GUIDELINE ON RACE DISCRIMINATION

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COMMISSION

Guideline on Race Discrimination
New Brunswick Human Rights Commission

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New Brunswick Human Rights Commission
P.O. Box 6000
Fredericton, NB
E3B 5H1 Canada

Telephone: (506) 453-2301
Toll Free: 1-888-471-2233

Fax: 506-453-2653
Email: hrc.cdp@gnb.ca

Website: www.gnb.ca/hrc-cdp

Facebook: www.facebook.com/HRCNB.CDPNB
Twitter: @HRCNB_CDPNB

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Editor's Note

The New Brunswick Human Rights Commission (Commission) publishes guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are educational resources, and they are designed to raise awareness and educate the public on human rights issues and the rights and responsibilities enshrined in the New Brunswick *Human Rights Act* (*Act*).

Guideline on Race Discrimination offers the Commission's interpretation of what constitutes race discrimination under human rights law, and the obligation of individuals, groups, and organizations to ensure non-discriminatory behaviours and practices in the areas protected under the *Act*. The guideline outlines basic human rights principes of equality, dignity, and inclusion in relation to race rights, and it is based on research and relevant race discrimination decisions of courts and tribunals.

For information on your rights and responsibilities in other human rights situations or on other protected grounds under the *Act*, review the Commission's publications on those subjects or contact the Commission.

This guideline is not equivalent to professional legal advice, and in case of a conflict between its contents and the *Act*, the *Act* shall prevail.

1. Introduction

The *Act* prohibits race discrimination in employment, housing and sale of property, accommodations and services, notices or signs, and in memberships of professional, business or trade associations.[1]

Therefore, under human rights law, it is illegal for employers, landlords, and service providers to discriminate against individuals because of their race, just as race discrimination is prohibited in the operations of professional, business or trade associations, and in publications, notices, signs, and banners, etc.

1.1 Background and contexts

Race is a complex ground to delineate for a number of reasons. The meaning of race, as it has come to be understood, or the idea that humanity is divided into distinct races with different capabilities, evolved in the context of distinct historical, political, and sociocultural developments.

> "How race is constructed and perceived stems from historical contexts, power dynamics, and social relations. These race constructions led to fixed or absolute race divisions, and ideas of racial purity and fetishization of pure-race ancestry". *Bill Ashcroft, et al*.

To understand these contexts, and how race has been perceived in recent history, it is useful to trace the emergence of race-based ideas in the last few hundred years, particularly in the historical and cultural background of Western colonization. This background is helpful to understand the meaning and scope of race as a protected ground under the *Act*.

1.1.1 The meaning of race

The term "race" has been used and continues to be used to classify human beings into distinct physical, biological, and genetic groups that are recognizable by their physical features.[2] The notion that humanity is divided into distinct races first emerged and was

[1] *Human Rights Act*, RSNB 1973, s. 2.1, and ss. 3-8. [*Act*].

[2] The word "race" was introduced into the English language in the 1500s and, by the late 18th Century, it had come to signify distinct categories of human beings who were identified with "physical characteristics transmitted by descent", and the different race categories were seen as "unchanging natural types". During the 17th and 18th Centuries, there was ongoing debate whether physical variations in human beings were caused by "descent" (biology) or by the "environment"; subsequently, with the ascendancy of the biological sciences by the late 19th Century, "descent"

systematized from the 16th Century onwards, and, by the late 19th Century, a vast body of race "scholarship", or theories of race, had entrenched the concept of distinctive and separate races in the collective social consciousness. These ideas gradually entered and became embedded in cultural, political, institutional, and legal systems and frameworks.

Race theories of the 19th Century divided humankind into distinct race categories based on skin colour and other physical features, including Black, White, Yellow, and Red, and situated these races in a hierarchy, with the White or Caucasian race uppermost in this assumed ranking.[3] Consequently, differences between races were described in simplistic terms, or stereotypes,[4]

> Race theories of the 19th Century described races in simplistic terms, or stereotypes, creating simplified binaries or oppositions like "civilized" and "primitive", "superior" and "inferior", or "pure" and "impure" races.

became the predominant idea in defining race, and it lent support to the notion of hierarchical race groupings based on physical characteristics. "How race is constructed and perceived stems from historical contexts, power dynamics, and social relations. These race constructions led to fixed or absolute race divisions, and ideas of racial purity and fetishization of pure-race ancestry". Ashcroft, Bill, Gareth Griffiths, and Helen Tiffin. "Race". *Post-Colonial Studies: The Key Concepts*. 2nd. Ed. New York: Routledge, 2007. 180-87. [Ashcroft].

[3] For example, Canada's 1901 census defined race in these terms: "The races of men will be designated by the use of W for White, R for Red, B for Black, and Y for Yellow. The Whites are, of course, the Caucasian race, the Reds are the American Indian, the Blacks or African are […], and the Yellows are the Mongolian, Japanese, and Chinese. But only pure Whites will be classed as Whites; the children begotten of marriages between Whites and any one of the other races will be classed as Red, Black, or Yellow, as the case may be, irrespective of the degree of colour". By the 1941 census, the explanations of race were beginning to attribute differences between groups also to ethnic, cultural, or national origin, rather than just colour of skin. "In actual census practice, the criterion on which the racial origin classification is based varies for different groups. The Indian […], Hindu, Chinese, and Japanese races are segregated on the basis of colour; with the Jewish the criteria is mainly religion; with the Ukrainian, language; with other groups, the term usually implies a geographical area, the country from which the individual himself came or that which was the home of his forebears. Knowledge of one's racial origin may be perpetuated in the family name, in the language or religion, or it may be traced in family history or passed on usually by word of mouth from one generation to another". Qtd. in Walter Tarnopolsky and William Pentney. *Discrimination and the Law*. Vol 1 (Part II). Toronto: Thomson and Carswell, 2004. (pages 5-16). [Tarnopolsky].

[4] "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". Stereotypes are based on misconceptions, incomplete information, and/or false generalizations, and they tend to ascribe the same characteristics to all members of

creating simplified binaries or oppositions like “civilized” and “primitive”, “superior” and “inferior”, “pure” and “impure” races.

These race theories and imagined racial hierarchies defined non-White and non-European persons, groups, and nations in derogatory terms,[5] while, at the same time, describing people of European descent, or persons belonging to the White race, as innately superior.

> Stereotypes of race have falsely linked race with attributes like “intelligence, sexual behavior, birth rates, infant care, work ethics and abilities, personal restraint, lifespan, law abidingness, aggression, altruism, economic and business practices, family cohesion, and even brain size”. *Robert Wald Sussman*

Correspondingly, the personality, moral behaviour, and intellectual capacity of individuals and groups were also attributed to their racial origin, suggesting that race was an “unchanging inner essence”,[6] and people were either “superior” and “civilized” or “inferior” and “primitive” owing to their racial identity or background.

Because of the dominance and power of these ideas and representations, these racial categories and hierarchies came to be seen as logical and natural, suggesting that the non-White races were not only inferior to the White or Caucasian race, but that their inferiority was naturally determined, or created by nature.

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a group and disregard individual differences. *Policy and Guidelines on Race and Racial Discrimination*. Ontario Human Rights Commission, 2005. [*Ontario Guideline*]. (page 18).

[5] Robert Sussman enumerates some of the stereotypes that have historically been associated with race and racialized persons: “We have been told that there are very specific things that relate to race, such as intelligence, sexual behavior, birth rates, infant care, work ethics and abilities, personal restraint, lifespan, law abidingness, aggression, altruism, economic and business practices, family cohesion, and even brain size”. *The Myth of Race: The Troubling Persistence of an Unscientific Idea*. Sussman, Robert Wald. Cambridge (Mass.): Harvard UP, 2014. [Sussman]. (page 2).

[6] Ashcroft, *supra* note 2. (page 182).

The "research" on which the race theories of the 19th Century were based has now been debunked as "pseudoscience".[7] Modern research in genetics[8] and the life sciences has established that human beings share the same "biological" or "genetic" make up, and their differences exist only in outward physical features like skin colour or hair type, etc.[9]

Modern research in genetics and the life sciences has established that human beings share the same "biological" or "genetic" make up, and their differences exist only in outward physical features like skin colour or hair type, etc.

Therefore, race is not a biological category or reality. However, the concept of race exists as a powerful social reality; it is widely accepted, and it permeates social relations and institutions, and their systems, practices, and structures.

1.1.2 Race as a social construct

As noted, the idea that racial groups exist in a hierarchy or pyramid, and that the human race is divided into pure/impure[10] or superior/inferior races, is a social and historical

[7] As Sussman, *supra* note 5, elucidates: "Anthropologists have shown for many years now that there is no biological reality to human races. There are no major complex behaviors that directly correlate with what might be considered human racial characteristics [….] Because of human migrations and mixing since the evolution of homo sapiens some 200,000 years ago, our genes have been mixing since we evolved, and it is very difficult to tell what our particular genetic background is over human historical time. [….] We humans are more similar to each other as a group than we are to one another within any particular racial or genetic category". (page 3-4).

[8] Modern genetics has established that "all humans share genes at the rate of 99.9 percent". "'Race': Fact or Artefact". Perry, Richard J. *Race and Racism: The Development of Modern Racism in America*. New York: Palgrave Macmillan, 2007. 1-19. [Perry].

[9] A prominent contemporary geneticist explains human physical differences as follows: "Because of the extensive evidence for genetic interchange through population movements and recurrent gene flow going back at least hundreds of thousands of years, there is only one evolutionary lineage of humanity and there are no subspecies or races. Human evolution and population structure has been and is characterized by many locally differentiated populations coexisting at any given time, but with sufficient contact to make all of humanity a single lineage sharing a common, long term evolutionary fate". Templeton, Alan R. "Human Races: A Genetic and Evolutionary Perspective". *American Anthropologist* 100: 632-650 (1998).

[10] In a study sponsored by UNESCO after the creation of the UN, Leslie Dunn debunked the myth of "pure" races: "There is great genetic diversity within all human populations. Pure races, in the sense of genetically homogeneous populations, do not exist in the human species today, nor is there any evidence that they have ever existed in the past". Dunn, Leslie Clarence. *Race and Biology*. UNESCO, 1958. [Dunn].

construct.[11] It was created by dominant cultures, notably by European colonizing nations during the age of colonization, and gradually became incorporated into the political, institutional, legal, and sociocultural structures that have evolved over time.

> "Race [is not] a natural or biological attribute but […] a socially and historically constructed concept […] which endow[s] human skin colour variations with meanings that reinforce a hierarchy of privilege and power in society". *Johnny E. Williams*

As one study affirms, "Race is defined not as a natural or biological attribute but as a socially and historically constructed concept by which members of society endow human skin colour variations […] with meanings that reinforce a hierarchy of privilege and power in society".[12]

Even though race is a social construct,[13] and "scientific" race theories have been disproved and rejected, because human beings live in a social world, race-based thinking is a reality that still pervades different facets of social relations and institutional frameworks.

For this reason, race thinking still impacts people's lives in practical terms, as physical or personal attributes, such as skin colour or accent, are relied upon to make judgements and decisions, consciously or unconsciously, that create adverse impact for racialized[14] groups.

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[11] As Perry, *supra* note 8, states: "Yet despite its concrete effects, racism is a cultural artifact, the product of a particular cultural context — a part of a belief system [….] It arises from distinct historic events and social and cultural dynamics [and it is a] learned cultural phenomenon".

[12] Williams, Johnny E. "Race and Class: Why All the Confusion?". *Race and Racism in Theory and Practice*. Ed. Berel Lang. Oxford: Rowman and Littlefield Publishers Inc., 2000. 215-227. [Lang].

[13] While social constructs may not be inherently detrimental for society, the social construction of race produced extremely harmful consequences for racialized groups. "Many other things that have practical impact on our lives are socially constructed, such as the economy, the political system, and the courts." *Let's Talk Race: A Guide on How to Conduct a Conversation on Racism*. Australian Human Rights Commission, 2019. https://www.humanrights.gov.au/our-work/publications.

[14] The word "racialized" is used in this guideline to denote people who identify with the ground of race or who are vulnerable to racism or race discrimination. "Racialized" is an appropriate term because it captures the fact that race is a social construct rather than a biological trait. The term "visible minority", which was adopted by the federal government for the purposes of the federal *Employment Equity Act*, has been seen as problematic, for it tends to lump disparate groups

Therefore, while race is not an objective category, the power of this idea still holds sway in society,[15] and it leads to racist[16] attitudes, racism, and race discrimination, which need to be addressed through viable legal frameworks, effective education on race issues, and systemic remedial measures to alleviate race related disadvantage.

1.1.3 Race and colonialism

It is not a coincidence that race theories and race thinking emerged and reached maturation during the height of European colonialism. In this period, race thinking was popularized through a systematic discourse and set of representations,[17] projecting simplistic ideas of "inferior" and "superior" races, which helped the colonizing powers justify their subjugation and inhumane treatment of the "Other" non-White races in the colonies.[18]

Colonial discourse endorsed the superiority of European and White culture, demeaned other cultures and races, and used these ideas to justify the occupation and exploitation of colonized people and lands.

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under a homogenous label. "Racialization" is a related term, which can be defined "as the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life." *Ontario Guideline*, *supra* note 4. (page 12).

[15] As explained by Dalia Ofer: "Many biologists and anthropologists rejected biological racial concepts as applied to human humans decades ago, and the social construction of race has been detailed in a substantial body of anthropological literature over the last decade. However, biological basis of race continues to be used as a rationale for political agendas, empirical research, medical diagnosis, and self-identification of individuals [….] Over the years the term race has been variously applied to groups defined by appearance, language, nationality, religion, and culture". Ofer, Dalia. "Nazi Anti-Semitism and the Science of Race". Lang, *supra* note 12. [Ofer]. (pages 61-76).

[16] The term "racist" is not used in this guideline to label persons or individuals; however, it may be used to describe attitudes, actions, policies, etc.

[17] Colonial discourse endorsed the superiority of European and White culture, demeaned other cultures and races, and used these ideas to justify the occupation and exploitation of colonized people and lands. As Ashcroft shows, this nexus between race and colonization even shows up in the domestic English commentaries on race, which denigrated the people of Ireland, Wales, and Scotland as "racially separate" from the English to justify "English colonial enterprise at home and paternalist English rule over these peoples". Ashcroft, *supra* note 2.

[18] Edward Said has demonstrated the power of "discourse" to create demeaning representations of "Other" cultures, in order to justify political or colonial objectives. According to Said, Western writings and cultural representations of the Orient during the colonial period created a "discourse",

These attitudes and practices dehumanized "Other" races, gave rise to racial prejudice, and engendered institutionalized racist policies and structures, which were consolidated during the apex of Western[19] colonization.

For example, demeaning racial stereotypes about Black Africans were constructed in a sustained discourse during the Transatlantic Slave Trade, which served to justify the colonization of the Americas and the institution of slavery, and, in turn, supported the demands for slave labour in the plantation economies of the New World.

The idea of White racial superiority was also accompanied by "idealized and transcendent images" of European culture and national identity. *Patricia Hill Collins and John Solomos*

By the 19th and early 20th centuries, pseudoscientific race theories had established that the White race was "biologically superior" to the other races, and non-Whites, particularly Black, and later Indigenous and Asian populations, were intrinsically inferior.

Backed by this discourse, it was possible to present the conquest and subjugation of these people through colonization as natural and logical. Similarly, colonization was framed in moral and religious terms, as an obligation of the White race to bring the light of civilization and faith to the "uncivilized" and "heathen" populations and places of the world.[20]

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which set up an imaginary Orient as the "Other", inferior civilization compared to the West: "Knowledge of the Orient, because generated out of strength, in a sense *creates* the Orient, the Oriental, and his world (40), [and] supplie[s] Orientals with a mentality, a genealogy, an atmosphere (42) [….] In time such knowledge and reality produce a tradition, or […] a discourse" (94). Said, Edward. *Orientalism*. New York: Knopf, 1978. Similarly, Robert Miles affirms that, before Western Europe's colonization of the Americas from the 15th century onwards, "the main focus of external interest was the Middle East, North Africa, and India, collectively known as the orient. Hence, Europe's idea of the foreigner was based for many formative centuries exclusively on the Arab world. Thus […] Europeans create[d] a discourse of an imagined other at the edge of European civilization". Miles, Robert. *Racism.* London: Routledge, 1989. [Miles]. (page 18).

[19] While the "West" is not a homogenous entity, the term is used loosely here to denote the nations of Europe and North America, as opposed to Africa, Asia, and the Middle East.

[20] The idea of White racial superiority was also accompanied by "idealized and transcendent images" of European culture and national identity. Collins, Patricia Hill, and John Solomos. "Introduction: Situating Race and Ethnic Studies". *The SAGE Handbook of Race and Ethnic Studies*. Eds. Patricia Hill Collins and John Solomos. SAGE Publications, 2010. 1-16. [Collins and Solomos].

Establishment of the UN and human rights regimes: It was only after millions of Jews, Slavs, Poles, and Roma people were exterminated on racial grounds by the state apparatus of Nazi Germany during the Second World War that the debilitating effects of racism and racial thinking were fully recognized in the West.

Subsequently, with the setting up of the United Nations, the adoption of the *Universal Declaration of Human Rights* (*UDHR*) and other international instruments, and the establishment of human rights institutions in nation states, legal mechanisms were put in place to prevent race discrimination and promote the equality of all races.

> "National, religious, geographical, linguistic, and cultural groups do not necessarily coincide with racial groups; and the cultural traits of such groups have no demonstrated connection with racial traits [….] The use of the term race in thinking of such groups may be a serious error, but it is one which is habitually committed".
>
> *Leslie Clarence Dunn*

The idea of the hierarchy of races, and of a scientific basis for these hierarchies, was dismantled after these developments,[21] and it has been definitively established in new scholarship that these past theories were based on myths, fantasies, and false premises.[22]

Following the declaration of racial equality in the *UDHR*, the UN's *International Convention on the Elimination of All Forms of Racial Discrimination* rejected the so-called scientific premise of race theories, setting the record straight on this issue: "Any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable,

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[21] For example, the error of thinking about race in restricted categories was elucidated emphatically in Leslie Clarence Dunn's UNESCO sponsored research, *supra* note 10: "National, religious, geographical, linguistic, and cultural groups do not necessarily coincide with racial groups; and the cultural traits of such groups have no demonstrated connection with racial traits. Americans are not a race, nor are Frenchmen, nor Germans; nor *ipso facto* is any other national group. Muslims and Jews are no more races than are Roman Catholics and Protestants; nor are people who live in Iceland or Britain or India, or who speak English or any other language, or who are culturally Turkish or Chinese and the like, thereby describable as races. The use of the term race in thinking of such groups may be a serious error, but it is one which is habitually committed".

[22] Following these developments, the American Association of Physical Anthropologists stated their position on the race question: "All humans living today belong to a single species, homo sapiens, and share a common dissent. Although there are differences of opinions regarding how and where different human groups diverged or fused to form new ones from a common ancestral group, all living populations in each of the earth's geographic areas have evolved from that ancestral group over the same amount of time". Qtd, in Tarnopolsky, *supra* note 3. (pages 5-12).

socially unjust and dangerous, and […] there is no justification for racial discrimination, in theory or in practice, anywhere".[23]

UNESCO also issued a series of statements on race, debunking the myth of racial hierarchies and claims about the inherent superiority of certain races:

"The differences between the achievements of the different peoples are entirely attributable to geographical, historical, political, economic, social, and cultural factors. Such differences can in no case serve as a pretext for any rank-ordered classification of nations or people".[24]

There is no scientific basis to believe that "groups of mankind differ in their innate capacity for intellectual and emotional development".
UNESCO

Race and Canadian legal history: In the context of Canadian law and legal history, the meaning of race remained unstable during the first half of the 20th Century, as evidenced both in legislation and court judgements.[25]

Prior to the promulgation of human rights laws, the *Canadian Bill of Rights*, and later, the *Canadian Charter of Rights and Freedoms*, court decisions and legal frameworks

[23] *International Convention on the Elimination of All Forms of Racial Discrimination*. (Preamble).

[24] UNESCO's first statement was issued by an expert group of sociologists and biologists in 1950, and next year, more experts were added to the group, including physical anthropologists, who issued a second statement, "Statement on the Nature of Race and Race Differences". Another statement, "Proposals on the Biological Aspects of Race", was released in 1964, and finally, in 1967, "Statement on Race and Racial Prejudices" was adopted. UNESCO published all these statements in a unified document in 1969, titled *Four Statements on the Race Question*. The statements assert that human behaviour is shaped by environment rather than inherited genetic factors, and that the moral or intellectual characteristics of human beings should not be included in such classifications, steering the debates on race away from the idea of the intrinsic superiority and exclusivity of some races compared to others. The statements also emphasized that there was no scientific basis to believe that "groups of mankind differ in their innate capacity for intellectual and emotional development". UNESCO Digital Library.

[25] Walker, James W. St. G. *Race, Rights and the Law in the Supreme Court of Canada: Historical Case Studies*. Waterloo: Wilfred Laurier UP, 1997. [Walker]. In the American context, a more radical theoretical approach to issues of race is evinced in "critical race theory", which includes a critique of legal studies, including the argument that law is part of the larger, hegemonic social fabric of American society, and it is complicit in maintaining the *status quo* in the struggle for racial justice.

expressed the prevailing "common sense" views about race, which, invariably, resulted in the infringement of people's rights based on their race, colour, ancestry, religion, or national origin, etc.[26]

> During the first half of the 20th Century, Canadian law and judicial approaches contributed to regulating race in Canada, through exclusionary immigration policies or through state instituted discrimination based on property and contract rights.
>
> *James W. Walker*

Despite the existence of legal mechanisms and protections, including human rights laws, racism continues to exist, both in social interactions, attitudes, or behaviours, and in systemic forms through institutional or state polices and practices.

