



Recommendations in the wake of Anti-Black Racism and Racial Discrimination at the Canadian Human Rights Commission

Submitted to: The Senate Standing Committee on Human Rights Study on
“Anti-Black Racism, Sexism and Systemic Discrimination in
the Canadian Human Rights Commission.”

Submitted by: The Canadian Association of Professional Employees

Date: May 15, 2023

Preamble

The Canadian Association of Professional Employees (CAPE) filed a policy grievance in support of our members against the for alleged anti-Black racism and systemic discrimination at the Canadian Human Rights Commission (CHRC). CAPE's policy grievance was filed alongside two other similar grievances filed by the Association of Justice Counsel (AJC) and the Public Service Alliance of Canada (PSAC).

In its grievance, CAPE alleged "Black and racialized people working at the Commission continue to experience the adverse impact of policies, procedures, practices and attitudes that serve as barriers to their advancement, health, safety, and overall wellbeing."

For greater context, despite efforts from Black employees of the CHRC to affect change in their workplace including submitting recommended actions to address the CHRC complaints process, practices, and operations as well as shared Black and racialized employees' experiences, the CHRC made unilateral decisions which further aggravated the situation prompting action from CAPE, the AJC and the PSAC.

Initially, the bargaining agents reached out to the CHRC in support of its racialized and Black members' recommendations, expressing their desire to work collaboratively to improve the CHRC's workplace and to help the CHRC regain the trust of its racialized and Black employees.

All three unions formally pressed the CHRC to conduct an independent workplace assessment instead of pursuing their non-inclusive investigative activities. The independent assessment was viewed as the most appropriate way to engage all employees to address racism and systemic discrimination and a better way to ensure meaningful collaboration, transparency, fairness, inclusivity, credibility and to protect the psychological health and safety of its employees.

However, in response, the CHRC conducted a unilateral, non-inclusive investigative process involving outside third parties without consulting their employees or the unions, all of which damaged their relationship with all the parties involved. The absence of a written report, which would have allowed for greater transparency and accountability, also worsened the situation.

It is against this backdrop that CAPE submits the following recommendations for the Senate Standing Committee on Human Rights' consideration which, it believes if implemented, will be a step forward in addressing concerns raised by Black and racialized employees at the CHRC and have a snowball effect across other federal departments, agencies, and institutions.

We would also like to recognize the courage, bravery, and strength of all the witnesses that have appeared before the Committee to share their stories. CAPE acknowledges that systemic discrimination exists, and anti-Black racism is an unfortunate reality for many of our members. CAPE further acknowledges its failures in addressing these realities and apologizes unreservedly to its Black members and those from other equity-deserving groups. We ought to do better. We are listening to the unique challenges of our Black members and those from various equity-deserving groups to better represent their needs. CAPE has deliberately taken steps to make a difference in our members' lives and experiences with their union and is working with several equity-deserving groups within the federal public sector to learn, respond to their members' unique challenges, and find solutions. CAPE also encourages members' increased involvement in their union by joining committees or running for elected positions and supports legislative changes that will contribute to a more equitable country.

CAPE will continue to stand with its Black and racialized members and all of our 23,000 members to promote work environments that are diverse and inclusive and free from harassment and discrimination.

Key Recommendations

- 1. Independent Workplace Assessment/ Review.**
- 2. Reform of the Federal Human Rights System.**
- 3. Data to be published by the Commission.**
- 4. Settle the Black Class Action lawsuit.**
- 5. Further research to be conducted by the Public Service Commission on the experience of Black employees including investigation of staffing practices at the Commissions.**
- 6. Legislative amendments.**
- 7. Require the Commission to use the tools already at its disposal to immediately increase the representation of Black staff at all levels of the organization.**

Background

On June 2, 2020, the Canadian Human Rights Commission issued its own statement on anti-Black racism in Canada, which includes the following paragraph:

“Racist comments and racist acts, no matter how subtle, must no longer be ignored or tolerated in Canada. Even the most subtle forms of racism contribute to the conditions that permit overt racism and violence to occur. When we are complacent, we are complicit. When we are silent, we are complicit.”

On July 10, 2020, nine Black and racialized employees of the Canadian Human Rights Commission (CHRC) wrote to then Chief Commissioner, Marie-Claude Landry, outlining ongoing concerns regarding systemic anti-Black racism, discrimination, and sexism at the CHRC and making concrete recommendations for substantive change.

On August 26, 2020, CAPE, the Public Service Alliance of Canada (PSAC), and the Association of Justice Counsel (AJC) wrote to the CHRC to express support of the Black and racialized employees urging the commission to seriously consider the recommendations put forward by the employees.

