

# Colour as a Discrete Ground of Discrimination

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*Colour, as a ground of discrimination, is usually equated with or subsumed under the ground of race. We argue that colour does and should have a discrete role in human rights and equality cases because it highlights certain hierarchies and forms of marginalization unaddressed by the ground of race. To support this argument, we first explore the concepts of “race” and “colour” and their relationship to one another as well as the harms done by discrimination based on colour. Then, after a brief review of the use of race and colour in international and domestic instruments, we examine American anti-discrimination employment cases to learn from that country’s experience with separating race and colour as two separate grounds of discrimination. We then turn to the emerging Canadian jurisprudence recognizing colour as a distinct ground and the possible consequences of that recognition.*

*La couleur de la peau est habituellement assimilée ou subsumée à celui de race en tant que motif de discrimination. Nous soutenons que la couleur de la peau a et doit avoir un rôle distinct dans les causes relatives à l’égalité et aux droits de la personne, parce qu’elle fait ressortir certaines formes de marginalisation, et certaines hiérarchies au sein de celles-ci, que le motif de race ne couvre pas. À l’appui de cet argument, nous allons d’abord explorer les concepts de race et de couleur et leurs relations l’un par rapport à l’autre, ainsi que les préjudices qui découlent de la discrimination fondée sur la couleur. Après un bref examen de la façon dont ces deux concepts sont utilisés dans les instruments internationaux et nationaux, nous examinerons des causes pour discrimination dans l’emploi entendues aux États-Unis pour comprendre l’expérience de ce pays en matière de séparation des motifs de race et de couleur. Nous nous pencherons ensuite sur la jurisprudence canadienne émergente qui reconnaît le rôle distinct de la couleur comme motif de discrimination et les possibles conséquences de cette reconnaissance.*

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## I. Introduction

Almost every international and domestic human rights instrument prohibits discrimination on the grounds of both race and colour. However, in Canada, as elsewhere, complaints and decisions about discrimination usually subsume colour within the ground of race. Complainants and decision-makers routinely assume that skin pigmentation and race are synonymous. As a consequence, the case law suggests that colour plays little or no role as a discrete ground of discrimination.<sup>1</sup>

We believe this state of affairs is changing and that colour as a discrete ground may become more important in human rights and equality law. First, more people are self-identifying as multi-racial, in part as a result of inter-racial marriages and immigration,<sup>2</sup> and these self-identifications may challenge racial categorizations.<sup>3</sup> Second, the legitimacy of racial classification is increasingly called into question,<sup>4</sup> whereas colour is seen as describing objectively identifiable biological realities.<sup>5</sup> Third, some commentators argue that discrimination is becoming less overt and more subtle and that colour as a ground of discrimination may be able to better handle that subtlety.<sup>6</sup> Fourth, some scholars note that, within racial minority groups, intra-group screening and preferencing is on the rise, based on hierarchies linked to

<sup>1</sup> See e.g. *CSWU Local 1611 v SELI Canada Inc*, 2008 BCHRT 436 at para 237 [*SELI*]; *Mitchell v Nobilium Products Ltd* (1981), 3 CHRR D/641, 1981 WL303352 (Ont. Bd. Inq.) [*Mitchell*]; William J Aceves, "Two Stories about Skin Color and International Human Rights Advocacy" (2015) 14:4 Wash U Global Studies L Rev 563 [Aceves]; Vinay Harpalani, "To Be White, Black or Brown? South Asian Americans in the Race-Color Distinction" (2015) 14:4 Wash U Global Studies L Rev 609 [Harpalani].

<sup>2</sup> See Angela P Harris, "From Color Line to Color Chart?: Racism and Colorism in the New Century" (2008) 10 Berkeley J Afr-Am L & Pol'y 52 at 62. In 2011, 19.1% of Canada's population identified themselves as a member of a visible minority group, as compared to 16.2% in 2006. Between 2006 and 2011, Asia (including the Middle East) was Canada's largest source of immigrants, accounting for almost 60%, as compared to 12.5% of newcomers arriving from Africa and 12.3% from the Caribbean, Central and South America. See Canada, Statistics Canada, *Immigration and Ethnocultural Diversity in Canada, National Household Survey 2011*, Catalogue No 99-010-X2011001 (Ottawa: Statistics Canada, 2013), online: <www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm>.