In historical terms, anti-racism policies, laws, and mechanisms seem to make progress in key historical periods or moments, like the adoption of the *UDHR* and other international instruments, the promulgation of human rights acts, the Civil Rights Movement, or more recently, the Black Lives Matter movement.

However, it has been argued that racism and race discrimination regenerate and re-emerge in disparate ways,[27] which shows that sustained educational initiatives and more

[26] *Ibid*. Walker shows that Canadian law and judicial approaches contributed to regulating race in Canada through exclusionary immigration policies or through state instituted discrimination based on property and contract rights. He references four Supreme Court of Canada decisions rendered between 1914 and 1955 to substantiate this argument. For example, in *Quong Wing v The King*, a Chinese restaurant owner was fined for employing a white woman, and his attempt to invalidate the employment restrictions imposed on Chinese Canadians was unsuccessful. Similarly, in *Christie v York*, the Supreme Court upheld a Montreal bar's decision to exclude an African-Canadian patron, citing the bar's rights based on the freedom of contract. In another case, property rights were relied upon to uphold a property association's decision to refuse a person of Jewish ancestry from buying a cottage. Likewise, immigration policies were the grounds to uphold a decision to deport a Trinidadian of East Indian descent, who had been accepted in the Canadian military but whose immigration was denied on the ground of race, as the Court determined that it did not have jurisdiction to review discriminatory race classifications. Walker cites *Noble and Wolf v Alley* as the sole success from the point of view of racial minorities in these early years, a case that dealt with restrictive covenants limiting the alienation of property. See also: *Colour-Coded: A Legal History of Racism in Canada, 1900-1950.* Constance Blackhouse. Toronto: U of Toronto P, 1999.

[27] In this context, it is educating to note the observations of Frantz Fanon, one of the foremost and highly influential theorists of race and colonization. In an essay written in 1956, Fanon argued, among other things, that racism is not a static phenomenon, but it is constantly renewed and transformed. He also posited that "primitive racism", which was grounded in biological claims, belonged to a past phase of colonialism, and it was discredited after millions of Jews were exterminated based on the racist ideology of Hitler's Germany; however, Fanon predicted that

effective legal mechanisms are needed to dismantle race thinking, race discrimination, and the systemic barriers that perpetuate disadvantage and discrimination for racialized individuals and groups.

1.2 Defining racism

While race is a marker of identity based on physical characteristics like skin colour, racism is an attitude or way of thinking, which can manifest in comments, conduct, behaviours, policies, etc.

Racism is based on the false belief that people of certain races are inferior compared to persons belonging to the "dominant" or White race, and that the physical attributes and/or cultural or ethnic backgrounds of individuals or groups define their psychological, moral, and intellectual characteristics and capabilities.

> "Racism is an ideology or a power centric idea to justify domination of other races, based on beliefs in their biological and cultural inferiority, and rationalizing exclusionary treatment of certain groups from the social order".
> *Patricia Hill Collins and John Solomos*

Racist thinking is based on assumptions that evolve over time in a society, and these ideas then get embedded in cultural, institutional, and group dynamics, leading to racism and race discrimination.

UNESCO offers the following definition of racism: "Racism is a theory of racial hierarchy which argues that the superior race should be preserved and should dominate the others. Racism can also be an unfair attitude towards another ethnic group. Finally, racism can also be defined as a violent hostility against a social group".[28]

According to Collins and Solomos: "Racism is an ideology or a power centric idea to justify domination of other races, based on beliefs in their biological and cultural inferiority, and rationalizing exclusionary treatment of certain groups from the social order. It gains power from utilizing other sets of ideas and beliefs in specific social or historical contexts".[29]

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new forms of racism will continue to emerge to oppress and objectify colonized populations. Fanon, Frantz. *Toward the African Revolution*. Trans. Haakon Chevalier. Grove Press, 1994

[28] "Racism". UNESCO. Web.

[29] Collins and Solomos, *supra* note 20.

Even though race is not based on objective reality, racism and "racist" ideas have psychological force, and they acquire objective existence and power through individual or social attitudes and behaviours, and through discriminatory institutional policies or practices. Moreover, different racialized groups may experience racism in different forms, reinforcing the idea that racism can manifest in subtle, complex, and multiple ways.[30]

Therefore, while race, as a biological category, rests on a false premise, racism, on the other hand, has an objective social and cultural presence, which produces adverse consequences for real people in real places and time.[31]

> "White privilege" refers to unearned advantages that accrue to White persons merely on account of their race, shaping their life experiences.
>
> *Peggy McIntosh*

Racism confers power and **privilege**[32] to the dominant group, mainly White or Caucasian persons (in the context of Western cultures), and when racist attitudes and actions manifest in policies, laws, or institutional frameworks, they lead to discriminatory outcomes for non-White persons and groups.

In it extreme form, as an ideology, racism can become an instrument of violence, as evidenced in the state sponsored racism of Nazi Germany.[33]

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[30] Race discrimination can manifest differently based on each person's racialized characteristics, and even people belonging to the same racialized group may experience racism or racist behaviour in distinct ways. For example, a person of South Asian descent who speaks English with an accent and wears South Asian cultural attire may be treated differently than a person of the same background who is more assimilated in Western culture and values. Similarly, a lighter skinned African Canadian may be treated differently than one with a darker skin; or a racialized person may be singled out for discriminatory treatment because they do not conform to stereotypes about their race or because they assert their rights. *Ontario Guideline*, *supra* note 4.

[31] Perry, *supra* note 8.

[32] Peggy McIntosh coined the term "White privilege", which refers to unearned advantages that accrue to White persons merely on account of their race, shaping their life experience. For example, a White person seldom runs the risk of being racially profiled by the police, being asked where they are *really* from, or being treated suspiciously at a store because of their race. These experiences create privilege and benefits that require little work or effort. McIntosh, Peggy. "White Privilege: Unpacking the Invisible Knapsack." Web. It is worth noting that while the idea of race has been socially constructed since the late 18th Century to assign identities to non-White people, "whiteness as a defining racial category has only recently emerged in the range of chromatic ideas of human difference". "Whiteness". Ashcroft, *supra* note 2. 220-23.

[33] In this context, Tzvetan Todorov offers an insightful distinction between behavioral and ideological forms of racism: "The word racism, in its usual sense, actually designates two very

New or cultural racism: It has been argued that contemporary forms of racism have shifted toward what has been designated as cultural or culturalist racism, or new racism.[34]

As the pseudoscientific race theories of the past have been discredited, and arguments about the biological basis of race hierarchies have lost their appeal, racism and race theories have moved toward emphasizing cultural difference, or the superiority of Western or European cultures as a mode of differentiating between racial groups.[35]

> Ideas of race and racism have shifted to "psychological, social, or cultural explanations" to define race differences and justify differential treatment of "other" races on this basis.
>
> *Adrian M.S. Piper*

different things. On the one hand it is a matter of behavior, usually a manifestation of hatred or contempt for individuals who have well defined physical characteristics different from our own; on the other hand it is a matter of ideology, a doctrine concerning human races. The two are not necessarily linked. The ordinary racist is not a theoretician; he is incapable of justifying his behavior with scientific arguments. Conversely, the ideologue of race is not necessarily a racist, in the usual sense: his political views may have no influence whatsoever on his acts, or his theory may not imply that certain races are intrinsically evil. In order to keep these two meanings separate, I shall adopt the distinction that sometimes obtains between racism, a term for designating behavior, and racialism, a term reserved for doctrines. I must add that the form of racism that is rooted in racialism produces particularly catastrophic results: this is precisely the case of Nazism. Racism is an ancient form of behavior that is probably found worldwide; racialism is a movement of ideas born in Western Europe whose period of flowering extends from the mid-eighteenth century to the mid-twentieth." Todorov, Tzvetan. "Race and Racism". Trans. Catherine Porter. *Theories of Race and Racism: A Reader.* Eds. Les Back and John Solomos. London: Routledge, 2009. 64-70. (page 64).

[34] For example, writing in the context of racism in British society, Tariq Modood observes: "Following the holocaust and the comprehensive discrediting of 19th Century scientific racism, racism based upon biological theories of superior and inferior races will no longer be intellectually and politically viable. Consequently, what emerged is racism based on cultural differences, or the natural preference of human beings for their own cultural group, and the incompatibility between different cultures, the mixing or coexistence of which, it is alleged, would lead to violent social conflict and dissolution of social bonds". Modood, Tariq. "Difference, Cultural Racism and Anti-Racism". 238-256. *Race and Racism.* Ed. Bernard Boxill New York: Oxford UP, 2001. [Boxill].

[35] Piper, Adrian M.S. "Two Kinds of Discrimination". 193-237. Boxill, *supra* note 34. As argued by the author, having ruled out biology as a possible explanation for any behavioral variation in humans, ideas of race and racism shifted toward "psychological, social, or cultural explanations" to define race differences and justify differential treatment based on race.

Consequently, cultural racism is said to be replacing the biological racism of the past, and it is emerging as a new practice for perpetuating discrimination against racialized persons and groups.[36]

Unconscious racism: While racism is rooted in attitudes, values, assumptions, and stereotypical beliefs, these beliefs may be internalized, unconsciously held, or play out at a deeper psychological level, so that people may not even realize that they hold these beliefs.[37] This is one of many reasons why racism can be particularly insidious, subtle, and complex, and why it has been so difficult to weed out from the social fabric.

> Microaggressions are behaviours that are rooted in racist beliefs or discriminatory attitudes and show up in everyday situations or encounters.

Everyday racisms: Racism also manifests and is expressed by **microaggressions[38],** "everyday racism",[39] racial gaslighting, and racial profiling.

Racial gaslighting happens when someone discredits the experiences and emotions of racialized persons or does not believe these persons when they speak about their lived experience of racism.[40]

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[36] *Ibid.* While cultural or culturalist racism is said to have originated recently, it has a "much greater international and historical depth. It could indeed be said that in the long history of racism, it is 19th Century biologism that is the exception, and certainly Europe's oldest racisms, anti-Semitism and Islamophobia, are culturalist".

[37] "Racial Discrimination". Brochure. Ontario Human Rights Commission. [ON Brochure]. Web.

[38] Microaggressions are behaviours that are rooted in racist beliefs or discriminatory attitudes and show up in situations when, for example, an Asian-Canadian person is told how well they speak English, a Black woman is labelled as aggressive because of the tone of her voice, or a Black person is followed in a store, etc.

[39] "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". *Ontario Guideline*, *supra* note 4. (page 13).

[40] In this context, Ashcroft notes that "racists of European descent typically have not accepted that pain matters as much when it is felt by Africans, for example, as when it is felt by Europeans". Ashcroft, *supra* note 2.

The notion of racial gaslighting was acknowledged by a human rights tribunal in an important race and colour discrimination case involving two Indigenous women. The tribunal rejected the respondent's testimony that the complainants were "playing the race card". It stressed that this kind of labelling was a stereotype, because "once an individual's actions were labelled in this way, they could be discounted and ignored".[41]

Racism is more than personal: While racism, racist jokes, racial stereotyping, racist slurs, or name calling are seen as personal attacks, such acts of racism or racial harassment also, directly or indirectly, malign a person's family, ancestry, and community.

People who face racism feel its sting not just on a personal level, but also as a vilification of their sociocultural, communal, or even national identity.

Therefore, individuals who face racism feel its sting not just on a personal level, but also as a vilification of their sociocultural, communal, or even national identity. For these reasons, racism can leave deep scars on people, and that is why the dismantling of racist attitudes and behaviours needs to be approached with careful thought, awareness, and sensitivity.

Human rights tribunals have accepted the severe impact that racist slurs, insinuations, and racial name calling can have on racialized persons, and they have acknowledged that racially abusive terms can reflect society's judgment about the supposed inferiority of "other" races.

As noted by a Board of Inquiry: "When white people in positions of power insult black or other racialized individuals in racially abusive terms, their words reflect society's judgments about the superiority of white people and inferiority of others".[42]

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[41] *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302 (CanLII) [*Radek*]: The tribunal noted: "A particularly revealing element of the attitudinal evidence led in this hearing related to the notion of "playing the race card" or "using the racist angle" [….] The use of this or similar language was […] a clear attempt to discredit allegations of racism as manipulative ploys to gain collateral benefit. Once an individual's actions were labelled in this way, they could be discounted and ignored. Any possibility of consideration of the genuineness of an allegation of racial discrimination was foreclosed after the application of the label. The use of this language reflected, in my opinion, a mind closed to the possibility that a given act was racially motivated or that unconscious racial stereotyping could be at play". (para. 524).

[42] *Fuller v Daoud* (2001), 40 CHRR D/306 (Ontario Bd. Inq.) [*Fuller*]. The board cited from *Report on Systemic Racism in Ontario*: "Racist language has this effect whether or not it is intended, because these judgments are built into the meaning of the words. Consequently, racial abuse

Human rights-based approach: Because the history of racism is scarred by exploitation, violence, and dispossession, it is a complex problem to address, among other things, due to the trauma and shame associated with its historical memory.

For this and other reasons, conversations about race, racism, and race discrimination can be difficult for many people; these conversations may make people uncomfortable, and many persons may even feel that they do not possess the politically correct vocabulary to discuss these issues with knowledge and sensitivity.

Because of these complexities, a human rights-based approach is the most viable way to address issues of racism and race discrimination, as it is informed by the principles of dignity, equality, inclusion, accountability, non-discrimination, and empowerment, and it is supported by the legal frameworks established in human rights statutes and international instruments.

1.3 Racism and race discrimination

While racism is a broader practice and experience that shows up in behaviours, attitudes, and mindsets, race discrimination involves unlawful actions that create adverse impact for racialized persons, excluding these persons from advantages or privileges that are generally available to other groups.

Race discrimination puts burdens on racialized persons comparative to others, and it withholds or limits the access of racialized groups to benefits available to other people in areas protected under the *Act,* i.e. in employment, housing, services, etc.[43]

> "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society".
>
> *The Supreme Court of Canada*

both insults the targeted person and expresses a history of general contempt for the person's racial group".

[43] For purposes of this discussion, it is useful to recall the definition of discrimination provided by the Supreme Court of Canada: "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of

While race discrimination may often result from racism or racist beliefs, human rights law doesn't protect against racism *per se*, or against racist beliefs,[44] but the *Act*'s protections are activated when these beliefs are manifested in actions that lead to race discrimination, i.e. when the affected person experiences adverse impact in employment, housing, services, or another protected area due to those actions.

> Institutional racism refers to "the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping".
>
> *Shreya Atrey*

However, since race discrimination is often motivated by racism, whether conscious or unconscious, the *Act*'s protections against race discrimination also operate to prevent racism and racist behaviour.

Moreover, in assessing race discrimination and its impact on individuals, human rights courts and tribunals use any existing evidence of racist comments or behaviours by parties to establish that race was a factor in the adverse treatment of a racialized person.

Forms of race discrimination: All forms of discrimination are often indirect or subtle, however, race discrimination is more acutely marked by this tendency, as human rights tribunals and courts have repeatedly emphasized.[45]

Also, like discrimination against other marginalized groups, race discrimination can be **personal,** i.e. stemming from an individual's attitudes, biases, or behaviours, which may, in turn, reflect the norms or "rules" of a society or culture, unwritten or even unspoken, that create a power imbalance for racialized persons.

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discrimination, while those based on an individual's merits and capacities will rarely be so classed". *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143. [*Andrews*].

[44] As pointed out by Shreya Atrey, if racism is a state of mind, states of mind are "not susceptible to investigation". Atrey, Shreya. "Structural Racism and Race Discrimination". *Current Legal Problems* Vol. 74 (2021). 1–34. [Atrey].

[45] A tribunal noted in one of Ontario's leading race discrimination cases, *Peel Law Association v Pieters*, 2013 ONCA 396 (CanLII). [*Pieters*]: "Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices" (para. 111). In *Basi v Canadian National Railway Co. (No. 1) (1988)*, 9 CHRR D/5029 (CHRT), the tribunal observed: "Discrimination is not a practice which one would expect to see displayed overtly". Similarly, another tribunal affirmed the "often subversive and subtle" nature of race discrimination. *Raheja v Newfoundland (Human Rights Commission) (1997)*, 155 Nfld. & PEIR 38. (para. 32).

Race discrimination can also be **institutional or systemic,** i.e. flowing from institutional policies, rules, or practices that are based on mindsets, norms, or preferences that have the effect of creating barriers for racialized persons.

Race discrimination can also be **structural,**[46] i.e. it may exist at the state or government level, for example, through discriminatory immigration laws or other regulations.[47]

Race discrimination in all its forms needs to be addressed in a **human-rights based anti-racism framework,** which begins by centering the experiences and knowledges of racialized persons, such as Indigenous, Black, Asian, and other racialized groups.

Such a framework should include correcting historical wrongs, addressing systemic, institutional, and structural issues, enhancing awareness, educational, and research initiatives, and creating special programs and equity-based strategies to alleviate the disadvantage of racialized persons in employment, services, housing, and other areas.[48]

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[46] Atrey, *supra* note 44, writing in the context of racism in the UK, draws a distinction between "institutional" and "structural" racism. Institutional racism refers to "the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people". Structural racism, according to Atrey, is different from institutional racism; structural racism is "well-considered and well-managed, lending itself to 'analytic rationality' because it is imagined and regulated in a broad-based way such as through immigration and criminal laws. It is also not to do with individuals or collectivities; but with the State itself: its government, institutions, and instrumentalities, in the way that they imagine and apply themselves".

[47] According to J. A. Powell, structural racism "comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes." Powell, J. A. "Structural Racism: Building upon the Insights of John Calmore". *North Carolina Law Review* 791 (2008). Atrey, *supra* note 44, emphasizes that structural racism "exists throughout the labyrinth of the State, such that laws (immigration laws, criminal laws, welfare laws etc.), policies (housing allocation etc.), practices and rhetoric deployed by the State are, both on their own and concertedly, capable of giving effect to racial hierarchy".

[48] It is important that such systemic solutions are informed by research and disaggregated race-based data, just as such data should be governed by standards that respect data sovereignty, access to data, and ownership of data for Indigenous people, and for other racialized groups where possible. For example, the Canadian Race Relations Foundation has established protocols for race-based data collection and research, including Indigenous people's access to personal data to advance historical land claims, disputes, grievances, etc. The Office of Privacy

Communities, civil society, and public and private sector institutions can play a role to influence and change mindsets and policies that may be exclusionary or oppressive for racialized persons, and to create and enforce strategies that promote respect, diversity, equality, and inclusion for people of all races.

1.4 Racial profiling

Racial profiling happens when persons in positions of authority, like law enforcement, scrutinize racialized persons more severely than others on the pretext of public safety or security.[49]

> Blacks, Indigenous persons, and people of Hispanic ancestry have been most common victims of racial profiling, and, since 9/11, Arabs and Muslims have also been targeted.

Racial profiling is different from criminal profiling, which does not rely on stereotyping but uses objective evidence and information about wrongful behaviour to profile criminals.[50]

Although racial profiling is not a protected ground under the *Act*, acts of racial profiling would be *prima facie* discriminatory if evidence shows that they were driven by stereotypes[51] about race, colour, ancestry, national origin, religion, or place of origin, etc.

Commissioner of Canada has also taken steps to allow First Nations, Metis, and Inuit people ownership and governance of their data.

[49] Racial profiling was introduced in Canada in the 1990s after members of the RCMP received training in the United States. Blacks, Indigenous persons, and people of Hispanic ancestry have been most common victims of racial profiling, and, since 9/11, Arabs and Muslims have also been targeted. *Racial Profiling: Context and Definition*. *[Racial Profiling].* Quebec Human Rights Commission, 2005. (page 4).

[50] *Paying the Price: The Human Cost of Racial Profiling: Inquiry Report*. Ontario Human Rights Commission, 2003.

[51] Regarding the prevalence of racial stereotyping in law enforcement, it has been demonstrated that the media contributes to endorsing these stereotypes, e.g. a crime committed by a White person may be reported in news and media coverage as an "individual's pathology", but a crime committed by a racialized person is more likely to be given the slant that it is a manifestation of a collective or group trait. Wortley, Scott. "Misrepresentation or Reality: The Depiction of Race and Crime in the Canadian Print Media". *Critical Criminology in Canada: Breaking the Links Between Marginality and Condemnation*. Eds. B. Schissel and C. Brooks. Halifax: Fernwood, 2003. 87-111. Qtd. in *Racial Profiling*, *supra* note 49.

In a case alleging national and ethnic origin discrimination, the Supreme Court of Canada offered the following definition of racial profiling:

"Racial profiling is any action taken by one or more people in authority with respect to a person or group of persons, for reasons of safety, security or public order, that is based on actual or presumed membership in a group defined by race, colour, ethnic or national origin or religion, without factual grounds or reasonable suspicion, that results in the person or group being exposed to differential treatment or scrutiny".[52]

Courts have emphasized that racial profiling "can arise from a process of subconscious stereotyping as well as from conscious decisions".[53]

Case law example: *In an early racial profiling case, the complainant, a person of colour, was stopped, searched, harassed, and charged by a police officer.[54] The Board of Inquiry concluded that the complainant was discriminated against on the basis of his colour and ordered the police officer to pay $100 as damages for injuring the complainant's dignity and self respect, and to refrain from discriminating against racialized individuals in the future.*

Based on human rights case law, courts use the following general rules to ascertain if racial profiling was a factor in the treatment of a person in a given situation:

- A person in authority (e.g. law enforcement) used language that showed prejudice or stereotyping, such as racial slurs, denigrating comments, innuendoes, or race-based microaggressions, etc.
- The explanation offered for the differential treatment of a racialized person was contradictory or deviated from normal practice in such situations.
- The person in authority used an unprofessional manner or process during the encounter.
- The situation unfolded differently than it would have if a White person had been involved.[55]

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[52] *Quebec v Bombardier Inc.*, 2015 SCC 39 (para. 33). [*Bombardier*].

