The use of critical race theory to understand the nature and forms of racial oppression has been growing among social scientists (Adalberto, 2000; Taylor, 2000). This is not surprising as many more analysts and researchers have tried to apply critical race theory in their research to get fresh insights into the connection between law and society and to promote social justice. Lynn (1999) maintains that an analytical framework based on critical race theory shares the following characteristics: offering a sound critique of the legal system; rejecting the claims of neutrality and objectivity; promoting an interdisciplinary focus; and establishing a linkage between racial oppression and other forms of oppression.

Consistent with this line of investigation, Professor Aylward, in her text Canadian Critical Race Theory, refers to the need to both deconstruct and reconstruct laws in conducting critical race analysis. She believes three critical questions must be answered in conducting such an analysis: first, does the legal rule, principle, doctrine, policy or practice subordinate people of colour, secondly, what aspects of the rules or laws contribute to the subordination of people of colour, and thirdly, what are the alternatives to the existing laws or rules that will not subordinate people of colour or lessen the subordination of people of colour (Alyward, 1999, pp135-36).

In reviewing the literature on the human rights process in Canada and reflecting on our own experience with it as advocates and in the case of one of us, a human rights officer, we wanted to use these three questions to frame our analysis of how human rights legislation and commission processes deal with the issue of race discrimination. We will begin with a short historical overview of human rights legislation and briefly outline the process which human rights commissions follow in dealing with discrimination complaints. We will then review the evidence which demonstrates that the present human rights process does not deal with the issue of race discrimination well. We will end by considering some of the problems which have been identified regarding human rights legislations and they way it is administered by human rights commissions and suggest some of the broad directions for change which front line workers such as teachers, educators and social workers could strive for to ensure that human rights mechanisms are more effective in dealing with racism and racial discrimination.

**Historical Perspective**

From a historical perspective, scholars such as Berger (1982) and others have written extensively about Canada’s self perception as a country with a relatively racist-free past, particularly when compared to it’s southern neighbor. This re-interpretation of Canada’s...
past overlooks the fact that slavery was present in Canada since at least 1607 in New France (Winks, 1971) and continued until 1803. It also ignores the removal of the right to vote for Chinese and First Nations people in 1874 and later the South Asian and Japanese Canadian population, resulting in the loss of the ability to vote in federal and municipal elections, the right to serve on juries, the right to own foreshore properties and to practice in certain professions. It also ignores the segregation of African Canadian students in separate schools in Ontario, the 1907 Vancouver race riot, restrictive immigration legislation directed against Chinese, Japanese and South Asians and of course, the internment of Japanese Canadians. It also ignores more recent evidence of racism found in such studies as the Commission on Systemic Racism in the Ontario Criminal Justice System (1995) which found evidence of race discrimination in virtually all aspects of the justice system, and the study conducted by the Economic Council of Canada in the early 1990’s which found that employers are more willing to offer jobs to white applicants than equally qualified racial minority applicants and were willing to offer them higher salaries.

This false sense of Canada’s past and present underlies one of the fundamental false assumptions one encounters in reviewing how race cases are often investigated and adjudicated; that is, that racist treatment is a relative aberration in Canadian society. On the contrary, racism and racial discrimination are very much embedded in our society. In this regard, human rights processes that were established with the intent to deal with issues of racism have failed to remedy the very wrong they were set out to eradicate.

**The Development of Human Rights Legislation**

As a result of the horror which followed from the extermination of Jews and gypsies and other groups by the Nazi regime in Germany, several key events occurred in the period immediately following World War II which pushed the development of human rights legislation and mechanisms in Canada. In the development of the UN Charter in 1945, specific language was included in Article 1 to deal with human rights. This was followed in 1948 by the introduction of the UN Universal Declaration of Human Rights. The anti-discrimination legislation in Canada was introduced in 1944 in Ontario in the form of the Ontario Racial Discrimination Act which prohibited the publication and display of signs, notices and other representations of racially and religiously discriminatory nature. In the 1950’s and 1960’s, several provinces introduced Fair Employment Practice Acts and Fair Accommodation Acts. These Acts allowed for the investigation, conciliation and arbitration of cases. Unfortunately, these Acts resulted in few complaints being filed for several reasons. First, the Acts were not well advertised. Secondly, a great deal of the responsibility for pursuing the complaint fell on the complainant, while the officials responsible acted in a facilitative role. Thirdly, the earlier Acts required a criminal standard of proof, which is an extremely difficult standard to prove in many discrimination cases (Tarnopolsky & Pentney, 1989).

It was not until 1962 that Ontario passed the first human rights legislation as we know it today. It also established the first formal institution exclusively devoted to administering human rights legislation, the Ontario Human Rights Commission. B.C. passed it’s first Human Rights Act and established it’s first commission in 1966. By 1975, every
province had human rights legislation and a human rights commission in place. The Federal government enacted the Canadian Human Rights Act in 1977 to cover discrimination (Mendes, 1995).

