Visible Minorities and Discrimination in Canada

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I. INTRODUCTION

I have never liked the term "visible minorities". A police officer once claimed to me that uniformed police were a visible minority. But the term does not apply to all collections of people who can be identified by the eye. It is a euphemism that seeks to avoid the word colour. The term "coloured people" was replaced by the description "Black" in the United States because it became unacceptable. To describe some individuals as "coloured people", it was theorized, implies that not to be coloured is the norm.

The same type of problem arises in Canada. For example, the term "East Indian" is not acceptable to describe people from Pakistan. The term "Indo-Pakistani" does not include persons from Sri Lanka, from Africa, and from as far away as Fiji. Some object to any term describing people in terms of original nationality because they proudly and rightfully wish to be recognized as Canadian. Even hyphenated, terms such as "Indo-Pakistani-Canadians" or "Chinese-Canadians" are taken to imply they are not recognized as completely Canadian.

In the absence of a suitable alternative one must surrender to using "visible minorities". Moreover, the term has been recognized by Parliament in the *Employment Equity Act*.[1] Visible minorities are defined in the Employment Equity Regulations as "persons, other than aboriginal peoples, who are ... non-Caucasian in race or non-white in colour..."

While the definition refers to both race and colour, colour is determinative for two reasons. First, according to traditional classification, the racial group Caucasian includes non whites such as people from the Indian sub-continent and the indigenous people of Australia. Second, any racial classification may be arbitrary.

Dictionary definitions of "race" are clear: "One of the great divisions of mankind, having certain physical peculiarities in common." However, classification of humankind into those great divisions cannot be done satisfactorily. Prior to the development of the science of genetics, beginning with the efforts of the Swedish botanist Carolus Linnaeus, racial classifications supposedly depended on observable macro-physiological attributes, such as skin colour, bone structure, hair structure and so on. These early systems generally divided humankind into three major groups: Caucasian, Mongolian and Negroid. The division into three groups was probably necessary to accord with the belief that human beings descended from the three sons of Noah. The fact that humankind did not fit neatly into three groups was ignored. Differences within a racial group were as great or greater than the differences between racial groups.

More modern classification systems have concentrated on single-gene traits; these hereditary traits that depend on a single-gene and which are thus more susceptible to study. From this perspective, classifying the human species into three great divisions cannot be rationalized and the very concept of "race" in the popular sense approaches meaninglessness. In *Mandla v. Lee,* a 1983 House of Lords case involving the application of the *Race Relations Act, 1976*, where the meaning of race was considered, Lord Fraser said:

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1. S.C. 1984-85-86 C. 31.

> *... the briefest glance at the evidence in this case is enough to show that, within the human race, there are very few, if any, distinctions which are scientifically recognized as racial."*[2]

As early as 1972, Lord Simon of Glaisdale had said in *Ealing London Borough Council v. Race Relations Board*, another case involving the *Race Relations Act*:

> *Moreover "racial" is not a term of art, either legal or, surmise, scientific. I apprehend that anthropologists would dispute how far the word "race" is biologically at all relevant to the species amusingly called homo sapiens."*[3]

In the *Mandla* case Lord Fraser recognized that it was impossible to deal with "race" as a biological term. He said:

> *... it would be absurd to suppose that Parliament can have intended that membership of a particular racial group should depend on scientific proof that a person possessed the distinctive biological characteristics (assuming that such characteristics exist.) The practical difficulties of such proof would be prohibitive, and it is clear that Parliament must have used the term in some popular sense."*[4]

No guidance as to the meaning of "race" can be gleaned from jurisprudence developed in Canada under human rights legislation. Boards and tribunals which have dealt with complaints based on "race" have simply assumed the ground to be established after seeing the complainant in the witness box. The only case to discuss the meaning of race is more amusing than instructive. In *Ali v. Such*[5] the ministerial order appointing the Board specified only the ground "race" and even though *The Individual's Rights Protection Act* included the grounds "colour" and "national origin", these were not alleged. The complainant had described herself as a black Trinidadian. The Respondent testified he knew nothing about Trinidad but stated "I don't rent to coloured people."

Perplexed by the jurisdictional dilemma the Board canvassed dictionary definitions, observed that "... characteristically, the Negroid race has black or dark skin," and sustained the complaint.

The Supreme Court of Canada has indicated that usage is determinative. In *Reference re "Indians"*,[6] the Supreme Court had to decide whether the term "Indians" in the *Constitution Act, 1867*, included "Eskimos". The Court did not examine the question from an anthropological perspective. Rather it embarked on an exhaustive analysis of historical

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2. [1983] 2 A.C. 548 (H.L.) at 561.

3. [1972] A.C. 342, (H.L.) at 362.

4. *Supra* note 2 at 561.

5. Alberta Board of Inquiry (1976), described in W.S. Tarnopolsky, *Discrimination and the Law in Canada* (Toronto: de Boo, 1982) at 159.

6. [1939] S.C.R 104.

documents before determining that by the usage of the day the term "Indians" included "Eskimos".

The resort to usage is sensible. In Canada, by usage, the term "race" simply means "colour", and the current euphemism happens to be "visible minorities". These terms are used interchangeably.