[53] *Johnson v Halifax Regional Police Service* (2003), 2003 CanLII 89397 (NS HRC). [*Johnson*]. The board also shed light on how situations of racial profiling and discrimination must be assessed, reiterating the dictum established in human rights jurisprudence that "circumstantial evidence and inference are heavily relied upon [in such cases] as there is seldom direct evidence of discriminatory conduct". (paras. 8-9).

[54] *Akena v Edmonton (City of) (1982)*, 3 CHRR D/1096 (Alberta Bd. Inq.).

[55] *Racial Profiling*, *supra* note 49.

***Case law example**: A Black man was stopped by the police without pretext and his car was seized.*[56] *A Board of Inquiry found that the police's actions were discriminatory and stated: "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 [….] Deviations from normal practice and evidence of discourtesy or intransigence are grounds for finding differential treatment. I find it difficult to imagine that these events would have unfolded the same way if a white driver […] had been involved in this stop".*

1.4.1 Consumer racial profiling

Racial profiling is not limited to acts by police and law enforcement, as it can also occur in other settings or areas protected by the *Act*, like services or housing.[57]

> Consumer racial profiling refers to the practice of providing differential treatment or services to racialized persons or groups in a marketplace or services setting.

Consumer racial profiling refers to the practice of providing differential treatment or services to racialized persons or groups in a marketplace or services setting. Consumer racial profiling may occur typically in hotels, restaurants, gas stations, grocery stores, malls, and other retail businesses.[58]

Signs of consumer racial profiling may be discernable by the following conduct or scenarios:

- Wrongfully detaining or searching a racialized person in a service setting.
- Following a racialized person or refusing them a service generally available to others.
- Giving slow or substandard service to a racialized person compared to others.
- Using offensive language or removing someone from a service location due to their race.

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[56] *Johnson, supra* note 53. (paras. 51 and 57).

[57] In *Wickham v Hong Shing Chinese Restaurant*, 2018 HRTO 500 [*Wickham*], the tribunal, while reviewing damages awarded in racial profiling cases, noted the existence of racial profiling in other contexts: "These awards make it clear that racial profiling does not just occur in the context of policing, but in a variety of fora".

[58] *Working Together to Better Serve All Nova Scotians: A Report on Consumer Racial Profiling in Nova Scotia*. Nova Scotia Human Rights Commission, 2013.

- Questioning whether a racialized person can afford a product.

Case law example: *A retail store, which had a high theft rate, required its employees to watch the customers and to page other staff, and it hired plain clothes officers to patrol the aisles.*[59] *A Black woman was looking for a specific product in the store and had to open her bag to check for its details. As she was zipping up her bag, one of the employees insisted on examining the bag, and after checking it and finding nothing suspicious, simply walked away without apologizing or explaining himself. The tribunal used the test of discrimination*[60] *established in human rights case law to conclude that while employees at the retail store were required to be vigilant, they were not allowed to confront customers. By confronting the complainant and asking her to open her bag, the store employee acted on racial stereotypes, either conscious or unconscious, and the complainant's race and colour were factors in how she was treated.*

Case law example: *A Black man was discriminated against on the basis of his race when a gas station attendant called the police due to his allegedly suspicious behaviour.*[61] *The respondents argued that they had no intention to discriminate against the complainant, so race was not a motivating factor in the attendant's call to the police. The court unequivocally rejected that argument, relying on the Supreme Court of Canada's stipulation that intention is not relevant in assessing discrimination,*[62] *and it reiterated the*

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[59] *McCarthy v Kenny Tan Pharmacy Inc*., 2015 HRTO 1303 (CanLII). [*McCarthy*].

[60] The test of discrimination was established by the Supreme Court of Canada in *Moore v British Columbia (Education)*, 2012 SCC 61. [*Moore*]. The test states: 1. The complainant has a characteristic protected by the *Act*; 2. They experienced adverse impact with respect to an area protected under the *Act*; and 3. The protected characteristic was a factor in the adverse impact. In *McCarthy*, *supra* note 59, the tribunal cited factors to be considered in race discrimination complaints, as noted in *Pieters*, *supra* note 44: "(a) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor; (b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant; (c) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element; (d) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and (e) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices". (para. 111).

[61] *Troy v Kemmir Enterprises Inc.*, 2003 BCSC 1947.

[62] *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536. [*Simpsons-Sears*]: The Supreme Court of Canada declared that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in human rights legislation". (para. 13).

Supreme Court's comment about the "insidious nature of racial prejudice and stereotyping" that perpetuates discriminatory conduct against racialized persons.[63]

1.5 Best practices to prevent racism and race discrimination

Organizations, employers, businesses, landlords, service providers, and professional, business, and trade associations must take proactive steps to ensure that their environments are free from racial discrimination or harassment; a failure to do so can lead to discriminatory conduct or racially toxic environments for which organizations can be held liable under human rights law.

- The Supreme Court of Canada has set down that employers are responsible for the discriminatory conduct of their employees;[64] therefore, it is the duty of organizations to develop anti-racism policies and to educate their employees and agents about racism, and about the kind of comments or conduct that could constitute race discrimination or racial harassment or create racially poisoned environments.

- In addition, employers, landlords, service providers, and professional, business, and trade associations must implement impartial, transparent, and safe mechanisms to prevent, report, and address incidents of race discrimination, harassment, stereotyping, or toxic environments created by racist comments, jokes, innuendos, teasing, etc.[65]

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[63] *R. v Williams*, [1998] 1 SCR 1128. In this case, the Supreme Court's comments were made in the context of the impartiality of jurors in race discrimination hearings, and the Supreme Court acknowledged the psychological nature of unconscious racial bias: "To suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it [….] Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. For this reason, it cannot be assumed that judicial directions to act impartially will always effectively counter racial prejudice". (paras. 1142-3).

[64] *Robichaud v Her Majesty the Queen,* [1987] 2 SCR [*Robichaud*]. The case is important for establishing the liability of employers (corporations) for the discriminatory conduct of their employees in human rights discrimination cases.

[65] ON Brochure, *supra* note 37.

- Employers must ensure that their recruitment and hiring policies and practices are not, consciously or unconsciously, discriminatory against racialized persons or groups.

- These anti-discriminatory practices must be visibly implemented from the initial stages of the hiring process, e.g. in job advertisements and job interviews;[66] and these practices must extend to the onboarding or mentoring stages of new employees, and to decisions related to employee retention, promotion, and training opportunities, to ensure that racialized employees do not face barriers comparative to other employees due to their race.

- The same level of due diligence and care must be taken by housing and service providers, and by professional, business, and trade associations to implement anti-racist and anti-discriminatory policies in their setups, based on research and up-to-date information on best practices regarding these policies.
- The duty of employers, housing, and service providers to ensure discrimination-free workplaces and premises includes the duty to investigate[67] race-based complaints, and to "respond reasonably and appropriately" to these complaints.[68]

- As noted earlier, if organizations fail to investigate race discrimination complaints or respond to them in an effective, reasonable, and appropriate manner, they can be held liable for discrimination under human rights law.[69]

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[66] For example, according to studies conducted in Australia, hiring practices can be subtly influenced by so-called "resume racism", which happens when job applicants with non-European sounding names get sidelined in favour of applicants whose names indicate European origin. *National Anti-Racism Framework Scoping Report: Community Guide*. Australian Human Rights Commission, 2022.

[67] In *Employee v The University and another (No. 2),* 2020 BCHRT 2020, the tribunal emphasized the employer's duty to investigate and to conduct discrimination-free investigations: "Because the *Code* obliges employers to respond to allegations of discrimination. In particular, an investigation can, on its own, amount to discrimination regardless of whether the underlying conduct subject to the investigation is found to be discriminatory". (para. 272).

[68] *Laskowska v Marineland of Canada Inc*., 2005 HRTO 30. [*Laskowska*]. (paras. 52-53)

[69] *Beharrell v EVL Nursery Ltd.,* 2018 BCHRT 62. The tribunal stated: "[The employer] does not have a harassment policy [and does not provide] training or information on how to bring a complaint forward […] Where a failure to address a complaint of discriminatory harassment results from an employer's lack of process and policy, this could constitute a breach of an employer's responsibilities under the *Code"*. (para. 34).

- A tribunal explained the role of employers in addressing situations of race discrimination: "Some factors the Tribunal may consider are whether the employer and persons charged with addressing discrimination have a proper understanding of discrimination, whether the employer treated the allegations seriously and acted 'sensitively', and whether the complaint was resolved in a manner that ensured a healthy work environment".[70]

- Generally, the following factors[71] are considered by courts when determining if an organization did its due diligence regarding incidents of race discrimination and/or in creating discrimination-free policies and environments:

    - The organization has an anti-racism policy with a clear vision statement that indicates its zero-tolerance approach to racism, racial harassment, and race-based discriminatory behaviours.
    - The organization has laid down clear procedures and protocols in its policy for reporting incidents of race discrimination, with an effective and clearly outlined mechanism for resolving race discrimination complaints.
    - The organization responds promptly to race discrimination or harassment complaints, treats these incidents with utmost seriousness, and allocates requisite resources to address them.
    - The progress and outcome of the complaint are clearly and efficiently communicated to the complainant and other parties.
    - The organization's policy ensures the dignity and confidentiality of complainants, and it safeguards complainants from all forms of reprisal.[72]
    - The policy is monitored, evaluated, updated, and implemented in an efficient manner.[73]

Moreover, employers, housing, and service providers must be diligent in discipling their employees or agents who have engaged in racially discriminatory comments or conduct.

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[70] *Laskowska, supra* note 68. (para. 59).

[71] *Wall v University of Waterloo* (1995), 27 CHRR 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".

[72] *Ontario Guideline*, *supra* note 4.

[73] *Ibid.*

Case law example: *A city terminated an employee who had a pattern of making racist and discriminatory comments against coworkers. The arbitration board unanimously upheld the termination and stated: "We live in an era where much more is being expected of companies and organizations to eliminate racism and discrimination in our diverse, multicultural workplaces. That also means much more is expected of employees".*[74]

Besides developing anti-racism, anti-harassment, and anti-discrimination policies, employers, housing providers, service providers, and professional, business, and trade associations should implement programs to educate their employees and agents on these issues, in order to prevent individual and systemic forms of racial discrimination in their environments and operations. These educational initiatives can include:

- Delivering cultural competency training to staff and providing culture-specific accommodations and supports to employees as required.
- Collecting race-based data where appropriate to assess race related historical disadvantage in hiring and retention of employees in the organization.

- Reviewing organizational policies, practices, decision-making priorities, and workplace cultures to assess potential adverse impact of these practices for racialized groups.

- Implementing special programs or equity initiatives that give preference to the hiring of racialized employees, if data shows that racialized persons are facing disadvantage in getting hired in the organization.

    - Special programs to support racialized persons can also be introduced in services, housing, and professional, business, or trade associations. For guidance on how to set up special programs, see the Commission's publication, *Special Programs and the Meaning of Equality and Discrimination*: Special Programs.

[74] *Calgary (Corporation of the City) v Canadian Union of Public Employees, Local 37*, 2018 CanLII 53476 (AB GAA). (para. 107).

2. Intersectionality and race discrimination

> "We must pay close attention to the ways in which the notion of race, and its associations with skin colour, facial features, and other aspects of physiognomy, has been intertwined, amongst other things, with issues of class, masculinity and femininity, sexuality, religion, mental illness, and the idea of the nation".
>
> *Ali Rattansi*

Although race is a distinct protected ground under the *Act*, racialized persons are also more likely to identify with other protected grounds like colour, ancestry, national origin, religion, place of origin, among others.[75]

Because the identities of racialized persons, and/or how they are perceived, are intertwined with these other grounds, race discrimination may often also be triggered by other grounds along with race, or it may transcend the boundaries of race to embrace these other classifications, making race discrimination complaints particularly complex, multilayered, or intersectional.

Under human rights law, **"intersectionality"** means or indicates situations when a person identifies with more than one protected ground, or multiple grounds intersect to create their identity or personal characteristics, and the person faces discrimination due to these multiple factors.

As noted in research, intersectionality or interconnecting identities make racialized persons vulnerable to **"racisms",** or multiple forms of discrimination: "One could call this view of racism as intersectional as it compels us to view racism as defined by more than just 'race', and instead as 'racisms', [which] cannot be understood without considering their interconnections with ethnicity, nationalism, class, gender and the state".[76]

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[75] This comingling of race with other personal characteristics is endorsed in contemporary scholarship on race: "We must pay close attention to the ways in which the notion of race, and its associations with skin colour, facial features, and other aspects of physiognomy, has been intertwined, amongst other things, with issues of class, masculinity and femininity, sexuality, religion, mental illness, and the idea of the nation". Rattansi, Ali. *Racism: A Very Short Introduction*. Oxford: Oxford UP, 2007. (page 12).

[76] Anthias, Floya, and Nila Yuval-Davis. *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-Racist Struggle.* London: Routledge, 1992. (page viii). For arguments on

People with intersectional characteristics are more vulnerable to discrimination, disadvantage, or exclusion, as the inequalities they may face are "never the result of single, distinct factors", but are created by different intersecting "social locations, power relations, and experiences".[77]

In situations of race discrimination, the protected grounds that intersect with race may become the immediate triggers of race discriminatory conduct in subtle and complex ways.

Also, because of the stigma attached to overt racism, race discrimination may often be disguised under seemingly less offensive identity markers like a person's accent, their national origin, or religion, which can become "euphemisms or proxies for notions of race" in race discriminatory conduct.[78]

> "Intersectionality promotes an understanding of human beings as shaped by the interaction of different social locations (e.g., 'race'/ethnicity, Indigeneity, gender, class, sexuality, geography, age, disability/ability, migration status, religion). These interactions occur within a context of connected systems and structures of power (e.g., laws, policies, state governments and other political and economic unions, religious institutions, media)".
>
> *Olena Hankivsky*

- Race, therefore, is a particularly unique ground in human rights jurisprudence because of its complex intersections and overlaps with other protected grounds.

- Case law on race discrimination substantiates that triggers of discriminatory conduct against racialized persons can stem cumulatively from vilification or stereotyping

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how racism is co-constituted with ideas of nation and ethnicity, see, for example: Hall, Stuart. *The Fateful Triangle: Race, Ethnicity, Nation*. Cambridge: Harvard UP, 2017. On the intermingling of racism, gender, and class, see: Hall, Catherine. *Civilising Subjects: Metropole and Colony in the English Imagination 1830-1867*. Chicago: Chicago UP, 2002.

[77] Hankivsky, Olena. *Intersectionality 101*. Institute of Intersectional Research & Policy: Simon Fraser University, 2014. The author offers the following definition of intersectionality: "Intersectionality promotes an understanding of human beings as shaped by the interaction of different social locations (e.g., 'race'/ethnicity, Indigeneity, gender, class, sexuality, geography, age, disability/ability, migration status, religion). These interactions occur within a context of connected systems and structures of power (e.g., laws, policies, state governments and other political and economic unions, religious institutions, media). Through such processes, interdependent forms of privilege and oppression shaped by colonialism, imperialism, racism, homophobia, ableism and patriarchy are created". (page 2).

[78] *Ontario Guideline*, *supra* note 4. (page 16).

based on multiple grounds, compounding the impact of discrimination for racialized persons.

- When race discrimination cases are filed under multiple grounds and the facts indicate a nexus between the acts of discrimination and other grounds along with race, courts use an intersectional lens to assess the adverse impact of discrimination on such individuals.

For example, while reviewing aspects of intersectionality in a case alleging discrimination based on race and perceived disability, a federal court stated:

"When multiple grounds of discrimination are present [in a complaint], their combined effect may be more than the sum of their individual effects. The concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination. When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge".[79]

Case law example: *In an intersectional race discrimination complaint, a tribunal noted: "An intersectional analysis of discrimination is a fact-driven exercise that assesses the disparate relevancy and impact of the possibility of compound discrimination".*[80] *The complaint involved allegations of sexual harassment by a Black woman, and the tribunal emphasized that both race and sex were factors in the sexual harassment conduct, and "reliance on a single axis analysis where multiple grounds of discrimination are found […] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred".*[81]

[79] *Turner v Canada (Attorney General)*, 2012 FCA 159. (para. 48).

[80] *Baylis-Flannery v DeWilde (No. 2)*, 2003 HRTO 28 (CanLII). [*Baylis*]. (para. 144).

[81] For comments by other tribunals on how intersectional race discrimination complaints are assessed, see *Morrison v Motsewetsho*, 2003 HRTO 21 (CanLII) and *Comeau v Cote,* [2003] BCHRT 32.

2.1 Protected grounds that intersect with race

To better understand the scope and meaning of race discrimination in human rights law, it is helpful to briefly review the other grounds that are most commonly cited with the ground of race in human rights complaints, in order to recognize how this intersectional factor plays out in race discrimination cases before tribunals and courts.

2.1.1 Race and colour

Colour is a distinct protected ground in the *Act* and in all other human rights statutes in Canada (in addition to the *Charter*), although it is often grouped with or subsumed under the ground of race.[82]

> The ground of colour is often lumped with race in human rights complaints. However, with increasing immigration and interracial marriages, more people will begin to identify as multiracial or biracial, which will bring more attention to colour as a protected ground.
>
> *Joshua Sealy-Harrington and Jonette Watson Hamilton*

The **nexus between race and colour** is easily established, and differences in skin colour have often been used,[83] and continue to be used, as the simplest and easily identifiable external sign to differentiate between people based on racial categories.

Therefore, because skin colour is a notable marker for identifying people by their race, colour is often alleged as an additional ground in race discrimination complaints, and courts acknowledge colour discrimination as an intersecting factor in these complaints.

The ground of colour, however, is **distinct from race,** as evidenced in instances of discrimination based on skin colour within the same "racial" groups.[84]

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[82] "The traditional view is that race and colour are synonymous, with colour serving as a proxy for race. This is observable in historical census categories of race that are labeled exclusively in terms of colour, such as White, Red, Yellow, Black". Sealy-Harrington, Joshua, *and* Jonnette Watson Hamilton. "Colour as a Discrete Ground of Discrimination". *Canadian Journal of Human Rights*, (2018) 7:1. 2018 CanLII Docs 108 [Joshua and Hamilton]. 1-34.

[83] For example, as noted earlier, 19th Century theories of race, which claimed to be grounded in science, essentially relied on colour difference to distinguish between people, and used this difference to categorize humanity into different races, associating distinct behavioural, moral, psychological, and intellectual traits with these races. Ashcroft, *supra* note 2.

[84] In this context, it has been pointed out that colour, instead of race, is the dominant marker of distinction or discrimination in Latin America. "Sociologists have widely accepted the idea that in Brazil and Latin America in general there was no racial prejudice just colour preference, because

Case law example: *In one of the first reported cases decided solely on the ground of colour, a lighter skinned Black woman, who identified as bi-racial, was fired by a Black only association because she "wasn't Black enough".*[85] *Although the complainant alleged discrimination based on colour and race (also age), the board found that the complainant was discriminated against based on her skin colour, not her race.*

As the above case indicates, in such **"intra-group" race discrimination** situations, race would be "unavailable as a ground of discrimination [and] colour must stand alone as the asserted ground".[86]

Case law example: *The complainant, a Black woman, worked in the sales department of a furniture store where she was subjected to unfair disciplinary measures and offensive comments, and her sales commissions were taken away.*[87] *Her manager would refer to her as "Condoleezza Rice" and "Contessa", and during her performance review, when she entered the office, the manager said, in the presence of two other managers, "Everybody out, it's time for a lynching". The complainant was offended by her treatment, resigned from the job, and filed a complaint of race and colour discrimination. The court found that the respondent's explanations were not credible, and it noted that at least one of the managers was aware that the "lynching" comment was racial in nature and had historical associations with slavery. The complainant was also denied promotion to the position of manager, and the respondent's workplace policies did not adequately address her complaints of discriminatory treatment. The court concluded that the complainant was discriminated against by the employer on the basis of her race and colour.*

- Even though the ground of colour is still most often lumped with race in human rights complaints, and it has not received much judicial attention as a distinct protected ground, this might change in the foreseeable future.

- It has been noted that with increasing immigration and consequent interracial marriages, more people will begin to identify as multiracial or biracial, which could

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colour functions to a great degree as a symbol of status and resistance to intermarriage, suggesting class and race prejudice". "Racism and Anti-Racism in Brazil". Guimaraes, Antonio. *Racism*. Eds. Bulmer, Martin, and John Solomos. London: Oxford UP, 1999. (pages 314-28).

[85] *Brothers v Black Educators Association*, 2013 CanLII 94697 (NS HRC). [*Brothers*].

[86] Joshua and Hamilton, *supra* note 82.

[87] *Cromwell v Leon's Furniture Limited*, 2014 CanLII 16399 (NS HRC).

bring the ground of colour more to the forefront of human rights analysis than it has been until now.[88]

2.1.2 Race and ancestry

Under the *Act*, the ground of ancestry refers to a person's lineage or line of descent, or the group, people, or ancestors a person is descended from. The ground of ancestry is used to identify Indigenous persons, and it includes other ethnic, cultural, or linguistic groups, such as South Americans, East Asians, Francophones, etc.

The ground of ancestry is used to identify Indigenous persons, and it includes other ethnic, cultural, or linguistic groups, such as South Americans, East Asians, Francophones, etc.

