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Racial Discrimination in Employment in Canada

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Résumé de l'article

Cet article a pour objet l'examen des développements récents qui se sont produits concernant la nature des solutions juridiques en matière de discrimination raciale au Canada. On y a procédé principalement par l'analyse des cas de discrimination raciale publiés dans le *Canadian Human Rights Reporter* entre 1980 et 1987.

L'étude porte aussi sur trois sujets importants qu'on retrouve sur cette question: le harcèlement racial, la responsabilité des employeurs en regard des actes discriminatoires de leur personnel salarié et l'option entre le recours à l'arbitrage des griefs ou aux lois sur les droits de la personne comme solution à la discrimination raciale au travail.

Le harcèlement racial est maintenant considéré comme une action prohibée par la législation de l'Ontario, du Québec et de l'État fédéral. De plus, les commissions d'enquête estiment que le harcèlement racial est discriminatoire, peu importe qu'il y ait ou non une stipulation spécifique sur le sujet dans les chartes des droits et libertés relativement au harcèlement.

En ce qui a trait à la responsabilité des employeurs pour les actes discriminatoires posés par leurs salariés, on semble de plus en plus s'orienter vers une jurisprudence où l'entreprise doit répondre des gestes de ses employés. La Cour suprême a exprimé une telle opinion dans l'affaire *Robichaud* c. *le Conseil économique du Canada* à laquelle le Tribunal des droits de la personne canadien a fait écho récemment dans une décision en matière de discrimination raciale.

Une autre règle est fort bien établie. Lorsque l'acte discriminatoire se produit dans une firme où les employés sont syndiqués, le plaignant peut recourir au mécanisme d'arbitrage des griefs et en même temps s'adresser à la commission des droits de la personne.

Une analyse des affaires soumises (n = 43) aux commissions d'enquête révèle ce qui suit:

a) Les deux tiers des affaires rapportées provenaient de l'Ontario;

b) 42% des intimés étaient des sociétés privées;

c) Les plaintes se décomposaient ainsi en ce qui touche le statut professionnel des personnes plaignantes: professionnels, gestionnaires, techniciens (25,5%), personnel de métier et contremaîtres tant hommes que femmes (25,5%), manœuvres (20,0%), employé(e)s de service (16,4%).

d) De toutes les plaintes portées, il n'y en avait que 13,1% qui se rapportaient à des incidents antérieurs à l'embauchage. Les réclamations les plus fréquentes avaient trait à des congédiements prétendus illégaux (30,0%) et à des conditions de travail discriminatoires (15,5%).

e) 31,0% seulement des plaignants ont réussi dans leur démarche, et la compensation la plus courante a consisté dans le versement d'une somme d'argent pour perte de salaires, souffrances ou humiliations.

Les commissions d'enquête et les tribunaux sont davantage enclins maintenant à accorder une compensation en argent et à appliquer des remèdes efficaces lorsqu'il y a preuve de violation de la loi.

Racial Discrimination in Employment in Canada

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and
Jang Singh

The purpose of this study is to examine recent developments in the legal remedies for racial discrimination in employment in Canada.

What is new about racial discrimination in employment in Canada is not that it continues to exist with minor variations but that more attention is being focussed on it. The Abella Commission Report (1984) which publicized the extent of racial and other types of discrimination included visible minorities as one of the designated groups who face discriminatory barriers in the workplace and need employment equity programs to overcome these barriers[1]. The much publicized study undertaken by Henry and Ginzberg (1985) for the Social Planning Council of Metropolitan Toronto mildly shocked those who were unaware of subtle and not so subtle racially discriminatory hiring practices of the employers in the Toronto region and demonstrated how prejudice can be built inadvertently into corporate personnel practices[2]. Academic studies on human rights in employment in Canada are increasing, especially since the *Canadian Charter of Rights and*

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1 *Report of the Commission on Equality in Employment,* Judge R. S. ABELLA Commissioner, Ministry of Supply and Services Canada, Ottawa, 1984, p. 255. Also see Lorna LAMPKIN, «Visible Minorities in Canada», in ABELLA (ed.), *Research Studies of the Commission on Equality and Employment,* Ottawa, 1985, pp. 649-683.

2 *Who Gets the Work? A Test of Racial Discrimination in Employment* (1985) and *No Discrimination Here? Toronto Employers and the Multi-Racial Workforce* (1985), Toronto.

Freedoms was proclaimed[3]. New approaches to dealing with racial discrimination in employment are being developed by human rights commissions, Boards of Inquiry set up under human rights laws and courts. Recognition of racial harassment in employment, systemic discrimination concept and imposition of larger financial penalties on employers who violate human rights laws are some of the notable developments in this respect.

The purpose of this study is to examine recent developments in the legal remedies for racial discrimination in employment in Canada. This is done mainly by analyzing racial discrimination decisions reported in the *Canadian Human Rights Reporter* between the years 1980 and 1987. We will also examine three major issues in this area — racial harassment, employers' liability for discriminatory actions of their employees and the choice between grievance arbitration and human rights laws as remedies for racial discrimination in employment.

