

# Current Issues in Racial Discrimination Law

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**I. INTRODUCTION ..... 481**

**II. INTENTIONAL VERSUS SYSTEMIC DISCRIMINATION ..... 481**

**III. RACIAL SLURS, JOKES AND HARASSMENT ..... 488**

**IV. RACE RELATIONS AND POLICING ..... 497**

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## I. INTRODUCTION

"Race" and "colour" are listed as prohibited grounds in virtually every anti-discrimination statute in Canada. In the United States and Britain "national origin" occurs frequently, and "ethnic origin" occasionally, as well. It is therefore surprising that none of these enactments attempts to define these terms.<sup>1</sup> It appears that only one Canadian board of inquiry set up under anti-discrimination legislation has tried to define "race" in response to a private discrimination complaint.<sup>2</sup>

## II. INTENTIONAL VERSUS SYSTEMIC DISCRIMINATION

As with other grounds of prohibited conduct in human rights laws, racial discrimination — that is, discrimination against visible minorities and native people — comes in two principal forms: intentional and systemic discrimination. Intentional discrimination can itself be subdivided further into two categories: evil motive or animus, and differential treatment.

These categories represent the outcome of a forty year evolution of the definition of discrimination, which has been traced in a seminal article by the former Chief of Conciliation of the U.S. Equal Employment Opportunity Commission:<sup>3</sup> evil motive or animus; differential treatment; and finally, adverse effects. The first category covered "acts causing economic harm to an individual that are motivated by personal antipathy to the group of which that individual is a member". Proof was required of both the act of denial, and a motive based on prejudice. The second step was the "equal protection" concept, which involved causing "economic harm to an individual by treating members of his minority group in a different and less favourable manner than similarly situated members of the majority group." Finally, the definition of discrimination progressed to the point of prohibiting "conduct that has an adverse effect on minority group members as compared to majority group members."

In *Griggs v. Duke Power Co.*,<sup>4</sup> the U.S. Supreme Court held that the Civil Rights Act of 1964, Title VII, was directed to "the consequences of employment practices, not simply the motivation".<sup>5</sup> Thus, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, [could not] be maintained if they [operated] to 'freeze' the status

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1. The British *Race Relations Act, 1976* does, however, declare that "racial grounds" include distinctions on race, colour and ethnic or national origins.
  2. *Ali v. Such* (29 November 1976) (Alta. Human Rights Bd. of Inquiry). For a more complete discussion of this issue, see Anand, "Ethnic Equality", in Bayefsky & Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985) at 81-85.
  3. A. Blumenrosen, "Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination" (1982) 71 Mich. L. Rev. 59, by the former Chief of conciliation of the United States Equal Employment Opportunity Commission.
  4. 401 U.S. 424 (1971).
  5. *Ibid.* at 432, Burger C.J.

quo of prior discriminatory employment practices".<sup>6</sup> In other words, "good intent or absence of discriminatory intent [did] not redeem employment procedures or testing mechanisms that [operated] as 'built-in headwinds' for minority groups and [were] unrelated to measuring job capability".<sup>7</sup>

In subsequent cases under the Civil Rights Act of 1964, the Supreme Court made clear in the context of anti-discrimination legislation that once disproportionate impact was proven, the burden of demonstrating "that any given requirement [had] ... a manifest relationship to the employment in question"<sup>8</sup> shifted to the defendant. In order to show disproportionate impact, plaintiffs produced comparisons between numbers of minority employees hired or promoted and their overall representation in a relevant population sample such as the city or state.<sup>9</sup>

The idea of disproportionate adverse effect, not mere intentional inferior treatment, was introduced in Britain into the *Sex Discrimination Act 1975* and the revised *Race Relations Act 1976*.<sup>10</sup> The "equal protection" concept of discrimination in the 1968 *Race Relations Act* was supplemented in the revised statute by a definition of "indirect discrimination" which required the complainant to prove five things:

1. that the respondent applied a "requirement or condition" such that the "proportion of persons";
2. of the "same racial group" as the complainant who
3. "can comply" with it is
4. "considerably smaller" than the proportion of those not of his group who can satisfy it, and
5. that the result is to his "detriment".<sup>11</sup>

If these points are proven, the burden shifts to the employer to show that the challenged requirement is "justifiable". Lustgarten has stated the rationale of the required change as follows:

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6. *Ibid.* at 430, Burger C.J.

7. *Ibid.* at 432, Burger C.J.

8. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) at 425, Stewart J.

9. See *Rowe v. Gen. Motors Corp.*, 457 F. 2d 348 (1982).

10. L. Lustgarten, *Legal Control of Racial Discrimination* (1980) at 4-5. See *Sex Discrimination Act 1975* (U.K.), 1975, c. 65; *Race Relations Act 1976* (U.K.), 1976, c. 74.

11. *Race Relations Act, Ibid.* at 5.