<sup>3</sup> Margaret Shih & Diana T Sanchez, "When Race Becomes Even More Complex: Toward Understanding the Landscape of Multiracial Identity and Experiences" (2009) 65:1 J Social Issues 1 at 3, 6.

<sup>4</sup> See e.g. Michael Banton, "The Race Relations Problematic", in Ellis Cashmore & James Jennings, eds, *Racism: Essential Readings* (London: Sage Publications, 2001) 286 at 287-88 [Banton, "Race Relations Problematic"]; Leila Nadya Sadat, "Introduction: From Ferguson to Geneva and Back Again" (2015) 14:4 Wash U Global Studies L Rev 549 at 549. See also the discussion of the concepts of race and colour in Part II.

<sup>5</sup> See e.g. Leonard M Baynes, "If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy" (1997) 75:1 Denver U L Rev 131 at 133; Paul Gowder, "Racial Classification and Ascriptive Injury" (2014) 92:2 Wash U L Rev 325 at 357.

<sup>6</sup> See e.g. Trina Jones, "Intra-Group Preferencing: Problems of Proof in Colorism and Identity Performance Cases" (2010) 34 NYU Rev L & Social Change 657 at 668 [Jones, "Intra-Group Preferencing"]; Angela Onwuachi-Willig & Mario L Barnes, "By Any Other Name?: On Being 'Regarded As' Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White" 2005:5 Wisconsin L Rev 1283 at 1285; Faisal Bhabha, "'Islands of Empowerment': Anti-Discrimination Law and the Question of Racial Emancipation" (2013) 31:2 Windsor YB Access Just 65 at 71, 74.

personal characteristics other than race, such as colour.<sup>7</sup> Fifth, individuals may be increasingly willing to claim discrimination against members of the same racial group, rather than prioritize racial solidarity.<sup>8</sup> Finally, tribunals and courts are beginning to recognize that race and colour are distinct categories, each distinguishing different facets of identity that may be subject to discrimination.<sup>9</sup>

A move toward colour playing a more significant role in our domestic human rights law is evident in Canada's first reported human rights decision based solely on the prohibited ground of colour: *Brothers v Black Educators Association*.<sup>10</sup> Rachel Brothers, a lighter-skinned Black woman who self-identified as bi-racial,<sup>11</sup> was fired from her job as a Black Educators Association (BEA) Regional Educator primarily because she "wasn't black enough"<sup>12</sup> in the eyes of other darker-skinned BEA employees, who considered themselves "actually black."<sup>13</sup> In this type of intra-group discrimination case, race is often seen as unavailable as a ground of discrimination.<sup>14</sup> Colour must stand alone as the asserted ground.

In this article, we will argue that colour, despite its apparent equivalence with race, can play an important discrete role in anti-discrimination initiatives, highlighting certain hierarchies and forms of marginalization unaddressed by the ground of race. We develop this argument in Part II by, first, looking at the categories of "race" and "colour" and their relationship to one another, then focusing on the harms done by discrimination based on colour. In Part III we

<sup>7</sup> See e.g. Jones, "Intra-Group Preferencing," *supra* note 6 at 659, 691.

<sup>8</sup> On solidarity's silencing effect, see e.g. Tennille McCray, "Coloring Inside the Lines: Finding a Solution for Workplace Colorism Claims" (2012) 30:1 *Law & Inequality* 149 at 176; Jennifer L. Hochschild, "When Do People Not Protest Unfairness? The Case of Skin Color Discrimination" (2006) 73:2 *Social Research* 473 at 485 [Hochschild, "Not Protest Unfairness?"]; Russell Rickford, "Black Lives Matter: Toward a Modern Practice of Mass Struggle" (2016) 25:1 *New Labor Forum* 35 at 38.

<sup>9</sup> See e.g. the E-RACE Initiative of the United States Equal Employment Opportunity Commission (EEOC) discussed in Part IV.A.1. See also the Federal Court of Australia's decision in *Eatock v Bolt*, [2011] FCA 1103 (a successful claim by an Aboriginal woman that newspapers articles had conveyed offensive messages about fair-skinned Aboriginal people).