CHANGES IN PUBLIC POLICY: ESTABLISHED AND EMERGING NORMS

The most significant change in Canadian public policy since 1980 has been the adoption of the *Canadian Charter of Rights and Freedoms*[4] (Charter) in 1982 and the consequent entrenchment of the Equality Rights provisions in 1985. Section 15 states:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It has been determined by the Supreme Court of Canada that the Charter's provisions are limited to restricting government action[5]. Thus, the Charter

3 For example, see Harish C. JAIN, «Race and Sex Discrimination in Employment in Canada: Theories, Evidence and Policies», *Relations Industrielles,* Québec, PUL, Vol. 37, No. 2, 1982, pp. 344-366. For legal studies, see for example, W. TARNPOLSKY and W.F. PENTNEY, *Discrimination and the Law,* Richard De Boo Publishers, Don Mills, Ontario, 1985; Judith KEENE, *Human Rights in Ontario,* Carswell, Toronto, 1983; BAYEFSKY and EBERTS (eds.), *Equality of Rights and the Canadian Charter of Rights and Freedoms,* Carswell, Toronto, 1985.

4 *Canadian Charter of Rights and Freedoms, Constitution Act, 1982,* as enacted by *Canada Act 1982* (U.K., 1982, c. 11).

5 *R.W.D.S.U., loc. 580* v. *Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573.

does not directly prevent one individual from discriminating against another. However, by controlling state action, the Charter ensures that provincial legislation does not infringe any of its provisions. By extension, in practical terms, this requires provincial human rights codes to comply with section 15.

An example of how the Charter is used in discrimination cases, is clearly evident in the *Blainey* case which involved a young girl named Justine Blainey who sought to play hockey on a boy's team[6]. The league's rules prohibiting girls from playing were permitted under the Ontario *Human Rights Code*. Section 19(2) allowed discrimination with respect to services and facilities where «participation in an athletic activity is restricted to persons of the same sex». Blainey successfully argued that this provision contravenes section 15 of the Charter. Thus, the Court ruled that section 19(2) was void. Blainey was then in a position to argue that the league's rule against allowing girls to play hockey contravened the Ontario Code.

Because the Charter applies to government action, it is likely that discrimination committed by Parliament or a provincial legislature (or by an agent) will be subject to section 15. But the private sector employees will be restricted to using the provincial human rights legislation in their jurisdiction. However, where the relevant human rights legislation conflicts with the Charter a two-step attack may be pursued, similar to *Blainey*.

Another area that has developed in the 1980's is the prohibition of racial harassment in the workplace. It was held in 1970 that racial harassment was prohibited under the «terms and conditions of employment» provisions of the Ontario Code[7]. However, the Ontario, Québec and Federal Governments have clearly stated their positions on this issue. For example, in 1981, the Ontario legislature revised the Code so as to provide that,

> 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 offenses, marital status, family status or handicap[8].

Another «change» is the declaration by the Supreme Court of Canada in 1985 that an employer can be held liable for adverse effect discrimination. In *Ontario Human Rights Commission and O'Malley* v. *Simpsons-Sears et al.*[9], the Supreme Court of Canada followed the American lead and concluded that adverse effect discrimination is a contravention of the

6 (1986) 54 O.R. 513 (C.A.).

7 *Simms* v. *Ford Motor Company,* 1970, Ontario Board of Inquiry, Kreever.

8 S.O. 1981, c. 53.

9 (1985) 7 C.H.R.R. D/3102 (Ont.).

Code[10]. Thus, an employer may be held liable for discrimination regardless of whether or not there was any intention to discriminate.

In addition to the *O'Malley* decision, a number of significant issues were raised in the human rights tribunals. In particular, three areas are discussed in this paper: (i) racial harassment; (ii) the extent of liability of employers for the discriminatory actions of their employees; and (iii) whether or not the jurisdiction of the Commission is ousted where the complaint has been previously decided by grievance arbitration.

Racial Harassment

Although racial harassment has now been included as a prohibited activity under the Ontario, Québec and Federal statutes, boards of inquiry have held racial harassment to be discrimination on the basis of race therefore finding it to be prohibited regardless of whether or not there is a specific provision relating to harassment. As early as 1970 in Ontario (prior to the enactment of the harassment provision) a Commissioner determined that employees were protected from racial harassment by fellow employees in the workplace[11]. In several subsequent cases, in Ontario before the amendment, and in other provinces which have not specified racial harassment in their statutes, boards of inquiry have come to similar conclusions. For example, in *Dhillon* v. *F.W. Woolworth Co. Ltd.*[12] a 1981 Ontario case (before the amendment), Commissioner Cumming found that the atmosphere of the workplace is a term or condition of employment, and was thus to be free from discrimination. The employer in *Dhillon* was found liable for the racial harassment and abuse of the complainant because it was widely known that verbal abuse was pervasive. Commissioner Cumming found that «there is a duty on the employer to take reasonable steps to eradicate this form of discrimination [...] if he does not, he is liable under the Code»[13].

In a 1980 case in Ontario, Commissioner R.W. Kerr found that the alleged abuse did occur, but that the Complainant had not made management aware of his concern[14]. Therefore, the employer could not be held liable for the harassment.

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

11 *Simms* v. *Ford Motor Company,* 1970, Ontario Board of Inquiry, Kreever.

12 3 C.H.R.R. D/743 (Ont.).

13 *Ibid.,* p. D/760.

14 *Singh* v. *Domglas Ltd.,* (1980) 2 C.H.R.R. D/285.

In a subsequent case, it was decided that although the employer's investigation of two serious incidents was «at best, anemic», a distinction had to be drawn between the actions of supervisory personnel as opposed to that arising from the conduct between co-workers[15]. However, the Commissioner did conclude that, «[...] employers must be put on notice that they have a special responsibility to ensure that the principles embedded in the Act are achieved.»[16].

