
Race and Culture in Investigations

ANITA K. ATWAL, ANITA ATWAL LAW

PAM COSTANZO, ROPER GREYELL

Agenda

- Racism and Racial Discrimination
 - Demographics/Experience of Racism
- Who Investigates?
 - Level of Competence Required to Investigate a Complaint of Racial Discrimination
- How do you investigate?
 - Trauma informed
 - Standard of a Reasonable Investigation
- What do you investigate?
 - Individual Complaints vs Systemic Discrimination
- What are the potential outcomes?
 - Take Aways and Recommendations
- Tips for Investigators

Demographics

- 2021 Census
 - 20 per cent of Canada's population is immigrants (1 in 5)
 - 42 per cent of Metro Vancouver's population are immigrants
 - Richmond - 60 per cent of residents identify as immigrants
 - Burnaby - 50 per cent of residents identify as immigrants
 - Coquitlam - 46 per cent of residents identify as immigrants
 - Surrey – 45 per cent of residents identify as immigrants

Demographics

- 2021 is the first time that more than 50% of British Columbians identify as a member of a racialized group
- About 54 per cent of Metro Vancouver residents identify as a member of a racialized group, up from 48.9 per cent in the 2016 census
 - 36% - Chinese
 - 26% - South Asian
 - 10% - Filipino

Experiences of Discrimination

- Environics Institute for Survey Research and the Canadian Race Relations Foundation released the Race Relations in Canada 2019 Survey ([Race Relations in Canada 2019 Survey \(environicsinstitute.org\)](https://www.environicsinstitute.org/race-relations-in-canada-2019-survey))
- Majority of Canadians who are Black (54%) or Indigenous (53%) have experienced discrimination due to race or ethnicity
 - Asian (38%), Chinese (36%), from other racialized groups (32%), or White (12%)
- Canadians are most likely to believe that Indigenous Peoples (77%), Black people (73%), and South Asians (75%) experience discrimination often or occasionally:
 - (54%) believe this is the case for Chinese people in Canada
 - (5%) say that racialized Canadians never experience discrimination

Racism, Racial Discrimination and Culture

- Racism is a wider phenomenon than racial discrimination (Ontario Human Rights Commission Fact Sheet)
- Racial discrimination and harassment are forms of racism
- Racism is not unlawful, but discrimination is
- Protected ground, adverse impact, connected to protected ground
- Challenging investigations because:
 - Making connection to the protected ground is hard
 - Rarely direct evidence and the respondent typically has the explanation
 - Trauma directly affects how people remember and describe events
 - Traditional approaches to investigations may not be culturally responsive

Racism, Racial Discrimination and Culture

- The BCHRT remarked on the difficulty of proving racism in ***Mezghrani v. Canada Youth Orange Network (CYONI) (No. 2)***, 2006 BCHRT 60:

[28]...“discrimination is not a practice which one would expect to be displayed openly”: *Basi v. Canadian National Railway Co.* (1988), [1988 CanLII 108 \(CHRT\)](#), 9 C.H.R.R. D/5029 (C.H.R.T.) at para. 38481. In particular, discrimination on the basis of race is frequently subtle. Direct evidence of racial discrimination is rarely available, and such discrimination must often be inferred from the conduct in issue...In many cases, the “subtle scent of racism” may have become very hard to detect. That said, in order for a finding of racial discrimination to be possible, there must still be some evidence from which such discrimination could be inferred.

Intersectionality

- Framework for understanding that people have complex identities
- Privilege and oppression arise from various aspects of our identity
- Complaints may be framed as racial discrimination alone
- When investigating issues of racism, be open to considering the complexities of people's identities and experiences
- “Critical” to take an intersectional approach – BCCA citing *Radek in Miller v. UBCP*, 2022 BCCA 358

Duty to Investigate & Retainer

- Failure to investigate may be discriminatory in and of itself (*Sahraoui v. School District No. 23*)
- Discriminatory investigation can cause independent harm (*Jamal v. Translink*)
- Once duty triggered, who investigates?

Jamal v. Translink Security, 2020 BCHRT 146

- Failing to investigate complaints appropriately can be discrimination under the *Code*, whether or not the conduct being investigated was found to be discriminatory
- Factors:
 - Does the investigator understand discrimination;
 - Does the employer treat the allegations seriously; and,
 - Was the complaint resolved in a manner that ensured a healthy workplace?

Who Investigates?

- Competence - Rule 3.1: Code of Conduct
 - **3.1-2** A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
- Commentary:
 - Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practices.

Competence

- Minimum standard of practice – completion of Indigenous Intercultural Course (Rule 3.28)
- Response to Truth & Reconciliation Calls to Action
- Law Society has not set formal requirements for anti-racism training
- What does it mean to be competent when conducting investigations?