In the Fall of 2020, due to a lack of meaningful progress on the concerns raised, the three bargaining agents took an unprecedented step and filed a trilogy of policy grievances with the Treasury Board Secretariat (TBS) pursuant to Section 220 of the *Federal Public Sector Labour Relations Act* to address the anti-Black racism, sexism, and systemic discrimination of Black employees at the CHRC. These are the first policy grievances alleging systemic anti-Black racism that have ever been filed against the CHRC. They highlight a pervasive and longstanding problem that Black and racialized employees at the Commission have been enduring for years without effective, meaningful, and appropriate redress.

CAPE’s policy grievance alleged that *“Black and racialized people working at the Commission continue to experience the adverse impact of policies, procedures, practices and attitudes that serve as barriers to their advancement, health, safety, and overall well-being”*.

On January 1, 2021, the CHRC released its draft anti-Black racism action plan which was fraught with problems as the Commission did not engage in meaningful consultation with any of the signatories that made the recommendation to the CHRC or with the three bargaining agents.

On September 23, 2021, CAPE, PSAC, and the AJC wrote a letter to the Auditor General of Canada to relay their deepest concerns regarding CHRC's "ineffectiveness to meet its mandate of promoting and protecting human rights in areas that fall under the Commission's federal jurisdiction pursuant to the *Canadian Human Rights Act* and its obligations as a national human rights institution as per the Paris principles."

On March 6, 2023, the Treasury Board of Canada Secretariat (TBS) issued its decision on the policy grievance and concluded that the CHRC had breached the "No Discrimination" clause of the respective collective agreements; for CAPE that was a breach of Article 16 of the Economics and Social Science Services (EC) collective agreement. The TBS arrived at this conclusion following a review of the grievances and oral submissions presented by bargaining agents during the grievance hearings held on October 4, 2023, and January 19, 2023, including the joint written submissions by CAPE, PASC and the AJC.

On May 1, 2023, the Senate Standing Committee on Human Rights began its study on Anti-Black Racism, Sexism and Systemic Discrimination in the Canadian Human Rights Commission.

The Issues

1) Anti-Black racism and systemic discrimination at the CHRC

- a) *Lack of safe space at the Commission and under-resourcing of supports for Black and racialized employees involved in the assessment of race-based complaints, as exemplified by the Race Pilot Project:*** Many staff and managers appear to lack a deep understanding of race-based discrimination in Canada, including that it is often intersectional and manifests in subtle forms of discrimination.

When Black and other racialized employees attempt to contribute to discussions at triage, investigations, or as legal advisors, their views are often undermined and disregarded. Their professional advice is given less weight or consideration. They are often dismissed as inherently biased, less credible and needing the corroboration of another colleague. This is particularly notable when they don't agree that a complaint should be dismissed, that certain grounds should be added, or if they use lived experience to contextualize a complaint. They often face immense resistance and even hostility when sharing their views on race-based complaints. When the reaction is not overt hostility, their views are often politely disregarded rather than heard with any kind of openness. This unwillingness to consider the views of people with lived experience of the subject matter of the complaint has led to the poor handling of many race-based complaints, and a disproportionately high rate of dismissals for race-based complaints received by the CHRC.

b) *Lack of representation at all levels:*

There is a serious lack of representation of racialized employees at all levels of the Commission, including the Commissioner level. Despite grossly misleading public messaging to the contrary, there are currently only a handful of racialized human rights officers and no Black individuals in executive positions. Until the recent move away from grounds-based teams, one team of human rights officers assessed race-based complaints and not one of them was racialized. To this day, almost all race-based complaints are assessed by officers and managers with no lived experience of racism.

c) *Employment practices and decision-making processes that discriminate and entrench disadvantage against Black and other racialized employees*

Racialized employees are chronically underrepresented in management and executive levels at the CHRC. Their strengths and contributions are undervalued. Black and racialized employees are

overlooked for assignments, acting opportunities, promotions, and other career advancement opportunities in favour of colleagues who are not Black or racialized. This occurs despite Black employees often being asked to do visible, high-risk work beyond their level without fair compensation or institutional support and in disproportionately precarious work arrangements, such as contract and term positions. These behaviours disadvantage Black and racialized employees, perpetuating their under-representation.

The CHRC is seeking to reframe the problem as wrongdoing by a select few when the problem is employment practices and how anti-Black racism and discrimination are ignored, swept under the rug, and the perpetrators, many of whom occupied senior positions when these concerns were first raised, are not held accountable. It appears, despite testimony from the CHRC to the contrary, that the individuals directly involved in the anti-Black racism practices at the Commission were never disciplined and still manage people.