In another case, Commissioner R.W. Kerr concluded that, the situation involved, «[...] an 'isolated offensive outburst' by another employee. Such an occurrence does not put the employer in violation of the Code even where the other employee is in a supervisory position»[17]. He relied upon the decision in *Simms* as support for the conclusion. Professor Kerr's conclusion has been upheld in at least two subsequent cases.

More recent decisions have added substance to the issue of racial harassment in terms of the type of abuse that will lead to liability under human rights legislation.

In *C.D.P.Q.* v. *Bombardier,* Mr. Justice Trudel of the District Court of Montréal found that, the «[...] foreman did make a statement referring in a derogatory way to black people, but he made his statement before two persons only, and on the following day he publicly apologized [...] it was an isolated incident and the company has never approved of or instituted any discriminatory acts or policies»[18]. Thus, no discrimination was found.

In *Ahluwalia* v. *Metro Toronto Board of Commissioners of Police* the Complainant police officer alleged that he was subjected to constant racial name-calling by his fellow officers. He was subsequently refused promotions and dismissed[19]. The Commission found that racial harassment or discrimination were not elements in either of these decisions. Commissioner Cumming did find that the complainant was subjected to name-calling and that he had complained to his sergeants about it. However, he did not find the Commission or the Police Chief liable. But, he ordered that the Police Commission do whatever is reasonably necessary to eliminate racial name-calling and that an ad hoc race relations sensitization programme be established.

15 *Shaffer* v. *Treasury Board of Canada, et al.,* (1984) 5 C.H.R.R. D/2315, at D/2316 (Fed.).

16 *Ibid.,* p. D/2316.

17 *Fuller* v. *Candur Plastics,* (1981) 2 C.H.R.R. D/419 (Ont.)

18 (1983) 4 C.H.R.R. D/1447 (Qué.)

19 (1983) 4 C.H.R.R. D/1757 (Ont.)

Although only three Canadian jurisdictions specifically prohibit racial harassment under their human rights legislation, Commissioners in others have had little difficulty in finding that employees have the right to work without being subjected to harassment. Still, it is advisable that human rights law specifically prohibit racial harassment to emphasize and sensitize employers and fellow employees of the seriousness and poisonous impact of harassment.

It appears that for racially motivated harassment to contravene human rights law, the activity leading to the complaint must be persistent to the point of causing an uncomfortable work environment. The wording of the revised Ontario Code supports this conclusion. Harassment is defined as, «engaging in a *course of* vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome»[20] (emphasis added).

The employer's liability for racial harassment by employees can be inferred from the Canadian Supreme Court decision in a sexual harassment case which arose under the federal human rights code. In *Robichaud* v. *Canada (Treasury Board),* the Supreme Court concluded that the *Canadian Human Rights Act* contemplates the imposition of liability on employers for all acts of their employees «in the course of employment»[21]. The court held that employer's liability in harassment is similar to that of «[...] vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions»[22].

Liability of Employers for the Actions of Employees

In a number of complaints, employers have attempted to shield themselves from liability by arguing that they should not be held liable for the acts of their employees.

The issue of corporate liability for the actions of its employees has been raised in a variety of areas of law. The problem surrounds the depiction of a corporation as a person and separate legal entity from its directors and employees. However, given that a corporation cannot perform any acts by itself, all acts performed by the corporation are by its directors and employees. If an employee acting on behalf of the corporation commits a crime or a tort, the Crown or the plaintiff as the case may be, may seek to pursue the action against both the employee and the corporation.

20 *Ontario Human Rights Code,* S.O. 1981, c.53, s.9(f).

21 (1987) 8 C.H.R.R., D/4326.

22 *Ibid.,* D./4333.

Courts have responded to this challenge by developing the «directing mind and will» of the corporation test. If an employee can be found to be in such a position, his or her action may be attributed to the corporation, making the latter personally liable. The act of the employee becomes the act of the corporate entity itself, in accordance with the «organic theory» of corporate responsibility[23].

The problem with the test is that it is often difficult to know what is meant by the «directing mind and will». The general guideline is that if an employee exercises managerial functions, he or she will be included within this definition. Alternatively, employers can be held vicariously liable at common law for the acts of their servants. Where the tortious or criminal actions of an employee can be connected to the master/servant relationship, the employer may be held liable for the action.

Before 1980, the concept of vicarious liability was not accepted in the human rights field. An employer could only be held liable for discrimination of a member of the directing mind and will of the employer committed the act, or «authorized, condoned, adopted and ratified» the discriminatory conduct[24].

However, in the 1980's some amendments have been made to human rights legislation in Canada. For example, a 1981 amendment to the British Columbia statute incorporated the ordinary common law principles[25]. The «directing mind and will» has been further expanded by the British Columbia Board to include persons who are *within their area* of the corporation, the directing mind and will[26].

A 1981 revision to the Ontario Code provides that:

44(1) For the purposes of this Act, except [harassment], any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization[27].

An employer was held liable for the discriminatory lay-off decision made by a foreman in *Means et al.* v. *Ontario Hydro et al.*[28]. The vague instructions given to its foremen was found to have permitted the discrimination.

23 *Ahluwalia* v. *Metro Toronto Board of Commissioners of Police, Dickson,* (1983) 4 C.H.R.R. D/1757 (Ont.)

24 (1983) 4 C.H.R.R. D/1520, at D/1549.

25 *British Columbia Human Rights Code,* S.B.C. 1981, c.21, s.123.