II. THE PAST

The history of early American judicial response to racial discrimination is well known. Cases such as *Plessy v. Ferguson*,[7] are widely known for affirming the "separate but equal" doctrine. The American judiciary considered this doctrine acceptable on the basis that only "natural affinities" and not enforced comingling could cause the two races to meet on an equal footing. While some, like the dissenting Justice Harlan, objected to this doctrine as it enforced the dominance of the Caucasian race, most found both the doctrine and its purposes acceptable and even natural. While the Canadian experience is not as well known, it is not significantly different.

The first visible minorities in Canada were black slaves who were brought to Nova Scotia when Halifax was founded. After the American Revolution the white Loyalists brought with them several thousands more black slaves, and free black Loyalists also arrived. The further introduction of slaves was prohibited in 1793 and in 1798 Chief Justice Monk of the Court of King's Bench of Montreal released two slaves and expressed his opinion that slavery did not exist in the province. Until the American Civil War runaway slaves from the United States fled Canada and settled in the Windsor area, as well as in Nova Scotia.[8]

The early black communities suffered much discrimination. For example, the early Nova Scotia legislation provided that provincial funding for a school would commence only after local residents had built the school and successfully operated it six months.[9] The black communities lacked the resources to fulfil this condition and their children did not receive an education.

On the west coast the first visible minorities, in addition to facing special taxes, were denied equal opportunities and equal status **by law**. For example, the British Columbia Coal Mines Regulations Act, s.4 provided:

> *No boy under the age of 12 years, and no woman or girl of any age,* and no Chinaman *shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground* (emphasis added)

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7. (1896), 163 U.S. 573.

8. Tarnopolsky, *supra* note 5 at 1ff.

9. *An Act to Establish Grammar Schools in Several Counties and District of this Province*, S.N.S. 1811, c.9

The purpose of the legislation was to prevent Chinese workers from having an equal opportunity for employment in the mining industry.

The Privy Council, in *Union Colliery Co. of British Columbia v. Bryden*,[10] found this Act to be *ultra vires* the province as it fell within the authority of the Dominion government with regard to "naturalization and aliens". In later cases the Court departed from this expansive view of the federal power over "naturalization and aliens."

In October 1900, Mr. T. Homma, a Canadian citizen applied to be placed upon the register of voters for the electoral district of Vancouver city. The collector of voters refused to do so relying on Section 8 of the *Provincial Elections Act*[11] which provided: "no Chinaman, Japanese or Indian shall have his name placed on the register of voters of any electoral district or be entitled to vote at any election".

Mr. Homma was a naturalized Canadian of Japanese origin. The definition of "Japanese" in the *Act* included "any person of the Japanese race naturalized or not". In *Cunningham and A.-G. for British Columbia v. Tomey Homma and A.-G for Canada*,[12] the House of Lords decided that the Legislation was *intra vires* the Provincial Legislature. The Court departed from its earlier ruling in *Union Colliery* by finding that the federal power over "naturalization and aliens" did not preclude the provinces from dealing with the privileges attached to that status. Therefore, the province of British Columbia had the authority to deal with suffrage and those falling into the *Act* had no right to vote. It should be noted that universal suffrage did not yet exist and hence, the right to vote was not recognized as a fundamental right. Japanese, Chinese and East Indian Canadians did not gain the provincial and federal vote in British Columbia until 1947-48.

In May 1912, Mr. Quong Wing, a Canadian citizen and the owner of the "CER Restaurant" in Moose Jaw, Saskatchewan was convicted of having employed Mabel Hopham and Nellie Lane as waitresses. Mr. Wing was Chinese Canadian, and Ms. Hopham and Ms. Lane were white Canadians. Section 1 of an *Act To Prevent The Employment of Female Labour In Certain Capacities*[13] provided:

> *No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or work in or, serve as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.*

Mr. Quong Wing's conviction was upheld by the Supreme Court of Canada in *Quong Wing v. The King*.[14] Chief Justice Fitzpatrick felt that this legislation was a justifiable

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10. [1899] A.C. 580.

11. R.S.B.C. 1897, c.67.

12. [1903] A.C. 151.

13. S.S. 1912-13, c. 18.

14. (1914), 49 S.C.R. 440.

attempt to protect the morals of women and girls and only incidently affected the civil rights of Chinese.

Justice Davies found that the legislation did affect the property and civil rights of Chinese. However, this infringement was found to be permissible as it was for a bona fide purpose.

Justice Duff distinguished the fact situation from that in *Union Colliery*. He found that since the law applied equally to aliens and naturalized subjects of a particular race the province was not infringing the federal authority over "naturalization and aliens."

While the first Chinese came to Canada from the United States in the gold rushes of the 1850s, the first significant immigration was in the early 1880s when the Canadian Pacific Railway "imported" some 15,000 Chinese "coolies" to build the railroad. It had been planned that the Chinese would return to China after the work was completed, but about 5,000 had sent so much money home they couldn't afford their passage back. The dispute between the C.P.R. and the government as to who was responsible for the cost of repatriation became a stalemate and the Chinese stayed. In spite of attempts to restrict their immigration, there were sizeable Chinese and Japanese communities in Vancouver at the turn of the century.

