation, as the complainant did not identify as gay and his harassers did not perceive him to be gay. However, the B.C. Court of Appeal reversed the Divisional Court decision finding that the complainant was protected by B.C.'s human rights legislation regardless of whether he was gay, and regardless of whether his harassers perceived him to be gay. The Court stated that the focus of the inquiry ought to be on the effect of the harassment, rather than on the intent of the harassers. The Court of Appeal also held that the school board was liable for the discriminatory conduct of students and that the school board had failed to provide an educational environment free from discrimination: see *North Vancouver School District No. 44 v. Jubran*, [2005] B.C.J. No. 733 (C.A.).

¹⁰⁹ In *Dhanjal v. Air Canada*, *supra*, note 100 at para. 209, the Tribunal noted that the more serious the conduct, the less need there is for it to be repeated and, conversely, the less serious it is, the greater the need to demonstrate its persistence.

¹¹⁰ *Lee v. T.J. Applebee's Food Conglomeration* (1987), 9 C.H.R.R. D/4781 (Ont. Bd. Inq.).

¹¹¹ *Smith v. Mardana Ltd.* (Ont. Div. Ct.), *supra*, note 79 at para. 24 and *Naraine v. Ford Motor Company of Canada* (Ont. Bd. Inq.), *supra*, note 88 at paras. 98 and 99.

¹¹² See *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ont. Bd. Inq.).

¹¹³ For a more detailed discussion please see the Commission's *Policy on Discrimination and Language* (June 1996), online: www.ohrc.on.ca.

¹¹⁴ Section 12 of the *Code* states:

A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination.

¹¹⁵ Sexuality is sometimes intertwined with racism. Stereotypical and racist views may be held about people's sexuality based on their ethno-racial identity. See *Baylis-Flannery v. DeWilde*, *supra*, note 105. As mentioned in the section dealing with The History of Racism in Canada, this form of discrimination was promoted by laws which prohibited Chinese and Japanese men from employing White women. For a detailed discussion, see C. Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999) at 132-172.

¹¹⁶ This experience was described to the Commission during its Racial Profiling Inquiry.

¹¹⁷ *Québec (Comm. des droits de la personne) v. Thibodeau* (1993), 19 C.H.R.R. D/225 (Que. H.R.T.).

¹¹⁸ *Tabar, Lee and Lee v. Scott and West End Construction Ltd.* (1984), 6 C.H.R.R. D/2471 (Ont. Bd. Inq.).

¹¹⁹ *Barclay v. Royal Canadian Legion, Branch 12* (1997), 31 C.H.R.R. D/486 (Ont. Bd. Inq.).

¹²⁰ From C. Agocs, "Surfacing Racism in the Workplace: Qualitative and Quantitative Evidence of Systemic Discrimination" (2004) 3:3 *Canadian Diversity* 25 at 25. Other definitions have been offered, for example:

...practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.... [from *Action Travail des Femmes v. Canadian National* (1984), 5 C.H.R.R. D/2327 (C.H.R.T.), *aff'd* (1987), 8 C.H.R.R. D/4210 (S.C.C.) [hereinafter *Action Travail*] at para. 33248] *...systemic discrimination...results from the unintended consequences of established employment systems and practices. Its effect is to block employment opportunities and benefits for members of certain groups. Since the discrimination is not motivated by a conscious act, it is more subtle to detect and it is necessary to look at the consequences or the results of the particular employment system.* [from *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* (1997), 28 C.H.R.R. D/179 (C.H.R.T.) [hereinafter *NCARR*] at para. 164.]

¹²¹ See Statistics Canada, *Selected Income Characteristics* online: www.statcan.ca.

¹²² See also the *Report of the Special Rapporteur on Indigenous People*, *supra*, note 17 for a more detailed discussion of the many indicators of historical and contemporary disadvantage among Aboriginal people in Canada:

Economic, social and human indicators of well-being, quality of life and development are consistently lower among Aboriginal people than other Canadians. ... Ever since early colonial settlement, Canada's indigenous peoples were progressively dispossessed of their lands, resources and culture, a process that led them into destitution, deprivation and dependency... [at 2].

¹²³ See Statistics Canada, *Selected Income Characteristics*, *supra*, note 122, and the Canadian Council on Social Development, *Aboriginal Children in Poverty in Urban Communities: Social exclusion and the growing racialization of poverty in Canada* (June 2003), online: www.ccsd.ca/pr/2003/aboriginal.htm.