26 (1983) 4 C.H.R.R. D/1520.

27 S.O. 1981, c.53.

28 (1984) 5 C.H.R.R. D/1927 (Ont.).

In *Fu* v. *Her Majesty the Queen in Right of Ontario et al.*[29] Commissioner Peter A. Cumming has made clear a number of situations where an employer may be held liable for the actions of an employee:

(1) the employer himself intentionally infringes a protected right;
(2) the employer does not intentionally discriminate, but there is constructive discrimination;
(3) the employer authorizes, condones, adopts or ratifies an employee's discrimination;
(4) the employer is a corporate entity, and an employee who is part of the 'directing mind' is in contravention of the Ontario *Human Rights Code*;
(5) the determination of whether or not an employee is part of the 'directing mind' requires a factual determination;
(6) where an employee unlawfully causes the breach of a contract between his employer and a complainant (according to common law agency principles);
(7) if the employee is a mere servant, employer is still liable for certain contraventions under subsection 44(1) of the Ontario *Human Rights Code*[30].

A recent Canadian Human Rights Tribunal decision also addresses the issue of employer liability for the actions of employees. In the first decision to hold an employer vicariously liable for discrimination under a 1983 amendment to the *Canadian Human Rights Act* (CHRA), the tribunal ordered the Canada Employment and Immigration Commission (CEIC) to pay $11,000 to a former employee for lost wages and humiliation[31]. The CEIC's former employee, a black man, had complained to the Canadian Human Rights Commission about on-the-job racial harassment. The significance of this case is that although the perpetrator of the harassment was unknown, the employer was nevertheless found liable. Arguments in the case concentrated on subsections 48(5) and 6 of the CHRA which were added in 1983. Subsection 48(5) basically states that an act of omission committed by an employee shall be deemed to be an act of omission committed by the employer while subsection 48(6) says that the employer is not liable for the actions of its employee if it is established that the employer did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof[32]. However, as already noted the Supreme Court of Canada had ruled in 1987 that even prior to this amendment employers could have been held vicariously liable for the discriminatory actions of their employees[33].

29 (1985) 6 C.H.R.R. D/2797 (Ont.).

30 *Ibid.*, p. D/2800-1.

31 «Employer Held Vicariously Liable for Workplace Racial Harassment», *The Lawyers Weekly*, Vol. 8, No. 25, November 4, 1988, pp. 1 and 19.

32 *Ibid.*, p. 19.

33 *Robichaud* v. *Canada (Treasury Board)*, (1987) 8 C.H.R.R. D/4326.

In view of the foregoing discussion of various amendments to and interpretations of human rights codes, the clear message for employers is that they cannot ignore, or afford to take complaints of discrimination in the workplace lightly.

Choice of Grievance Arbitration or Human Rights Law Remedy

When an alleged act of discrimination occurs within a unionized environment, the complainant is in a position to use grievance arbitration, and later, file a complaint with the human rights commission. Employers have unsuccessfully argued that once the issue has been subject to an arbitration award, the employee should not be entitled to subsequently pursue a human rights complaint. They have relied on the legal principle, *res judicata*. The principle states that where a legal issue between the same parties has been decided, it should not become subject to a subsequent action. Thus, it appears that if the complaint has been dealt with by an arbitrator, it should not be subject to a Board of Inquiry.

However, Swinton and Swan argue that there is no reason to assign exclusive jurisdiction to or to exclude either tribunal from dealing with a human rights complaint[34]. They contend that the role of human rights commissions is central to the determination of any discrimination issue, and does not fade merely because alternative routes for redress may be available[35]. In the U.S., the Supreme Court has recognized the multiplicity of remedies for discrimination complaint[36].

The problem of duplication of proceedings could be reduced if arbitrators would fully consider the human rights issue and apply the relevant human rights legislation. Andiappan (1978) argues that one of the solutions to the problem is to include a provision in the collective agreement that the arbitrator shall apply the relevant human rights law when considering grievances[37].

The first reported Canadian case in which the defence of *res judicata* was raised was *Singh* v. *Domglas Ltd.*[38] Board of Inquiry Commissioner R.W. Kerr was unwilling to blindly apply the *res judicata* principle. He

34 «The Interaction Between Human Rights Legislation and Labour Law», *Studies in Labour Law,* Toronto, Butterworths, 1983, p. 126.

35 *Op. cit.,* pp. 126-127.

36 415 U.S. 36 (1974).

37 «The Use of Arbitration as a Remedy for Sex Discrimination in Employment», *Proceedings of the Policy Division, Administrative Sciences Association of Canada Conference,* London, Ontario, pp. 6-7.

38 (1980) 2 C.H.R.R. D/285.

noted that caution should be taken to insure that a complaint receives an appropriate hearing given the special nature and policy of human rights legislation. Furthermore, he noted that an arbitration hearing may not deal directly with the discrimination issue.

Thus, Kerr concluded that the Board,

> in its discretion may defer to an arbitral award if it is satisfied that the arbitration procedure was fair and regular, all parties are bound, and the decision is not clearly repugnant to the purposes and policies of the statute [...] one concern is whether or not the award has actually dealt with the principal issues raised by the statute[39].

Professor Kerr concluded that this approach accommodates the public interest to make sure that the issue was litigated in accordance with the principles of the statute. If it has been, then the Commissioner should refuse to re-litigate the issue. If it has not been properly dealt with by the arbitrator, then the Commissioner should hear the complaint.