On September 7, 1907 a mob, estimated by the Vancouver Daily Province at some 30,000, led by the Asiatic Exclusion League, attacked the Chinese and Japanese inhabitants of Vancouver. The riot took place on a Saturday night. The Monday edition of the Vancouver Daily Province of September 9, 1907 reported:

> *By nine o'clock in the evening the thousands of people who could not gain admission to the City Hall where the big anti-Asiatic mass meeting was being held, began to search for diversion elsewhere, and it was this crowd, disappointed in not gaining entrance to the overflowing hall, which split into small sections, some of which eventually consolidated into the property smashing mob.*
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> *Thirty thousand people thronged the streets in the vicinity of the zone of disturbance, for there was an indefinable something in the air which carried a message of trouble impending.*

When the mob entered Chinatown,

> *Bricks and stones started to fly in every direction, and the noise of shattered glass falling into stores and to pavement answered the volleys of the mob. Chinese took to their heels, running into stores and barricading doors as rapidly as possible while the tumult lasted.*

Soon,

> *... the mob headed in the direction of Japtown... by ten o'clock in the evening practically every policeman on duty in Vancouver was on guard either in Chinatown or Japtown.*

> *Clubs were drawn by the blue coats, and calls were sent in for the fire brigade because of the fear that the mob might eventually decide to add arson to the list of its other crimes.*
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> *The crash of broken glass and the shouts of besieged Japanese rent the air as the mob reached the intersection of Powell Street and Westminster Avenue. The plate glass windows in a large Japanese store at the southeast corner of the street were in small pieces in less than half a minute, and volley after volley of stones and bricks were hurled into the interior of the shop, with the consequent damage to stock.*
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> *The police on the scene were utterly unable to cope with the mass of struggling, cursing, shouting humanity which surged back and forth under the glare of the street arc lights. While in front the police were pushing and crowding the mob back, bricks and stones came flying from the rear over the heads of those in the van.*
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> *The crash of glass was continual. Window after window was shattered in other stores and boarding houses in the vicinity as the riotous gang pushed further into the thoroughfare lined with nests of Japanese.*

Finally the Japanese fought back:

> *Armed with sticks, clubs, iron bars, revolvers, knives and broken glass, the enraged aliens poured forth into the streets. Hundreds of little brown men rushed the attacking force, their most effective weapons being the knives and bottles, the latter being broken off at the neck, which was held in the hands of the Jap fighter. The broken edges of glass clustering around the necks of the bottles made the weapon very formidable and many a white man was badly gashed about the arms, neck and face...*
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> *Armed only with stones, the mob could not stand before the onslaught of knives and broken bottles propelled by the Japanese while they made the air ring with "Banzais". Many of the Japanese went to the ground as stones thumped against their heads, but the insensible ones were carried off by their friends, and the fight kept up till the mob wavered, broke and finally retreated.*

The Newspaper's editorial is especially interesting. The editorial described the "mob of roughs" who "occupied the oriental quarters" and "terrorized the Chinese and the Japanese" as a "disorderly element, which, "though as a rule quiescent, is ready to break out on occasion into lawless acts". The editorial called on the police and mayor to demonstrate that "we are prepared to deal with this element; that we simply will not have lawlessness on any account whatever".

However, the editorial continued:

> *With regard to the demonstration against Asiatic immigration that came to such unfortunate a finish, it may be said that it was conducted by an organization with the objects of which most British Columbians agree, and for the attainment*

> *of the aims of which the B.C. local government has again and again vigorously striven. We are all of the opinion that this province must be a white man's country. We hold it in trust to preserve it for our race. We do not wish to look forward to a day when our descendants will be dominated by Japanese, or Chinese or any colour but their own. We are, as has been well said, an outpost of the empire, and that outpost we have to hold against all comers.*

Prime Minister Laurier sent his young Deputy Labour Minister to Vancouver to investigate. His name was Mackenzie King. On the basis of King's report, the Chinese were awarded $100,000.00 in compensation and the Japanese an undisclosed amount. Further restrictions were put on Chinese immigrants in part because of King's report which identified immigration as a problem. In his Report King said:

> *That Canada should desire to restrict immigration from the Orient is regarded as natural, that Canada should remain a white man's country is believed to be not only desirable for economic and social reasons but highly necessary on political and national grounds.*

Later on May 1, 1947, when he was Prime Minister, King addressed the House of Commons on Canada's immigration policy. His statement "served as the official formulation of Canadian immigration policy until 1962".[15] In part he said:

> *There will, I am sure, be general agreement with the view that the people of Canada do not wish, as a result of mass immigration, to make a fundamental alteration in the character of our population. Large-scale immigration from the Orient would change the fundamental composition of the Canadian population. Any considerable oriental immigration would, moreover, be certain to give rise to social and economic problems of a character that might lead to serious difficulties in the field of international relations. The government, therefore, has no thought of making any change in immigration regulations which would have consequences of the kind.*[16]

There is another event worth mentioning here. In 1910, an Order in Council was passed requiring immigrants designated by the Governor in Council to have come to Canada "by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepared in that country". This Order was geared to restrict East Indian immigration as there were no ships operating directly between India and Canada. However in 1914 an enterprising Gurdit Singh chartered a Japanese vessel, the Komogata Maru, and sold tickets in the Punjab for a continuous journey to Canada. On May 23, 1914 the Komogata Maru arrived in Vancouver with 376 would-be immigrants aboard. The perplexed immigration officials refused to let the East Indians disembark relying on a 1908 Order in Council that required all "Asiatic" immigrants to be in possession of $200.00. The Indians argued that this provision could not apply to them as they were British subjects and refused to leave. The boat sat in Vancouver Harbour. On July 6, 1914, the British

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15. Freda Hawkins, *Canada and Immigration* (Kingston: McGill-Queen's University Press, 1972) at 91.