<sup>10</sup> *Brothers v Black Educators Association*, 2013 CanLII 94697 (NS HRC) [*Brothers*].

<sup>11</sup> "Bi-racial," like "mixed race," carries problematic connotations of racial purity; see e.g. John Hutnyk, "Hybridity" (2005) 28:1 *Ethnic & Racial Studies* 79 at 90. We use the term in this paper because the Nova Scotia Human Rights Commission repeatedly referred to Ms. Brothers as bi-racial.

<sup>12</sup> *Supra* note 10 at para 42. While such a comment could be interpreted either as a direct reference to Ms. Brother's skin colour, or as an indirect reference to her supposed lack of racial authenticity, based on the tribunal's findings, the remarks related exclusively to the former. *Ibid* at para 83. For further discussion on the relationship between colour and racial authenticity, see Part II.

<sup>13</sup> *Ibid* at para 42. In this paper, we have adopted the convention of capitalizing words such as Black and White when they are used to refer to racial groups and omitting capitals when they are used to refer to skin colour. We have also preferred "Black" to, for example, "African-Canadian," in order to capture the visual element that is the focus of this paper.

<sup>14</sup> *Ibid* at para 83. See also United States, Equal Employment Opportunity Commission (EEOC), "Race and Color Discrimination: A Distinction with the Difference" (2009) 20:3 *The Digest of Equal Employment Opportunity Law*, online: <<https://www.eeoc.gov/federal/digest/digest/xx-3.cfm>> [EEOC, "Race and Color Discrimination"].

briefly review the history of race and colour in international and domestic human rights instruments.

Next, in Part IV we consider the judicial treatment of the colour ground. We begin with a review of the American jurisprudence, focusing on the problems that have typically arisen in discrimination claims based on colour. Our analysis of the emerging Canadian jurisprudence addressing colour as a discrete ground of discrimination follows. We find that colour makes intra-group claims such as *Brothers'*, as well as intersectional claims, possible or at least easier to advance. Colour also enhances decision-makers' understanding of race and identity by forcing judges and tribunals to conceptualize colour as distinct from race and analyze the relationship between the two concepts. We also find that colourism claims tend to involve direct discrimination, in other words claims based on explicit line-drawing, rather than adverse effects discrimination claims – those where facially neutral rules are alleged to have a discriminatory impact.<sup>15</sup> Few colourism claims seem to have been based on adverse effects,<sup>16</sup> which is perhaps another reason to analyze colourism as a distinct ground. In Part V, we conclude that colour is playing an increasingly important role in deconstructing hierarchy; that it is important now, more than ever, to reflect on how colourism informs the growing divisions within multi-cultural societies; and that solidarity within racial groups should not be secured at the expense of individuals and communities that experience marginalization because of the colour of their skin.

## II. “Race” and “Colour”

The relationship between the concepts of race and colour is both complicated and contradictory. Nevertheless, an understanding of these concepts and their relationships is necessary to appreciate how colour can play a discrete role in human rights and equality litigation.<sup>17</sup>

The traditional view is that race and colour are synonymous, with colour serving as a proxy for race.<sup>18</sup> This is observable in historical census categories of race that are labelled exclusively in terms of colour, such as White, Red, Yellow, and Black.<sup>19</sup> We also see this in almost every Canadian human rights

<sup>15</sup> Sophia Moreau, “What is Discrimination?” (2010) 38:2 *Philosophy & Public Affairs* 143 at 154.

<sup>16</sup> In addition, most of the colourism claims we examined involved intentional discrimination, rather than unconscious negative stereotyping. See e.g. *Brothers*, *supra* note 10 at paras 44, 49.

<sup>17</sup> Timothy Caulfield, “Defining ‘Race’ as the Defining Problem” (2009) 45:5 *Hous L Rev* 1475 at 1480–81; Peter Geller, *Making Blackness, Making Policy* (PhD Dissertation, Harvard University, 2012), online: Digital Access to Scholarship at Harvard, <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:9548618>> at 32.