This «wait and see» approach is endorsed by Swinton and Swan[40]. However, it has not been followed in two subsequent decisions.

First, in *Abihsira* v. *Arvin Automotive of Canada Ltd. and Markham*[41] Professor Hunter suggested that the issues and the parties will always be different in a human rights complaint than those in an arbitration. Thus, he concluded that the Board of Inquiry would always be entitled to hear a case, notwithstanding that the complaint had already been subject to an arbitration award.

A number of objections were raised by counsel for the Respondent in the above case. First, the *Labour Relations Act*[42] provides that a grievance arbitration shall be the final and binding settlement of all differences between the parties arising from the interpretation, application, administration or alleged violation of the collective agreement. In a human rights complaint, the differences between the parties relate directly to the Code, not to any particular article of the collective agreement[43].

Secondly, it was argued that permitting the Board to hear the case raised the possibility of conflicting results. Professor Hunter responded to this objection as follows:

> It may be [...] that precisely the same facts and the same issues will emerge [...] if that happens, the unfortunate possibility exists of different findings and inconsistent

39 (1980) 2 C.H.R.R. D/285, at D/286.
40 *Op. cit.*, p. 141.
41 (1981) 2 C.H.R.R. D/271 (Ont.)
42 R.S.O. 1979, c.232, s.37(1).
43 (1981) 2 C.H.R.R. D/272.

decisions [...] But that would not affect the jurisdiction of an arbitration board, properly constituted, to decide the grievance, nor the jurisdiction of a board of inquiry, properly appointed, to decide the complaint of discrimination [...] both tribunals would have jurisdiction since they exist for different purposes[44].

He further noted that the remedial procedures under the two statutes are different. Finally, Professor Hunter concluded that had the legislature wished to prevent an employee from having a second chance, it could easily have done so[45].

In the second case, *Fleming, Baptiste* v. *Byron Jackson Division, Borg-Warner (Canada) Ltd.*[46], Commissioner F. Zemans was faced with the same argument presented by the respondent. Commissioner Zemans noted that the two fundamental requirements for *res judicata* are that the parties and the issues in both actions must be the same. He concluded that in a human rights case in Ontario, these requirements can never be met because,

the parties are not the same in this hearing as those before the arbitration tribunal. The Commission's involvement in the complaint is much more than a formality or of mere symbolic value. The subject matter of the proceedings is not the same in both hearings and public policy dictates that the present Inquiry should proceed. Clearly the purpose of this Board and its duties [...] are not those of an arbitration board[47].

However, Professor Zemans considered two other related issues. First, he concluded that the arbitration award was admissible evidence before the Commission Inquiry. While the award is hearsay evidence, he decided that this flaw is not fatal to its admission. The second issue related to the weight to be attached to the evidence. Given that there was no transcript of the arbitration hearing and therefore, no way to judge procedural fairness, Professor Zemans attached very little weight to the award.

In conclusion, it appears that an employer will be unable to successfully raise *res judicata* as a defence. Even if the Board of Inquiry followed Professor Kerr's approach, it would be necessary to prove that the exact issues to be raised were considered by the arbitrator against the backdrop of the human rights legislation.

On the other hand, if the collective agreement contains a provision requiring the arbitrator to consider the human rights legislation when dealing with grievances alleging discrimination, it is possible to meet Professor Kerr's test. However it is suggested that the arbitrator also consider involving the Human Rights Commission in the arbitration in some way to ensure that the legislation is properly interpreted.

44 *Ibid.*

45 *Ibid.*, at D/273.

46 (1982) 3 C.H.R.R. D/765 (Ont.)

47 *Ibid.*, at D/768.

A REVIEW OF BOARDS OF INQUIRY CASES

Professor Jain's pioneering study (1982) of racial and other types of discrimination analyzed boards of inquiry and court cases which were adjudicated during the years 1975 to 1980[48]. Our study covers racial discrimination in employment cases which appeared in *Canadian Human Rights Reporter,* the major source for human rights boards of inquiry and court cases in Canada, from the year 1980 (first year of the publication) to the end of 1987. The reader should be cautioned that there is no claim made that these cases are representative of the human rights complaints received by the human rights commissions. A large proportion of the complaints is settled at stages before the board of inquiry level. An additional cautionary note involves comparisons with Jain's (1982) study. While Jain obtained the board of inquiry cases directly from various human rights commissions our study relies solely on the cases reported in the *Canadian Human Rights Reporter.*

Jurisdictional Breakdown

As Table 1 indicates, out of a total of 43 reported cases, involving 84 complaints from 1980 to 1987, almost two-thirds are from Ontario (n = 28). Québec had the next highest total (n = 4). There have been no board of inquiry cases involving race discrimination reported in Newfoundland, New Brunswick and Prince Edward Island.

Table 2 demonstrates that an overwhelming percentage (88,4%) of race discrimination cases that reach the Board of Inquiry stage do not go any further despite the availability of appeal mechanisms. Of 43 cases reported, only five were pursued beyond the Board of Inquiry stage.

Industrial Category of Respondent

Of the corporate employers cited in complaints, many were private corporations (n = 29, 42% of all respondents (see Table 3). Government and quasi-government employers were the next most likely to be named as respondents (n = 10, 14,5%). Private individuals (i.e., employees, managers) were named as respondents 22 times, accounting for 31,9% of all respondents.

48 «Race and Sex Discrimination in Employment in Canada: Theories, Evidence and Policies», *Relations Industrielles,* Québec, PUL, Vol. 37, No. 2, 1982, pp. 344-366.