16. Excerpt from Hansard, 1 May 1947.

Columbia Court of Appeal decided in *Re Munshi Singh*, [1914] B.C.R. 243 the Canadian Parliament could authorize the deportation from Canada of British subjects. Regulations made under s.37 of the *Immigration Act* could apply to British subjects (Section 37 delegated authority to the Governor in Council to make regulations providing "as a condition to land in Canada that immigrants and tourists shall possess money to a prescribed minimum amount which amount may vary according to race").

The Japanese captain was ordered to sail, but the Indians took over the ship and refused to budge. On July 19, 125 Vancouver policemen, and 35 special immigration agents attempted to board the freighter and were beaten off, some 30 of them sustaining injury. Finally on July 23, two months after its arrival, the Komogata Maru was escorted out to sea under the guns of the S.S. Rainbow, a naval cruiser. The Ottawa Citizen editorial said:

> *Sending a tug laden with police and armed gunmen to deal with the Hindus is really the limit of comic opera government. ...It is hoped that ... someone responsible for the government of Canada has taken action to stop buffoon campaigns against the Hindus... The shipload at Vancouver were not sent there to become targets for hilarious hose players..."*
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> and
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> *To use the little British-Canadian cruiser against British Indian subjects would seem to be the height of inconsistent imperialism...*[17]

Another example of establishment discrimination was the practice of the B.C. government of issuing timber licences with the following stipulation: "this licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith."[18] In 1923, the cancellation of a company's timber licence was upheld by the Privy Council, because the company hired Chinese-Canadians.[19]

In eastern Canada lower court decisions varied widely in their responses to the discriminatory treatment of Blacks. Not all courts were unsympathetic to their position. In *Johnson v. Sparrow et al.*,[20] before the Quebec Superior Court, the plaintiff had bought tickets for orchestra seats at the theatre. However, when he arrived the ushers would not allow him to sit in that section. The theatre had a policy of not allowing Blacks in the orchestra section and offered him alternate seating which he refused. Mr. Johnson was successful primarily because the seats had already been leased to him and the theatre could not unilaterally alter the terms of the agreement.

The Supreme Court of Canada affirmed freedom of commerce in *Christie v. York Corporation*, [1940] S.C.R. 139. A tavern in the Montreal Forum had a policy of not serving Blacks, and Mr. Christie, who had been refused service, sued for damages for injury to his

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17. Quoted in T. Ferguson, *A Whiteman's Country* (Toronto: Doubleday 1975) at 125.

18. *Infra* note 19 at 454.

19. *Brooks-Bidlake and Whittall Ltd.* v. *A.-G. of British Columbia* [1923] A.C. 450.

20. [1899] Q.R.C.S. 104.

reputation and humiliation. The Supreme Court ruled that a merchant was free to deal as he may choose with any individual member of the public regardless of his motives for doing so.

Perhaps the best known of all the historical cases dealing with racial discrimination is *Cooperative Committee on Japanese Canadians v. A.G. for Canada*.[21] In this case, the Privy Council considered the legality of three Orders in Council passed in 1945 under the authority of the *War Measures Act*. These riders authorized the Minister of Labour to make deportation orders against Japanese persons, including a "natural-born British subject of the Japanese race" and their families. The Court found the Orders to be *intra vires* the federal government as the *War Measures Act* authorized the making of deportation orders against any person regardless of their status. Although deportation is customarily directed only at aliens, the Court felt that nationality was not per se relevant. Furthermore, the Court felt that once a deportation order was issued, the government could deprive these persons and their families of their nationality. It was felt that these Orders were made for an authorized purpose which justified the steps that were involved.

In Ontario, well into the 1950s, it was not unusual for title deeds of vacation property to contain covenants that the property could not be sold to non-whites and Jews.[22] As late as 1961, the Alberta Court of Appeal held that a motel owner could refuse to rent accommodations to a black individual.[23]

III. THE PRESENT

In the present era the historical cases just summarized may best be described as mere curiosities. They have no relevance or value in understanding the disposition of current discrimination cases. The disjunction between the historical cases and the current cases is attributable to changed global attitudes following the Second World War and to the enactment of Human Rights Codes. Human Rights Codes are in force in all thirteen jurisdictions in Canada, including the Territories.

The Supreme Court of Canada has accorded Human Rights Commissions exclusive jurisdiction over discrimination by foreclosing the development of a common law tort of discrimination.[24]

Race discrimination can no longer be said to be a central concern of Human Rights Commissions. When the Commissions first came into existence, publicly posted "whites only" signs were not unusual, and standard employment application forms requested the race of the applicant. Over time the Commissions' mandate has been expanded to include the grounds of age, marital status, family status, handicap, criminal record, pregnancy/childbirth,

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21. [1947] A.C. 87.

22. *Noble* v. *Drummond Wren*, [1945] O.R. 778, *Noble* v. *Alley,* [1951] S.C.R. 64.

23. *King* v. *Barclay* (1961), 35 W.W.R. (N.S.) 240.