The **meaning of ancestry** is defined by a people's shared culture, language, and religion:

"The most important criterion underlying the concept of ethnicity is that of common ancestry or peoplehood. Common ancestry in turn is a multifaceted concept implying at least three criteria: biological dissent from common ancestors, maintenance of a shared ancestral heritage (culture and social institutions), and attachment to an ancestral territory (homeland). Frequently the criterion of ancestral heritage emphasizes one social cultural phenomenon, such as language or religion."[89]

A human rights tribunal defined ancestry as follows: "The term 'ancestry' is here interpreted to mean family descent. In other words, one's ancestry must be determined through the lineage of one's parents through their parents, and so on".[90]

- A person's ancestry may have close linkages with their first language[91] or mother tongue, even though language identity is also associated with the grounds of place of origin and national origin.[92]

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[88] Joshua and Hamilton, *supra* note 82.

[89] Hughes, David R, and Evelyn Kallen. *The Anatomy of Racism: Canadian Dimensions*. Montreal: Harvest House, 1974. [Hughes and Kallen].

[90] *Cousens v Canadian Nurses Association*, 1981 CanLII 4331 (ON HRT). [*Cousens*]. (para 30).

[91] Language is not a distinct protected ground under the *Act*, and, Canada-wide, it is included as a ground of discrimination only in Quebec, although the Yukon *Human Rights Act* also lists "ethnic or linguistic background or origin" as a protected ground.

[92] *Cousens*, *supra* note 90: "Discrimination based on 'mother tongue' may fall within Ontario's proscription in relation to 'ancestry'". (para 38).

- **Indigenous experience in Canada** has been one of widescale systemic disadvantage and exclusion, beginning with the colonization and dispossession of Indigenous populations, discriminatory state policies like the residential school system, and continuing experience of exclusion, disadvantage, and systemic barriers.

Ancestry, as a protected ground, also intersects with protected grounds like national origin, place of origin, and ethnic origin, with subtle overlaps between each of these grounds.

- Moreover, many of these injustices happened, and continue to happen, within the lifetimes of people who are still living today,[93] so Indigenous communities continue to suffer the effects of these wrongs, while the cultural memory of past injustices creates **intergenerational trauma** and spiralling disadvantages for people of Indigenous ancestry.

- Ancestry, as a protected ground, also intersects with protected grounds like national origin, place of origin, and ethnic origin, with subtle overlaps between each of these grounds. It may be noted that "ethnic origin" is not a distinct ground under the *Act*, although it is included as a protected ground in the Human Rights Acts of 11 Canadian jurisdictions,[94] for which reason it is frequently referenced in race discrimination cases.

- These overlaps can have many dimensions. For example, it has been pointed out that Canadians whose ancestors came from the Indian subcontinent through Africa, Malaysia, or the Caribbean, might identify themselves as Indians or Pakistanis, which would be a reference to their national origin, but they might also identify as Punjabis, Gujaratis, or Bengalis (based on the region of India that they came from), which would be a reference to their ethnic origin. However, other people might think of them simply as East Indians or Asians and identify them with one or more protected grounds like race, colour, national origin, place of origin, or ancestry.[95]

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[93] For example, the last of the residential schools in Canada closed only in 1996. "Residential Schools in Canada". The Canadian Encyclopedia. Web.

[94] The Human Rights Acts of Manitoba, Nova Scotia, Newfoundland and Labrador, Ontario, PEI, Quebec, North-Western Territories, Nunavut, Yukon, and Canada (federal) include ethnic origin as a protected ground. Section 15 of the *Charter* also guarantees equality protections based on ethnic origin, among other grounds.

[95] Tarnopolsky, *supra* note 3.

While Indigenous persons can claim discrimination based on the ground of ancestry, many cases involving Indigenous rights also cite race as a protected ground.

Case law example: *In an early case, an Indigenous person, who was penalized for getting intoxicated off the reserve, challenged his conviction under the "equality before the law" clause of the now superseded Canadian Bill of Rights.*[96] *In a majority 6-3 decision, the Supreme Court of Canada affirmed that the complainant had suffered adverse impact because of his race, and that Section 94(b) of the Indian Act, which barred Indigenous people from drinking off reserves, differentiated on the basis of race, as non-Indigenous persons would not be charged with intoxication in similar circumstances.*[97] *Following the decision, Section 94 of the Indian Act was repealed by Parliament in 1971.*

Tribunals have relied on the Supreme Court of Canada's ruling in the *Janzen*[98] case to affirm that, in order to prove discrimination, Indigenous complainants are not required to show that all persons of Indigenous ancestry suffered discrimination in the given context of a complaint.

Case law example: *When guards at a shopping mall racially profiled and discriminated against two Indigenous women, the tribunal rejected the respondent's argument that they*

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[96] *The Queen v Drybones*, [1970] SCR 282.

[97] *Ibid*. The Supreme Court noted in the case: "An individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty. Section *94(b)* of the *Indian Act* is a law of Canada which creates such an offence and it can only be construed in such manner that its application would operate so as to abrogate, abridge or infringe one of the rights declared and recognized by the *Canadian Bill of Rights*. Section *94(b) is* therefore inoperative" (para. 283).

[98] *Janzen v Platy Enterprises Ltd.* [1989] 1 SCR 1252 [*Janzen*]. Speaking in the context of a sexual harassment and sex discrimination complaint, the Supreme Court of Canada noted: "While the concept of discrimination is rooted in the notion of treating an individual as part of a group rather than on the basis of the individual's personal characteristics, discrimination does not require uniform treatment of all members of a particular group. It is sufficient that the ascribing of a group characteristic to an individual is a factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value". (para. 68).

did not discriminate against the women because other Indigenous visitors to the mall were not mistreated, or because the mall employed security guards of Indigenous ancestry.[99]

2.1.3 Race, national origin, and place of origin

Race discrimination complaints may also allege discrimination based on the grounds of national origin and place of origin, as many racialized persons, like first generation immigrants, for instance, can face discriminatory treatment because they were not born in Canada, or they migrated from another country.

As the Supreme Court of Canada noted in a discrimination complaint under Section 15 equality rights of the *Charter*:

> A person's ties with their nation have cultural, sociological, and even spiritual dimensions, and "it is particularly noticeable where the nation a person feels allegiance to does not currently exist as an independent political unit".
> *David R. Hughes and Evelyn Kallen*

"Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin".[100]

A person's ties with their nation have cultural, sociological, and even spiritual dimensions, and "it is particularly noticeable where the nation a person feels allegiance to does not currently exist as an independent political unit".[101]

People's race, national origin, and place of origin can compound the barriers they face in employment, including integration in the workplace, making them more vulnerable to exclusion and discriminatory treatment.

Case law example: *An immigrant from Kenya, who worked as a bookkeeper, was subjected to verbal abuse, derogatory comments, and other employment related mistreatment by his employer due to his race, place of origin, ancestry, and religion.*[102]

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[99] *Radek*, *supra* note 41. The tribunal stated: "The fact that one or two Aboriginal security guards may have been employed at the mall over the four year period about which I heard testimony, or that some Aboriginal people may have had no problems at the mall, does not prove that other Aboriginal people were not discriminated against. (para. 539). See also: *Friday v Westfair Foods Ltd.* (2002), 2002 CanLII 62874 (SK HRT) and *McNab v Calynuik Restaurants Inc.* 919950, 1995 CanLII 10835 (SK HRT).

[100] *Andrews*, *supra* note 43.

[101] Hughes and Kallen, *supra* note 89.

[102] *Chieriro v Michetti*, 2013 AHRC 3 (CanLII).

Three months into his employment, the complainant's employer asked him to co-sign a mortgage; he was only shown the signature page, and he was misled into believing that his name would be taken off the mortgage after six months. Similarly, the respondent reprimanded the complainant for his accent, telling him that he had to learn to speak like a Canadian, and when the complainant requested religious accommodation as a member of the Seventh Day Adventist Church, his accommodation requests were refused, and derogatory comments were made about his religious beliefs, race, and place of origin. The tribunal found that the employer exploited the complainant because he was a new immigrant to Canada and discriminated against him based on his race, ancestry, religion, and place of origin.

- It may be noted that the ground of national origin does not necessarily include the concepts of **nationality or citizenship;** the concept of national origin is linked to a person's race, ethnicity, or culture, but nationality and citizenship relate to people's legal ties to a nation or state or their legal citizenship status.

> Due to political and historical factors, identities based on race, national origin, place of origin, and ancestry can overlap and interconnect in multilayered and complex ways.

- Discrimination against persons due to national origin or place of origin can also occur based on perceptions that such racialized individuals are not Canadian enough, or do not espouse **Canadian values** or culture.

However, it should be noted that if someone is discriminated against *because* of their Canadian origin or culture, that too would constitute discrimination based on national origin or place of origin under the *Act*.

Case law example: *A Canadian citizen, who was also born in Canada, alleged that her employer, a British national, subjected her to a barrage of derogatory and humiliating comments about Canadians, calling them ignorant, stupid, and bereft of sense of humor. The council concluded that the comments were offensive, and their nature and frequency were sufficient to constitute harassment based on place of origin.*[103]

- Due to political and historical factors, identities based on race, national origin, place of origin, and ancestry can overlap and interconnect in multilayered and complex ways. For example, a people may previously have lived under a single nation, but

[103] *Egolf v Watson (1995)*, 23 CHRR D/4 (BC HRC).

currently live under different sovereign states, and consequently, they may identify with the same ancestry, but not the same national origin.

For example, Arabs, who previously lived under Ottoman rule and still share linguistic, ethnic, religious, and cultural characteristics, now belong to distinct nations; therefore, despite their cultural, linguistic, and ethnic similarities, their national origin identities would be distinct in a human rights complaint, although they may claim the same ancestry.

On the other hand, people from India, for example, will identify with the same national origin, but they may have different ancestry characteristics because of the multiple religions, languages, and ethnicities that exist in India.[104]

- People who identify with race, national origin, or place of origin may also experience exclusion or discrimination because they cannot **communicate effectively in Canada's official languages.** Even though language is not a prohibited ground under the *Act*, if persons are discriminated based on their language (their accent, for example), their treatment may be deemed discriminatory based on national origin, place of origin, or race.

Language based discriminatory treatment can occur in employment settings, and it is also likely to happen in services, as racialized people may face restricted access or denial of services in hospitals, restaurants, retail stores, or government services, if their language or cultural needs are not adequately accommodated by a service provider.[105]

Case law example: *The complainant and his coworkers from South America were harassed and denigrated by their supervisors, who made fun of their accent and bullied them for their inability to communicate in English, besides discriminating against them in the terms and conditions of employment.[106] The tribunal relied on expert evidence to note*

[104] Tarnopolsky, *supra* note 3.

[105] *Policy on Discrimination and Language*. Ontario Human Rights Commission.

[106] *Espinoza v Coldmatic Refrigeration of Canada Inc.*, 1995 CanLII 18164 (ON HRT). [*Espinoza*]. The case is notable for being one of the few where a tribunal offered a definition of ethnicity: "Ethnic refers to place of origin of a group, that is in geographical terms, the actual place in the world that they come from. It refers also to their cultural patterns and cultural beliefs which are shared amongst them. And with respect to the cultural shared features, the ones that are most important in human populations are such things as a shared language, a shared religion, and other social characteristics such as family organization, kinship, and other aspects like that". (para. 217). The tribunal also noted that "race and/or ethnicity stemmed from a variety of common denominators not all of which are immutable or innate". (para 214).

that the ground of place of origin is linked to a person's ethnicity, language, religion, and other societal factors like family kinship, etc.[107]

Stereotypes or unconscious bias about people's race, place of origin, or national origin often become factors that lead to discrimination against these groups.

Case law example: *The complainants were immigrants from India and wanted to book hotel rooms for a Bhangra event, a music and folk-dance tradition from the Punjab region of South Asia.*[108] *The hotel refused the booking because it had had a bad experience with a previous Bhangra event, and erroneously presumed, based on stereotypes, that any group associated with Bhangra would be unsuitable for the hotel. It was held that the hotel discriminated against the complainants based on their ancestry and place of origin.*

2.1.4 Race and religion

Under the *Act*, it is prohibited to discriminate against persons based on their religious faith, beliefs, and practices, etc. The onus is on complainants to show that their religious faith or belief is sincerely held, and it stems from an established faith system or tradition.

Race and religion can be closely intermixed in people's personal identities or characteristics, and when discriminatory conduct against such persons is based on both these grounds, it can manifest in complex ways.

For example, one form of racism, or expression of racist ideas, stems from the belief that certain cultures and their religious beliefs or practices are incompatible with Canadian identity, or with a so-called Western, secular way of life.

Members of certain religious groups can become targets of racial harassment and discrimination because they express their religious identity through external markers of appearance or dress.

Members of certain religious groups can also become targets of racial harassment and discrimination because they express their religious identity through external markers of appearance or dress. For example, individuals who wear certain articles of clothing to

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[107] See also, *Etienne v Westinghouse of Canada Ltd.* (1997), 34 CHRR D/45 (Ont. Bd. Inq.), which held that the complainant faced harassment and discrimination by his co-workers because he is Francophone and a Black person of Haitian origin.

[108] *C1 and Sangha v Sheraton Wall Centre (No. 2)*, 2011 BCHRT 147.

fulfill their religious beliefs, such as the Jewish Kippah, the Sikh turban, or the Muslim hijab, may be mocked or religiously or racially stereotyped due to these factors.

Case law example: *A tribunal determined that a Bosnian Muslim man, who was subjected to repeated offensive and threatening comments by a Serbian coworker, was discriminated against on the basis of his race, religion, ancestry, and place of origin.*[109] *The complainant had been imprisoned in his Bosnian hometown by Serb groups during the Balkan war, and he had witnessed the killing of Muslims by his Serb captors. His Serbian coworker made threats to decapitate him, harm his family, and kill all Muslims in Sarajevo. The tribunal noted that the context in which the racial harassment occurs is important, and "racial/religious harassment may take various forms including offensive comments, slurs, jokes, insults or graffiti."*[110] *The tribunal ruled that the complainant was subjected to racial and religious discrimination, and, among other things, the respondent's comments to kill all Muslims and his use of a particular Slavic word for decapitation were particularly egregious, as they triggered the complainant's memories of that practice in his hometown.*[111]

- The *Act*'s religious protections also include protection from discrimination based on a person's faith in or practice of Indigenous spirituality.

Case law example: *A young inmate of Indigenous ancestry who followed Indigenous spiritual practices was discriminated against on the grounds of religion and ancestry when the prison did not facilitate his requests for religious accommodations.*[112] *The complainant was in segregation for a period of his sentence and made many requests to see the prison's Indigenous liaison person, but he never received a visit from that official. Contrarily, when he asked to see a Chaplain, a visit was arranged in reasonable time. Similarly, when he requested Indigenous spiritual literature, it was not provided, but when he asked for literature on Christianity, it was provided to him. The tribunal noted that the complainant belonged to a protected group, and his vulnerability as an Indigenous inmate*

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[109] *Hadzic v Pizza Hut*, 1999 BCHRT 44. [*Hadzic*].

[110] *Ibid*. (para 32). The tribunal explained the relevance of context in racial harassment situations as follows: "The context within which the racial/religious harassment occurs is important. Usually repeated conduct is required to establish racial/religious harassment. However, if the conduct is considered extreme, there is less need to establish a pattern of behaviour and a single act may be sufficient evidence". (para. 33).

[111] *Ibid.* According to the tribunal: "I find that the comments, including the use of word 'Zacklan' and threats to kill all Muslims in Sarajevo, Hadzic and his family, were comments based on Hadzic's Bosnian heritage, ancestry and place of origin as well as his religion". (para. 47).

[112] *Kelly v BC (Ministry of Public Safety and Solicitor General) (No. 3)*, 2011 BCHRT 183.

was evident, given the historical treatment and experience of Indigenous people in the Canadian criminal justice system. He was also vulnerable because of his young age. The prison failed in its duty to accommodate the complainant's religious needs, even though prisons are required to provide religious or spiritual programs, and supports were available in the prison for Indigenous spiritual practices, such as sweat lodges and circles.[113]

In extreme forms, discrimination, bias, and stereotypes based on race and religion can manifest in ideologically grounded discriminatory practices, like **anti-Semitism**[114] or **Islamophobia,**[115] which have deep and complex historical roots, and need to be addressed through sustained educational initiatives, and by raising awareness in society about the dignity, inclusion, and respect of persons of all religious faiths.

2.1.5 Race and sex

Race and gender intertwine in intricate ways, and women of colour have historically been more vulnerable to race-based discrimination, including sexual harassment, racial harassment, and various forms of disadvantage in employment, housing, or services, including discrimination in rates of pay.[116]

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[113] See also, *Mohamud v Canadian Dewatering (2006) Ltd.*, 2015 AHRC 16 (CanLII), wherein a tribunal determined that the complainant faced a poisoned work environment due to his race, colour, and religious beliefs when he was subjected to several humiliating workplace incidents by other employees and a supervisor.

[114] As enunciated by Dalia Ofer, *supra* note 15, the extermination and genocide of the Jews by the Nazi racial state was a manifestation of modern, scientific racism, which stemmed from the race theories of the 19th Century and helped radicalize existing anti-Semitic sentiment and infuse it with new energy. Nazi anti-Semitism relied on an "evolving racial mythology" that constructed the image of Jews as the "Other" race, supported by stereotypes like the "wandering Jew", casting Jewish people as "eternal foreigners who would never become part of a people".

[115] Justice Canada defines Islamophobia as follows: "Islamophobia refers to a fear, prejudice, and hatred of Muslims or individuals perceived to be Muslim, which can lead to hostility, intolerance, and discrimination by means of threatening, harassment, abuse, incitement, and intimidation. It is often rooted in institutional, ideological, political, and religious hostility that can manifest in structural and cultural forms of discrimination, targeting the symbols and markers associated with Islam and being Muslim". *Justice Canada's Anti-Racism Policy*. Government of Canada, 2024.

[116] The history of racism shows that how people are perceived often determines how they are treated, and Black women have been discriminated because of visible signs of their physical difference, like skin colour, hair type, and facial features, and these physical differences have

Case law example: *A court determined that an African Canadian woman was paid significantly less than other employees who performed similar work, and her employer's actions were discriminatory based on the complainant's race and sex.*[117] *The complainant was the only person of colour working for the organization, providing personal care for people with mental health issues, and she was better qualified than her coworkers. When the complainant inquired about the pay discrepancy, the respondent refused to meet with her. At the hearing, the respondent failed to provide credible and non-discriminatory justification for its actions, and the court concluded that the complainant was paid less for doing the same work, and her race was the only distinguishing characteristic between her and her coworkers.*[118] *A finding of discrimination based on race and sex was established, and the court returned the file to the human rights panel for assessment of damages.*[119]

2.1.6 Race and sexual harassment

Racialized persons may be more likely to be subjected to sexual harassment due to stereotypes about their race or cultural background, or due to perceptions and stereotypes that they would either be accustomed to such treatment or would be less likely to complain about it for fear of reprisals.

Racialized women and gender diverse persons are vulnerable to sexual harassment in employment or other protected areas, especially when they also identify with grounds like national origin, place of origin, ancestry, etc.

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been used to reinforce race and gender prejudices against them. As Black feminists from the second-wave feminism of the 1970s onwards have argued, single axis theories that separate race and gender to assess the impact of discrimination do not accurately capture Black women's lived experience of discrimination, which needs to be seen through an intersectional lens.

[117] *Workeneh v 922591 Alberta Ltd*, 2009 ABQB 191(CanLII).

[118] *Ibid.* The board cited from B. Vizkelety's *Proving Discrimination in Canada* (Toronto: Carswell, 1987): "An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses". (page 142).

[119] See also, *Malko-Monterrosa v Conseil Scolaire Centre-Nord*, 2014 AHRC 5 (CanLII), wherein the tribunal held that a school board discriminated against a female teacher on the grounds of race, colour, sex, and ancestry because it did not take appropriate action to address the teacher's harassment by a student.

Case law example: *A woman of mixed Métis and Black ancestry was subjected to sexualized comments by her employer, who talked about the physical attributes of Black women in sexual terms.*[120] *The employer also made unwelcome physical contact with the complainant and shared pornographic materials with her. The tribunal held the respondent liable for sexual and racial harassment, and it noted that he exploited his position of authority over the complainant and acted on racist stereotypes about the sexuality of Black women. The tribunal noted that the complainant was vulnerable due to her race and sex and this intersectionality compounded her disadvantage, and it ordered the employer to pay monetary damages for each incident of racial and sexual harassment.*

- Racialized women with precarious socioeconomic or employment status, like temporary foreign workers, may be more vulnerable to acts of sexual harassment.

Case law example: *Two sisters from Mexico worked under the federal government's temporary foreign worker's program for low-skill occupations at a fish processing plant.*[121] *The owner of the company subjected the complainants to sexual solicitations and advances, ranging from unwanted touching to sexual assault. He threatened to fire the complainants and used other intimidating tactics. Both the owner and the company were held liable for sexual harassment and discrimination based on sex. In assessing the damages awarded to the complainants, the tribunal noted the particular vulnerability of migrant workers, who become easy targets of sexual predation and other discriminatory conduct because of their limited rights and economic dependence on a single employer.*

- While most sexual harassment incidents involve women and sexual minorities, racialized men may also become targets of sexual harassment conduct, interlaced with racial and sexualized teasing, slurs, or disparagement.