TABLE 1

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Number of Cases, Complaints and Degree of Success by Jurisdiction

					Complaint Successful?			
	Cases		*Complaints*		*Yes*		*No*	
Jurisdiction	*N*	*%*	*N*	*%*	*N*	*%*	*N*	*%*
Alberta	1	2,3	1	1,2	0	0,0	1	100,0
British Columbia	3	7,0	4	4,8	2	50,0	2	50,0
Manitoba	1	2,3	2	2,4	2	100,0	0	0,0
Newfoundland	0	0,0	0	0,0	0	0,0	0	0,0
New Brunswick	0	0,0	0	0,0	0	0,0	0	0,0
Nova Scotia	3	7,0	4	4,8	1	25,0	3	75,0
Ontario	28	65,1	64	76,2	19	29,7	45	70,3
Prince Edward Is.	0	0,0	0	0,0	0	0,0	0	0,0
Québec	4	9,3	6	7,1	1	16,7	5	83,3
Saskatchewan	1	2,3	1	1,2	1	100,0	0	0,0
Federal	2	4,7	2	2,4	0	0,0	2	100,0
Total	43	100,0	84	100,1	26	31,0	58	69,0

Most of the workplaces involved were in the community, business and personal services area (n = 12, 27,9%). The manufacturing (n = 10, 23,3%), transportation, communications and utilities (n = 8, 18,6%) and the trade and retail (n = 6, 14,0%) sectors were also common areas for complaints.

Occupational Category of Complainant

Most complainants were grouped in the following occupational groupings: professional, managerial or technical (n = 14, 25,5%), crafts and foremen/women (n = 14, 25,5%), labour and general (n = 11, 20,0%) and services (n = 9, 16,4%) (see Table 4).

Jain (1982) found a much higher degree of white collar complainants (72,7%) than in the present study (50,9%)[49]. This probably indicates that blue collar employees have become more aware of their right to be free from discrimination in employment or more willing to pursue the remedy available under the human rights laws.

49 *Ibid.*, p. 365.

TABLE 2

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter (1980-87)* Number of Decisions, Level of Final Disposition by Province

Jurisdiction	*Tribunal of First Instance*	*Number of Cases*				
		Board	*Appeal*	*Further Appeal*	*Total*	*%*
Alberta	Board of Inquiry	0	0	1	1[a]	2,3
B.C.	Human Rights Council[b]	3	0	0	3	7,0
Manitoba	Board of Adjudication	1	0	0	1	2,3
Newfoundland	Commission of Inquiry	0	0	0	0	0,0
New Brunswick	Board of Inquiry	0	0	0	0	0,0
Nova Scotia	Board of Inquiry	3	0	0	3	7,0
Ontario	Board of Inquiry	27	1	0	28	65,1
Prince Edward Island	Board of Inquiry	0	0	0	0	0,0
Québec	Provincial or District Court	2	2[c]	0	4	9,3
Saskatchewan	Board of Inquiry	1[d]	0	0	1	2,3
Federal	Human Rights Tribunal	1	1[e]	0	2	4,3
Northwest Territories	Fair Practices Officer	0	0	0	0	0,0
Yukon	Fair Practices Officer	0	0	0	0	0,0
Total		38	4	1	43	99,6

Notes

a Supreme Court of Canada
b Formerly Board of Inquiry until 1986
c Superior Court
d Human Rights Commission Decision
e Review Tribunal

TABLE 3

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Industrial Category and Ownership of Respondent

*Industrial Category of Respondent**	*N*
Natural Resources	2
Manufacturing	10
Construction	2
Transportation/Communications/Utilities	8
Trade and Retail	6
Finance, Insurance, Real Estate	0
Community/Business/Personal Services	12
Public Administration	3
Total	43
*Ownership Category of Respondent***	*N*
Private Company	29
Publicly Funded (e.g. University, Hospital)	3
Crown Corporation	4
Government, Quasi-governmental	10
Individual Person	22
Trade Union	1
Total	69

* This refers to the workplace in which the complainant(s) are/were working at the time of the complaint.

** This refers to the individual respondent. There may be more than one respondent for a given complaint (for example, where the complainant alleges discrimination by a supervisor and by the company).

Stage of the Employment Relationship

Table 5 indicates that of the total of eighty-four complaints reported, 13,1% involved incidents in the pre-employment stage and 84,5% occurred after the complainant had been hired (the remaining 2,4% represent applications for special programs).

The two most common complaints are of unlawful dismissal (n = 26, 30,2%) and discriminatory terms and conditions of employment (n = 13, 15,5%). If racial harassment is combined with the latter category, one finds that 22,6% of reported cases involve terms and conditions of employment. Other frequently cited complaints include refusal to hire (n = 9), refused promotion (n = 8) and lay-offs (n = 7).

TABLE 4

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Occupational Category of Complainant

Category	*N*
White Collar	
Professional/Managerial/Technical	14
Sales	3
Clerical	2
Services	9
Total White Collar	26
Blue Collar	
Crafts and Foremen/Women	14
Operatives	2
Labour/General	11
Total Blue Collar	27
Total	55

1 complainant could not be categorized with the available material.

Degree of Success of Complaints

Table 6 indicates that of the 84 complaints recorded, only 31,0% have been successful[50]. In contrast, Jain found that in race discrimination complaints, for the period 1975-80, 59% were successful. The authors suggest that the contrast evident in the two studies indicates that as time progresses more cases involving questionable complaints might have been brought to the Board of Inquiry stage. Could it be that the human rights commissioners felt that it is better for the board of inquiry to find a complaint not meritorious than reaching the same conclusion themselves?