24. *Seneca College* v. *Bhadauria*, [1981] 2 S.C.R. 181.

political belief, language, and source of income or receipt of public assistance. While race/colour complaints continue to be a significant component of the Commissions' work they are now significantly exceeded by complaints on the ground of handicap, and sex (especially if one includes sexual harassment and pregnancy).

Interestingly, there is a dramatically higher rate of dismissal of race/colour and ethnic origin complaints. This statistic led the Canadian Human Rights Commission to initiate both internal and independent studies for an explanation, and led the Ontario Human Rights Commission to set up a special Race Relations Division with its own full-time Commissioner.

The Commissions have continuously broadened what is accepted as discrimination. In the earliest cases evidence of prejudice or bias was required and often exhibited. It is now unusual for a respondent to explicitly express a preference for a "nice white girl" as in *Daisley v. Fantasy Cut*[25] or to question an applicant about his race as in *Suchit v. Sisters of St. Joseph's For Diocese of Toronto*.[26]

The Boards began to infer the requisite intention from evidence of differential treatment. Once an individual proved a *prima facie* case of differential treatment the respondent was called upon to establish a non-discriminatory reason for its decision.

In many situations proving different treatment is difficult and The Ontario Commission has gone so far as to argue the complainant's subjective perception of discrimination is actual evidence of discrimination.[27]

The latest and most significant development in human rights law, constructive or adverse effect discrimination, seems to have had little effect on race/colour complaints.

That discrimination can result from equal treatment, and that actual intention or even inferred intention is not required, was first recognized by the United States Supreme Court in a race case.[28] In *Griggs* employment requirements (high school certificate and aptitude tests) were applied equally to all applicants, but had the effect of disqualifying blacks disproportionately. The U.S. Supreme Court found the requirements to be discriminatory when the employer was unable to show that they were related to ability to perform the labouring jobs in question. In Canada this doctrine has been recognized and applied by the Supreme Court in religious discrimination cases.[29] After *Griggs*, race cases in the United States have tended to be large class actions involving validation studies of the employment requirements, and statistics regarding the internal workforce and the available labour pool. Many of these cases are resolved by "consent decrees" under which the employer adopts affirmative hiring policies.

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25. (1988), 9 C.H.R.R. 4447 (B.C. Human Rights Council).

26. (1983) 4 C.H.R.R. 1329 (Ont. Bd. of Inquiry).

27. *Johnson* v. *East York Board of Education,* unreported.

28. *Griggs* v. *Duke Power Company,* 401 U.S., 424 (1971).

29. *Ontario Human Rights Commissions* v. *Simpson Sears Limited*, [1985] 2 S.C.R. 536; and *Bhinder* v. *C.N.R.*, [1985] 2 S.C.R. 561.

This phenomenon has not occurred in Canada, and I believe it will not. Minorities in Canada are small, dispersed in the communities in which they live, and recently immigrated. Race discrimination by a large corporation in Canada tends to be the act of an individual manager rather than a reflection of corporate policy. Canadian race cases most often involve small, closely held businesses.

The few attempts to prove unintentional "adverse effect" discrimination in race cases in Canada have not been successful. In *Mears v. Ontario Hydro*[30] an Ontario Board of Inquiry considered the allegations of certain individuals that they were laid off because they were black. The Board had before it statistical data relating to the racial composition of the group of employees laid off. However, no expert testimony had been called as to what inferences could be drawn from the data and what degree of certainty these inferences might have. The Board, while lamenting that such evidence had not been called, nevertheless admitted the data but decided the case on other evidence.

In *Malik v. Ministry of Government Services*[31] the Ontario Human Rights Commission argued that the Ontario Civil Services selection procedure, which required an interview by a Selection Board, was a neutral requirement that had the effect of discriminating against persons of the complainant's race, ancestry, and place of origin. The Commission called expert testimony that the complainant's ethnic background seriously disadvantaged him in the apparently neutral interview. The Board summarized the expert's testimony:

> *An individual of Mr. Malak's background would assume a very differential, non-assertive, low key approach. The assessment procedure would make him feel his inferior and subordinate position and react accordingly. In a work environment, the person of Mr. Malak's ethnic and cultural background thinks that being non-assertive and simply doing his small job without anything further, he would demonstrate his loyalty to his superior. In exchange for that loyalty, he would expect to be cared for and protected.*[32]

The Board cursorily dismissed the complaint saying "one must show something more than this in order to show indirect discrimination arising from a superficially neutral requirement".[33] It seems then, in Canada, that race/colour complaints tend to require proof of intentional discrimination or differential treatment. This may explain, in part, the higher rate of their dismissal.

Nevertheless, there are many significant successful prosecutions and the law continues to develop. In *Karumanchiri v. Liquor Control Board of Ontario*[34] the Board found intentional discrimination against a non-white chemist when a white co-worker was appointed Director of Laboratory Services without a competition. The complainant was far

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30. (1984), 5 C.H.R.R. 1927 (Ont. Bd. of Inquiry).

31. (1981), 2 C.H.R.R. 374 (Ont. Bd. of Inquiry).

32. *Ibid.* at 377.

33. *Ibid.* at 378.

34. (1987), 8 C.H.R.R., 4076 (Ont. Bd. of Inquiry), affirmed 25 O.A.C. 161 (Ont. Ct. Gen. Div).

more qualified. The Liquor Control Board was ordered to pay the complainant the difference between what he earned and what would have been earned (over $80,000.00) and $6,000.00 for insult and hurt feelings.