The Public Service Commission should investigate the staffing practices at the CHRC to examine what is going on and how decisions are made. Oversight of the Commission is clearly needed to ensure that fair and equitable decisions are made and that transparent processes are put in place.

d) High dismissal of race-based complaints:

Year after year race-based complaints have been dismissed at disproportionately higher rates than other complaints. The CHRC's own data supports this assertion.

In his May 1 Senate Committee hearing, Richard Sharpe said, "Its own data proves this to be true. For example, only 33% of race-based complaints were accepted by the Commission between 2018 and 2022. What happened to the 67% I guess we will never know. People had to go home without having redress." This is a significant cause for concern.

There is no evidence to suggest that racialized complainants are more likely to bring unfounded or unmeritorious complaints. Therefore, there is no reason why these complaints should be dismissed at higher rates than other complaints.

Racism is no less common in Canadian society than other forms of discrimination. Even the Commission has publicly noted that racism is "pervasive" in Canada. The Commission, like all federal institutions, is not immune: to state otherwise is simply false. Considering testimony from the CHRC at the May 8th Senate Committee hearings, external oversight over the CHRC is needed to properly and adequately address systemic anti-black racism.

Other mechanisms that have been proposed to address anti-Black racism at the CHRC and more broadly within the federal public service include:

- a national inquiry into anti-Black racism in federal public institutions eliminate the CHRC's gatekeeper role by allowing Canadians to file human rights complaints directly to the Canadian Human Rights Tribunal (as is done in Ontario and BC);
- the establishment of a Black Equity Commissioner which would serve as a champion and special advisor to the federal government on anti-Black racism domestically. And, as the AJC has outlined in its submissions to the Senate Committee, could "*...be contemplated in the context of the existing structure of the OAG, whose infrastructure, parliamentary reporting obligations, authorities, and legislative powers are already dictated by a pre-existing legislative framework. To do so however, it would be imperative that the OAG have adequate funding and resources at its disposal.*"

2) The impacts on Black employees:

The Commission's repeated failure to meaningfully or adequately address CHRC employees' concerns of anti-Black racism and discrimination has taken a serious toll on the physical and mental health of those same employees. Most of the signatories to the July 2020 letter to then Commissioner Landry have either quit or taken extended leave from the Commission.

One employee resigned from a job that they loved because the racism they faced was so blatant they felt that their only option was to resign in the middle of a pandemic and amidst economic uncertainty. Afterwards, other racialized employees directly approached upper management to express that they too faced similar experiences as those detailed in the letter of resignation. These discussions come after various attempts to raise with managers and directors' issues of racism, inequity and intersectionality pertaining to Commission practices that foster institutional, interpersonal, and systemic discrimination.

Another employee appeared as a witness at the Senate Human Rights Committee hearing on May 8th and recounted how, initially she was so proud to be working at the Commission – and had basically accepted a demotion to do so - as its mandate represented the very core of what she believed in and stood for. However, because of the discrimination and anti-Black racism that she faced and the repeated failures of senior management to address the issues despite being fully aware of the situation, she left in September 2020 on sick leave. She further mentioned at the hearing that she was pregnant with her third child, and she ended up giving birth earlier than her due date.

These employees are not alone, and their experiences are, very unfortunately, not unique. Black and racialized employees at the Commission have reported feeling scared, intimidated, and distressed by their experiences in the workplace. Their confidence in the Commission and its leadership has been eroded.

It must be noted that confidence was further eroded when allegations of misconduct by the Accessibility Commissioner were met with swift action to protect employees who alleged mistreatment and the almost immediate appointment of an external investigator. The Commission's response in that case serves to further highlight the differential treatment experienced by Black employees at the CHRC.

The TBS's finding of discrimination at the CHRC has also eroded public confidence in the Commission, especially within the Black community. The impact of racism and discrimination is far-reaching and long-lasting. It reignites traumatic experiences others have faced. It has brought trauma to the Black community at large as many in the community viewed the Commission as one of the only means through which they could access justice.

3) What has the Commission done:

a) Failure to engage members and bargaining agents in meaningful way

The Commission has consistently failed to address the concerns raised by Black employees and the bargaining agents.

In 2019 and 2020, then Chief Commissioner Landry was personally made aware, by Black employees working at the Commission, of the anti-Black racism in the workplace. Also in 2020, Mr. Ian Fine, the Executive Director of the CHRC and the highest ranking federal public service employee at the Commission, was also personally made aware of these same issues.

Despite Black employees' efforts to affect change in their workplace and after having taken the very brave step of raising those concerns directly to the two highest ranking members of the CHRC, no concrete or tangible action was taken, and these problems went unaddressed. These behaviours were in fact allowed to persist and continue to permeate the Commission.