**Fundamental Characteristics of Human Rights Legislation and Mechanisms in Canada**

Provincial human rights codes provide a type of ‘code of conduct’ to which members of society are expected to abide. While the prohibited grounds of discrimination are somewhat different depending on the province studied, all jurisdictions ban discrimination in the provision of accommodation, facilities, services, contracts, and employment. All of the codes prohibit discrimination on the basis of race, creed, colour, ethnicity, religion, gender, disability and sexual orientation.

Provincial human rights codes have quasi-constitutional status and have traditionally been interpreted to have primacy over other provincial legislation. All codes are, of course, subject to the Canadian Charter of Rights and Freedoms, which in Section 52 states that the Constitution is the supreme law of Canada.

The main effort in human rights legislation is to ensure that a complainant is fully compensated for the effects of the discrimination encountered rather than to punish the discriminator. The remedies offered in such cases include an order to cease the discriminatory acts or practices, and can include making the right, opportunity or privilege denied (i.e. a job or rental accommodation), compensation for any wages, salaries or expenses lost, and compensation for injury to dignity, feelings and self respect (there are usually monetary limits set on this compensation) (Government of British Columbia, 2003). A human rights board of inquiry or tribunal can also order an employer to establish an employment equity program or other special program to address instances of widespread discrimination, although in practice, this is done rarely.

The processing of human rights complaints varies slightly from province to province, with British Columbia’s new system adopted in April 2003 representing the most radical departure. Most commissions follow a similar process to the one outlined in the attached flow chart:

1. A complainant (usually an individual) makes an inquiry about an allegation of discrimination by either phone or mail. This inquiry is reviewed to ensure that it is within the jurisdiction of the Commission, that the complaint involves a ground covered under the legislation (e.g. race), that the discrimination took place in a public area covered (e.g. employment), and that there is evidence of negative differential treatment based on a ground of protection.
2. Mediation between the two parties is attempted where it appears appropriate.
3. A formal complaint is filed and sent on to the respondent for response.
4. An investigation is undertaken.
5. Conciliation is attempted.
6. If conciliation does not result in settlement, the complaint along with the investigation report is passed on to the Commission. The Commission is a body
of individuals selected by the government minister with responsibility for human rights from a variety of backgrounds (e.g. labor, community groups, business). The Commissioners then decide whether the complaint should be heard before a formal hearing or; alternatively, whether it should be dismissed.

7. Either a quasi-judicial hearing hears the case and makes a ruling OR the complainant can file for reconsideration of the Commission’s decision to an internal body and/or to a court of appeal.

Several commissions have been authorized in legislation to proactively initiate investigations themselves in situations in which a group or individual has been subjected to discrimination. In practice, this has rarely happened due to the expensive nature of systemic investigations and the political pressure to keep caseload processing times down within limited budgets. The consequences of these decisions will be more fully explored under the section “What aspects of the present laws and process subordinate the discrimination complaints of people of colour?”.

Does the human rights law and process subordinate the discrimination complaints of people of colour? The Evidence

Many commentators have offered anecdotal information that suggests many racialized communities have lost faith in Canadian human rights processes (Henry, 1992, Alyward, 1999, Mendes, 1995). In 1992, the Ontario government commissioned a report by Mary Cornish which addressed, among other things, the degree of faith which members of various communities expressed in the human rights process. The hearings conducted in conjunction with this study, among the most extensive conducted by any government regarding human rights, revealed deep seated skepticism among racialized communities regarding the adequacy of the Ontario human right process in dealing with their concerns (Government of Ontario, 1992).

These negative appraisals are borne out by a statistical study undertaken by the Canadian Human Rights Commission. In a review of their own case dispositions, the authors of the study found that in 1991, 36% of race cases were rejected for lacking substance compared to 20% of complaints based on other grounds. In particular, it was found that complaints based on race were dismissed without a hearing more often than those based on other grounds. They compared the record of the federal commission with those of the Ontario and Nova Scotia and found that the same pattern held in these two provincial jurisdictions as well; race complaints were dismissed more often than other types of complaints. In the case of Nova Scotia, race based complaints were dismissed at a rate of 17.2% whereas other types of complaints were dismissed at a rate between 4 and 5%. Hearings were appointed in only 1.7% of race complaints, compared to 6% of cases involving gender discrimination and 9% in disability cases (Canadian Human Rights Commission, 1992).

In 1988, the Quebec Human Rights Commission commissioned a study of 174 cases from 1985 to 1986. The authors found that 49% of the race cases in their sample were decided to be unfounded by the Commission, in comparison to 35% of complaints based on other
grounds. They also found that delays in race cases in their sample were twice as long as for other types of cases (Cote and Lemonde, 1988).