Case law example: *An immigrant from Afghanistan worked part-time providing security services for his employer at different venues.*[122] *His coworkers and supervisors teased him and called him derogatory names that were tainted with racial, cultural, and religious stereotypes. When company staff travelled out of town to provide security services at a venue, one of the complainant's colleagues subjected him to sexualized remarks and made inappropriate physical contact. Following the incident, the company terminated the colleague, but also terminated the complainant shortly thereafter. The tribunal stated that*

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[120] *Baylis*, *supra* note 80.

[121] *O.P.T. v Presteve Foods Ltd.*, 2015 HRTO 675 (CanLII). See also: *PN v FR and another (No. 2)*, 2015 BCHRT 60 (CanLII).

[122] *Hashimi v International Crowd Management (No. 2)*, 2007 BCHRT 66 (CanLII).

the employer was liable for the discriminatory conduct of its employees, and it did not take sufficient steps to address the racialized behaviour or to prevent the sexual harassment.

2.1.7 Race and poisoned work environment

Human rights law recognizes that derogatory comments based on race, colour, ancestry, national origin, place of origin, or religion create a poisoned work environment[123] for racialized employees, resulting in the disadvantage, exclusion, and discriminatory treatment of these employees.

> "Comments related to a person's race, colour or ancestry could constitute discrimination if they create a hostile environment or are connected to other adverse employment consequences".
>
> *BCHRT*

In poisoned environment assessments, courts look at patterns of behaviour, to assess the cumulative or escalating effects of such conduct.[124]

As one tribunal noted: "Comments related to a person's race, colour or ancestry could constitute discrimination if they create a hostile environment or are connected to other adverse employment consequences".[125]

Employers, landlords, service providers, and other organizations, like trade, business, and professional associations, have the responsibility to preserve healthy, respectful, and inclusive environments that are free from coercion, discrimination, and harassment.

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[123] The concept of poisoned work environment was recognized by the Supreme Court of Canada in *Robichaud*, *supra* note 64. In *Janzen*, *supra* note 98, the Supreme Court used the terms "intimidating", "hostile", "offensive", and "detrimentally affected" to describe the environment of a workplace poisoned by sexual harassment and sex discrimination.

[124] For example, as noted by the tribunal in *Kennedy v British Columbia (Ministry of Energy & Mines) (No. 4)*, 2000 BCHRT 60 (CanLII). [*Kennedy*]: "In cases such as this it is possible that discrete events, which in isolation are insufficient to establish discrimination, establish a pattern of discrimination when viewed in totality".

[125] *Ibid.* In this case, a coworker commented that the complainant had a "funny accent", but the tribunal concluded, after reviewing all the evidence and circumstances, that the comment was not egregious enough to create a hostile work environment or create other adverse consequences for the complainant. (para. 71). For a discussion of poisoned work environment based on race, place of origin, religious beliefs, colour, and ancestry discrimination, see: *Lalwani v ClaimsPro Inc.*, 2016 AHRC 2 (CanLII).

- It is not a defense that an organization was unaware of the poisoned environment in its work, housing, or services setting. Similarly, organizations would be liable for discrimination if they ignore or fail to address these issues, especially if someone has complained about them.[126]

Case law example: *The complainant was called racially derogatory names at his workplace, including "Kunta Kinte", a slave name from a TV program based on Alex Haley's book, Roots.*[127] *On one occasion, when the complainant was supervising some employees, one of them remarked, "Two hundred years ago, we would have told him what to do". At another time, the complainant and two other employees witnessed a robbery and caught the offender. When the police arrived, they mistook the complainant for the thief and started to grab him. The complainant's colleagues teased him because of this incident, and while the two other employees (who were White) received civilian citations for bravery, the complainant's role was not recognized. The court reiterated the Supreme Court of Canada's determination that intention is not relevant in discrimination,*[128] *and that discrimination should be assessed by its effects or adverse impact. It concluded that the complainant was racially harassed at work, endured a poisoned work environment, and his supervisors, even though aware of the harassment, took no steps to address the situation.*

- Human rights tribunals have recognized that the environment of a workplace, housing, or services setting is a component of the terms and conditions of that employment, housing, or services setting; courts also recognize that a poisoned environment creates adverse emotional and psychological impact for those who are subjected to it.[129]

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[126] *Ontario (Ministry of Correctional Services) v Ontario (Human Rights Comm.) (No. 7)* (2002), 45 CHRR D/61 (Ont. Bd. Inq.). The tribunal found that the respondent failed to stop or address the harassment of an Indigenous man, despite remedial orders to that effect in a prior decision.

[127] *Smith v Mardana Ltd. (c.o.b. Mr. Lube)*, 2005 CanLII 2811 (ON SCDC). [*Mardana*].

[128] *Simpsons-Sears*, *supra* note 62.

[129] *Dhillon v F.W. Woolworth Company Ltd. (1982)*, 1982 CanLII 4884 (ON HRT). [*Dhillon*]: "Verbal racial harassment, through name-calling, in itself, is in my view prohibited conduct under the *Code.* The atmosphere of the workplace is a "term or condition of employment" just as much as more visible terms of conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological

Case law example: *A Chinese Canadian worked at a processing plant where he was subjected to a series of discriminatory incidents and harassing conduct and comments for many years: his bicycle tires were slashed on a number of occasions; his shirt was smeared; a coworker took a photo of his genitals and shared it with other employees; and the nametag on his locker was burned.*[130] *The tribunal found that sexual and racialized comments and actions created a poisoned work environment for the complainant, and the owner failed to investigate the allegations or address the workplace culture. The tribunal emphasized the principle laid down in human rights case law that the emotional and psychological environment of a workplace forms part of its terms and conditions of employment. It held that the bullying and sexualized remarks and conduct suffered by the complainant demeaned his race and sexuality, created a poisoned work environment, and discriminated against him based on race and sexual harassment.*

- Human rights law states that if an employee is terminated in a poisoned work environment situation, "a proper consideration of whether the termination was discriminatory requires that it be examined in the context of the poisoned work environment."[131]

Case law example: *A company discriminated against a man of East Indian background when it permitted a racially poisoned environment to develop and persist at the facility where he worked.*[132] *Instead of addressing the racially hostile work environment, the company disciplined and eventually dismissed the complainant from the job. The tribunal held the company liable for discrimination. It noted that instead of firing the complainant, the company should have set up policies against the use of racist language, disciplined the employees responsible for the offensive conduct, and implemented effective measures for resolving such incidents.*

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circumstances in the workplace. There is a duty on the employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the *Code*".

[130] *Xu v Quality Meat Packers Ltd.*, 2013 HRTO 533 (CanLII).

[131] *Mardana, supra* note 127. In another case, *Coward v Tower Chrysler Plymouth Ltd.*, 2007 AHRC 7 (CanLII), the tribunal determined that the complainant faced a poisoned work environment in employment due to comments about his race, colour, and ancestry: "The law is clear in recognizing that racial slurs and insults constitute discrimination in and of themselves. Additional factors such as incitement to hatred or violence constitute a further additional factor to consider in the full context of discrimination". (para. 147).

[132] *Naraine v Ford Motor Company of Canada (No. 4),* 1996 CanLII 20059 (ON HRT).

- In poisoned environment situations, it is not necessary that a person was the direct target of racial slurs or discriminatory language; it is enough that they were part of that environment and were adversely impacted by the alleged conduct.

Case law example: *A Chinese Canadian woman worked in a bakery where other employees used racial slurs and stereotypical language against their Black coworkers.*[133] *Even though these remarks were not specifically directed at the complainant, a Board of Inquiry found that she had been subjected to a racially poisoned work environment.*

2.1.8 Race and social condition

Race also intersects with the ground of social condition, as racialized persons may be more likely to face discrimination based on their real or perceived socioeconomic status.[134]

Racial stereotypes are frequently used to reinforce class or social condition inequalities, just as these stereotypes are relied on to justify the socioeconomic status of racialized persons as logical or natural.[135]

Case law example: *A board found that a department store discriminated against the complainant on the basis of race and perceived source of income when a store employee*

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[133] *Lee v T.J. Applebee's Food Conglomeration* (1987), 9 CHRR D/4781 (Ont. Bd. Inq.).

[134] The grounds of race and social condition (or class) have close intersections that can be traced back to the inception of ideas about racial hierarchies, because these ideas were entrenched with notions of class superiority and difference. As Ashcroft shows, race and class were intertwined in 19th Century European thought, which expressed "aristocratic fear of the degeneracy produced by the emerging power of the new urban bourgeoisie". These fears were expressed in theories of race popularized by persons like Joseph Gobineau, sometimes called "the father of modern racism". Similarly, "myths of Germanic and Gallic origin in nineteenth-century French thought and appeals to ideas of Norman and Saxon blood in English thought of the period were […] used to legitimize the superiority of the aristocracy in the class struggles of the time". Ashcroft, *supra* note 2.

[135] Rex, John. "The Concept of Race in Sociological Theory". *Race and Racialism*. Ed. Sami Zubeida. London: Routledge, 2018. (pages 36-58). As the author points out, socioeconomic inequality based on class (social condition) creates a system of social stratification, whereby the unequal allocation of resources and opportunities for social advancement is supported by cultural myths about racialized persons, which suggests that the existing socioeconomic inequality is natural and logical. Due to these factors, socioeconomic issues are "often concealed in racially coded language and meanings".

accused her of shoplifting.[136] *The complainant was waiting in line to pay for her purchase when a store employee accused her of past thefts at the store, saying that the store had video footage of those incidents and would press charges if that happened again. The complainant demanded to see the videotape, and she was taken to the office and shown footage of a dark-skinned woman allegedly shoplifting. The only thing common between the complainant and the woman in the video was that they were both Black. The employee also asked the complainant where she lived, and when the complainant named a Black settlement in the city, the employee commented that the store had recently charged somebody else from that community. The complainant felt offended and humiliated, and she felt that the employee's remarks were personal attacks due to her race. Later, when the complainant called the store's head office to discuss the matter, the office told her that they accepted the employee's version of events. A board concluded that the store did not have sufficient information to accuse the complainant of being the shoplifter in the video; the complainant should not have been confronted in the store lineup; and the employee should have followed the store's policy on dealing with shoplifting and suspected shoplifters. It held that race and perceived source of income were factors in the complainant's adverse treatment, and she would not have been treated in that way had she been White.*

2.1.9 Race and ethnic origin

Ethnic origin is not a protected ground under the *Act*, but it is included as a ground in 11 human rights statutes across Canadian jurisdictions,[137] for which reason complaints based on race and ethnic origin have received attention in human rights case law.

On the simplest level, while race refers to a person's outward physical characteristics, ethnicity is more distinctly tied to people's shared cultural, traditional, and familial bonds,[138] which shows that the characteristics of ethnicity or ethnic origin are closely linked with the protected ground of ancestry under the *Act*.

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[136] *David v Sobeys Group Inc (No 1)*, 2015 CanLII 154352 (NS HRC).

[137] For human rights statutes in Canada that include ethnic origin as a protect ground, see *supra* note 94. The *Canadian Charter of Rights and Freedoms* also extends "equality before and under the law and equal protection and benefit of the law" to people based on "national or ethnic origin", among other grounds. *Charter*. (Section 15(1)).

[138] "The Difference between 'Race' and 'Ethnicity'". Merriam-Webster. Web. [Webster].

A human rights tribunal defined ethnicity in the following terms: "The most important criterion underlying the concept of ethnicity is that of common ancestry or peoplehood. Common ancestry, in turn, is a multi-faceted concept implying at least three criteria: biological descent from common ancestors, maintenance of a shared ancestral heritage (culture and social institutions), and attachment to an ancestral territory (homeland)."[139]

People may be similar in racial terms, and yet have different ethnic characteristics due to their distinct cultural heritage, ancestry, and upbringing. According to one definition, ethnicity is identified by a "common racial, national [...], religious, linguistic, or cultural origin or background".[140]

While a people's ethnicity is bound by common ties of race, nationality, or culture, it is also broader than race or national origin, embracing wider characteristics.[141]

As a marker of identity, race was established in dominant discourses and continues to be widely used as a category to identify people and groups. However, interest in ethnicity has been growing in research, and ethnicity may assume a more central role as an identity marker in the future.

By identifying people with ethnicity rather than race, it may become possible to shift the focus away from race and the negative connotations historically associated with racial categorizations. With such a shift, people may be identified by their broader and inclusive ethnic or cultural attributes, instead of being seen in fixed biological and genetic categories.[142]

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[139] *Espinoza*, *supra* note 106. (para. 214). For this definition, the tribunal relied on Hugh and Kallen, *supra* note 92.

[140] United States Census Bureau. Qtd in Webster, *supra* note 138.

[141] Based on scholarship on ethnicity, to identify with ethnicity or ethnic origin, a group must identify with a distinct community, exhibiting some of the following characteristics: 1. A long, shared history, which distinguishes the group from other groups, and whose memory it keeps alive. 2. A cultural tradition of its own, including family, social customs, and manners, often but not necessarily associated with religious observance. 3. Either a common geographic origin or descent from common ancestors. 4. A common language and literature peculiar to the group. 5. A common religion, different from other groups or the general community surrounding it. 6. Being a minority or oppressed group within a larger community, like a conquered people. Tarnopolsky, *supra* note 3.

[142] Ashcroft, *supra* note 2.

3. Race discrimination under human rights law

Race discrimination is prohibited under international human rights law, just as it is prohibited under the *Canadian Charter of Rights and Freedoms* (*Charter*), and in the federal, and all provincial and territorial human rights legislations in Canada.

> Race discrimination is prohibited under international human rights law, and it is prohibited under all human rights legislations in Canada.

3.1 Race discrimination protections in international law

Race discrimination is prohibited in all principal human rights instruments, including the three core instruments collectively termed the International Bill of Human Rights, i.e. the *Universal Declaration of Human Rights* (*UDHR*),[143] the *International Covenant on Economic, Social and Cultural Rights*,[144] and the *International Covenant on Civil and Political Rights*.[145]

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[143] *UDHR:* "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (Article 2).

[144] *ICESCR*: "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (Art 2 (2)).

[145] *ICCPR*: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". (Article 2 (1)).

Race discrimination is also prohibited in the UN's *Convention on Rights of Persons with Disabilities,*[146] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*,[147] and *Convention on the Rights of the Child*.[148]

3.1.2 The *International Convention on the Elimination of All Forms of Racial Discrimination* (*ICERD*)

The *ICERD*, the principal UN convention specifically devoted to race rights and prevention of racism and race discrimination, requires nation states to eliminate all forms of race discrimination, prevent incitement of hatred and violence based on race, and promote awareness of race rights and understanding between different races.

The *ICERD* defines race discrimination as "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".[149]

Under the *ICERD*, it is the obligation of governments (States Parties), which include provincial governments, to guarantee equal rights for racialized persons: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee

[146] *CRPD*: "Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status". (Preamble).

[147] *ICPRMWMF*: "The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status". (Article 1 (1)).

[148] *CRC*: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". (Article 2 (1)).

[149] *ICERD*. Article 1 (1).

the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law".[150]

The Canadian government is signatory to all the core international human rights instruments, including the *ICERD*, which Canada ratified in 1970.

This means that the federal, provincial, and territorial governments in Canada are legally obligated to set up legislation, regulations, policies, and practices to uphold race rights and eliminate individual, systemic, institutional, and structural forms of race discrimination.

3.2 Race discrimination under the *Charter*

The *Charter* guarantees "equality before and under the law" and "equal protections and benefits of the law" to persons based on their "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[151]

The *Charter* applies to all matters "within the authority" of the federal parliament and government, and the provincial governments and legislatures.[152]

The scope of the *Charter*, therefore, extends to government ministries and departments (federal, provincial, and territorial), and to laws and policies passed by federal, provincial, and territorial legislatures. Under the *Charter*, it is incumbent on federal, provincial, and territorial governments to ensure that no laws, regulations, and policies under their purview have the effect of discriminating against people based on the ground of race.

Complaints that fall outside the purview of the *Charter*, including race discrimination complaints, are contested under the human rights statutes of the respective provinces, territories, or the federal government, as the case may be.

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[150] *ICERD*. Article 5.

[151] *Charter*. Section 15(1). The Commission does not have the mandate to enforce rights guaranteed under the *Charter*; but these rights can be invoked and are enforceable by the courts.

[152] *Charter*. Section 32(1).

3.3 Race discrimination under the *Act*

Race was one of six protected grounds included in the *Act* when it was promulgated in 1967, along with colour, national origin, ancestry, place of origin, and creed or religion.

Race is not defined in the *Act*, or in any other human rights statute in Canada. However, this fact cannot become a pretext to evade liability for race-based discrimination, or to rely on convenient definitions to evade race related discriminatory conduct.

For example, in a relatively early human rights case, a respondent argued that they did not discriminate against a person from India based on race, because, according to anthropological research, people from Europe and India belong to the same race. The tribunal rejected the argument and stated: "The factors that set aside one race from another may include colour, and ethnic or national origin. Statutes frequently do not use language with mathematical exactitude, and their meaning often owes more to common usage, than to scientific journals".[153]

Very few boards or tribunal decisions have offered a definition of race.

In an early human rights case, wherein the complainant (a Black Trinidadian woman) alleged denial of rental housing due to her race, the board relied on the definition of race in the Webster's dictionary to state: "Race indicates broad or great divisions between mankind, and each of the definitions indicates that the races have physical peculiarities that distinguish one race from the other".[154]

3.3.1 General principles of race discrimination analysis

Courts and tribunals rely on the legal test of discrimination outlined by the Supreme Court of Canada[155] to assess discrimination in race-based complaints. According to the Moore Test, to establish a *prima face* case of race discrimination, a complainant must show that:

1. They identify with the ground of race;

[153] *Dhaliwal v BC Timber Ltd. (1983)*, 4 CHRR D/1520 [*Dhaliwal*].

[154] *Ali v Such*, 1976 CanLII 2094 (AB HRC).

[155] The *Moore* Test, *supra* note 60.

2. They suffered adverse impact in housing, services, or housing, or another area, as the case may be; and

3. The adverse impact had a nexus with their race.

Further, in assessing race discrimination complaints, tribunals and courts consider the following factors:

- It is not a defense that a person was not discriminated against based on race because other members of the same race did not face discrimination in the given setting (e.g. in employment, housing, or services).[156]
- It is not a defense that a respondent did not intend to discriminate against a racialized person; in assessing discrimination, human rights law considers the effects of discrimination on an aggrieved person, and it disregards the professed intention of discriminatory actions.[157]
- Under human rights law, it is enough to constitute race discrimination if race was one of the factors in the alleged discriminatory actions; it does not have to be the *only* factor or motivation in the discrimination.[158]
- Like other forms of discrimination, race discrimination is often proved by circumstantial evidence and inference rather than by direct evidence.[159]
    - Circumstantial evidence and inference may be more relevant in race discrimination complaints than discrimination based on other grounds, as the dynamics of race discrimination situations are particularly complex, and parties may not discriminate in overt ways because of the sensitivity, stigma, and controversy associated with acts of racism and race discrimination.
- Courts and tribunals recognize that race discrimination and racial stereotyping may often be the result of unconscious or internalized biases and prejudices that people have about racialized persons.[160]

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[156] *Radek*, *supra* note 41.

[157] *Pieters*, *supra* note 45.

[158] *Bombardier*, *supra* note 52.

[159] *Shaw v Phipps*, 2010 ONSC 3884 71. (paras. 75-77). [*Phipps*]. Also see, *Singh v Canada (Statistics Canada)* (1998), 1998 CanLII 3996 (CHRT), where the tribunal reiterated the need to "view all of the circumstances to determine if there exists 'the subtle scent of discrimination'". (para. 147).

[160] *Pieters*, *supra* note 45.

- It is not a defense that because a racialized person was treated acceptably in the past, they did not face discrimination later or in the future.[161]
- It is not a defense that someone did not discriminate against a person based on race because they themselves identify with the ground of race; intra-racial discrimination, or race discrimination by people who belong to the same race, is also discriminatory under the *Act*.[162]
- It is also discriminatory under the *Act* if someone discriminates against a person based on a perception that they are racialized. In such a situation, even if a complainant does not identify with the ground of race, but they are treated unfairly because of a perception about their race, the treatment would be *prima facie* discriminatory under the ground of race.[163]
- If employers, housing, or service providers do not act with due diligence to address discriminatory conduct against racialized persons in their organizations or environments, they can be held vicariously liable for acts of race discrimination committed by their employees, agents, or patrons.[164]

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[161] For example, a tribunal stated in a race discrimination complaint (*Mardana, supra* note 127): "Why 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?" However, a Divisional Court rejected this argument, stating that an act of discrimination cannot be judges based on past treatment; it also noted that the tribunal erred in focusing on the motivation of the respondent, rather than the actions and effects of race discrimination.

[162] See, for example, *McCarthy*, *supra* note 59. In that case, the tribunal noted that even though the respondent was a racialized person himself, this fact did not guarantee that he would not discriminate against another racialized person based on the grounds of race or place of origin: "Clearly, people who are not white are also capable of holding and acting upon racist stereotypes and/or beliefs". (paras. 88-89).

[163] A person may be of European origin or of mixed race, for example, but if the respondent perceives them to be Black or racialized, and discriminates against them based on that perception, they will be liable for race discrimination. In *Lobzun v Dover Arms Neighbourhood Public House Ltd*., 1996 CanLII 20080 (BC HRT), the tribunal held that perceived racial characteristics can be the basis of a valid complaint: "In my view, the issue is not whether the complainant is black or white but rather how the respondent perceived her racially". (para. 48).

[164] As a board noted in a complaint of racial harassment, to avoid liability, an employer must show that they did not consent to the discriminatory act; they did their due diligence to prevent the alleged conduct; and they acted diligently to mitigate the effects of the actions after they had occurred. *Hinds v Canada Employment and Immigration Commission [1988]*, 10 CHRD No. 13.