*The significant evolution undergone by the law in less than a decade mirrors a growing and radically transformed understanding of the subordinate position occupied by racial minorities.*<sup>12</sup>

Many of the Canadian human rights tribunal decisions concern for instance, overt differential treatment of native people: a hotel requiring only natives to pay in advance to obtain a room,<sup>13</sup> a service station requiring only Indians, "transients and hippies" to pay in advance to buy gasoline,<sup>14</sup> and an automobile repair shop refusing to sell an \$8.00 part to an Indian complainant unless he bought at least \$20.00 worth of parts in all.<sup>15</sup>

However, differential treatment cases can be separated from instances of evil motive only by a thin veneer of artificial civility. In the last decade, tribunals and legislatures have gradually moved toward a result-oriented definition. In *Attorney-General for Alberta v. Gares*,<sup>16</sup> Mr. Justice McDonald was faced with an equal pay complaint by female nurses' aides whose rates of pay under their collective agreement with a hospital were less than the wages of male orderlies, who performed similar work but were represented by a different bargaining agent at the same hospital. Even in the face of a provision of the *Individual's Rights Protection Act*<sup>17</sup> which appeared to focus on results (in terms of wage paid for "similar or substantially similar work"), the employer argued that it did not intend to distinguish between male and female employees when it negotiated separate agreements. McDonald J. responded that the complaint

*[h]as been found to be justified, even in the absence of present or past intent to discriminate on the ground of sex. It is the discriminatory result which is prohibited and not a discriminatory intent.*<sup>18</sup>

This passage was applied in 1979 by the Prince Edward Island Court of Appeal.<sup>19</sup>

The "adverse effects" concept has been applied by human right boards in a number of cases in the areas of sex, age and religion.<sup>20</sup> Professor Cumming's decision in *Singh v. Security and Investigation Services Ltd.*<sup>21</sup> held that an apparently neutral requirement that

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12. *Ibid.* Documentation of their "subordinate position" is contained at 95-108.

13. *Ermine v. United Enterprises Ltd.* (26 July 1976) (Sask. Human Rights Comm.).

14. *Weaselfat v. Driscoll* (24 April 1972) (Alta. Human Rights Bd. of Inquiry).

15. *Sinclair v. Kostuk* (30 Sept. 1975) (Sask. Human Rights Comm.). In this case, any doubt about the reason for differential treatment was resolved by the respondent's refusal to allow the complainant's eight-year old son to use the washroom on the basis that "I am not in the habit of cleaning up after Indians".

16. (1976), 67 D.L.R. (3d) 635 (Alta. S.C.).

17. S.A. 1972, c. 2.

18. *Supra* note 16 at 694, McDonald J.

19. *Spike v. Rocca Group Ltd.* (1980), 29 N. & P.E.I.R. 1, 82 A.P.R. 1 (P.E.I.S.C.).

20. See W.S. Tamopolsky & W.F. Pentney, *Discrimination and the Law in Canada* (Toronto: de Boo, 1985) at 113-22.

21. (31 May 1977) (Ont. Human Rights Bd. of Inquiry).

all employees be clean-shaven and wear a special cap, raised a prima facie case of violation of the Ontario Human Rights Code since the Sikh complainant was unable to adhere to these rules without acting inconsistently with the tenets of his religion, and he was thereby denied employment. The Board of Inquiry placed the onus on the employer to show that "undue hardship" would result from its attempt to accommodate the genuine religious beliefs of the complainant. In the Chair's view, "we cannot profess to encourage religious freedom, yet, at the same time, refuse employment to persons who are exercising their religious freedom, simply because they are exercising that freedom."<sup>22</sup>

The "adverse effects" formulation of discrimination was emphatically accepted by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpson-Sears Ltd.*<sup>23</sup> In that case, a Board of Inquiry held that the employer's demotion of the complainant, a Seventh Day Adventist, was discriminatory since it was based on her inability to meet an apparently neutral condition of employment, namely, that she be available for work on Saturday, which was her Sabbath. The Supreme Court upheld the Board's decision, and in doing so described adverse effect discrimination in these terms:<sup>24</sup>

*It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.*

The Court held, in addition, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person which is decisive in considering any complaint. The proposition was expressed as follows:<sup>25</sup>

*The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties or restrictive conditions not imposed on other members of the community, it is discriminatory.*

Subsequent decisions of the Supreme Court have gone further in equating unintentional or "adverse effects" doctrines to the concept of "systemic discrimination". The latter term arises because in cases of unintentional effects, it is essentially *the system* rather than the actions of an individual wrongdoer, which represents the prohibited conduct. In *Canadian National Railway Co. v. Canadian Human Rights Commission*,<sup>26</sup> the Chief

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22. *Ibid.* at 18.

23. [1985] 2 S.C.R. 536.

24. *Ibid.* at 551.

25. *Ibid.* at 547.

26. [1987] 1 S.C.R. 1114 at 1138-39.

Justice stated in dealing with a complaint of discriminatory hiring and promotion practices which denied employment to women in certain unskilled positions:

*A thorough study of "systemic discrimination" in Canada is to be found in the Abella Report on equality in employment. The terms of reference of the Royal Commission instructed it "to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting individuals to compete for employment opportunities on an equal basis". (Order in Council P.C. 1983-1924 of 24 June 1983). Although Judge Abella chose not to offer a precise definition of systemic discrimination, the essentials may be gleaned from the following comments, found at p. 2 of the Abella Report.*

*Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ...*

*It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.*

Subsequent cases in the Supreme Court of Canada have affirmed these principles.<sup>27</sup>

The Supreme Court's clear acceptance of systemic discrimination as a ground of liability under anti-discrimination laws has coincided with an evolution toward broadened definitions in the statutes themselves.<sup>28</sup> The inclusion of systemic discrimination within the ambit of anti-discrimination statutes has had far-reaching consequences in the last several years. First, human rights commissions must now re-orient their investigative structures and procedures to extend beyond individualized findings of "who said what to whom". They must develop staffing levels and expertise to be able to collect statistical and other specialized forms of evidence of "disparate impact" or "adverse effects" of broad-based corporate or societal systems. They must formulate equally broad systemic remedies to support their findings of discrimination. Second, employers in the public and private sectors, providers of service and accommodation, and professional and trades organizations have been required to

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27. *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 173-75; *Brooks v. Canada Safeway Limited*, [1989] 1 S.C.R. 1219 at 1234.