Cultural Competence

- Cultural competence refers to a sets of skills, behaviour, attitudes and knowledge that enable a professional to provide services that are appropriate to a diverse range of clients (Parmar, Pooja “Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence.” *Canadian Bar Review* 2019 CanliiDocs 3803)
 - Ability to communicate effectively across cultural difference
 - Degree of self-awareness
 - Work that is mindful of issues of justice and equality.
- Lived vs. Learned experience
- Don’t assume investigator of same culture/race is culturally competent

Cultural Competence

- Recognize your own cultural conditioning and consider how it shapes your view of the incident
 - Inventory available online (<http://rapworkers.com/wp-content/uploads/2017/08/cultural-competence-selfassessment-checklist-1.pdf>)
- Consider the structure of the process itself – is it culturally responsive:
 - Values and colonial processes embedded in the policy, procedure and the law
- Consider using interpreters and cultural support people (who are different from support people)

Who Investigates?

- Scenario: a client requests an investigator who is from the same racial or cultural community as a complainant.
- What do you consider before deciding how to respond to the demand?
- Consider: need for competence vs. potential for re-traumatizing investigators

How do You Investigate?

- Trauma Informed Approach – it is about *how* not what
- Be very clear about process and safeguards – transparency builds trust and feelings of safety
- Ask about the experience not just the events
- Repeat back what is said to ensure you understand
- If you have not experienced racial discrimination, do not pretend to have expertise in this area
- Take time to learn
- Avoid stereotypes
- Respect the lived experience of the individuals you interview

Martinez Johnson v. Whitewater Concrete Ltd. and others (No. 2), 2022 BCHRT 129

- Respondent regarded complainant as being from the same cultural group
- Racial slurs considered in the context of the complainant's identity
- Adverse impact found: no medical evidence necessary
- Employer's investigation ensured safety of the complainant
- Training recommended
- Policy scrutinized

Kwan v. Shaw Sabey and Associates Ltd. and others, 2022 BCHRT 53

- Application to dismiss, largely decided on the grounds that credibility was in issue
- Tribunal also considered whether the employer had provided a remedy
- Not enough to simply ask the person to stop using the slur
- Impact not assessed in isolation (like Whitewater)
- The employer had no policy and there was no evidence of training (unlike Whitewater)
- Poor documentation of the “investigation” (unlike Whitewater)

Systemic Discrimination - Definition

C.N.R. v. Canada (Human Rights Commission), 1987 CanLII 109 (SCC)

Discrimination ... means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory. This is why it is important to look at the results of a system...

Individual vs. Systemic

- Western legal systems are based on inalienable individual rights
- Policies and processes are driven by individual complaints

Moore vs. British Columbia (Education), 2012 SCC 61

It was, however, neither necessary nor conceptually helpful to divide discrimination into these two discrete categories. A practice is discriminatory whether it has an unjustifiably adverse impact on a single individual or systemically on several: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The only difference is quantitative, that is, the number of people disadvantaged by the practice.

Individual vs. Systemic

Radek v. Henderson Development (Canada) and Securiguard Services (No. 3), 2005 BCHRT 302

[509] In my view, the nature of the evidence necessary to establish systemic discrimination will vary with the nature and context of the particular complaint in issue. If the remedial purposes of the *Code* are to be fulfilled, evidentiary requirements must be sensitive to the nature of the evidence likely to be available. In particular, evidentiary requirements must not be made so onerous that proving systemic discrimination is rendered effectively impossible for complainants. In my view, to accept the respondents' arguments with respect to the necessity of statistical evidence, would, in the context of a complaint of the type before me, render proof of systemic discrimination impossible.

[604] The evidence in this case established a pattern of systemic discrimination on the part of the respondents. In their desire to keep undesirable people out of the mall, the respondents created policies and engaged in a number of practices which had an unfair and discriminatory effect on Aboriginal people, as well as people with some disabilities. In general, Aboriginal people were likely to be viewed as "suspicious" or "borderline suspicious" and thus subject to heightened scrutiny and intrusive questioning. People with some kinds of disabilities were excluded on a class basis, in particular drug addicts and people with visible signs of or otherwise identified as having HIV/AIDS. Further, people with other kinds of disabilities, including those affecting their mobility, their behaviour or their appearance, were liable to be the subject of negative treatment, on the basis of the explicit terms of the site post orders or as a result of being mistakenly identified as intoxicated or stoned.

Takeaways: Investigations

- Discrimination analysis is highly contextual
- Subjective evidence of impact likely enough
- Investigations must be prompt, and documented
- Intersectional and trauma informed approach to discrimination investigations
- Designing investigation process that is culturally sensitive
 - Know how to handle this before you take the file
 - Question your competence in doing the investigation

Takeaways: Investigations

- Be alive to issues of systemic discrimination and raise them with the client
- Ask for policies beyond the usual workplace harassment policies
- Be aware of your own biases.
- Take the time to learn about the history and experience of racial discrimination. Read the literature and science.
- Diversify your firms

Recommendations to Clients

- Policies and training are important recommendations even if there is no finding of discrimination
- Systemic Discrimination:
 - Data collection
 - Special Programs (s. 42 of the Code)
 - Community or client consultation, where appropriate
- External monitors and audits
- Accountability mechanisms

Contact Us



Anita Atwal
anita@anitaatwallaw.com
778-769-3393

Pam Costanzo
pcostanzo@ropergreyell.com
604-806-3870