Case law example: *An Indigenous woman, who walked with a limp due to a disability, frequented a mall close to her house for her shopping needs.*[165] *Security guards at the mall, who were required to keep an eye on suspicious persons, treated the complainant as suspicious and followed her movements at the mall for many months. One day, a security guard approached the complainant and her friend and questioned them in a harsh tone. The guard kept following them, and later, he and his supervisor told the complainant to leave the mall, and the supervisor touched the complainant twice while trying to stop her. The tribunal noted that the security guards were acting based on stereotypes about race, ancestry, colour, and disability, and these were factors in their adverse treatment of the complainant.*

Using the standard framework of prima facie discrimination applied in human rights cases, the tribunal set down the following factors to establish race discrimination:

a) "The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;

b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;

c) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;

d) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and

e) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices".[166]

3.4 Race discrimination in employment

Under the *Act*, employers are prohibited from discriminating against employees or prospective employees based on race. The *Act*'s employment protections extend to all aspects of employment, including job ads, job applications, interviews, hiring, promotions, training opportunities, terminations, and the terms of conditions of employment, which include, among other things, the culture or environment of a workplace.

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[165] *Radek*, *supra* note 41.

[166] *Ibid*. (para. 482).

If a racialized person is not hired to a position and alleges race discrimination in employment, courts and tribunals look at the entirety of circumstances involving the hiring decision, in order to determine if race discrimination was a factor in the decision. A tribunal reiterated the following test of *prima facie* discrimination in such situations:

1. "That the complainant was qualified for the particular employment;
2. That the complainant was not hired; and
3. That someone no better qualified […] subsequently obtained the position."[167]

If these three elements are proved, the onus shifts to the respondent to show that race discrimination was not a factor in their hiring decision.

As a tribunal 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".[168]

Based on human rights case law, the following actions may be indicative of *prima facie* race discrimination during employment:

- Differential management practices, such as excessive monitoring of racialized persons or deviating from written policies or standards in dealing with such persons.
- Withholding racialized employees from training, mentoring, or promotion opportunities generally available to other workers in their position.
- Imposing different job standards or expectations on racialized employees.
- Attributing disproportionate blame for work-related incidents to a racialized person.[169]
- Assigning racialized persons to less lucrative or desirable positions or job roles.[170]

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[167] *Lasani v Ontario (Ministry of Community and Social Services) (No. 2)*, 1993 CanLII 16433 (ON HRT).

[168] *Abdolalipour v Allied Chemical Canada Ltd. (1996)*, CHRR Doc. 96-153 (Ont. Bd. Inq). (para. 188).

[169] *Mardana*, *supra* note 127.

[170] *Nelson v Durham Board of Education (No. 3) (1998)*, 33 CHRR D/504 (Ont. Bd. Inq.). [*Nelson*].

- Treating differences of opinion voiced by racialized persons as confrontational or insubordination, based on stereotypes that racialized persons are aggressive, loud, and quarrelsome.[171]
- Penalizing a racialized person for not getting along with a coworker, instead of addressing racially discriminatory attitudes or behaviours in the workplace.[172]
- Refusing to hire racialized persons because they are perceived as "troublemakers" and have filed complaints against the respondent or another employer.[173] This would constitute reprisal under the *Act*.

3.4.1 Race discrimination and circumstantial evidence

Human rights jurisprudence has established that discrimination based on race may often be proved by circumstantial evidence and inference,[174] rather than direct evidence.

In a complaint alleging discrimination based on national or ethnic origin, the Supreme Court of Canada stated that, in human rights complainants, it is enough to show that the alleged ground was *a factor* in the adverse treatment—it does not need to be the "causal" or the most significant factor.[175]

The Supreme Court noted that human rights complainants must show "on a balance of probabilities"[176] that they suffered adverse treatment, and courts will use standards of proof applied in ordinary civil matters to ascertain the evidence in such complaints.

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[171] *Ibid.* For example, in the *Nelson* complaint, an interviewer admonished the complainant for being "aggressive" in response to a question, and subsequently turned his back toward him for the duration of the interview.

[172] *Mardana*, *supra* note 127.

[173] *Abouchar v Toronto (Metro) School Board (No. 3)* (1998), 31 CHRR D/411 (Ont. Bd. Inq.).

[174] As noted by the tribunal in *Williams and others v Travelodge (No. 2)*, 2006 BCHRT 569 (CanLII): "Human rights tribunals and boards of inquiry have frequently noted that the initial burden on complainants is not an onerous one [….] This is so because it is recognized that discrimination is rarely displayed openly. Rather, discrimination must be inferred from circumstantial evidence". (para. 22).

[175] *Bombardier*, *supra* note 52.

[176] *Ibid*. (para. 56).

Further, according to the Supreme Court, human rights tribunals are "not bound by special rules of evidence applicable in civil matters", and they can admit various forms of evidence, including circumstantial evidence, "presumptions" and "hearsay evidence on certain conditions".[177]

In a relatively recent case, a tribunal reiterated that there is often limited direct evidence of racial discrimination, and that the "connection" or "factor" of race in the discriminatory conduct may be inferred from the surrounding circumstances. The relevant considerations include whether the respondent's conduct was abnormal, disproportionate, discourteous, or inexplicable.[178]

These less stringent evidentiary rules allow courts to apply the protections granted in human rights statues with a more "liberal, contextual and purposive interpretation",[179] in keeping with the objective of these laws to protect human dignity and ensure the social inclusion and equality of all persons.

Case law example: *The complainant, an African Canadian, was a letter carrier for Canada Post, and was filling in for a colleague in an affluent neighbourhood.*[180] *As he was not the usual letter carrier for the locality, a police officer who regularly patrolled the area became suspicious, even though the complainant was wearing a Canada Post jacket, had his Canada Post identification, and was carrying mail. The officer asked the complainant for an identification and ran his information in the system. The tribunal rejected the officer's testimony that his actions were not motivated by the complainant's race; it noted that the police did not question a White deliveryman who was in the neighbourhood that day, or the White construction workers who were around. The complainant was profiled because he was Black, on foot, and in an affluent neighbourhood. The Police Board and the Chief of Police were found jointly liable for the actions of the constable. On review, the majority of the Divisional Court determined that the tribunal's conclusion that race was a factor in the complainant's treatment was reasonable and it dismissed three applications for judicial review. The court reiterated the test of racial discrimination established in the Radek*[181] *decision, and it emphasized that*

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[177] *Ibid*. (para. 67).

[178] *Symonds v Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLII 37128 (NS HRC). (paras. 113-119).

[179] *Ibid*. (para. 31).

[180] *Phipps*, *supra* note 159.

[181] *Radek, supra* note 41.

direct evidence is often limited in race discrimination situations, so courts must draw reasonable inferences from the available facts and circumstances.

3.4.2 Racially poisoned work environment

Race discrimination situations may involve some form of personalized racial name calling, slurs, or innuendoes based on race stereotyping, and such racially motivated comments or conduct can create poisoned work environments for racialized employees; this aspect is closely scrutinized by human rights board and tribunals to assess race discrimination complaints.

Case law example: *A Black man worked for a construction firm for more than eight years, doing general labour, masonry, construction, and other tasks at different worksites.*[182] *He was the only Black worker at the company and was subjected to racist comments, slurs, banter, and jokes by his coworkers, including being called the N-word. The complainant was also assigned the most onerous tasks, which no one else wanted to do. He reported the incidents to the company management, but his complaints were ignored, and nothing was done to either prevent the discriminatory treatment or to address its effects. A board concluded that the workplace was poisoned by racism and racist comments and conduct, and the employer did nothing to resolve these issues. It reiterated the established principle of human rights jurisprudence that "employers are liable for the discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment". The company was ordered to pay lost wages and general damages to the complainant, provide anti-racism training to its employees, and develop a harassment policy for its workplace. A Court of Appeal upheld the board's decision, noting that the damages awarded by the board were commensurate with the "humiliation, stress and pain" experienced by the complainant because of the racial harassment and discrimination.*

- Under human rights law, it is the responsibility of employers to ensure that their work environments are free from racism and race discriminatory behaviours and policies; employers are required to provide training to their staff on non-discriminatory conduct and practices, and to put in place effective policies and mechanisms for reporting and addressing complaints of race discrimination.

[182] *C.R. Falkenham Backhoe Services Ltd. v Nova Scotia (Human Rights Board of Inquiry)*, 2008 NSCA 38 (CanLII).

Case law example: *People of East Indian descent who worked in a warehouse were subjected to racial discrimination and harassment for many years, which created a poisoned work environment for these employees.*[183] *Coworkers painted racist graffiti in the bathrooms, used racial epithets and swearing, and in one incident, joked around as one of the racialized employees was run into by a truck. The work distribution at the warehouse was also unfair to the racialized workers, as lighter duties were assigned to the White employees. The management did not respond to complaints of the mistreatment and discrimination on grounds of race was established in the case. The tribunal noted that the emotional and psychological atmosphere of a workplace is part of its terms of conditions of employment, and that the employer is duty bound to take reasonable steps to prevent racial harassment in its workplace. It awarded general damages to the complainant, ordered the respondent to end racial harassment at its warehouse, and to create a "Race Relations Committee", comprising representatives from management, racialized and non-racialized employees, and overseen by the provincial Human Rights Commission, to meet regularly for four months to address the race related workplace issues.*

3.4.3 Race discrimination due to association

It is *prima facie* discriminatory based on race if someone is put under disadvantage, faces racist comments or conduct, or is discriminated against or harassed because of their association, relationship, or dealings with a racialized person or persons.

Case law example: *The complainant worked as a mechanic for the city's transit company, and he was married to a woman who identified as African Nova Scotian and had a band status card.*[184] *The complainant was also friends with two of his colleagues who were the only racialized persons in the workshop where he worked. The complainant was subjected to prolonged discrimination and harassment due to his association with his racialized colleagues and because he was married to a person of colour. The workplace was rife with racial abuse, the complainant's tools were vandalized, he was physically assaulted, racial graffiti was painted in the workplace washroom, and incessant racialized comments, insinuations, and ribaldry created a poisoned work environment. The municipality was held vicariously liable for the conduct of its employees, and for not taking measures to prevent the racial harassment and poisoned work environment. Race and colour discrimination were established in the case; the case is remarkable for the highest damages amount awarded in a human rights complaint in the province's history. The*

[183] *Dhillon*, *supra* note 129.

[184] *Y.Z. v. Halifax (Regional Municipality) 2019 (No. 2)*., NS HRC.

tribunal ordered the respondent to pay general damages to the complainant and his wife for mental anguish, and it ordered costs for future psychological care of the complainant, and for loss of his past and future income.

3.4.4 Race discrimination and systemic remedies

Because of the complex history and legacy of race relations, racism, and race discrimination, race discrimination can often manifest at systemic, institutional, or structural levels (see Section 1.3). The systemic aspects of race discrimination may be more difficult to address, for they require more wide-ranging and long-term measures and remedies for effective redressal.

There is a deep history of systemic discriminatory practices against the Indigenous populations in Canada; in addition, Black persons, or people of African Canadian descent, have faced widespread systemic disadvantage, while other racialized minorities, like Asians,[185] have also been subjected to systemic race-based discrimination.

Systemic discrimination creates long-term, historical, and intergenerational disadvantages for racialized communities, including Indigenous, Black, and Asian populations, resulting in diminished socioeconomic status, education levels, employment opportunities, and housing equality.

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[185] For example, immigrants of Chinese descent faced systemic discrimination through discriminatory laws, policies, and practices in British Columbia during the first half of the 20th Century; Japanese Canadians faced systemic discrimination during the Second World War; and Asian Canadians became targets of discrimination during the Covid-19 pandemic. These disadvantages stemmed from systemic, institutionalized, or even state backed policies. In this context, it is instructive to consider David Goldberg's argument that modern states are founded on ideologies of race and racial thought, and that contemporary notions of citizenship and statehood need be reconfigured around "heterogeneity, mobility, and global openness". According to Goldberg, although modern states may not necessarily reveal overt racist ideologies like Nazi Germany or apartheid South Africa, "in the way that they were imagined or ideated, the way they govern, and the way the effects of their ideation and governance are experienced, are at once implicated in the possibility of producing and reproducing racist ends and outcomes". Goldberg, David Theo. *The Racial State*. New Jersey: Wiley-Blackwell, 2001. (pages 109-110). Miles, *supra* note 18, makes the same point about the role states play in perpetuating racism: "It is their openness to being 'racial' or to 'racialisation' — as a process of attaching racial meaning and hierarchy to people — that puts them at the heart of the structural view of racism".

- Systemic or institutional discrimination is a major barrier to racialized groups, particularly in the employment context, and in services like education[186] and the criminal justice system.

- The Supreme Court of Canada has unequivocally stated that systems must be designed and implemented in such way that they ensure inclusivity of all persons.[187]

- The Supreme Court of Canada has also emphasized that institutions, governments, and public bodies have the ultimate responsibility to take measures to remove systemic barriers in employment, housing, services, and other sectors.[188]

- To remove systemic barriers, it is critical to create organizational cultures[189] that are inclusive, that respect diversity and difference, and that put in place policies to address the exclusion and marginalization of racialized persons and groups.

- Consequently, racial inequalities must be addressed at systemic, institutional, and structural levels, at the initiation, setup, and design stages of programs and services, to alleviate historical and systemic barriers and vulnerabilities.

Commenting on systemic disadvantage faced by persons who identify with the grounds of race, colour, and ethnic origin in attaining management level positions in federal departments, a tribunal stated:

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[186] For example, it has been documented that racialized students may face exclusion due to bias in testing and evaluation, monocultural or exclusionary curricula, strict disciplinary measures, lack of attention to racial incidents and bullying, lack of role models, stereotypes about their backgrounds, and fewer programs attuned to their cultural needs. *Ontario Guideline*, *supra* note 4. (page 34).

[187] For the Supreme Court's directive on systemic equality in gender rights, see *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3. (para. 38). [*Meiorin*]; for systemic remedies with regards to disability rights, see *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868. (para. 880).

[188] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624. (para. 64).

[189] "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". *Ontario Guideline*, *supra* note 4. (page 34).

"The essential element then of systemic discrimination is that it 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".[190]

- It has been noted that it can be very difficult for individuals to demonstrate the adverse impact of discriminatory systemic practices, as individuals are unlikely to have access to information about the internal workings of institutions and organizations.[191]

- Consequently, in complaints alleging systemic discrimination based on race, the onus should be on the concerned organization to show that systemic barriers did not contribute to a person's disadvantage.[192]

Case law example: *In the longest running human rights case in Canadian history, which has been seen as the leading Canadian case for meting out systemic remedies for race discrimination, an Indigenous jail guard and his spouse, also a correctional officer, filed a racial discrimination complaint against Ontario Correctional Services.[193] A Board of Inquiry concluded (in 1998) that the complainants had faced discrimination in employment and had been subjected to a poisoned work environment, including racist comments and reprisals. After the original decision, the complainants continued to return to the board (later the Ontario Human Rights Tribunal), and the deliberations resulted in a settlement in 2011, 23 years after the initial complaint was filed. Based on rulings of the Ontario Human Rights Tribunal and remedies ordered therein, the Ontario Human Rights Commission initiated a partnership with the Ontario government to introduce long-term systemic remedies in the province's Correctional Services, especially pertaining to the treatment of Indigenous and racialized employees.[194] McKinnon can be regarded as a*

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[190] *National Capital Alliance on Race Relations v Canada (Health and Welfare) (1997)*, 28 CHRR D/179 (CHRT). [*NCARR*]. (para. 29).

[191] *Ontario Guideline*, *supra* note 4. (pages 35-36).

[192] *Ibid.*

[193] *McKinnon v Ontario (Correctional Services)*, 2011 HRTO 263.

[194] Among other things, these steps have resulted in enhanced accountability related to the hiring and training of Indigenous employees. For information on the systemic initiatives agreed on as a result of this settlement, see the Project Charter on the Ontario Human Rights Commission's website.

test case which highlights that entrenched discriminatory practices against historically marginalized persons require long-term systemic approaches for effective redressal.

3.4.5 Race discrimination and cultural difference

As noted earlier in this document, cultural racism may be a new form of racism, whereby racialized persons are treated differently due to their different cultural background or characteristics, or due to the perception that they will not belong or fit into the mainstream culture of an organization, etc.

- It could be *prima facie* discriminatory if an organization undervalues the strengths or contributions of racialized employees due to cultural stereotypes, or based on expectations that racialized persons should fit in better with Western or Canadian values and cultural norms.

Case law example: *A Pakistani Canadian teacher was not given a teaching job at a school for which he was the most qualified candidate, and a less qualified White female teacher was hired instead, because she was seen as more enthusiastic and having greater potential to motivate the students.*[195] *However, a tribunal noted that the complainant was highly motivated about his teaching, but he demonstrated his passion and commitment in a different manner because of his cultural background. He could not exhibit or communicate that enthusiasm during his interview. The board concluded that the school discriminated against the teacher based on place of origin and ethnic origin, because it failed to consider the complainant's culturally different teaching style or methods.*

Case law example: *A Chinese Canadian teacher was placed on a surplus list and transferred to another school, while a younger and less experienced teacher was retained.*[196] *A board found that the school board had overemphasized the need for teachers to lead or participate in cultural or extra-curricular activities, without taking into consideration the cultural differences of non-White teachers. The school had formed a perception that the Chinese teacher would not be amenable to participate in cultural events, like the school's "TGIF Breakfast Meetings", which were set up for socializing and networking among colleagues. Race and ethnic origin discrimination was established in the case.*

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[195] *Quereshi v Central High School of Commerce (No. 3) (1989)*, 12 CHRR D/394 (Ont. Bd. Inq.).

[196] *Wong v Ottawa Board of Education (No. 3) (1994)*, 23 CHRR D/37 (Ont. Bd. Inq.).

- Similarly, it would be *prima facie* discriminatory if racialized employees suffer adverse impact or exclusion from upper-level management positions based on presumptions that they would not blend in or "fit" within an organization's leadership culture.[197]

Case law example: *A board found that a Black vice principal was discriminated against due to his race when he was not promoted to the position of Principal, despite being highly qualified and applying for the promotion for many years.*[198] *As a vice-principal, the complainant was offered less time off from teaching to perform administrative duties than his White counterparts; he was refused approval for the principal's course on grounds that "only those with an expectation of succeeding" were being approved; and he was challenged about his ability to be a principal of a "White school". The board also found systemic discrimination practices based on race at the school board, including arbitrary promotion decisions, no established policies on promotion, rotation, or release time, and no anti-discrimination policies for teachers. Many White teachers who were less experienced or less qualified than the complainant, were promoted to the position of principalship during the years that the complainant sought for a promotion. The board also found that the school management made references to the race of the complainant and another Black teacher during interviews and discussions about transfer opportunities, and that Black teachers were reprimanded for advocating for equitable employment practices at the school.*

3.4.6 Single or isolated comments and race discrimination

A single comment that demeans a person based on their race could be construed as discriminatory, especially if it is egregious in nature. However, such complaints are closely assessed by courts and tribunals within the context of each particular situation, and assessments of race discrimination are made based on the entirety of circumstances under which an incident unfolded.[199]

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[197] Also see, *NCARR*, *supra* note 190, wherein the tribunal found significant under-representation of visible minorities in senior management in a federal department and ordered systemic remedies to address the issue.

[198] *Nelson*, *supra* note 170.

[199] Commenting on this aspect, the tribunal stated in in *Dhanjal v Air Canada*, 1996 CanLII 2385 (CHRT): "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 in order to create a hostile work environment and constitute racial harassment". (para. 51).

For example, a tribunal enumerated "some of the relevant factors" that should be considered in such situations:

- The egregiousness or virulence of the comment;
- The nature of the relationship between the involved parties;
- The context in which the comment was made;
- Whether an apology was offered; and
- Whether or not the recipient of the comment was a member of a group historically discriminated against.[200]

Case law example: *The complainant, a Mi'kmaq woman, alleged that her employer created a poisoned work environment by greeting her as "Kemosabe", the name of an American Indigenous character in The Lone Ranger TV series and movies of the 1940s and 1950s.[201] In the series, the character is affectionately called Kemosabe, or trusted friend. The board dismissed the complaint on the basis that 1. The complainant did not establish that she was offended by the term, and 2. The supervisor understood the meaning of the word as harmless, so the employer could not be aware that the complainant considered it as a racial epithet.*

- Tribunals have stated that even if isolated comments verge on "poor taste or insensitivity", but they are not threatening of offensive, they may not meet the legal threshold of discrimination.

Case law example: *A complainant alleged that his employer used an offensive term that invoked his religious identity on three occasions.[202] The tribunal found that the comments were not "part of a pattern of religious harassment or adverse treatment based on his*

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[200] *Pardo v School District No. 43*, 2003 BCHRT 2003. (para.12). The same points were reiterated by a tribunal in *Raweater v MacDonald*, 2005 BCHRT 63: "In my view all the circumstances must be taken into account when considering whether a single comment could constitute a contravention of the code without suggesting that this is an exhaustive list, some of the relevant factors would be the egregiousness or vigilance of the comment, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against". (para 37).

[201] *Moore v Play It Again Sports Ltd. (2004)*, 50 CHRR D/476 (NS Bd. Inq.). Commenting on how such situations are reviewed, the board stated: "If a slur in question is universally pejorative the requirement to prove unwelcomeness would doubtless be minimal, if it existed at all. It would be astonishing if for example a board would need […] expert advice to get evidence on the meaning of the N word".