¹²⁴ Adapted from C. Agocs, *supra*, note 121. Also, for a decision which considered numerical data, employment practices and organizational culture in finding systemic discrimination, see *NCARR*, *supra*, note 121.

¹²⁵ *Blake v. Mimico Correctional Institute* (1984), 5 C.H.R.R. D/2417 (Ont. Bd. Inq.) at para. 20100. The Tribunal went on to say that the less there is of other evidence of discrimination, the greater the statistical disparity must be in order to make out a *prima facie* case (at paras. 20129-20130). For a very helpful summary of general propositions from the *Blake* case, see *Angeconeb*, *supra*, note 93 at para. 28-29.

¹²⁶ See *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 at 38 (in the context of gender) and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at 880 (in the context of disability).

¹²⁷ *NCARR*, *supra*, note 121 at para. 142.

¹²⁸ *Quereshi v. Central High School of Commerce (No. 3)* (1989), 12 C.H.R.R. D/394 (Ont. Bd. Inq.).

¹²⁹ *NCARR*, *supra*, note 121 at paras. 153-158 and 162.

¹³⁰ *Wong v. Ottawa Board of Education (No. 3)* (1994), 23 C.H.R.R. D/37 (Ont. Bd. Inq.).

¹³¹ See for example, *Wong v. Ottawa Board of Education*, *ibid.* at para. 103-104.

¹³² In *Action Travail*, *supra*, note 121 the Supreme Court of Canada noted that systemic discrimination fosters the belief that the exclusion is the result of “natural forces,” for example, that women “just can’t do the job” (at para. 33249).

¹³³ *Kearney v. Bramalea Ltd. (No. 2)* (1998), 34 C.H.R.R. D/1 (Ont. Bd. Inq.); *Shelter Corp. v. Ontario (Human Rights Comm.)* (2001), 39 C.H.R.R. D/111 (Ont. Sup. Ct.).

¹³⁴ Subsequent to the initial decision in *Kearney*, *ibid.*, the Ontario government added section 21(3) and Regulation 290/98 to the *Code* which permit the use of income information in some circumstances. In subsequent decisions, Tribunals have grappled with the effect of these regulations. While income information can be used along with other considerations such as rental history and credit, the Regulation does not allow the use of rent-to-income ratios as the sole basis for refusing a tenant; See *Vander Schaaf v. M & R Property Management Ltd.* (2000), 38 C.H.R.R. D/251 (Ont. Bd. Inq.) and *Sinclair v. Morris A. Hunter Investments Ltd.* (2001), 41 C.H.R.R. D/98 (Ont. Bd. Inq.).

¹³⁵ There have been legal challenges to qualification rules for foreign trained doctors. In *Jamorski v. Ontario (Attorney General)* (1988), 64 O.R. (2d) 161 (C.A.), different internship requirements for graduates of unaccredited medical schools were found not to be an infringement of s. 15 of the *Canadian Charter of Rights and Freedoms*. However, in *Bitonti v. British Columbia (Ministry of Health) (No. 3)* (1999), 36 C.H.R.R. D/263 (B.C.C.H.R.) a Tribunal found that foreign-trained doctors were discriminated against on the basis of place of origin by a requirement of the College of Physicians and Surgeons of British Columbia that they have an additional year of post-graduate training in order to be eligible for registration.

¹³⁶ A report by the Canadian Race Relations Foundation indicates that barriers are especially persistent for racialized people who are foreign-born. They face extensive inequities in income, employment and education within Canada. See Jean Lock Kuntz for Canadian Council on Social Development, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income*, Toronto: Canadian Race Relations Foundation, 2000 p. 13, 17, 19, 22, 24-26.

¹³⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, *supra*, note 127.

¹³⁸ *Ibid.*

¹³⁹ *Payne v. Otsuka Pharmaceutical Co. (No. 3)* (2002), 44 C.H.R.R. D/203 (Ont. Bd. Inq.). The nature of when a third party or collateral person would be drawn into the chain of discrimination is fact specific. However, general principles can be determined. The key is the control or power that the collateral or indirect respondent had over the complainant and the principal respondent. The greater the control or power over the situation and the parties, the greater the legal obligation not to condone or further the discriminatory action. The power or control is important because it implies an ability to correct the situation or do something to ameliorate the conditions; at para. 63.