Remedies

A total of 49 separate remedies were ordered in the 26 successful complaints (see Table 7). By far the most commonly ordered remedies are monetary compensation for lost wages and salaries (n = 14, ordered in 54%

50 *Ibid.*, p. 364.

of the successful cases), monetary compensation for pain and humiliation (n = 10, ordered in 39% of the successful cases) and other general damages (n = 7, ordered in 27% of the successful cases).

TABLE 5

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Cases by Stage of the Employment Relationship

Stage of Employment Relationship	*Cases*	*%*
Pre-Employment		
Refusal to Hire	9	10,7
Application form, discriminatory questions	1	1,2
Interview, discriminatory questions	1	1,2
Sub-total	11	13,1
Affirmative Action/Special Program Sought	2	2,4
Post Employment		
Terms/Conditions of Employment*	13	15,5
Harassment	6	7,1
Refuse Promotion/Raise/Full-time Work	8	9,5
Reprisals	3	3,6
Discipline	4	4,8
Dismissal/Constructive Dismissal	24	28,6
Lay-offs	7	8,1
Other	6	7,1
Sub-total	71	84,5
Total	84	100,0

* Included in «Terms/Conditions of Employment» are cases of racial slurs and verbal abuse in jurisdictions that do not have, or did not have at the time of the complaint, a harassment provision.

Other remedies reported include interest (n = 6), an order to stop the discriminatory conduct (n = 2), promises to comply in the future (n = 2), orders to post Human Rights Code cards (n = 2), legal expenses compensated (n = 1), letter of apology (n = 1), race relations committee established (n = 1), respondent to investigate hiring practices (n = 1), replacement of the incumbent employee with the complainant (n = 1) and criminal conviction in Québec (n = 1).

TABLE 6

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Complaint Success Rate by Stage of Employment Relationship

Stage of Employment Relationship	*Complaint/Application successful?* *Yes*	*No*	*Total*
Pre-Employment			
Refusal to Hire	3	6	9
Application form, discriminatory questions	1	0	1
Interview, discriminatory questions	1	0	1
Post Employment			
Terms/Conditions of Employment*	2	11	13
Harassment	1	5	6
Refuse Promotion/Raise/Full-time work	4	4	8
Reprisals	2	1	3
Discipline	0	4	4
Dismissal/Constructive Dismissal	6	18	24
Lay-offs	4	3	7
Other	1	5	6
Special Program application succesful?	1	1	1
Total	26	58	84

* Included in «Terms/Conditions of Employment» are cases of racial slurs and verbal abuse in jurisdictions that do not have, or did not have at the time of the complaint, a harassment provision.

It is evident that monetary awards are the most frequently cited orders by the Boards, consisting of 78% of the total number of remedies ordered. The highest dollar amount ordered by a Board occurred in *Scott* v. *Foster Wheeler Ltd*[51]. The original award was for approximately $50,000 consisting of lost wages, compensation for pain and humiliation, interest, general damages and legal expenses. On judicial review the amount was reduced to approximately $35,000 but, it still ranks as the largest award made in a race discrimination case since 1980.

Most monetary awards for lost wages were for under $4,000 (n = 8). Similarly, general damages and awards for pain and humiliation were usually, $1,000 or less (n = 11).

51 (1987) 8 C.H.R.R. D/2885 (Ont.)

TABLE 7

Race Discrimination Cases Reported in the *Canadian Human Rights Reporter* (1980-87) Remedies Ordered in Successful Complaints

Remedy	*Number of Cases*	*Range*
Monetary compensation; lost wages/salary	14	$879-18,000
Monetary compensation; pain, humiliation	10	$100- 7,500
Interest	6	$379-10,000
Other General Damages	7	$400- 1,200
Legal Expenses	1	
Order to stop discriminatory conduct	2	
Promise to comply in the future	2	
Order to post Human Rights Code card	2	
Letter of apology	1	
Race Relations Committee established	1	
Respondent to investigate hiring practices	1	
Replace incumbent with complainant	1	
Criminal conviction	1	
Total	49	

Note: More than one remedy may be provided in a given case.

A major difference between these results and those reported by Jain (1982) is the greater tendency of the Boards to award monetary compensation for pain and humiliation. In Jain's study, this award only accounted for 12% of all remedies, as opposed to 20% found in this study[52].

There has also been a marked decrease in non-monetary awards since 1980. Jain (1982) found that non-monetary awards amounted to 32% of all remedies ordered, as opposed to 22% from 1980 to 1987[53].

A discussion on legal remedies for racial discrimination in employment will not be complete without discussing the case of *Liquor Control Board of Ontario* v. *Ontario Human Rights Commission*[54]. The Board of Inquiry, upon finding that the Liquor Control Board of Ontario (LCBO) had blatantly discriminated against Dr. Karumanchiri by promoting the less qualified E.A. Parker to the position of director of laboratory services, ordered that Karumanchiri should be awarded the position. When LCBO

52 *Op. cit.*, p. 366.