What is most significant about the decision is that the respondent was ordered to grant the complainant the promotion displacing the white candidate who had held the position for over four years while the case proceeded. On appeal, the Divisional Court held that it would be contrary to the purposes of the *Code* to hold that the Board lacked jurisdiction to order that the complainant be placed in the job that was denied him.

Another development has been to extend protection to non-minority individuals because of their association with minority members, or because of their refusal to participate in discrimination. In the *Majestic Electronic Stores*[35] case there were five complainants. Four were white male senior managers who quit their jobs rather than follow their employer's directions to not hire minorities and women. The comprehensive settlement provided that some $293,000.00 in lost pay was divided by the five complainants. Each complainant also received $8,000.00 in general damages.

Another important new development is the application of the jurisprudence developed in the context of sexual harassment to race cases. The seminal case is *Dhillon v. F. W. Woolworth Company Limited*.[36]

The complainant worked in the company's warehouse where he was routinely subjected to racial slurs and insults. He informed his supervisor of this harassment by his co-workers, but no action was taken. The Board found the harassment to which the complainant was subjected was a "term or condition" of his employment not imposed on other employees, and was therefore discriminatory. The Board ordered the company to pay $1,000.00 in general damages to Dhillon and take all reasonable steps to eradicate the racial harassment, including the organization of a race relations committee in co-operation with the Commission.

The distance to which the harassment cases have been extended is indicated by *Hinds v. Canada (Canada Employment and Immigration Commission)*.[37] The complainant, who was black, had received anonymous racist material through the employer's internal mail system. The Tribunal concluded that the act was done in the course of employment because it had occurred in the work environment and found the employer responsible for the harassment by the co-employee. The Tribunal was of the view the employer too easily decided nothing could be done to identify the perpetrator or prevent a reoccurrence.

There are still many "classic" human rights complaints in which the victim has been refused simple service in a restaurant or accommodation in a motel. Sadly these cases most often involve native Canadians. Shamefully, in some cases the police when summoned have participated in the exclusion. In *Alec v. Lakeland Hotel*[38] the complainant, a native Indian,

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35. Ontario Human Rights Commission, 1989.

36. (1982), 3 C.H.R.R. D/743 (Ont. Human Rights Board).

37. (1988), 24 C.C.E.L. 65 (Canadian Human Rights Tribunal).

38. (1987), 8 C.H.R.R. D/4270 (B.C. Human Rights Council).

was removed from the only bar in the town. While in the hotel's bar with a group of acquaintances, the complainant was asked to leave as he was, allegedly, sleeping. When he refused to leave, the R.C.M.P. were summoned to remove him. He subsequently launched the complaint and was again excluded from the hotel for "causing trouble". The B.C. Council found the complaint to be justified as the refusal was based on discrimination due to race.

But the jurisprudence has significantly developed even in this traditional area of "access to services available to the general public". Of particular importance to race cases has been the determination that policing services are services available to the public within the meaning of human rights legislation. Therefore complaints regarding racist behaviour by police officers may be dealt with by Human Rights Commissions. In *Akena and Gomez v. Edmonton Police*,[39] Mr. Justice St. Clair of the Court of Queen's Bench of Alberta refused an application for prohibition against a Human Rights Board of Inquiry appointed to look into several complaints of racist treatment by police officers.

The Board of Inquiry dismissed the Gomez complaint that a police constable unnecessarily abused and detained him, and called him a "nigger" in the process of giving him a traffic ticket. The police officer's testimony was preferred to that of the complainant.

However, in the *Akena* case[40] the result was different. The complainant, a black Canadian, held a Ph.D. in Chemistry and was employed by the Environmental Department of the province of Alberta. While in the company of a white female he was unnecessarily searched, charged with two offenses he did not commit, and subjected to harassment by a police constable. The charges were unilaterally withdrawn by the Crown prosecutor. Dr. Akena was awarded $100.00 as damages for the affront to his dignity. Both Gomez and Akena were black. In *Fraser v. Victoria City Police (No. 2)*[41] Fraser, a black Canadian, was asked to relinquish his table in a motel restaurant to other guests. No other tables were available and he refused to do so. Incredibly, he was a registered guest at the motel. The waitress summoned the police who arrested him for "assault by trespass" and detained him overnight. Fraser then launched this complaint against both the motel and the police for discriminatory treatment due to his race.

The B.C. Council accepted the testimony of witnesses, including the police officers, that the complainant was polite, passive and sober. The Council ruled that the only reasonable explanation for the treatment Fraser had received from the police and the motel was that it was racially motivated. Both respondents were unable to satisfactorily explain their conduct. Each respondent was ordered to pay Fraser $2,000.00 for the humiliation he received.

In *Quebec Human Rights Commission v. City of Montreal*[42] the Quebec Court of Appeal upheld a judgment of the Superior Court which awarded $500.00 to a black individual who had been subjected to racist insults by a police officer. Since the particular officer who

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39. (1982), 3 C.H.R.R. 888.

40. (1982), 3 C.H.R.R. 1096.

41. (1988), 9 C.H.R.R. D/5068 (B.C. Human Rights Council).