After submitting recommended actions to address the CHRC complaints process, practices, and operations as well as shared Black and racialized employees' experiences, the CHRC's unilateral decisions aggravated the situation, prompting action from CAPE, the AJC and the PSAC.

The bargaining agents and their members had requested that, in consultation with all stakeholders, the CHRC appoint an external consultant, with lived experience of racism, demonstrated expertise in racial discrimination, institutional racism, and anti-Black racism in employment practices to investigate and document the experience of racialized employees at the Commission, and to provide binding recommendations to the Commission.

However, the CHRC proceeded to unilaterally engage the services of Arleen Huggins, followed by Nina Fernandez, to conduct facilitated discussions with employees. As a result, many of the affected members lacked trust and confidence in the process. Most chose not to participate as they feared being re-traumatized and worried about reprisal. When the bargaining agents raised concerns with respect to how these processes were being conducted, the CHRC took no meaningful action.

It was only several months after the bargaining agents had made requests to receive the mandate of the external consultants that the Commission finally authorized Ms. Huggins to provide a summary of her overall impressions as well as her mandate. No recommendations were ever shared with the affected employees or the bargaining agents.

b) Commission's actions have been predominantly performative

To date, the CHRC's approach to the concerns raised by Black employees, their response to the policy grievances and to TBS' March 2023 decision have been predominantly performative and demonstrate a complete lack of respect and accountability. While the Commission has undertaken various anti-racism initiatives including an Anti-Racism Action Plan, this was done without meaningful participation and input from the Black employees who were instrumental in filing the systemic racism policy grievances against the CHRC.

In January 2021, concerns around the lack of transparency in developing the Anti-Racism Action Plan were forwarded to Senior Management and included the ongoing exclusion of the Black employees who came forward as well as CHRC's unwillingness to adopt a human rights-based participatory approach with signatories. Black and racialized signatories again requested an opportunity to review and contribute to the Action Plan. However, instead of doing so, the CHRC proceeded to unilaterally release and publish the anti-racism action plan the following day.

In addition, despite the CHRC publicly accepting the TBS decision of March 2023, an email from Interim Commissioner Charlotte-Anne Malischewski sent to all CHRC staff shows the contrary. The March 30, 2023, message was sent following a town hall held with employees on March 22, 2023 regarding the policy grievances and the TBS decision. Ms. Malischewski's email downplayed TBS's findings, showed a complete lack of accountability, re-traumatizing Black and racialized employees.

It is evident that there is a very serious disconnect between what senior leaders at the CHRC say publicly, the actions they take and how they engage and communicate with CHRC employees. Accountability requires taking responsibility and facing consequences when failing to fulfil assigned duties. Accountability is essential for anti-racism efforts to be successful.

Many Black and racialized employees' concerns remain unaddressed which has been demoralizing and re-traumatizing for affected employees who continue to experience systemic anti-Black racism at the Commission. There needs to be accountability and significant behavioural changes to begin a process of healing and reconciliation.

Key Recommendations

The CHRC has a lot of work to do to gain the trust of Black and racialized employees and that of other Canadians. The Commission must take concrete steps to effect change and to demonstrate that it can protect human rights through fair and effective complaints process and advance human rights for all Canadians.

➤ **Independent Workplace Assessment/ Review:**

An independent expert should be retained to conduct a workplace review/assessment, focused on the experience of Black employees at the CHRC, akin to the independent review conducted by former Justice Louise Arbour into systemic sexual misconduct in the Canadian Military concluded in 2022. This review should include the Commission's formal and informal practices relating to the hiring, promotion, and retention of Black employees. This review must meet the following:

- a) It should be conducted by an independent, reputable individual with demonstrated expertise in anti-Black racism and workplace discrimination.
- b) The expert's mandate should include making specific time bound recommendations to address any findings of systemic anti-Black racism.
- c) The expert should have access to, among other things, all relevant internal Commission disaggregated data and all other information relating to the hiring, promotion, and retention of Black employees.
- d) It should assess at least the last 10-year period. A review of the past 10-year period will permit the expert to have a comprehensive understanding of the systemic issues and will allow them to be better placed to recommend lasting solutions.
- e) The expert's report, along with their recommendations, should be made public because this is the best way to ensure accountability.
- f) The Commission should be required to implement all the recommendations within the timeframe indicated in the report and publicly report on its actions toward implementation.