¹⁴⁰ *Ibid.*

¹⁴¹ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, *Mayo v. Iron Ore Co. of Canada* (2002), 43 C.H.R.R. D/65 (Nfld. Bd. Inq.).

¹⁴² Tribunals have also dealt with failures to implement remedial orders from prior human rights complaints. In *Ontario (Ministry of Correctional Services) v. Ontario (Human Rights Comm.) (No. 7)* (2002), 45 C.H.R.R. D/61 (Ont. Bd. Inq.), the Tribunal found that the poisoned environment, which the remedial orders in its prior decision were intended to address, persisted. The respondent, at the highest levels, failed to stop the harassment of Michael McKinnon, an Aboriginal man, both before the prior decision and after it. When he complained about continuing harassment, he was met with refusals, delays, bias and unjustified findings against him. The Board of Inquiry found the handling of his complaints to have been in itself retaliatory and a further infringement of the complainant's rights under the *Code*. The Board issued new, or extensively rewritten, orders, including systemic remedies.

¹⁴³ *Naraine v. Ford Motor Co. of Canada* (Ont. Bd. Inq.), *supra*, note 88.

¹⁴⁴ *Smith v. Mardana Ltd.* (Ont. Div. Ct.), *supra*, note 79.

¹⁴⁵ *Mohammed v. Mariposa Stores Ltd.* (1990), 14 C.H.R.R. D/215 (B.C.C.H.R.). See also Labour Arbitration decisions which have concluded that an employer must have procedures in place to deal with racial harassment of its staff by patrons. These procedures should indicate how staff are expected to respond to the harassment, ensure that serious and/or ongoing problems are brought to the attention of management and also that management takes appropriate steps to assess the situation and take remedial action; *C.U.P.E., Local 79 v. Toronto (City)* (1995), 1995 Carswell Ont 1840 (Ont. Arb. Bd.); *Clarendon Foundation v. O.P.S.E.U., Local 593*, [2000] L.V.I. 3104-6, 2000 Carswell Ont 1906, 91 L.A.C. (4th) 105 (Ont. Arb. Bd.).

¹⁴⁶ *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44 (Ont. Bd. Inq.). These factors assist in assessing the reasonableness of an organization's response to harassment. A reasonable response by the organization will not affect its liability but will be considered in determining the appropriate remedy. In other words, an employer that has reasonably responded to harassment is not absolved of liability but may face a reduction in the damages that flow from the harassment.

¹⁴⁷ For example, recognizing the significant disadvantage that was created by wartime measures targeting Japanese Canadians, on September 22, 1988 the Japanese Canadian Redress Agreement was signed. In the House of Commons, Prime Minister Brian Mulroney acknowledged the government's wrongful actions, pledged to ensure that the events would never recur and recognized the loyalty of the Japanese Canadians to Canada. As a symbolic redress for those injustices, the government offered individual and community monetary compensation to Japanese Canadians. The government also committed to create a national organization that would foster racial harmony and help to eliminate racism, the Canadian Race Relations Foundation. However, efforts by other communities to obtain redress for government laws and policies that have created historical disadvantage have not been successful, see *Mack v. Canada (Attorney General)*, *supra*, note 29.

¹⁴⁸ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 64.

¹⁴⁹ *Action Travail*, *supra*, note 121.

¹⁵⁰ *NCARR*, *supra*, note 121.

¹⁵¹ See for example the remedial decisions in *McKinnon v. Ontario (Ministry of Correctional Services)* (No.3) (1998), 32 C.H.R.R. D/1 (Ont. Bd. Inq.) and *Ontario (Ministry of Correctional Services) v. Ontario (Human Rights Comm.) (No. 7)* (2002), 45 C.H.R.R. D/61 (Ont. Bd. Inq.), *NCARR*, *supra*, note 121 and *Hendry v. Ontario (Liquor Control Board)* (1980), 1 C.H.R.R. D/160 (Ont. Bd. Inq.).

¹⁵² See *Paying the Price: The Human Cost of Racial Profiling*, *supra*, note 8 at 70-71, Ontario Human Rights Commission, *Guidelines on Accessible Education*, (September 2004) at 33, and Ontario Human Rights Commission, *Guidelines for Collecting Data on Enumerated Grounds Under the Code* (September 2003), online: www.ohrc.on.ca.