28. See, for example, *Ontario Human Rights Code*, S.O. 1981, c. 53, as amended by 1984, c. 58, s. 39 and 1986, c. 64, s. 18, particularly ss. 10 and 16; and *Manitoba Human Rights Code*, S.M. 1987, c. 45, particularly s. 9(3). The significant exception to this development has been the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, which was interpreted by the Supreme Court of Canada in *Bhinder v. C.N.R.*, [1985] 2 S.C.R. 561, to exclude a finding of liability where the "neutral" requirement or qualification which had adverse impact on a Sikh worker was "reasonable" for the workplace as a whole and was uniformly applied.

begin the arduous yet essential task of analyzing their "systems" of inclusion, qualification and assessment for "hidden" barriers to the advancement of minorities.

Thus, for example, in the employment area, cases are now on-going which question particular forms of face-to-face interviewing systems for the selection of personnel. Such systems may involve systemic discrimination against certain visible minorities who originate in cultures whose expected norms of conduct in such situations are quite different from those of "majority" Canadian traditions, and may result in an unfavourable assessment which is not reasonably predictive of actual job performance. Height and weight criteria can have the effect of excluding women and members of certain ethnic groups, and may again be less than adequate predictors of ability to perform the job in question. Word of mouth hiring policies can constitute systemic barriers in companies whose present staff composition is particularly homogeneous.

Foreign-trained professionals and tradespeople regularly complain of bias in accreditation mechanisms for determining the validity of foreign credentials and experience and the over-emphasis on the validity of "Canadian experience" as a job requirement. Such concerns have resulted in the appointment by the Ontario Government of a Task Force on Access to Professions and Trades, which will shortly be reporting its findings and recommendations. In May 1987, I presented the report of the Task Force of Law concerning Publicly-Used Property as it Affects Youth and Minorities. One of my findings was that the present trespass law, which has not changed in substance since the Middle Ages and treats publicly-used properties such as shopping malls in exactly the same fashion as private homes, has resulted in adverse treatment of racial minorities in the application of the unrestricted right of the owner or occupier to exclude any person for any reason, or for no reason at all.

These situations represent just a few examples, and touch but a tiny fraction of the broad scope of potential systemic discrimination which is covered by anti-discrimination statutes and/or the equality rights provisions of the Charter of Rights and Freedoms. In all of these situations, to treat all persons equally can be the worst form of unequal treatment.

But the law, as stated in *Simpson-Sears*, does not merely discard an apparently neutral and broadly-applied requirement or qualification which has grown up over time, simply because it disregards its actual effect on a minority group. Rather, a two-step assessment of the requirement or qualification must be made to determine whether it can withstand scrutiny. First, the requirement or qualification must be reasonable in both the subjective and objective sense, as described by the Supreme Court of Canada in the *Etobicoke Firefighters* case.<sup>29</sup> Second, the party seeking to uphold the requirement must demonstrate that the special needs or circumstances of the adversely affected person or group could not be accommodated without undue hardship to the system or enterprise in question.

Thus, in *Sehdev v. Bayview Glen School*,<sup>30</sup> an Ontario Board of Inquiry assessed the validity of a school uniform requirement in a Toronto private school, which stated that in the interest of minimizing religious differences amongst its diverse student body, all visible

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29. *Re Borough of Etobicoke and Ontario Human Rights Commission* (1981), 132 D.L.R. (3d) 14.

30. (1988) (Ont. Human Rights Bd. of Inquiry).

displays of religious symbols would be prohibited. The complainant was a six year-old Sikh student who met all entrance requirements except that he was required by the dictates of his religion to wear a turban. The Board determined that the school uniform requirement was a rule that was equally applied across the student body without any hint of malice or intended differential treatment toward members of those religious groups (such as Sikhs and orthodox Jews) who are required to "wear" their religious symbols. Nevertheless, the Board determined that it would not constitute undue hardship to the school in question to relax the rule in the case of those students who held genuine religious beliefs which conflicted with it. This form of accommodation was ordered by the Board, and the complaint was upheld.

Similar issues involving the requirements of the Sikh religion have arisen in the context of the wearing of turbans in place of motorcycle helmets and safety hats, and the wearing of ceremonial kirpans in school classrooms and in courtrooms. In all of these cases, the essential issue is whether a broad, seemingly neutral rule forming part of the "system" (whether school, motor vehicle regulation, courtroom or workplace) can be accommodated without undue hardship. These latter terms will clearly require extensive judicial consideration in particular fact situations. The Ontario Human Rights Commission has begun the process of elucidating their meaning (initially in the context of disability complaints) in accommodation guidelines to be published shortly.

In the remainder of this paper, I shall focus on two current issues in racial discrimination, the first involving intentional discrimination and the second concerning allegations of systemic inequality. As might be expected, given the historical evolution described above, the first issue — racial slurs, jokes and harassment — has received some judicial consideration, and my purpose in discussing it in this paper is to analyze the limits of current legislative and judicial prescriptions and the need for further refinement. The second issue — race relations and policing — is on the other hand, a matter which has received extensive analysis from a social policy standpoint but little consideration within the legal framework provided by the Supreme Court in *Simpson-Sears* and by recent Human Rights statutes. The focus, therefore, in the last section will be on the identification of potential systemic issues which may well found future litigation.