More recently, a study was conducted by the BC Human Rights Commission into its handling of race discrimination (Mohammed, 2000). The author reviewed 71 complaint files, 37 involving race based harassment and 34 involving sexual harassment. Among its most startling findings, it found that only 3% of the race complaints were successful in their final disposition as compared to 53% of the sexual harassment complaints. 56% of sexual harassment complaints were settled, while only 3% of race complaints were settled (Mohammed, 2000).

**What aspects of the present laws and process subordinate the discrimination complaints of people of colour?**

Many of the problems which face communities of colour seeking justice from human rights commissions are the same problems facing other equality seeking groups. First of all, many ethnic and racial minorities are not aware of the human rights process. Additionally, there are the issues of lengthy delays in case processing and the myriad of often incompatible roles which commissions try to fulfill as impartial investigators, mediators, educators, and promoters of human rights. Other groups have also complained that the exclusive jurisdiction which human rights commissions have over human rights cases is oppressive and that complainants should be given the option of presenting their case before a court of law. This is, in fact, the case in Quebec. A related concern is that, under the present process, the investigation, conciliation and the decision making process for deciding whether to hold a hearing resides with the Commission and its staff, and the complainant has little direct say in these key decisions. Still another concern is that with shrinking resources, commissions are often forced to push complainants towards settlement before issues are properly resolved in mediation. Finally, there is the concern that awards in human rights cases for the mental anguish suffered by complainants are far too low and do not act as a deterrent. (Thornhill, 1992).

In the following section, we will detail other problematic aspects of investigations into race based discrimination based on our own experience and consultations that we have conducted with experts in the field.

**Common assumptions evident in race investigation files**

a) The perception of racism as being an ‘abnormal’ occurrence in Canadian society

As we noted earlier, Canadians generally are unaware of their country’s racist past or present. Most Commission staff and tribunal members therefore consider an accusation of racism to be a very serious threat to a respondent’s reputation and appear to be less concerned about the effect of the racist behavior on the complainant.

One could cite many instances to support this claim. For instance, MacAdam v. Mr. and Mrs. Meadows (1982, 3 CHRR D74) involved the case of a First Nations woman who had applied for and been rejected for rental accommodation. Three witnesses
testified that they heard the landlord inquire, “Is she native?” The tribunal member in his ruling stated that the only inference that could be drawn from the landlord’s continued inquiries was his state of mind and this did not constitute an intent to discriminate.

b) The complainant or the complainant’s witnesses lack objectivity or are considered overly-sensitive
In the sample case study conducted by Lemonde and Cote (1988), the authors noted that investigators tended to avoid findings of discrimination in race complaints and instead tended to focus on attitudinal problems on the part of the complainant. Emotional outbursts or instances of poor performance are often highlighted by investigators as the reason for dismissal from a job, for example. The context of name calling or on going harassment that often precipitates such events are often overlooked.

c) Complaints involving race discrimination must be corroborated.
Many investigators feel that in order to make a finding of discrimination that they must be able to find evidence of other racial minorities being treated negatively as well. This ignores the possibility that the two individuals may be at different stages in their acculturation process to Canadian society. This also ignores the possibility that in workplaces with little diversity that the other people of colour may have a genuine fear of the repercussions of involving themselves in a race complaint investigation.

d) The impact of historical stereotypes and name calling.
Some investigators and tribunal members have not been sensitive to the way in which words and images can be interpreted in very different ways by people of colour because of the racist stereotypes associated. In one case, a black student reacted with rage when he was teased by a fellow student about being treated like a ‘slave’ by his gym teacher. This reaction, while not exemplary, was understandable in this student’s case because of the meaning of the term to him as an Afro Canadian male.

e) An employer obviously does not discriminate if he/she has already hired a racial minority
Some investigators make the logical leap that if an employer shows evidence that she/he already has an employee who is a person of colour, that this then disproves the complainant’s discrimination claim. In fact, the employer may have hired the other person of colour for a number of other reasons (e.g. There was a real shortage of skilled applicants when the first person of colour was hired.)

Broader issues

a) Pursuing complaints involving more than one ground (intersectionality)
Women of colour, in particular, have suggested for many years that human rights
processes do not take into account the way that stereotypes and historical barriers based on both their gender and race result in impacts on them that are unique and different than those faced by men of colour or white women. This need to particularize the unique ways in which multiple forms of discrimination affects victims affects many individuals with many types of group characteristics. For example, a white woman with a physical disability is affected by a combination of ableist and sexist stereotypes and assumptions that indeed are different than those faced by a white male with a physical disability.