42. (1988), 9 C.H.R.R. 4466.

made the slurs could not be identified, the Court had held the City of Montreal liable. The individual had also been assaulted and had complained that the assault was racially based as well. The Superior Court[43] rejected this part of the complaint as unproven. The Commission then appealed to the Court of Appeal. The Court of Appeal was also of the opinion that there was insufficient evidence for the Court to conclude that race was the cause of the assault. The Court pointed out that the complainant had a private action for the assault in which he did not need to prove discrimination.

While the foregoing cases pertained to the discriminatory conduct of individual police officers there has been a human rights case that changed a standing operating procedure of a police force: *Hum v. Royal Canadian Mounted Police*.[44] The R.C.M.P., even when providing provincial policing services, have the duty of enforcing the *Immigration Act*. Officers were instructed to ask persons "with foreign ethnic backgrounds" if they are Canadian citizens or born in Canada. The standard operating procedure was to consider a non-white person to be of foreign ethnic background" even if they spoke English with no trace of an accent and their dress was not unusual. Whites, on the other hand, would only be considered to be of "foreign ethnic backgrounds" if they spoke with an accent or wore unusual clothing. The complainant, Canadian born but of Chinese extraction, was stopped for a routine traffic violation and asked these questions. His unaccented response was all too much in the Canadian vernacular: "Of course I'm a Canadian citizen. What the f... do you think?". The ensuing confrontation led to the complainant's arrest. The Tribunal found that the standard operating procedure subjected non-whites to adverse differential treatment. They were subjected to immigration inquiries according to different criteria than whites were. The Tribunal ordered the R.C.M.P. to apply the same criteria of "foreign ethnic background" to whites and non-whites alike, and to issue a directive to its officers and employees to this effect.

The meaning of "services available to the public" was extended in another context in a case that received little attention and the significance of which has not been appreciated by the general public. In *Re Singh*,[45] the Canadian Human Rights Commission began to investigate ten complaints from persons who said that the Canada Employment and Immigration Commission and the Department of External Affairs had discriminated against them in refusing their relatives visitor's visas or landed immigrant visas to enter Canada. The government refused to allow the investigations to proceed on the basis that the administration of the *Immigration Act* was not a "service customarily available to the public" and furthermore the victims of the discrimination were not resident in Canada and therefore not protected by the *Canadian Human Rights Act*. The complaints relied on a variety of grounds. For example, two complaints relied on marital status, family status, and age with the allegation that young, single relatives were denied visitor's visas because of the fear that without dependents in their home country they would not leave Canada. Others related to refusal to allow the sponsorship of a spouse on the basis that the marriage was not *bona fide*. Nevertheless the case is pertinent to this discussion because most of the complainants were visible minorities.

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43. (1983), 4 C.H.R.R. 1302.

44. (1987), 8 C.H.R.R. 3748 (Canadian Human Rights Tribunal).

45. (1989), 10 C.H.R.R. 5501 (F.C.A.).

The Federal Court of Appeal ruled that the Commission had jurisdiction to investigate the complaints. The Court expressed the opinion that "... by definition, services rendered by public servants at public expense are services to the public...". The Court also ruled that the Canadian residents who were denied the opportunity to be visited by their relatives could qualify as victims of discrimination and thus could file complaints. Mr. Justice Hugessen gave an illustration: "could it seriously be argued that a Canadian citizen who required a visit from a sibling for the purpose of obtaining a life saving organ transplant was not victimized by the refusal, on prohibited grounds, of a visitors visa to that sibling?"

These cases illustrate how the Courts have been extending the scope of human rights statutes by giving them a large and liberal interpretation. There remains a role for the Courts outside of the regulatory sphere as well. Human Rights Codes apply only where an employment, client, customer, or landlord/tenant or similar relationship exists. Racial actions by members of the public must be dealt with under the criminal justice system.

The Courts have recognized that racial bias may motivate criminal behaviour. In the case of *R. v. Ingram and Grimsdale*,[46] two youths on a subway car attacked a fellow passenger without provocation because of his race. The assault was quite severe and resulted in the victim's hospitalization for 4 1/2 months. In determining that a greater sentence should be imposed for a racial assault, Justice Dubin of the Court of Appeal stated:

> *An assault which is racially motivated renders the offense more heinous. Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation. The danger is even greater in a multicultural, pluralistic urban society. The sentence imposed must be one which expresses the public abhorrence for such conduct and their refusal to countenance. (page 379).*

He went on to say "only a penitentiary term can demonstrate the serious view that the Court takes of such conduct." (page 379). The older of the two attackers was given a sentence of two-and-one-half years in prison, while the younger was sentenced to a one year term of imprisonment.

The Courts will undoubtedly be called upon to apply Section 175(1)(a) of the *Canadian Criminal Code* to race cases. It provides:

> "Everyone who
>
> *1. not being in a dwelling-house causes a disturbance in or near a public place,*
>
> *(a) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language, is guilty of an offence punishable on summary conviction.* (emphasis added)

While this section has not yet been used to deal with racial incidents, it is certainly wide enough to encompass them.

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46. (1977), 35 C.C.C. (2d) 376 (Ont. C.A.).