### III. RACIAL SLURS, JOKES AND HARASSMENT<sup>31</sup>

For visible minority communities, racial slurs, jokes and harassment, and the ability of Human Rights Commissions to respond to them in a meaningful way, is of growing concern. While complaints before Commissions most frequently involve an employment setting, the use of racially abusive language or statements also arises in the areas of accommodation and services.

Historically, anti-discriminatory laws did not expressly prohibit racially derogatory statements. However, insulting or annoying comments or behaviour, directed at employees

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31. I am indebted to Ms. Tanja Wacyk, Counsel and later Director of Policy and Research of the Ontario Human Rights Commission, whose research and writing in this area I have extensively relied upon in preparing this Section.



because of their race, were in some narrow circumstances found to be a violation of the general non-discrimination provisions of these laws. In some circumstances, the reasoning which led to findings that such behaviour violated human rights laws was that racial slurs, name-calling and other offensive behaviour created a *hostile/poisoned working environment* for those persons subjected to it. Such an environment then constituted a "term or condition" of employment which was different from that to which other employees were subjected and thus was discriminatory.<sup>32</sup>

Typically, only employers could be held liable for discrimination under this reasoning. As a result, boards of inquiry invariably held that there must be evidence that the employer knew or should have known about the offensive behaviour and made no effort to stop it. A single offensive incident was, therefore, insufficient to establish a breach of the *Code*. This principle was set out in the case of *Simms v. Ford Motor Company*<sup>33</sup>, where the Board stated:

*It should be noted that, to begin with, the Legislature has not seen fit to prohibit the use per se of racially derogatory epithets. To call a black man a "nigger" or even for that matter, "fucking nigger", is reprehensible but, by itself, it is not prohibited by the Code ... (p. 15)*

*An isolated offensive outburst directed at an employee by another employee, who has been placed in a supervisory position over the first employee by the employer, does not, in the absence of any repetition of the insulting conduct, amount to discrimination with regard to employment or any term or condition of employment because of race or colour within the meaning of those words as they are found in section 4(1) of the Code. In my opinion the word "discriminate" in the context of the Code means to treat differently or, in the particular context of section 4(1), to make an employee's working conditions different (usually, in the sense of less favourable) from those under which all other employees are employed. Thus, to permit, even passively, a black employee in a plant where the majority of employees are white to be humiliated repeatedly by insulting language relating to his colour by other employees, even, I would go so far as to say, by non-supervisory employees, would be to require the black employee to work under unfavourable working conditions which do not apply to white employees. In such circumstances the employer has an obligation, imposed by section 4(1), to remove the cause of the discriminatory working conditions and police the prohibition against the humiliating conduct or language. But where the employer had no reason to anticipate that an isolated insulting act would occur, it cannot be said that, if and when it does, the mere occurrence immediately puts the employer in violation of section 4(1). (p. 18)*

It would appear, therefore, that in order for racial name-calling or other insulting conduct to constitute discrimination under these laws, the impugned action had to involve

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32. J. Keene, *Human Rights in Ontario* (Toronto: Carswell, 1983) at 195.

33. (1970) (Ont. Human Rights Bd. of Inquiry).

more than "an isolated offensive outburst" and was required to be of such magnitude that it resulted in "less favourable" working conditions than that experienced by other employees. In addition, it was also required that the employer either knew or should have known of the impugned behaviour and took no action to prevent it.

The above approach mirrors that of the U.S. courts in dealing with racial slurs in employment situations. In the case of *Degrace v. Rumsfeld*,<sup>34</sup> the court held that an employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers. The employer must take reasonable steps to eradicate the harassment or be held responsible for it. The court also held that employers must take responsibility for their supervisors' derelictions.

In *E.E.O.C. v. Murphy Motor Freight Lines*,<sup>35</sup> the court held that the standard to determine if an employer is responsible for the racial harassment of an employee should be an objective one, i.e., if an employer knew or ought to have known of the racial harassment of an employee, the employer has a responsibility to take reasonable steps to eliminate such harassment.

In Canada, decisions subsequent to the *Simms* case have followed its reasoning with regard to employment situations: *Dhillon v. F.W. Woolworth Co., Ltd.*;<sup>36</sup> *Ahluwalia v. Metropolitan Toronto Board of Commissioners of Police*;<sup>37</sup> *Avtar Singh v. Domglas Limited*.<sup>38</sup>

In the area of "accommodation", the test regarding the making of racially derogatory or insulting statements has been significantly lower than that applied in employment situations. The only reported case dealing with comments relating to an individual's race is *Jeffers v. Greenbrook Manor Limited et al.*<sup>39</sup> In that case, the superintendent of an apartment building told the complainant, who was black, that he intended to get rid of all blacks in the building. Both the superintendent and the corporate respondent for whom he acted as an agent were found to be guilty of harassment as the complainant was subjected to a "condition" of his tenancy, i.e., fear of being expelled because of his race, to which other tenants were not subjected. The facts in this case suggest that under general non-discrimination provisions, "harassment" in the area of accommodation does not have to be ongoing or repeated in order to result in a finding of discrimination.

Two cases dealing with "racial slurs" or a negative portrayal of a protected group in the provision of services were *Iwasyk and Pennywise Foods Ltd.*<sup>40</sup> and *The Ukranian*

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34. (1980) 614 F. 2d 796.

35. (1980) 22 E.P.D. 30,888.

36. (1982) 3 C.H.R.R. D/161.

37. (1983) 4 C.H.R.R. D/330.

38. (1981) 2 C.H.R.R. D/61.