[202] *Falou v Royal City Taxi*, 2014 BCHRT 149. (para. 56).

religion", nor were they at "the extreme or egregious end of the spectrum of such remarks". The comments were "in the realm of poor taste or insensitivity, but did not approach the threshold of "threatening, offensive and repeated" comments to be egregious, according to the standard set in the Hadzic case. [203]

3.4.7 Race discrimination by patrons or agents

Employers can also be liable for race discrimination if they fail to protect their employees from racial harassment or race discrimination by their agents or patrons, or they fail to address these issues in a reasonable manner.

Case law example: *An organization disciplined an employee who reacted to racially harassing behaviour by a customer.*[204] *The tribunal found that even though the employer had no control over the customer's conduct, it condoned the discriminatory behaviour by disciplining the employee and normalized such conduct for its workplace. In such situations, employers are expected to have procedures in place to deal with racial harassment of its staff by patrons, and the organization was held liable for race discrimination against the employee.*

3.5 Race discrimination in services

Differential treatment due to race may occur in different kinds of services, including government services, services like retail or shopping malls, educational institutions,[205]

[203] *Hadzic*, *supra* note 109.

[204] *Mohammed v Mariposa Stores Ltd.* (1990), 14 CHRR D/215 (BCCHR).

[205] For example, it has been seen as a form of systemic race discrimination when educators stream racialized students towards technical programs, based on stereotypes that Asian students do well in the sciences but not in other academic subjects. In such situations, so-called "positive stereotypes" may be at play, based on generalizations that cast members of a particular group as math whizzes, great athletes, or dutiful employees, which can also result in unequal treatment for such persons. *Ontario Guideline*, *supra* note 4. For other examples of discrimination in the education system, see *supra* note 186. Also, fewer number of racialized persons in leadership roles (such as principals) in the education system has also been attributed to promotional practices or organizational cultures that see the experiences of White educators as the norm and, as a consequence, devalue the experience of racialized educators.

and in law enforcement or the criminal justice system, through differential scrutiny, force, or detention measures against racialized persons.[206]

- The Supreme Court of Canada has emphasized that denial of services or withholding services because of stereotypes about certain groups is "the ultimate signifier of discrimination", and it promotes the view that these groups are "less capable or worthy of recognition or value as human beings or as members of Canadian society".[207]

Case law example: *A Black man was charged and ticketed by the police under the provincial Motor Vehicles Act for jaywalking on a busy city street.* [208] *After considering all the evidence, the tribunal found that race was a factor in the conduct of the police officers, and the complainant was subjected to needless surveillance and investigation because he was Black. General damages were awarded to the complainant for mental anguish and loss of dignity, and in addition, the respondents were asked to provide a written apology to the complainant, and to provide training in bias-free policing to all new hires in the department.*

Case law example: *A Black person, originally from Togo, was helping a friend purchase a car at a dealership.*[209] *They arrived for their appointment, and test drove a car they were interested in buying. However, the car seemed to vibrate at high speed, so they decided to look at other models. When the complainant was discussing their concern with the car dealer, the dealer became agitated, pointed a finger at the complainant's face, and asked him to "return to Africa". After this interaction, the complainant and his friend left the*

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[206] For example, a report by the Ontario Human Rights Commission concluded that racialized communities and, in particular, African Canadian men, experience harsher treatment in the mental health and forensic mental health systems, and their misdiagnosis may be common because of stereotypes and cultural or language barriers. Also, rates of restraint and confinement in the criminal justice system are higher for people of African or Caribbean descent compared to people of other ethnic backgrounds, although the reasons for this may be complex. *Minds That Matter: Report on the Consultation on Human Rights, Mental Health, and Addictions.* Ontario Human Rights Commission, 2012.

[207] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

[208] *Symonds v Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLII 37128 (NS HRC). The tribunal noted that while officer rudeness and aggression may create adverse impact, such behaviour only becomes discriminatory under human rights law when a protected characteristic is a factor in that behaviour. In the absence of such a factor, the appropriate recourse is a complaint under the *Police Act* to report "discourteous or uncivil" behaviour toward a member of the public. (para. 169).

[209] *Amegadze c Automobiles Beresford Auto, 2023 CanLII 33446 (NB CTE)*.

dealership without making a purchase. The complainant filed a complaint alleging discrimination in services based on race, ancestry, place of origin, and national origin. After investigating the facts and relying on the Supreme Court of Canada's Moore Test, a Board of Inquiry held that the complainant was discriminated against by the car dealership, as the respondent made a racist comment, behaved aggressively, and denied service to the complainant. The board awarded general damages to the complainant for injury to dignity, feelings, and self-respect, and it ordered the respondent to undergo human rights training.

- Racialized persons may suffer discriminatory treatment in availing services available to the public because of various kinds of stereotypes that prevail in society about them.

Case law example: *A security guard at a supermarket prevented an Indigenous man with a disability from buying a cleaning product.*[210] *According to the tribunal, the security guard acted on stereotypes, and, because the complainant was Indigenous and walked unsteadily, the guard assumed that he was intoxicated and was buying the product for ingestion. The tribunal reiterated the human rights precept that the "pre-existing disadvantage" of a group, like Indigenous persons, is an important context to assess discrimination, and "in most cases, differential treatment imposed on groups who are already vulnerable because of their unfair circumstances or treatment by society will be discriminatory".*[211]

Case law example: *The complainant, a 32-year-old Black man who had recently immigrated to Canada from Sierra Leone, went to the respondent's bar to have a drink.*[212] *Shortly after he entered, a server asked to see his identification to ensure that he was of legal age to consume alcohol. The complainant produced multiple pieces of identification, most of which had his date of birth, although some of them had expired. The manager of the bar asked the complainant to leave, and when the complainant did not comply, called the police to escort the complainant out of the premises. The board found that the server was bound by the respondent's policy on age identification for serving alcohol, but the manager was liable for race discrimination for calling the police on the complainant.*

Case law example: *The complainant, a South Asian man of Punjabi ancestry and adherent of the Sikh faith, drove from Ontario with his wife and two minor children, arriving at the respondent's motel in New Brunswick for an overnight stay.*[213] *At the reception*

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[210] *Friday v Westfair Foods Ltd. (2002)*, 2002 CanLII 62874 (SK HRT).

[211] *Ibid.* (para. 29).

[212] *Gilpin v Halifax Alehouse Limited*, 2013 CanLII 43798 (NS HRC).

[213] *Chouhan v Fundy Rocks Motel, 2024 CanLII 100984 (NB LEB).*

desk, the respondent asked the complainant where he was from, and when the complainant mentioned Brampton, the respondent said in a derogatory tone, "Little India". The complainant had used an online booking website to reserve a room with two beds for two adults and two children. However, the respondent showed them a room which only had one bed, and he asked the complainant to pay an additional amount for a room with two beds. When the complainant showed a printout of the confirmed reservation, the respondent became aggressive, tore the reservation sheet, and asked the complainant to leave the premises. Because it was a foggy and rainy night and they were in a remote location, the complainant agreed to pay the extra amount for a larger room. However, the respondent refused and insisted that they leave the premises, so the complainant booked another motel several kilometres away and drove to that location. A board found that the complainant had suffered discrimination in services based on his race, creed or religion, national origin, and place of origin. It awarded general damages to the complainant for injury to dignity, feelings, and self-worth, and special damages for fuel costs and differential motel rates, and it ordered the respondent to undergo human rights training.

- Cultural stereotypes about racialized persons or groups, and conscious and unconscious bias against them, can result in racial profiling of racialized people in the services sector, creating various forms of disadvantage for them in availing services that other, non-racialized individuals can receive without hindrance or difficulty.

Case law example: *The complainant and his three friends, all of them Black, went to a restaurant and were asked to pre-pay for their meal.*[214] *The restaurant stated that it had a policy to ask patrons to pre-pay if they were not the restaurant's regular customers, but it did not offer further explanation and did not participate in the hearing. The tribunal found that the complainants were the only Black people in the restaurant, and they were the only customers who had to pay for their meal in advance, so the restaurant acted on presumptions and stereotypes about race. The tribunal emphasized that racial profiling does not only happen in policing and law enforcement, but it is also present in services and other areas. The restaurant was held vicariously liable for the conduct of its staff, for "these acts were not just the acts of rogue employees".*

Case law example: *In an early human rights case, a gas station required its Indigenous customers pay for gas before being served, while other people could get gas and pay later.*[215] *A Board of Inquiry ruled that the gas station was liable for discrimination on the basis of race and recommended that the outcome of the inquiry be published in the media, and asked the provincial Human Rights Commission to write a letter to the manager of*

[214] *Wickham*, *supra* note 57.

[215] *Weaselfat v Driscoll*, 1972 CanLII 1949 (Alberta HRC).

the gas station asking him to desist from further discrimination against Indigenous customers.

- Under human rights law, as enunciated by courts and tribunals, it is the legal obligation of service providers to train their employees on human rights issues, including dignity, equality, inclusion, race discrimination, and cultural sensitivity, in order to prevent discriminatory practices against vulnerable groups.

Case law example: *The complainant, a Chinese Canadian, visited the respondent's nightclub with his friends.*[216] *The door attendant told the group that the nightclub had concerns about Asian gangs, and it would not admit any Asian people that night. The complainant alleged denial of services based on race. The tribunal found that the complainant was denied entry in the club due to his race, and that the club's door attendants were not trained on human rights issues, which was a serious shortcoming, especially given the nature of the business.*

Case law example: *Three complainants of Indo-Canadian ancestry went to a club where the door attendant, who was letting in White patrons, denied entry to the complainants.*[217] *When they questioned him, he swore at them and pushed one of the complainants. Discrimination in services based on race, colour, and ancestry was established, and the club was held liable for the actions of its employee.*

- If a single or isolated comment is the basis of a race discrimination complaint in services, human rights tribunals look at the entire context of the situation to assess if the comment was egregious enough to meet the threshold of discrimination under human rights law.

Case law example: *The complainant, a man of Eritrean decent, went to a rehab centre run by the regional health authority.*[218] *He was not willing to sign a consent form due to an error in it, so the healthcare worker, who had previously asked the complainant about his country of origin, said to him: "Go back to your own country and pick cotton". Despite the isolated comment, the tribunal awarded damages to the complainant for injury to*

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[216] *Simpson v Oil City Hospitality Inc.*, 2012 AHRC 8 (CanLII).

[217] *Rai and others v Shark Club of Langley (No. 2)*, 2013 BCHRT 204. For other complaints in which refusal of entry to a bar or nightclub was upheld as discriminatory based on race, see: *Simpson v Oil City Hospitality Inc.*, 2012 AHRC 8 (CanLII) and *Randhawa v Tequila Bar & Grill Ltd.*, 2008 AHRC 3 (CanLII).

[218] *Kahsai v Saskatoon Regional Health Authority*, 2005 CanLII 80915 (SK HRT).

feelings and dignity, and also noted that the comment created a "poisoned treatment atmosphere" for the complainant.

Case law example: *A woman of Asian Indian origin approached a fitting room with her young children and an employee said to her: "This is not a washroom. You cannot change your baby here."[219] The woman interpreted the employee's tone as rude and as implying that the complainant did not speak English. Nearby customers heard the comment and the complainant felt embarrassed. The tribunal found that the single comment did not meet the threshold of particularly egregious or virulent language: "Although apparently made in a rude tone", the comment was "merely a statement that [the complainant] could not change her baby in a fitting room".[220]*

Case law example: *A man of Spanish ancestry went to get a tire repaired, but the repair could not be completed the same day.[221] The complainant, who self described himself as a person with "an audible accent" and "a non-native English speaker", spoke to a staff person about the service delay, and the staff member asked him to "speak in English". While the tribunal dismissed the complaint due to different reasons, it acknowledged that the complainant was a "member of a group historically discriminated against" and the staff person's comment was "in the realm of poor taste or insensitivity". The tribunal did not make a finding of discrimination because the exchange was "part of an isolated incident [with] no hint of a pattern or of a prior personal interaction", and it was not threatening or offensive. It noted that while human rights law does not "condone inappropriate or offensive utterances", it is "not the purpose of the Code or the Tribunal to sanction all incivility which occurs in society".[222]*

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[219] *Patria v Winners*, 2018 BCHRT 164.

[220] *Ibid*. (para. 21). The tribunal cited other complaints where isolated comments or conduct, while inappropriate or offensive, were found not virulent or inherently damaging to dignity to trigger the protection of the BC *Human Rights Code*: *Campbell and Abraham v Krizmanich*, 2009 BCHRT 5; *Banwait v Forsyth (No. 2)*, 2008 BCHRT 81; *Finucci v Mohammed*, 2005 BCHRT 80; *Feleke v Cox*, 2009 BCHRT 7; and *Finnamore v Strata Plan NW 3153,* 2018 BCHRT 26.

[221] *Figueroa v Canadian Tire Corporation, Ltd and another*, 2024 BCHRT 140 (CanLII).

[222] In a similar vein, a tribunal noted in a more recent case: "By virtue of their humanity, everyone will identify with at least one *Code*-enumerated ground and, over the course of their lifetime, most people will suffer some form of adverse treatment which may or may not be connected to the *Code*. Because of this, the *Code* does not assume that all adverse treatment is discriminatory". *Groblicki v Watts Water*, 2021 HRTO 461 .

- While Indigenous persons are protected under the grounds of race and ancestry under both the *Charter* and the *Act*, they can also invoke constitutional treaty rights in federal matters.

Case law example: *An Indigenous commercial fisherman was charged with fishing in the Fraser Valley area contrary to Section 61(1) of the federal Fisheries Act and for using a larger fishing net than permitted by his fishing licence.*[223] *The complainant invoked his immemorial, ancestral fishing rights as an Indigenous person, arguing that these rights were protected by the Indigenous rights enshrined in Section 35 of the Canadian Constitution. A BC provincial court ruled in favour of the federal government, arguing that the Indigenous right to fish must be clearly and specifically identified in a treaty or similar document, and it cannot be invoked merely based on historical claims. After a series of appeals,*[224] *the matter came before the Supreme Court of Canada, which acknowledged that the complainant, as an Indigenous person, had an ancestral right to fish in the area and that right had not been extinguished by Section 35 of the Constitution. In its decision, the Supreme Court established a set of criteria, now known as the Sparrow Test,*[225] *to determine what constitutes Indigenous rights under Section 35 of the Constitution, and when can those rights be legally or justifiably infringed by the government.*

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[223] *R. v Sparrow, 1990 CanLII 104 (SCC)*, [1990] 1 SCR 1075.

[224] The initial ruling of the provincial court was upheld by a BC County Court, and, on appeal, the Court of Appeal overturned the complainant's conviction on a procedural error and ordered a retrial. Subsequently, both the Crown and the complainant took the matter to the Supreme Court of Canada.

[225] Under the Sparrow Test established by the Supreme Court, the following two criteria should be applied to determine if Indigenous rights under Section 35 had been infringed: First criteria: 1. The action imposes undue hardship on Indigenous persons. 2. It is considered "unreasonable" by the court. 3. It denies the right holders "their preferred means of exercising that right". Second criteria: An infringement of rights might be justified if: 1. It serves a "valid legislative objective," such as "conserving and managing a natural resource", 2. It involves "as little infringement as possible" to achieve the intended result. 3. It is for the purposes of expropriation and "fair compensation" is provided. 4. The government has consulted with the Indigenous group in question about the conservation measures being implemented.

3.6 Race discrimination in housing

The *Act* prohibits landlords, owners, and sellers of property, including their employees and agents, from discriminating against racialized persons in rental housing, sale of property, and in the terms and conditions of occupancy.[226]

It is *prima facie* discriminatory for landlords and housing providers to deny racialized persons the opportunity to buy or rent a house or an apartment because of their race; or to grant them unequal access to housing facilities like laundry, parking, recreational areas, etc.; or to impose unequal rental conditions on them, like differential rent rates, and so on.

Acts of *prima facie* race discrimination in housing may including the following:

- Posting ads that exclude or imply exclusion of racialized persons from renting an advertised unit.
- Denying racialized individuals the right to rent or own property.
- Evicting persons from a house or property due to their race.
- Withholding racialized tenants from facilities and services in rental units available to other tenants.
- Harassing racialized tenants or creating a poisoned housing environment through racially vexatious comments or conduct.
- Disadvantaging racialized persons in the terms or conditions of occupancy, like differential rental rates, inadequate repairs, or maintenance, etc.
- Preventing racialized individuals in any other way from rightful enjoyment of property comparative to others.

Case law example: *A complainant of Caribbean ancestry spoke with a landlord and arranged to view their apartment.[227] On the day of the viewing, the landlord called the complainant to inquire where she was from, and after hearing her answer, told her that the apartment was unavailable. The complainant's boyfriend called the landlord the next day, saying that he was a Canadian student looking to rent. The landlord said that the apartment was still available, but that he did not rent to students. The complainant alleged discrimination based on race, place of origin, colour, and ethnic origin. The tribunal stated that the complainant only needed to show that her protected characteristics were a*

[226] *Act*, *supra* note 1. Sections 5(1), 5(2), and 5(3).

[227] *Thomas v Haque*, (2016) HRTO 1012.

factor[228] *in the respondent's decision not to rent the apartment to her. Relying on established case law for assessing credibility,*[229] *the tribunal reiterated that race discrimination is more often proven by circumstantial evidence and inference than direct evidence.*[230] *Therefore, the tribunal concluded that it was logical to infer that the respondent's refusal to rent was based, at least in part, on the complainant's race, place of origin, colour, and ethnic origin.*

- Stereotypes about race often create disadvantages for racialized persons in housing transactions or lead to the diminishment of housing rights or enjoyment of property for these persons.

Case law example: *A Cambodian woman alleged that her landlord discriminated against her and other Cambodian tenants by failing to carry out repairs in their apartment.*[231] *A board noted that the landlord had neglected repairs in the entire building, so the complainant did not suffer unequal treatment, as the other (non-Asian) tenants were similarly treated. However, the board did award damages to the complainant for the landlord's acts of reprisals after she filed a human rights complaint: her electricity was cut off, her rent was raised unreasonably, and she was issued an eviction notice. On appeal, a Divisional Court ruled that the board had erred in its ruling and it had disregarded the fact that the landlord created a poisoned housing environment for the complainant and other Cambodian tenants; the landlord blamed the tenants for the condition of the apartments; and he uttered derogatory comments about Asian immigrants, including, "They are like little pigs"; "They think they are still living in the jungle"; "These are a different kind of people from you and me", etc. The landlord was held liable for discrimination based on race and place of origin.*

Case law examples: *A tribunal found that South Asian tenants were denied a rental unit because of stereotypes that South Asian foods would produce strong odours when cooked in the apartment.*[232] *Similarly, in another case, a complainant of East Indian*

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[228] The tribunal relied on the Ontario's court's ruling in *Pieters*, *supra* note 45.

[229] The tribunal cited principles of credibility articulated in *Faryna v Chorney* (1952) and the Ontario Court of Appeal's opinion on credibility in *R. v Morrissey*, 1995 CanLII 3498 (ON CA).

[230] The tribunal cited *Phipps*, *supra* note 158, wherein the court reiterated that in a human rights complaint the ultimate question was whether the complainant had discharged their burden of proving discrimination on "a balance of probabilities".

[231] *Ontario (Human Rights Comm.) v Elieff,* 1996 CanLII 20062 (ON SCDC).

[232] *Fancy v J & M Apartments Ltd. (1991)*, 14 CHRR D/389 (BCCHR).

ancestry experienced differential treatment when she was notified by the landlord to cease her cooking of ethnic foods or face eviction. The tribunal held that the landlord's rule to evict the tenant due to cooking odours in the building was not a BFR.[233]

Case law example: *Two women of Indigenous ancestry were seeking to rent a house. Upon learning that they were Indigenous, the owner's wife stated that she didn't rent to "Indians" and made further disparaging comments about Indigenous people.* [234] *She then asked the women about their professions, and when one of them said that she was on social assistance, she said, "That's just as bad."*

- Human rights law also recognizes that it is discriminatory based on race if landlords treat their tenants differently due to their association with racialized persons.[235]

Case law example: *The complainant met with a landlord to rent an apartment, and he asked her whether she associated with Black persons, and that he would not allow "coloured people or black people" on his property.*[236] *The complainant was upset by this comment, because her children were bi-racial, and their father and grandparents were African Canadians. A board held that the landlord discriminated against the complainant owing to her association with Black persons, based on race, colour, and place of origin. It was not relevant whether the landlord knew about the complainant's family, because he made non-association with racialized persons a term or condition for renting the apartment. The board ordered the landlord to pay general damages to the complainant for mental anguish, and special damages to cover the difference in rent she had to pay for an alternative apartment she rented for a one-year period. In addition, the landlord was ordered to write a letter of apology to the complainant, failing which he would be liable for further damages.*[237]

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[233] *Chauhan v Norkam Seniors Housing Cooperative Association*, 2004 BCHRT 262.

[234] *DesRosiers v Kaur (2000),* 37 CHRR D/204 (BCHRT).

[235] For example, in an early case, a tenant was evicted because they invited a racialized person as their dinner guest, which was found discriminatory based on race due to association. *Jahn v Johnstone* (1977), No. 82, Eberts (Ont. Bd. of Inquiry).

[236] *Hill v Misener*, 1997 CanLII 24830 (NS HRC).

[237] Stereotyping or vilification of racialized tenants by landlords or property owners can sometimes create extreme difficulties for such persons. For example, a White woman wanted to evict her Black male tenant and falsely accused him of threatening to rape her. The board observed that the nature of the respondent's allegation could create particularly serious consequences for the

- Race discrimination is also prohibited in co-ops and social housing, and in short term rentals like hotels or Airbnb.

Case law example: *An Indigenous man was provided an unclean and substandard room at a hotel. Evidence from the hotel's records showed that substandard rooms were more often booked for Indigenous clients, whereas non-Indigenous patrons were generally put up in better rooms.*[238]

- Racialized persons are also protected from discrimination in housing transactions involving sublets or lease transfers.