➤ **Reform of the Federal Human Rights System:**

The Minister of Justice should heed calls made by the Canadian Association of Labour Lawyers, the Canadian Association of Black Lawyers, the Canadian Bar Association, and countless community legal organizations to introduce a direct access model in the federal human rights system. Under this model, the Commission would no longer play a gatekeeper role. Complainants would have the right to file complaints directly with the Canadian Human Rights Tribunal (CHRT" or "Tribunal"). This model already exists in Ontario and British Columbia. In fact, this exact recommendation was made over 20 years ago by the Honourable Justice LaForest in his report recommending changes to

the federal human rights system. With respect to Ontario, the Pinto Report also commented on the benefits of a direct access system to reduce delays and facilitate access to justice.

For this direct access model to be successful and ensure the best possible access to justice for Black and other equity-deserving complainants, the following measures are of equal importance. Many of these measures were also recommended by Justice LaForest in his above-mentioned report:

- a) The CHRT must be adequately funded and resourced.
- b) The federal government must ensure CHRT appointees have adequate human rights expertise and are representative of the Canadian population which includes ensuring racial diversity.
- c) CHRT members should be required to take yearly training on anti-black racism.
- d) The CHRT should be required to publish annual data regarding its dismissal rates of complaints, disaggregated by ground of discrimination.
- e) The CHRC's mandate should transform to focus on initiatives like public education, intervening in significant public interest cases, producing expert research studies, launching public inquiries into systemic discrimination issues at the federal level, etc.
- f) An adequately funded and resourced legal support centre clinic should be established to represent complainants who file human rights complaints with the CHRT. This has been done in Ontario with the establishment of the Human Rights Legal Support Centre).
- g) As recommended by Justice LaForest, the *Employment Equity Act* and the *Canadian Human Rights Act* should be "*made to work together so that it is possible to obtain an employment equity order like the one that was approved by the Supreme Court of Canada in Action Travail des Femmes.*"
- h) The federal government should remove the statutory monetary cap on damages that exists under sections 53(2)(e) and 53(3) of the CHRA. True access to justice cannot be achieved without meaningful remedies, including monetary compensation. This statutory cap on damages prevents the CHRT from awarding compensation that adequately compensates victims of egregious human rights violations. Jurisdictions like Ontario have already long removed similar statutory caps. It is time for the federal government to finally do the same.

➤ **Data to be published by the Commission:**

Considering the media attention regarding the Commission's higher dismissal of race-based complaints, and to promote transparency and public accountability, the Commission should regularly publish data on the dismissal rates of complaints. This data should be disaggregated by ground of discrimination, as well as disaggregated by race of complainant. This measure should be taken in the interim until the above-noted broader reforms are implemented.

➤ **Settle the Black Class Action lawsuit:**

The Black Class Action raises many similar issues as those that Black Commission employees have raised. We call on the federal government to settle the class action, by agreeing to meaningful individual and systemic remedies, rather than fighting Black employees in court.

- **Further research to be conducted by the Public Service Commission on the experience of Black employees including investigation of staffing practices at the CHRC.**

The Public Service Commission (PSC) should conduct further research relating to the experience of Black employees at the CHRC. It should also investigate the hiring, promotion, and retention of Black employees within the federal public service. The research conducted to date is important, but also of limited value as it has only examined external advertised processes or promotion rates of “visible minorities” without considering Black employees’ unique experiences. In addition, in its future analyses of federal public service employment data, the PSC should control for factors like education level, and years of experience, to be able to uncover the extent of bias and discriminatory decision-making relating to Black employees which is currently a gap in its studies.

- **Legislative amendments:**

In addition to the legislative amendments already mentioned, unions and other stakeholders have advocated for, the *Employment Equity Act* to be amended to include “Black” individuals as a distinct employment equity group, as well as include stronger enforcement mechanisms. The UN Working Group of Experts on People of African Descent rightly noted in its 2017 report following its mission to Canada: “the category ‘visible minority’ obscures the degrees of disparity in treatment and specific human rights concerns of African Canadians.”

- **Require the Commission to use the tools already at its disposal to immediately increase the representation of Black staff at all levels of the organization:**

Under section 34(1) of the *Public Service Employment Act*, the CHRC can already restrict the “area of selection” for selection processes to Black employees and racialized employees. This would allow the CHRC to promote Black and racialized employees into acting or indeterminate positions.

About the Canadian Association of Professional Employees (CAPE)

With over 23,000 members, the Canadian Association of Professional Employees (CAPE) is the third-largest federal public sector union in Canada, dedicated to advocating on behalf of federal employees in the Economics and Social Science Services (EC) and Translation (TR) groups, as well as employees of the Library of Parliament (LoP), the Office of the Parliamentary Budget Officer (OPBO) and civilian members of the RCMP (ESS and TRL).

For more information: www.acep-cape.ca