39. (1982) 3 C.H.R.R. D/213.

40. (1977) 6 W.W.R. 699.

*Canadian Professional and Business Association of Vancouver v. William Kinyk et al.*<sup>41</sup> Both cases dealt with the naming of restaurants and portrayal of a particular protected group which was perceived by some members of that group as demeaning and stereotypical.

The trend in recent Canadian anti-discrimination statutes is to set out an explicit prohibition against harassment under particular grounds and in particular areas of social activity. Thus, in the 1982 *Ontario Human Rights Code*, racial harassment is specifically prohibited in the areas of employment and accommodation but not in the context of services. In employment, for example, the *Code* provides as follows:

*4. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.*

*4. (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.*

With regard to the area of accommodation, s. 2 of the current *Code* provides as follows:

*1. Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status, handicap or the receipt of public assistance.*

*2. Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance.*

There are no express provisions dealing with harassment in the provision of services, but it is arguable that "harassment" as well as any other derogatory treatment or statements in the area of services would be a violation of s. 1 of the *Code* which provides as follows:

*1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.*

Section 9(f) defines harassment for the purpose of the above sections as follows:

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41. (1983) 4 C.H.R.R. D/319.

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.<sup>42</sup>

To date, the only case involving derogatory racial comments heard under the provisions of the current Ontario *Code* is *Wei Fu and Her Majesty in the Right of the Province of Ontario et al.*<sup>43</sup> In that case, the Board of Inquiry acknowledged that racial slurs and jokes constitute a possible violation of the *Code*, but did not do so in the instant case, as the "racial jokes and slurs were not directed at Mr. Fu or made to him, and were very much a peripheral aspect of the case". The specific complaint in that case was one of disciplinary action allegedly resulting from racial motivation.

The definition of harassment set out above is rather narrow in that it requires "a course of vexatious comment or conduct" (emphasis added). Webster's Dictionary defines a "course" as inter alia:

- a regular manner of procedure
- a way of behaving; mode of conduct
- a series of like things in some regular order
- a particular succession of events or actions
- regular or natural order or development.

It would appear that this requirement that the offensive behaviour be repeated in order to constitute a violation of the *Code* reflects the case law prior to the inclusion of express provisions governing harassment in the *Code*.

The difficulty arises with comments or conduct which are extremely offensive, racially motivated and yet do not meet the test of being "a course of vexatious comment or conduct ...". An example would be a fact situation such as the *Jeffers* case where a landlord or the landlord's agent advised a black tenant that he intended to get rid of all blacks in the building, but made the statement only once. While, as previously stated, this was held to be a violation of the existing *Code* provisions regarding accommodation, this would not be the case under the existing *Code* if the current definition of harassment were applied. Similarly, how many times must a black employee be told by an employer or his/her representative that they are going to get rid of all black workers before that black employee can be viewed as experiencing a work environment (i.e., a term or condition) significantly different from that experienced by the non-black employees? In my opinion, such an employee need only be advised once that his/her supervisor or co-employee is a racist or views blacks in a particular manner before being entitled to rely on that information and have any resulting apprehension

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42. See also *Manitoba Human Rights Code*, *supra* note 28, s. 19, and *Newfoundland Human Rights Code*, R.S.N 1970, c. 262, as amended, ss. 8.1 and 10.1.

43. 6 C.H.R.R. D/445 (Appeal denied November 1986 by Divisional Court).

considered legitimate. Yet, applying only the current definition of "harassment", such a comment quite likely would not be held to violate the *Code*.

In other jurisdictions, existing case law would sanction a finding of liability in such circumstances. In *La Commission des Droits de la Personne du Québec c. La Communauté Urbaine de Montréal et MM. Les Argent Remi Gauthier Pierre Lecuyer et al.*,<sup>44</sup> damages were awarded for one racist insult directed toward the complainant by a member of the Montreal police force, although the particular police officer responsible for the slur could not be identified.

Again, in the case of *Emilda Schaffer v. Treasury Board of Canada*<sup>45</sup> the Tribunal was confronted by allegations of one or at most two incidents of allegedly racist conduct. In that case, the Tribunal treated the number of incidents as inconsequential and appeared to focus on the seriousness of the incident. The Tribunal stated at paragraph 19520:

*Although considerable argument was raised on this point, we find there is nothing to be gained by analysing whether the incidents involved constituted one continuous incident or two separate incidents. There is no question that the first incident involved the mutual exchange of insults and that those of Mr. Coté were clearly racial in nature. The slapping incident the following day was not clearly characterized as racial even by Mrs. Schaffer, either when she filed her union grievance or when she testified before the tribunal.*

As in the case of systemic discrimination, jurisprudence in the Supreme Court of Canada appears to have overtaken the slower process of legislative reform and has afforded the opportunity of creative solutions to the problem of a restrictive definition of harassment. In its May 4, 1989 decision in *Janzen and Govereau v. Platy Enterprises Ltd. et al.*, a unanimous Court held sexual harassment fell within the scope of sex discrimination, even in the absence of a specific prohibition against any form of harassment in the pre-1988 *Manitoba Human Rights Code*. Significantly, in coming to this conclusion, the Court borrowed from the analogy of racial harassment to formulate its working definition of sexual harassment:

I am in accord with the following dictum of the United States Court of Appeals for the Eleventh Circuit in *Henson v. Dundee*, quoted with approval in the *Meritor Savings Bank* case:

*Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.*

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44. (1983) C.H.R.R. D/265.

45. (1984) 5 C.H.R.R. D/394.