¹⁵³ For example, Human Resources Development Canada has numerous resources on workplace equity, online: Human Resources Development Canada www.hrsdc.gc.ca/en/gateways/topics/wzpgxr.shtml. *Policy and Guidelines on Racism and Racial Discrimination*, Ontario Human Rights Commission 75 June 2005

¹⁵⁴ Anti-racism is an action-oriented approach to identifying and countering the production and reproduction of all forms of racism. It addresses the issues of racism and the interlocking systems of social oppression. Anti-racism implies a goal of producing an understanding of what racism is and how it can be challenged; C. Tator, "Advancing the Ontario Human Rights Commission's Policy and Education

Function” (2004) 3:3 Canadian Diversity 29 at 30.

¹⁵⁵ Section 8 of the *Code* prohibits reprisal for asserting a human rights claim:

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

¹⁵⁶ Decision-makers have sometimes even tended to place a greater emphasis on the effect of a finding of discrimination on a respondent’s reputation than on the effect of racism on an individual. See *Gaba v. Lincoln County Human Society* (1991), 15 C.H.R.R. D/311 at para. 37 (Ont. Bd. Inq.), *Smith v. Mardana Ltd.* (Ont. Bd. Inq.), *supra*, note 79 at para. 39 and *R. v. Brown* in which the trial judge in a criminal case in which racial profiling had been raised as a defence stated that the defence raised “very serious allegations” that he found “a little troubling.” The Court of Appeal noted that the allegation of racial profiling was serious but just as serious as the impact of the racial profiling in question on the accused, if such were the case. The proper judicial attitude should have been one of detachment rather than one which appeared to show only concern respecting the impact of the defence allegations on the police officer; *R. v. Brown* (Ont. C.A.), *supra*, note 66 at para. 60.

¹⁵⁷ For a discussion of some of the barriers to anti-racism change initiatives see C. Tator, “Advancing The Ontario Human Rights Commission’s Policy and Education Function,” *supra*, note 155.

¹⁵⁸ For a discussion of the purposes of section 14 of the *Code* see *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* 21 C.H.R.R. D/259 (Ont. C.A.). The majority of the Court stated that s. 14(1) has two purposes. One is to protect affirmative action programs from being challenged as violating the formal equality provisions contained in Part I of the *Code*. The second purpose is the promotion of substantive or concrete equality. Affirmative action programs are aimed at achieving substantive equality by assisting disadvantaged persons to compete equally with those who do not have the disadvantage. Section 14(1) is also an interpretive aid that clarifies the full meaning of equal rights by promoting substantive equality.

¹⁵⁹ See K. Kafele, “Racial Discrimination and Mental Health: Racialized and Aboriginal Communities” (2004) 3:3 Canadian Diversity 43.

¹⁶⁰ See for example, C.C. Smith, “Tuition Fee Increases and the History of Racial Exclusion in Canadian Legal Education” (2004) 3:3 Canadian Diversity 32.

¹⁶¹ See also the Commission’s publication *Human Rights at Work* which explains the types of questions that are and are not permitted at various stages in the recruitment process, Human Resources Professionals of Ontario & Ontario Human Rights Commission, *Human Rights at Work* (Toronto: Government of Ontario, 2004) at 40-50.

¹⁶² In NCARR, *supra*, note 121 a workplace questionnaire revealed that racial minorities had career development training experiences less often than White persons. There was also a difference as to how employees became aware of a training opportunity. White persons were more often informed of these opportunities by managers, whereas minorities tended to find out about these opportunities by using their own initiative. [at paras. 55 and 56] In *Nelson*, *supra*, note 85 the Tribunal found that officials of the Board of Education subjectively decided which teacher would be approved to take principal’s courses. Policy and Guidelines on Racism and Racial Discrimination Ontario Human Rights Commission 76 June 2005

¹⁶³ In NCARR, *ibid.* the Tribunal explained:

Staffing decisions based on an informal process can present a barrier for promotion because, according to D. Weiner, the less formal the process, the less likely job qualifications will be set out in advance, will be assessed in a standard manner for all candidates and will allow for their recognition in candidates who are different from those who typically perform the job. [at para. 142]

¹⁶⁴ Human rights decisions have identified informal practices with regard to providing acting assignments as a barrier for racialized employees who may be less likely to be approached with these opportunities. See for example, NCARR, *ibid.*

This informality can create barriers in that not all potentially qualified staff can seek the acting position. Further, the acting assignment provides valuable managerial experience and gives the person who is acting the appearance of being “right” for the jobs. [at para. 147]