53 *Ibid.*

54 (1988) 9 C.H.R.R. D/4868.

and Parker appeled on the grounds that the Board had no jurisdiction under the *Ontario Human Rights Code* to award the position to Karumanchiri when it was already occupied by Parker, the Ontario Supreme Court rejected the appeal. The significance of this decision lies in the finding by the Board of Inquiry that a monetary award will not fully respond to the wrongs that have been done and the appropriate remedy is awarding the position to Karumanchiri. By this decision, the Board of Inquiry has shown that it is willing to go beyond the usual monetary compensation and order replacement of the incumbent employee with the complainant when appropriate.

CONCLUSIONS

The review of the human rights board of inquiry cases highlights the nature and extent of the legal issues involved in racial discrimination in employment in Canada. The recent developments in this area indicate the following:

- Racial harassment is given recognition and is a prohibited activity under the human rights laws;
- Employer's liability for employee's actions which violate the human rights law is more clearly defined. Employers are now held responsible for discriminatory actions by managers as well as by employees and for failure to correct or to take action to stop discriminatory behaviour by employees or managers;
- Employees have access to both the grievance arbitration and the procedures available under human rights legislation. The use of arbitration does not preclude the pursuit of a remedy under human rights legislation;
- The boards of inquiry set up under human rights laws and the courts are now seen to be more willing to award monetary compensation and to come up with more effective remedies when violations of the legislative provisions are proven.

The boards of inquiry decisions, the Abella Commission Report and the Federal *Employment Equity Act* provide hopeful signs that we are moving towards racial equality in employment. Even though the legislative remedies on their own cannot achieve equality, it is important to explore various approaches to improve the effectiveness of legal remedies for racial discrimination in employment. In this respect, the recent developments in Canada point in the right direction.

TABLE OF CASES

Ofori v. *Cara Operations,* (1981) 2 C.H.R.R. D/343.

Ontario Human Rights Commission, et al. v. *Liquor Control Board of Ontario, et al.,* (1987) 8 C.H.R.R. D/4076, 9 C.H.R.R. D/4868.

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Saskatchewan Pipe Fitting Industry Training Board v. *Association of Metis and Non-Status Indians of Saskatchewan, et al.,* (1981) 2 C.H.R.R. D/452.

Scott v. *Foster Wheeler Ltd.,* (1987) 8 C.H.R.R. D/4179, (1986) 7 C.H.R.R. D/3193, (1985) 6 C.H.R.R. D/2885.

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Wadhawan v. *McDonald Supply Ltd. and/or McDonald Supply Appliances Ltd., Borowski,* (1987) 8 C.H.R.R. D/3858.

Watson v. *Highway Trailers of Canada Ltd., Smith,* (1983) 4 C.H.R.R. D/1621.

Williams v. *Export Plastics Co. Ltd.,* (1982) 3 C.H.R.R. D/1009.

Discrimination raciale dans l'emploi au Canada

Cet article a pour objet l'examen des développements récents qui se sont produits concernant la nature des solutions juridiques en matière de discrimination raciale au Canada. On y a procédé principalement par l'analyse des cas de discrimination raciale publiés dans le *Canadian Human Rights Reporter* entre 1980 et 1987. L'étude porte aussi sur trois sujets importants qu'on retrouve sur cette question: le harcèlement racial, la responsabilité des employeurs en regard des actes discriminatoires de leur personnel salarié et l'option entre le recours à l'arbitrage des griefs ou aux lois sur les droits de la personne comme solution à la discrimination raciale au travail.

Le harcèlement racial est maintenant considéré comme une action prohibée par la législation de l'Ontario, du Québec et de l'État fédéral. De plus, les commissions d'enquête estiment que le harcèlement racial est discriminatoire, peu importe qu'il y ait ou non une stipulation spécifique sur le sujet dans les chartes des droits et libertés relativement au harcèlement.

En ce qui a trait à la responsabilité des employeurs pour les actes discriminatoires posés par leurs salariés, on semble de plus en plus s'orienter vers une jurisprudence où l'entreprise doit répondre des gestes de ses employés. La Cour suprême a exprimé une telle opinion dans l'affaire *Robichaud* c. *le Conseil économique du Canada* à laquelle le Tribunal des droits de la personne canadien a fait écho récemment dans une décision en matière de discrimination raciale.

Une autre règle est fort bien établie. Lorsque l'acte discriminatoire se produit dans une firme où les employés sont syndiqués, le plaignant peut recourir au mécanisme d'arbitrage des griefs et en même temps s'adresser à la commission des droits de la personne.

Une analyse des affaires soumises (n = 43) aux commissions d'enquête révèle ce qui suit:

a) Les deux tiers des affaires rapportées provenaient de l'Ontario;

b) 42% des intimés étaient des sociétés privées;

c) Les plaintes se décomposaient ainsi en ce qui touche le statut professionnel des personnes plaignantes: professionnels, gestionnaires, techniciens (25,5%), personnel de métier et contremaîtres tant hommes que femmes (25,5%), manoeuvres (20,0%), employé(e)s de service (16,4%).

d) De toutes les plaintes portées, il n'y en avait que 13,1% qui se rapportaient à des incidents antérieurs à l'embauchage. Les réclamations les plus fréquentes avaient trait à des congédiements prétendus illégaux (30,0%) et à des conditions de travail discriminatoires (15,5%).

e) 31,0% seulement des plaignants ont réussi dans leur démarche, et la compensation la plus courante a consisté dans le versement d'une somme d'argent pour perte de salaires, souffrances ou humiliations.

Les commissions d'enquête et les tribunaux sont davantage enclins maintenant à accorder une compensation en argent et à appliquer des remèdes efficaces lorsqu'il y a preuve de violation de la loi.