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas*, *supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Arjun Aggarwal, in his article quoted earlier, offers an additional explanation for the increased vulnerability of women to sexual harassment. Drawing an analogy to the practice of racial discrimination where racial slurs reinforce perceived racial inequality, Aggarwal argues that sexual harassment is used in a sexist society to (at p. 506): "underscore women's difference from, and by implication, inferiority with respect to the dominant male group" and to "remind women of their inferior ascribed status".<sup>46</sup>

In my view, the effect of this decision in the area of racial harassment, slurs and jokes is to create two distinct and overlapping heads of liability: (1) conduct coming within the narrow harassment provisions of the statute, and (2) a wider range of conduct — any objectively offensive conduct of a racial nature which has the effect of creating a poisoned work environment. Thus, using the earlier example of a supervisor's statement to a black employee that they are going to "get rid of all you black bastards", it can be argued that such an offensive and demeaning racial comment, even if stated only once, has the effect of changing the terms and conditions of employment and thereby creating a poisoned work environment. This shift away from the quantitative analysis has already been indicated in the *Gauthier* and *Schaffer* cases discussed above.

The problem arising from comments directed to individuals other than the complainant can be manifested in a number of ways such as:

- slurs about the complainant to others;
- slurs made to others about the racial group of which the complainant is a member; or
- racial slurs made about other racial groups to the complainant.

Regardless of whether an individual is aware of the slurs made against him or her, either personally or as a member of a particular racial group, such comments could constitute a violation of the general equality rights provisions. Depending on the nature of the statements, the context, and perhaps also the frequency, it could be argued that such

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46. At 33-34 and 34-35.

comments have the effect of changing the terms and conditions of the individual's employment, tenancy, etc. as they establish a "them/us" barrier on the part of those persons who hear them. This results in the view that those individuals who are the targets of the comments are something less than equal to their co-employees/tenants, etc. This, in turn, has an impact on those persons' ability and opportunity to interact equally with their peers. At the very least, it could be argued that the targets of such negative comments have been treated differently simply because they have experienced or have been subjected (again possibly without their knowledge) to a negative characterization of their race to which others are not subjected.

Another argument applied to such circumstances may simply be that a person's right to equal treatment on the basis of race has been violated as a result of an environment tainted/poisoned by prejudice. This approach has been taken in American jurisprudence.

In the American case of *Rogers v. Equal Employment Opportunity Commission*<sup>47</sup>, the complainant had argued that, as a member of a minority group, she was discriminated against by her employer's practice of segregating his optometry patients, and that it was so demeaning as to constitute an invidious condition of employment and an unlawful employment practice.<sup>48</sup> In response, the employer had argued<sup>49</sup> that the charge could not relate to an unlawful employment practice because it alleged discrimination toward the petitioner's patients and not towards any employee. Essentially, the contention is that their discriminatory treatment or classification of patients is not a practice directed toward any employee and that the complainant, as a result, could not complain that she was treated any differently from any other employee. The U.S. Court of Appeals stated, however:<sup>50</sup>

*The employer's failure to intentionally direct any discriminatory treatment toward minority group employees was not material to a finding on an unlawful employment practice on the part of the employer in segregating optometry patients with the allegedly resulting effect on the employee's sensibilities. If the alleged patient discrimination was a sophisticated method of perpetuating discrimination among employees, the employee was the primary object of the discriminatory treatment and would be entitled to protection under the Unlawful Employment Practices of Civil Rights Act of 1964.*

Also, in the case of *Waters v. Heublein Inc.*,<sup>51</sup> a white woman brought an action under the *Civil Rights Act* charging a corporation with discriminatory employment practices against women, blacks and Spanish-surnamed Americans and seeking compensation and injunctive relief. The court, in that case, held that her standing to sue to enjoin discrimination against groups to which she does not belong depended on whether she was a "person claiming to be aggrieved" by such discrimination. In making that determination, the court referred to

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47. (1971) 454 F. 2d 234.

48. *Ibid.* at 235, para. 12.

49. *Ibid.* at 239, para. 7.

50. *Ibid.* at 235, para. 7.

51. (1976), 547 F 2d. 466.

the earlier case of *Trafficante v. Metropolitan Life Insurance Co.*<sup>52</sup> That case concerned racial discrimination in housing and an alleged violation of Title 8 of the *Civil Rights Act* of 1968. Two tenants, one white, one black, of an apartment complex owned and operated by the defendant, brought action alleging discriminatory rental practices aimed at non-whites. A unanimous Supreme Court held that the term "person aggrieved" includes persons not themselves the objects of discrimination, who are injured "(by) loss of important benefits from inter-racial associations". As a result of the holding in that case, the court held in the *Waters* case that Ms. Waters had standing to redress racial and ethnic discrimination.

Often a defence or rationale offered for racial comments within an employment or accommodation setting, is that the person accused of such behaviour was simply joking, or that such name-calling was an accepted and integral part of a particular workplace and that everyone took part in it. This argument was addressed, to some extent, in the case of *Harjit S. Ahluwalia v. Metro Toronto Board of Commissioners of Police and Inspector Dixon*.<sup>53</sup> In that case, the Board of Inquiry, confronted with such a dynamic, made the following statement:

*I have no doubt in finding on all the evidence that there was persistent racial harassment by way of racial name calling by fellow police officers. ... This harassment by way of name calling constitutes a breach of paragraph 4(1)(g) of the Code as there was discrimination on a prohibited ground with respect to the condition of employment. ... (It) is not a defence to say that the racial name calling was in jest or that everyone was called nicknames, or that one had to be toughened up before dealing with the public on the street. The fact that the conscious motive may be not to harm the recipient does not excuse racial name calling in the workplace, or make unlawful conduct lawful. The named recipient (who has not expressly and truly and freely agreed to being called racial epithets — which would be very rare indeed) of racial name calling within the employment relationship has the right to protection under paragraph 4(1)(g) of the Code because of its hurtful effect. Moreover, the employer who knows, or should reasonably know, of such racial name calling by some employees, must take reasonable actions to stop it, or the employer, as well as the offending employees, is personally liable under the Code for a breach of paragraph 4(1)(g).*

Once again, however, while clearly using racial epithets in jest will not be a defence to allegations of a poisoned work environment, an objective standard or test must be applied to the context of the exchange, as well as the relationship and history of the parties.