Section 175(1)(a) has previously been used in the analogous context of verbal harassment of police officers, in the case of *Mysak v. R.*[47] In that case, the accused was charged with causing a disturbance by using obscene language which included the phrase "fucking pig". The Court said:

> *Before a conviction can be obtained there must be a disturbance which can be either the secondary reaction on the part of others or a disturbance caused by the act of the accused himself. A disturbance is disorderly conduct which must interrupt the peace and tranquility of the community or a subject of the community and there must be persons affected by the conduct of the accused. It is impossible to have a disturbance in circumstances where no one is disturbed. (page 570).*

Since the court found that the police officer had not in fact been disturbed, the conviction was quashed. Nevertheless, the basis for using this section to deal with racial name-calling is clear, as the victim would certainly be disturbed.

Issues of race have come before the Courts in the context of allegations of bias by an inferior decision-maker. In *Simmons v. Manitoba*[48] a black employee was dismissed from his employment for making sexual advances to two female employees. He unsuccessfully grieved his dismissal. He then applied to the Court to set aside the arbitration board's decision alleging the Chair was biased against blacks.

The Court found a reasonable apprehension of bias arose from comments made by the chair even though they were made one year after the arbitration. In complaining of his unpaid account the Chair had said to the griever's lawyer: "If he was white he would have paid it." In a discussion on an American Court decision he had said "The simple fact is that more niggers commit murders." The arbitral award was set aside.

IV. THE FUTURE

The source countries for Canadian immigration indicate that the significant majority of immigrants to Canada will continue to be non-white. Canadian society has adjusted to the changed immigration patterns very well. A 1989 Decima poll reported that fewer Canadians expressed racism (13% vs. 32%) and fewer visible minorities reported incidents of victimization due to their race (12% vs. 18%) than 10 years earlier.[49]

The trend of human rights administration towards an employment equity or affirmative action approach is firmly entrenched. I believe that such initiatives, except in carefully selected narrow contexts, are not in the long-term interest of visible minorities or of Canadian society. In another paper presented at this conference, I have suggested that the

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47. [1982] 6 W.W.R. 563 (Sask. Q.B.).

48. (1988), 54 Man. R. (2d) 161 (Q.B.).

49. Reported in *The MacLean's Magazine* (3 June 1989).

designation of "visible minorities" as a disadvantaged group under the federal *Employment Equity Act* would not withstand constitutional challenge.

Such programs, while they reflect a generosity of spirit and the best of intentions, will lead to undesirable consequences quite unforeseen by those who implement them. A useful illustration is the special admissions programs of educational institutions. Readers will be familiar with the *Bakke* case, the first affirmative action case decided by the United States Supreme Court.[50] The University of California had an affirmative action plan in place under which it set aside a specified number of admissions for minority students. Bakke, who was white, had his application for admission rejected, even though his admission rating was substantially higher than that of the minority students. An extremely divided Supreme Court held that Bakke should be admitted to the school, while also ruling that race could be a criterion in determining university admissions. While there is a plethora of legal commentary on the Bakke case, these dwell on legal and social policy. The actual scores are not discussed. These are set out in a footnote to the U.S. Supreme Court's judgment and illustrate the degree of preference that was accorded. The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of special admittees in both 1973 and 1974.

Class Entering in 1973

	SGPA	OGPA	Verbal	MCAT Quantitative	(Percentiles) Science	Gen. Info.
Bakke	3.44	3.46	96	94	97	72
Average special admitees	2.62	2.88	46	24	35	33

Class Entering in 1974

	SGPA	OGPA	Verbal	MCAT Quantitative	(Percentiles) Science	Gen. Info.
Bakke	3.44	3.46	96	94	97	72
Average special admitees	2.42	2.62	34	30	37	18[51]

Special admissions programs are the norm on U.S. campuses, and have been for some twenty years. They are now receiving fresh criticism. Professor Thomas Sowell, a senior fellow at the Hoover Institution, argues that special admissions programs systemically mismatch minority students to their disadvantage. He points out in top tier institutions, black students whose test scores are at the 75th percentile are competing with white students who are at the 99th percentile. The average black student at MIT had math scores in the top 10%

50. *Regents of the University of California* v. *Bakke,* 438 U.S. 265 (1978).

51. *Ibid.*

of all American students, but in the bottom 10% of MIT students. When the top tier institutions accept the minority students who would qualify to enter second-tier institutions, the second-tier institutions accept minority students who would normally go to institutions whose standards are even lower. While minority students' qualifications cover a wide range they are systemically mismatched, so that they are competing with students with superior qualifications. The result is that black students fall to the bottom of the class, and have high rates of failure and dropping out. That minority students, in effect, form a different "class" on campus has contributed to the "new campus racism"[52]. These programs, adopted with the best of intentions, may be having unforeseen deleterious effects.

Employment equity programs define visible minorities to be different and to form a different class of society with different rights and obligations. Such programs are harmful on the individual level. They deprive outstanding individuals of a sense of achievement. A visible minority individual cannot, with certainty, savour the success he or she attains as due to his or her own talent and industry. Even if his or her personal self-image does not suffer, he or she will have to wrestle with the perceptions and diminished esteem of others.

People who are from a visible minority who are marginal performers will suffer because they are systematically overmatched as Professor Thomas Sowell points out.

On a societal level visible minorities as a whole will suffer because the institutionalization of preferential treatment for them can only cause the resentment of the programs' non-beneficiaries who must compete with them.

Following from these observations, I believe Canadian courts should subject affirmative action programs for the immigrated visible minorities to the strictest scrutiny.

52. T. Sowell, 'The New Racism on Campus' *The Fortune Magazine* (13 February 1989).