Recently, the Ontario Human Rights Commission has issued a discussion paper on what they term ‘An Intersectional Approach to Discrimination’ which they hope will serve as a starting point in incorporating an intersectional approach to investigations, litigation and policy development (Ontario Human Rights Commission, 2002)

**b) Relying on Individual Complaints to address issues of race discrimination**

The current complaint system is based on a liberal ideology which maintains that racial equality is the norm in Canadian society and that instances of discrimination are simply aberrations. This ideology flies in the face of most of the current literature on racism which finds racism embedded in the ideology, cultures and operating principles of Canadian institutions.

Given the embedded nature of racism, many human rights experts, including Professor Bill Black of the UBC Faculty of Law, have suggested that the present reactive individual complaint human rights process is not likely to result in addressing discrimination in any substantive sense. (Black, 1992) They suggest that commissions should be free to prioritize cases based on the likely overall impact of each case on the social condition of racialized communities. In addition, they suggest that commissions should devote resources to identifying areas of particular concern (particular employment sectors, for example) to people of colour and proactively initiate complaints themselves. Remedies would focus on establishing monitoring mechanisms, training programs, and employment and service equity programs. Rather than seeing the human rights process as a means to settle individual complaints of discriminatory treatment, it is suggested that human rights commissions and process become proactive in identifying and addressing issues of inequality facing people of colour.

In other words, there is a case for creating an inquiry procedure that would enable the human rights commissions to initiate inquiries into situations of grave or systematic racism or racial discrimination. The inquiry procedure would allow commissions to undertake an investigation of serious and/or systematic violations of ethnic groups’ human rights. Commissions should be able to take action on its own initiative when it receives information about this kind of violation. The inquiry procedure would authorize commissions to investigate widespread or very serious violations without waiting to receive a complaint.

There is a catch. Howe and Johnson (2000) have pointed out the difficulties of
pursuing systemic investigations in the present fiscal climate. Systemic investigations often require large investments in time and manpower. At the same time, there is increasing pressure on commissions from the media and governments to reduce caseload backlogs with less resources. It is easy to see why most commissions have been somewhat hesitant to take on systemic investigations. Political pressure and lobbying is therefore needed to press governments and commissions to ensure that systemic initiatives are not jettisoned in favor of dealing with the never ending tide of individual complaints.

**What are the alternatives to the present human rights process that would lessen the subordination of people of colour?**

As teachers, social workers and others often working ‘on the front line’ with individuals facing race discrimination, we would like to suggest some broad directions that we can take in addressing this question.

In working directly with individuals who have faced race discrimination, Freire’s notion of ‘consciousness raising’ is a critical one. Workers can assist clients in understanding that their experience with racism, while painful, is not unique to them and is an unfortunate part of life for many people of colour in Canada. Encouraging individual and collective action on the part of the client based on this understanding is a critical first step. They should be encouraged to make full use of the human rights commissions to launch their complaints against racism and racial discrimination.

Advocates working with human rights investigators and tribunal members should ensure that key assumptions underlying investigations are challenged where appropriate. A critical assumption that must be challenged is any attempt to decontextualize the complaint from the collective experience of the person of colour. In particular, the notion that a race discrimination incident was an aberration must be challenged.

As advocates on the ‘wider stage’, we must push for progressive change in the way that commissions operate. Commissions need to ensure open and ongoing dialogue with communities of colour in ensuring that their initiatives and priorities reflect the realities of these communities. We must also strive for commissions to focus more of their efforts and resources towards developing systemic initiatives that proactively monitor, investigate and develop remedies to begin to address substantive issues facing communities of colour. The issue of how to ensure that the unique impacts upon individuals facing multiple forms of discrimination must be addressed. Commissions’ personnel should be better trained and informed to identify issues of racism. Such sensitization training is indispensable to staff at all levels of the commissions.

Finally, we must continue to explore alternative means to address race discrimination complaints. Further consideration should be given to opening up alternative routes for race discrimination complaints. This could include access to civil and criminal proceedings for victims of race discrimination as is the case in Quebec, as well as
access to international processes, such as those established under the UN International Convention on the Elimination of all forms of Racial Discrimination. The value of being able to take complaints directly to international treaty bodies has already been demonstrated to Canadians in the case of Sandra Lovelace (1) who launched her complaint of human rights violation to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.

Notes

(1) In Sandra Lovelace v. Canada, a group of university students complained of the inconsistency existing between Canada’s obligation under the International Covenant on Civil and Political Rights and the discrimination faced by Native women who marry non-Natives caused by the provisions of Section 12(1)(b) of the Indian Act. Consequently, a Native woman could not claim a legal right to reside on her reserve. The complaint was forwarded to the Human Rights Committee of the United Nations pursuant to provisions of the Optional Protocol to the International Covenant of Political and Civil Rights that Canada has ratified. After reviewing all the relevant evidence, the Committee concluded that Canada was in breach of international human right treaty. The Government of Canada subsequently amended the Indian Act so that Aboriginal women did not lose their Aboriginal status when they married non-Aboriginals.

REFERENCES