A Board of Inquiry has also addressed the issue of racial abuse being directed to employees of various backgrounds in a particular workplace. In the case of *Avtar Singh v. Domglas Limited*,<sup>54</sup> the Board stated as follows:

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52. (1972), 409 UF 205.

53. C.H.R.R. D/61, para. 2527.

54. C.H.R.R. D/61, para. 2527.



*I would add that racial abuse is inherently discriminatory because it singles out persons on the basis of their race or ethnic origin. Thus, it is no defence that such abuse is indiscriminately being carried out at the same time in relation to employees of many different backgrounds.*

In Ontario, even prior to the Supreme Court decision in *Jantzen*, the Human Rights Commission had formulated a policy on racial slurs and harassment and racial jokes which follows the approach described in this section.

#### IV. RACE RELATIONS AND POLICING

In Ontario, a sense of crisis followed the deaths of Lester Donaldson and Michael Wade Lawson, both black and both shot in separate incidents by on-duty police officers from different Ontario forces. The deaths lead to what one observer described as "an atmosphere of mutual mistrust and pessimism" between representatives of visible minority communities and the police forces. Visible minority leaders stated that their communities were not policed in the same manner as the mainstream white community. Their allegations led to the creation of a Task Force on race relations and policing, which issued its report in April 1989. The Task Force concluded that "relations between police and visible minorities in the Province of Ontario are at a dangerously low level".<sup>55</sup> The Task Force concentrated on three principal areas of concern: hiring and promotion within police forces; race relations training for officers; and community relations.

All of these areas represent issues of potential systemic discrimination in the provision of employment or services by police forces in Ontario. All police activity and all police officers are governed by the *Human Rights Code*, as are all other Ontario institutions. The provisions of the *Code* that most specifically apply to allegations of discrimination by the police are sections 1 (Services), 4 (Employment) and 10 (Systemic Discrimination). These provisions state:

*1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.*

*4(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.*

*4(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin,*

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55. *Report of the Race Relations and Policing Task Force* (April 1989) at 35.

*citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.*

*10(a) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,*

- (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or*
- (b) it is declared in this Act, other than in section 16, that to discriminate because of such ground is not an infringement of a right.*

*(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and bona fide in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the costs, outside sources of funding, if any, and health and safety requirements, if any.*

The Ontario Commission has received and inquired into complaints alleging discrimination or harassment by the police, both as service providers and as employers. Thus, for example, the following incidents were recently reported to the Commission:

- An officer of the Ontario Provincial Police was charged with aggravated assault after he shot a black man in Ottawa. Many members of the black community believe that the shooting was racially motivated, and represents an alarming trend of violence among the police.
- Also in Ottawa, taxi drivers of Latin American origin allege that they receive little or no support from the police when their passengers refuse to pay the fare.
- Many complaints allege that the police are more sympathetic to the accounts given by white persons in a neighbourhood dispute than to those of non-white persons.

Particularly in the area of native-police relations, a number of concerns have been raised:

- Many Natives cannot understand the justice system, and particularly the plea bargaining that is conducted by their lawyers.
- There is a shortage of Native police officers and a concern that many non-Native officers lack sensitivity to their cultural needs and aspirations.

- There is a failure to recognize and draw on the strength of their institutions and the experience of their professionals such as the native court workers.
- There is an increasing need for Native communities to establish their own justice system using an independent judiciary and law enforcement structure that is more able to reflect their culture and values.
- Racism has motivated many incidents of random violence involving Native peoples and the police.

In the area of hiring and promotion, the Task Force found evidence of systemic discrimination. While Ontario's population is approximately 9% visible minorities, and Toronto's approximately 20%, just 22 of 99 municipal police forces and the Ontario Provincial Police employed members of visible minorities, and in total less than 2% of the police officers were members of visible minorities. By far the greatest representation was in Metropolitan Toronto, with 3.9%, and Peel Region, with 4.1%, but in these areas, at least 12% of the available general labour pool was made up of visible minorities. In the Ontario Provincial Police, the visible minority component was 0.4%. The Task Force concluded that Ontario Police Forces were "out of step with the general labour market"; and indeed "Ontario police are among the least representative institutions in our society".<sup>56</sup> Moreover, the Task Force found that the low representation rates were attributable in large part to the inability or unwillingness of police forces to engage in the act of recruitment and hiring of visible minorities, even though it was evident that in this and other areas of employment, the traditional or passive methods had proven ineffective. To remedy an apparent situation of systemic discrimination in its recruitment and promotional practices, the Task Force recommended a comprehensive employment equity program. Under the program, each municipal police force would be responsible for setting up a five year program of hiring and promotional goals and time tables. In default, a reservations and policing review board would take over the responsibility. Finally, any failure to meet such targets and timetables could be referred to the Ontario Human Rights Commission as a complaint of systemic discrimination.