Case law example: *A tribunal held that a landlord discriminated against a tenant when he prevented him from subletting his apartment to a couple of Indigenous ancestry.*[239] *In another case, a landlord was found liable for discrimination when he refused to allow transfer of a lease to persons of "East Indian" or Pakistani origin.*[240]

- Like race discrimination in employment and services, race discrimination in housing is also often proven by circumstantial evidence, and tribunals apply the same evidentiary principles that are used in employment discrimination situations when assessing housing discrimination complaints.

Case law example: *A Black woman was looking to rent an apartment, and her mother was assisting her by viewing the apartments and dealing with prospective landlords.*[241] *She arranged an appointment by phone to view the respondent's apartment, and when she arrived on the premises, the landlady reluctantly showed her the apartment. The next day, the landlady informed the mother by phone that the apartment had been rented. Subsequently, the complainants asked a friend to phone the landlady and enquire about the apartment, and they were told that it was still available. A tribunal held that the respondent discriminated against the complainants due to their race, and it ordered them to pay damages for mental anguish to both complainants, and to draft a non-*

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complainant because it "mobilized a history of racist views about white fear of Black men to white womanhood". *Fuller*, *supra* note 42.

[238] *Angeconeb v 517152 Ontario Ltd. (1993)*, 19 CHRR D/452 (Ont. Bd. Inq.).

[239] *Québec (Comm. des droits de la personne) v Thibodeau (1993)*, 19 CHRR D/225 (Que. HRT).

[240] *Tabar, Lee and Lee v Scott and West End Construction Ltd. (1984)*, 6 CHRR D/2471 (Ont. Bd. Inq.).

[241] *Watson v Antunes*, 1998 CanLII 29809 (ON HRT).

discrimination policy for the apartment building and have it approved by the provincial Human Rights Commission.

3.7 Race discrimination in publicity and associations

The *Act* also prohibits race discrimination in publications, banners, and signs, and in membership of professional, business, and trade associations.

Case law example: *A Board of Inquiry determined that a White supremacist event that displayed signs and symbols of racial and religious hatred and bigotry was discriminatory based on the protected grounds of race, religion, colour, and place of origin*.[242]

Case law example: *A board held that an association discriminated against one of its members when it disciplined her for objecting to racist comments about Black and Indigenous people by other members.*[243]

[242] *Kane v Church of Jesus Christ Christian-Aryan Nations (No. 3)*, 1992 CanLII 14249 (Alberta Bd. Inq.).

[243] *Barclay v Royal Canadian Legion, Branch 12*, (1997) 31 CHRR D/486 (Ont. Bd. Inq.).

4. Duty to accommodate, BFR, and undue hardship in race discrimination

Under the *Act*, employers, housing, and service providers, and professional, business, or trade associations, have a duty to accommodate the reasonable accommodation needs of persons based on their race.[244]

Under the *Act*, employers, housing, and service providers, and professional, business, or trade associations, have a duty to accommodate the reasonable accommodation needs of persons based on their race.

Human rights law recognizes that under certain situations or contexts, employers, landlords, or service providers can justifiably refuse accommodation requests from persons protected under the *Act*.

4.1 General rules of the duty to accommodate

As a general rule, when a racialized person makes a request for an accommodation that is related to their race, the employer, landlord, or service provider's duty to accommodate the request would be triggered, and they must explore all reasonable options to accommodate the request.

However, under human rights law, an employer, housing, or service provider's duty to accommodate is not absolute or endless, i.e. the duty ends at a certain point, when providing an accommodation becomes excessively difficult within the context of a given situation.

[244] The Supreme Court of Canada has laid out the fundamental principles of the duty to accommodate and undue hardship: "The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future". *Hydro-Québec v Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 SCR 561 (CanLII).

This end point is called undue hardship. An employer, housing, or service provider, as the case may be, will not be liable for discrimination under the *Act*, if they can show with clear evidence that they denied an accommodation request due to undue hardship.

4.2 Basic principles of undue hardship

Human rights law recognizes that "some hardship" is an aspect of accommodation. Only "undue hardship" can justify refusal of an accommodation.

The Supreme Court of Canada has outlined the factors that can lead to undue hardship, based on which an employer, housing, or service provider would be justified to refuse an accommodation request.[245]

Some of these factors include:

- Financial costs (i.e. a requested accommodation would be too expensive to implement or provide).
- Health and safety risks (e.g. to an employee, other workers, or the public).
- Inability of an employee to perform essential duties of their job.

    - However, employers should not presume that racialized employees would be unable to perform their duties; any decision about work competence must be made after an individualized assessment, and not based on stereotypes about race, racial origin, or grounds that intersect with race.

Other factors to consider when assessing if an employer, housing, or service provider has reached the point of undue hardship include:

- Previous efforts to provide accommodation to a complainant and attempts to explore alternative or next best accommodation solutions.
- The racialized person's response, participation, and collaboration in the accommodation process.[246]

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[245] *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489. In *McLoughlin v British Columbia (Ministry of Environment, Land and Parks*), [1999] BCHRTD 47, the tribunal noted: "The accommodation process is one in which everyone involved must work together towards a solution that balances competing interests. The process necessarily involves an exchange and refinement of information, and cooperation can only speed that process along". (para. 96).

[246] *Central Okanagan School District No. 23 v Renaud,* [1992] 2 SCR 970.

- The size, nature, and financial condition of a workplace or business, and the availability of alternative options.

The onus is on employers, housing, or service providers to prove that they refused an accommodation request due to undue hardship, or that they treated a racialized person differently due to a BFR.

To prove undue hardship, employers, housing, or service providers must provide direct and objective evidence of any of the above undue hardship factors.

For example, to show that an accommodation would cause undue hardship because of excessive financial costs, an employer would be required to provide clear and quantifiable estimates, and not just rely on vague impressions or apprehensions about potential expenses.

4.3 The BFR test

Employers, housing, or service providers can also refuse an accommodation request, or treat someone differently because of a BFR, i.e. a *bona fide* (in good faith) occupational (e.g. work related) requirement or rule.

According to the Supreme Court of Canada, to show that a rule or standard is justified as a BFR, an employer, landlord, or service provider must pass all three parts of the following test, known as the Meiorin Test:[247]

1. The rule was adopted for a purpose that is rationally connected to the function performed by the organization;
2. It was adopted honestly and in good faith that it is necessary to fulfil that function;
3. It is reasonably necessary to accomplish its purpose or goal, and it would be impossible to accommodate the protected person without undue hardship.

Example: *A college requires students who apply to enrol in its programs to have a high school diploma. A racialized student is refused admission because she has not completed their high school diploma. The denial of admission would not be considered discriminatory against the student based on race, because the college rule or requirement is justified as a BFR.*

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[247] The *Meiorin* Test was established by the Supreme Court of Canada in the Meiorin case, *supra* note 187. (para. 38).

- Courts put BFR claims under strict analysis, and employers, housing, or service providers must substantiate these claims by tangible evidence.
- A blanket, all-serving, one-size-fit-all rule or standard that is applied to everyone without assessing individual facts and circumstances would be difficult to prove as a BFR.
- A rule that only impacts or applies to racialized persons would not pass muster as a BFR.[248]
- Employers must show that they explored all viable alternatives before implementing a rule or practice.
- BFR is assessed on a case-by-case basis, and it is context-bound, so the circumstances and contexts of each individual situation would determine the legality of a BFR claim.

4.4 Undue hardship and BFR in race complaints

In the context of race discrimination complaints, it has generally been difficult for employers, housing, or service providers to justify that their denial of accommodation, or their discriminatory treatment of a racialized person, was reasonable or *bona fide* under the *Act*.

In certain specific situations, the BFR defense has been used by employers, landlords, and service providers to justify their differential treatment of a racialized person or group. Some of these situations are examined below.

4.4.1 Professional certification requirements as BFR

Certification or accreditation regulators and universities may have certification or accreditation requirements for foreign-trained professionals (like doctors) or students that could be deemed discriminatory based on the grounds of race, place of origin, or national origin.

Several studies and reports, including those by the Office of the Fairness Commissioner, have noted that new immigrants and foreign trained professionals face obstacles in obtaining professional licenses, and that these practices could constitute a form of systemic discrimination in access to regulated professions.

[248] *Wardair Canada Inc. v Cremona (1992)*, 146 NR 69 (Fed. CA).

In human rights cases involving challenges to certification requirement, applicants have often cited the ground of place of origin as the basis of the alleged discrimination; however, the intersectionality of complainants with other grounds like race or national origin is evident in such cases.

- Tribunal decisions have noted the various ways in which foreign-trained professionals may face differential treatment in regulated professions due to their race or place of origin, etc. Some of the potentially discriminatory accreditation or certification requirements include:[249]

    - Unduly difficult language requirements.[250]
    - Requirements to complete pre-internship programs with limited openings for foreign-trained candidates.[251]
    - Differential or additional measures or requirements, like internships or examinations, for foreign-trained professionals compared to Canadian-trained candidates.[252]
    - Territorial restrictions on professional practice.[253]
    - Higher application fees for foreign-trained candidates.[254]

- Generally, tribunals have held that evaluation standards would be justified as BFR if they were established on the basis of evidence and research of other education or accreditation systems and jurisdictions. However, a BFR defense may fail if the

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[249] "Looking beyond 'Canadian experience': A step toward equality in employment". Rubin Thomlinson. 2023. Web.

[250] *Brar and others v BC Veterinary Medical Association and Osbourne*, 2015 BCHRT 151. (1266-1273).

[251] *Neiznanski v University of Toronto*, 1995 CanLII 18166 (ON HRT). (paras 45-48).

[252] *Jamorski v Ontario (Attorney general)*, 1988 CanLII 4738 (ON CA), wherein it was held that different internship requirements for graduates of unaccredited medical schools did not infringe Section 15 of the *Charter*. See also: *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61. (para 77).

[253] *Forghani c Québec (Procureur général)*, 1997 CanLII 9991 (QC CA) (page 10); *Newfoundland Dental Board v. Human Rights Commission, et al*., 2005 NLTD 125 (CanLII).

[254] *Durakovic v Canadian Architectural Certification Board*, 2011 HRTO 333. (para 32).

requirements were set up based on assumptions about the superiority of Canadian professional standards or education system.

Case law example: *In a case that dealt with the qualifications of international medical graduates, a tribunal found a requirement of the provincial College of Physicians and Surgeons discriminatory under the ground of place of origin; the rule required foreign-trained doctors to take an additional year of post-graduate training to be eligible for registration as medical professionals.*[255] *The licensing rule divided applicants into two categories: Those educated at medical schools in countries approved by the College, and those with medical degrees from non-approved countries. Applicants from the second group of countries had to undergo a more rigorous licensing process, including an additional year of training. The tribunal found that the rule was not based on research but relied on assumptions about other educations systems, so it did not qualify as a BFR. The tribunal stressed that the skills of the affected medical graduates should be "assessed based on merit rather than assumptions"; they should be "given an opportunity to compete fairly" with graduates of Canadian schools; and they should be provided opportunity "to demonstrate the equivalency of their qualifications."*

- If there is evidence that certification requirements were set up after due diligence, based on relevant research regarding comparative education and accreditation systems, and the requirements pass the Meiorin Test, or respondents can show that they explored alternative options and made efforts to accommodate different groups up to the point of undue hardship, differential certification or accreditation requirements may be deemed justified and non-discriminatory.

Case law example: *An applicant from Russia alleged discrimination based on ethnic origin and place of origin because an accreditation regulator denied equivalency for her Russian law degree and work experience in Russia as a lawyer and law professor.*[256] *The tribunal found that the regulator's accreditation standards were set up based on evidence and research of the legal systems of other jurisdictions, and they did not rely on stereotypes or assumptions that those other systems were inferior compared to Canada. According to the tribunal, even if the complainant suffered adverse impact, it was justified based on the third part of the Meiorin Test, as the standard was reasonably necessary to accomplish the regulator's purpose. Moreover, there was evidence that the regulator had*

[255] *Bitonti et. al. v College of Physicians and Surgeons of British Columbia (No. 3) (1999)*, 199 CanLII 35189 (BC HRT).

[256] *White v National Committee on Accreditation,* 2010 HRTO 1888 (CanLII).

made sufficient efforts to accommodate foreign-trained lawyers, so its decision to not grant the required rating to the applicant's credentials was not discriminatory.

Case law example: *A university's assessment of foreign credentials was challenged under the provincial human rights code, alleging that the accreditation standards resulted in differential treatment for the complainant by failing to adequately credit her education in the Philippines.*[257] *The tribunal concluded that the differential treatment was not based on assumptions about the superiority of the Canadian education system, but it was based on evidence from various sources and took into consideration the merits of different international education systems. Discrimination was ruled out in the case.*

- Fee differentials applied to foreign students by universities may be legally justified, even if they impact racialized students.

Case law example: *International students at a university argued that the university discriminated against them based on race and place of origin by charging them higher tuition fees than domestic students and requiring them to maintain higher GPAs to get admission in certain programs.*[258] *A tribunal dismissed the complaint based on the following reasons: 1. The international students body is highly diverse with students from various countries, so it is difficult to categorize them under the grounds of race or place of origin. 2. International students are treated differently because of their citizenship or legal status in Canada, and not because of their race or place of origin.*

- As a general rule, accreditation related requirements and decision making should be as transparent and inclusive as possible, and the specific skills and experience required for a position should be clearly set down and communicated.[259]
- In addition, individualized assessment of candidates should be considered, and alternative and less discriminatory certification requirements should be explored, instead of always screening out certain protected groups through blanket standards and requirements.

Example: *Instead of requiring all foreign-trained applicants to undergo two years of practicum training to receive a professional designation, a regulatory body provides*

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[257] *Agduma-Silongan v University of British Columbia,* [2003] BCDTD No. 22.

[258] *Simon Fraser University International Students v Simon Fraser University*, 1996 CanLII 20076 (BC HRT).

[259] *Removing the "Canadian experience" Barrier: A Guide for Employers and Regulatory Bodies*. Ontario Human Rights Commission, 2013.

applicants the opportunity to demonstrate their technical skills and knowledge in a practical, competency-based examination.[260]

4.4.2 Language proficiency requirements as BFR

If a racialized person is not considered for a job because of an employer's language proficiency requirement, the requirement may be justified as a BFR if the employer can show that it meets all three parts of the Meiorin Test.

Case law example: *A sawmill did not hire a landed immigrant from the Indian Punjab as a laborer because he could not speak English.*[261] *A board found that the mill had hired no workers from the Indian community for several years, despite receiving a number of applications from that group. However, Caucasians and members of other ethnic groups were hired. According to the board, several entry level jobs available at the mill could be performed safely without any significant communication in English, so proficiency in the English language was not a BFR for the job. It held that the employer discriminated against the complainant based on the grounds of race and place of origin, and it ordered the mill to hire the complainant with seniority on a backdated basis.*

- Courts have noted that while language is tied to grounds like place of origin, it is also a tool of communication in the workplace, and a language requirement cannot always be seen as discriminatory based on grounds like race or place of origin.

Case law example: *A provincial supreme court set aside a decision of a human rights council which had held that a complainant was discriminated against due to his race, colour, and place of origin when he was not hired because of the employer's language requirements.*[262] *The court noted that language has a dual aspect: it is tied to a person's race or culture, but it is also a means of communication in workplace settings, whereby it is not intrinsically an issue of personal identity or culture.*[263] *The employer's language*

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[260] *Ontario Guideline*, *supra* note 4**.**

[261] *Dhaliwal*, *supra* note 153.

[262] *Fletcher Challenge Canada Ltd. v British Columbia (Council of Human Rights)*, 1992 CanLII 1119 (BC SC).

[263] *Ibid.* In the words of the court: "There is no question that language is the conveyor of culture. It shapes and is shaped by culture and is directly related to race, colour, ancestry, or place of origin. However, apart from its capacity to convey culture, language is also a communication skill

proficiency requirement did not target people because of their race or ethnicity, and, among other errors of interpretation, the council had erred in framing the issue as one of accommodation and BFR.

- Based on the Meiorin Test, a language requirement will not qualify as a BFR if it is not rationally connected to the essential functions performed by an organization, or if it is not adopted in good faith.

Case law example: *The complainant was dismissed from his job at the Canadian Nurses Association when, as part of administrative restructuring, his post was replaced by a similar position that required a "fluently bilingual and preferably Francophone" candidate.*[264] *The complainant was Anglophone with some French language training, but he was not fluent in French, and he filed a complaint alleging discrimination under the ground of ancestry. The tribunal found that the job requirement that French should be the mother tongue of applicants was discriminatory. Fluency in French did not appear to be necessary for the work required, but it was added to improve the association's chances of selling its French language examinations to the Québec Order of Nurses. The respondent was ordered to pay general damages for loss of dignity and special damages for loss of pay to the complainant.*

- If a racialized person does not meet a job's language requirement, and the requirement is essential to perform the job role, the employer would be justified to not hire them for the position.

Example: *An immigrant settlement agency serves persons from Middle Eastern countries and needs to hire settlement and support workers. Most of the immigrants that the agency supports are new to Canada and do not speak either of its official languages. To apply for a job as a settlement or support worker at the agency, applicants have to show that they have language proficiency in Arabic, in addition to either English or French. In this situation, if a racialized person does not meet the language criteria and is screened out of the competition for this reason, the stated language requirements would be deemed a BFR.*[265]

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that may be learned, and the ability to learn any language is not dependent on race, colour, or ancestry".

[264] *Cousens*, *supra* note 90.

[265] *Ontario Guideline*, *supra* note 4.

4.4.3 BFR in rental housing

If a racialized person faces disadvantage in accessing rental housing, or in the terms or conditions of housing, landlords or housing providers will have show that the differential treatment was justified due to a BFR.

- Landlords have used minimum income requirements to disallow rental housing to housing applicants, but courts have determined that these standards discriminate against protected persons under the *Act*, including racialized individuals.

Case law example: *A board ruled that landlords cannot use rent-to-income ratios to exclude tenants, including racialized applicants, from renting apartment units, and that minimum-income ratios or criteria are not a BFR.*[266] *The board noted that landlords were using rent-to-income ratios to exclude tenancy applicants whose income levels showed that more than 30 percent of their monthly income would go toward rent. The board stated that excluding people from housing due to such income eligibility criteria was based on stereotypes about low-income people, and the criteria was not supported by data about the unreliability of these persons as tenants. Landlords could not establish that excluding people based on minimum income requirement was a BFR, or that not using this criterion would cause them undue hardship. An appeal court accepted the board's findings, but it held that landlords may use certain income criteria to assess the suitability of rental applicants (based on a then amendment introduced in the Ontario Human Rights Act), such as the credit scores or rental histories of prospective tenants.*

- In the housing context, minimum occupancy requirements of certain rental units may be seen as a BFR, if they are based on stipulations of building codes and other safety or regulatory guidelines. When a BFR is established in such a situation, the rule or requirement would not be discriminatory based on race if it impacts a racialized person or family.

Case law example: *A provincial supreme court concluded that a co-operative had established a BFR for imposing a minimum occupancy standard for various sized units.*[267] *For example, a three-bedroom unit had a minimum requirement for two adults and two*

[266] *Kearney v Bramalea Ltd. (No. 2) (1998), 34 CHRR D/1 (Ont. Bd. Inq.)* Other decisions have reiterated that while income information, rental history, and credit scores can be used to assess tenants, rent-to-income ratios cannot be the sole basis for refusing tenancy. See *Vander Schaaf v M & R Property Management Ltd.* (2000), 38 HRR D/251 (Ont. Bd. Inq.) and *Sinclair v Morris A. Hunter Investments Ltd.* (2001), 41 CHRR D/98 (Ont. Bd. Inq.).

[267] *Hansen v Penta Cooperative Housing Assn.*, 2005 BCSC 612.

children or one adult and two children. The court stated that the occupancy standard was consistent with the CMHC's guidelines for co-operatives, and it aligned with the co-operative's family-oriented policy and vision.

4.5 Responsibilities of racialized persons in the accommodation process

Racialized persons must participate in the accommodation process; accommodation is a collaborative endeavor, and its success depends on effective communication and cooperation between all parties.[268]

Employees who fail to cooperate with the employer in the accommodation process abandon their right to accommodation.

- It is the responsibility of racialized employees to inform the employer of their accommodation needs, so that employers understand the nature of the requested accommodation; this is especially true if the employee requires a specific accommodation due to their race, whose details the employer has no way of knowing unless they are informed about it.

- The employer's duty to accommodate and the employee's duty to inform about the required accommodation exist in a fine balance; tribunals and courts scrutinize these respective duties on a case-by-case basis to assess if an employee was subjected to discriminatory treatment.

- It is the responsibility of racialized persons to accept in good faith reasonable or alternative accommodations offered by an employer, housing, or service provider; racialized persons must cooperate with the accommodation provider to find the best or next-best accommodation solution if required, and they must make reasonable efforts to work with the offered accommodation.

[268] *Lougheed v Little Buddies Preschool Centre*, 2015 HRTO 909 (CanLII): "The law regarding the duty to accommodate clearly establishes that all parties to the accommodation process have obligations. An individual seeking accommodation, for example, is responsible for initiating the process by stating the need for accommodation. The duty to accommodate is a cooperative duty and requires the applicant, who is seeking accommodation, to provide sufficient information to allow the respondents to understand the nature of the request. The duty to accommodate would require, at the least, the party seeking accommodation to act in a reasonable and cooperative manner". (para. 43).

- If racialized persons do not accept reasonable accommodations, an employer, housing, or service provider may reach the point of undue hardship, after which they may be justified in not offering further accommodation.