On the question of training, the Task Force reported that visible minority communities generally believe that police forces are not adequately trained to respond sensitively to the needs of racial minority communities. Again, "the system" (designed in an altogether historically different demographic environment), provided little special attention to the needs of visible minority communities nor to the existence of "deep seated beliefs", stereotypes and prejudices built up through a lifetime of socialization".<sup>57</sup> As one consultant noted during the Task Force hearings, police forces are the main agents of social control in a democratic society. While in the past their paramilitary organization and philosophy has been associated with traits of strength, assertiveness and authoritarianism, today, these traits often conflict with the need for tolerance and understanding of differences in cultural characteristics and habits, as well as the ability to communicate across gaps between diverse cultures.

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56. *Ibid.* at 57, 63.

57. *Ibid.* at 94.

To assist in bridging these gaps and to ensure that police training is relevant to the tasks which police officers must perform in today's society, the Ontario Human Rights Commission has assisted the police forces in four Northern Ontario cities with cross cultural training to create greater understanding of native cultures. Yet, across Ontario, the Task Force found that in spite of repeated calls for mandatory race relations and cross-cultural sensitivity training for police officers over the past decade, the existing programs fell "so far short of what is needed, in both design and delivery, that it is not only inadequate but may also result in reinforcing stereotypes".<sup>58</sup>

The Task Force's central recommendation concerning race relations training programs was as follows:

*The Task Force recommends that the Solicitor General impose an immediate moratorium on all race relations training programs and planned initiatives pending the review and replacement of all existing race relations programs.*

- (a) Further, the Task Force recommends that the Solicitor General require that, by January, 1990, the instructional materials and training programs used by all police forces and training institutions be reviewed jointly by the Solicitor General, the Municipal Police Authorities, the Ontario Association of Chiefs of Police, the Police Association of Ontario, the Ontario Race Relations and Policing Review Board and civilian consultants for the purposes of developing a basic race relations training program and integrating race relations issues into all aspects of police training.*
- (b) Further, the Task Force recommends that the review of training materials ensure that visible minority civilians and police officers of both sexes be appropriately depicted in all departments and in all ranks, interacting with each other and with white officers and civilians.*
- (c) Further, the Task Force recommends that all police race relations training manuals be available for review by the public.*
- (d) Further, the Task Force recommends that, by June 1990, a race relations program be designed jointly by the Solicitor General, the police, representatives of visible minority communities and civilian consultants with expertise in race relations training for use by all police forces, training institutions and police governing authorities.*
- (e) Further, the Task Force recommends that this program be implemented by all police forces, training institutions and police governing authorities by December 31, 1990, and be monitored and evaluated every year for the first three years and every five years thereafter by the Ontario Race Relations and Policing Review Board.*

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58. *Ibid.* at 97.

In the section on police-community relations, the Task Force report referred to the police and visible minority communities as "two solitudes". The Task Force noted that in some areas of the province, relations between these groups are "strained at the best of times", and that "following a confrontation, they deteriorate dramatically, leaving a gulf of mutual misunderstanding and sometimes outright hostility".<sup>59</sup> The Task Force heard evidence of two forms of discrimination: neglect and harassment.

*Firstly, members of visible minorities allege that police often fail to protect them adequately or to respond to their requests for assistance. For example, battered women from the visible minority community believe that they receive less sensitivity from police than do white females who have been abused. Most abused women, regardless of colour, express frustration over police response time and attitudes. However, visible minority women allege that police are particularly slow in responding to their calls and that many police seem to believe they somehow like or deserve abuse from men.*

*Secondly, those persons who complained of active harassment told the Task Force of different types of objectionable encounters with police. For example Beverly Folkes described the experience of an acquaintance:*

*Harassment is being released from prison, finding a job, to have a police officer come to your job and ask your employer, "Why have you hired him, don't you know he's a criminal?"*

*She went on to tell of visible minority young people constantly being stopped by police on the street, especially after dark. She told the panel:*

*The questions are always being asked (by police): "Where are you going?" "Where are you coming from?"<sup>60</sup>*

What emerged, therefore, was evidence of police conduct which, if asserted in the context of an individual or group complaint, might constitute intentional or systemic discrimination. The Task Force found that there was uncertainty within police ranks of what conduct represented racial discrimination and harassment, and so it recommended that the Ontario Association of Chiefs of Police and the Ontario Human Rights Commission develop a working definition of racially prejudiced police behaviour, to be incorporated into the *Provincial Police Act*.

On another level, the Task Force criticized the reactive method of policing, which was said to measure success by its volume of arrests and convictions, as "unresponsive, alienated and rigid" and "failing to meet community needs". The Task Force, like the Human Rights Commission, made a plea for community-based policing, which would enlist the cooperation of communities which were fearful and resentful and elicit information without adopting an authoritarian manner. As further remedial measures, the Task Force

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59. *Ibid.* at 151.

60. *Ibid.* at 153-54.

recommended the establishment of a Race and Ethnic Relations Unit within all police forces; rotation amongst various sections of the police force into such Race and Ethnic Relations Units; a direct reporting relationship between such Units and the Chief or Deputy Chief of Police; and the establishment of visible minority advisory committees for police forces with more than 100 members. Thus, without making a direct finding of discrimination, because of its limited fact-finding capability and institutional role, the Task Force arrived at conclusions and recommendations which resemble at least a portion of the range of remedial orders which would be available in a systemic discrimination complaint under the Ontario Human Rights Code.