<sup>18</sup> Aceves, *supra* note 1 at 563; Harpalani, *supra* note 1 at 609.

<sup>19</sup> Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999) at 3 (linking Canadian racial distinctions specifically to colour); Chris Anderson, “From Nation to Population: The Racialization of Métis in the Canadian Census” (2008) 14:2 *Nations and Nationalism* 347 at 354 (examining the role of the 1901 census categories of White, Red, Black and Yellow in developing the category “Metis”).

case that includes a claim of racial discrimination, where the colour ground is included as part of the claim and race and colour – as well as ancestry, place of origin, ethnic origin and national origin – are used as synonyms.<sup>20</sup> Another common view sees colour as a subset of race,<sup>21</sup> as when it is identified as the predominant feature of racialization.<sup>22</sup> The current prevailing view is that colour and race are separate, but overlapping, systems of hierarchy.<sup>23</sup> However, geography, history and the individuals or groups involved all influence the relationship between race and colour.<sup>24</sup>

The relationship between colour and race is more complex if colour is understood to mean more than simply skin pigmentation. If colour is as much about culture – about a person’s education, their socio-economic class, the neighbourhood in which they live, how they dress, what type of music they listen to, and much more – as it is about skin tone, then colour and race are even more inextricably linked.<sup>25</sup> A charge that an individual is, for

<sup>20</sup> See the discussion in Part IV.B. Other Court decisions have described ethnic identity as the umbrella term encompassing race, colour, ancestry, and place of origin. See e.g. *SELL*, *supra* note 1 (alleging that Latin American workers working on the Canada Line Skytrain expansion in Vancouver in anticipation of the 2010 Winter Olympic Games were discriminated against in comparison with workers from Europe who received superior salaries, accommodations, meal arrangements, and expense arrangements).

<sup>21</sup> See e.g. Taunya Lovell Banks, “Colorism: A Darker Shade of Pale” (2000) 47:6 *UCLA L Rev* 1705 at 1713 [Banks, “Colorism”] (contending that colourism constitutes a form of race-based discrimination); Michael Banton, “The Nature and Causes of Racism and Racial Discrimination” (1992) 7:1 *International Sociology* 69 at 74 (including colour, descent, national origin and ethnic origin as sub-categories of race). Other grounds of discrimination, such as national origin, do contribute to racial classification. Indeed, among some groups, race and national origin are conflated in discrimination claims. See e.g. Taunya Lovell Banks, “Colorism among South Asians: Title VII and Skin Tone Discrimination” (2015) 14:4 *Wash U Global Studies L Rev* 665 at 669 [Banks, “Colorism among South Asians”]; Ronald E Hall, “Eurocentrism and the Postcolonial Implications of Skin Color among Latinos” (2011) 33:1 *Hispanic Journal of Behavioral Sciences* 105 [Hall, “Eurocentrism”]. Ethnic origin is also often conflated with race: Geller, *supra* note 17 at 3; Denia Garcia & Maria Abascal, “Coloured Perceptions: Racially Distinctive Names and Assessments of Skin Color” (2015) 60:4 *American Behavioural Scientist* 420.

<sup>22</sup> “Racialization” is used to describe the socio-historical processes for “the creation, inhabitation, transformation, and destruction of formal racial categories and of social meanings associated with race”: Harpalani, *supra* note 1 at 611, n 15; Michael Omi & Howard Winant, *Racial Formation in the United States*, 2nd ed (New York: Routledge, 1994) at 55.

<sup>23</sup> Margaret Hunter, “The Persistent Problem of Colourism: Skin Tone, Status, and Inequality” (2007) 1:1 *Sociology Compass* 237 at 239 [Hunter, “Persistent Problem”] (noting that the hierarchy employed in colourism, however, is usually the same one that governs racism: light skin is prized over dark, and European facial features and body shapes are prized over African features and body shapes). A recent example of this view of racial discrimination as a power hierarchy can be seen in the Supreme Court of Canada’s decision in *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, [2018] 1 WWR 1 [Schrenk] (concerning the jurisdiction of the Tribunal over workplace discrimination) at para 43:

[E]conomics is only one axis along which power is exercised between individuals. Men can exercise gendered power over women, and white people can exercise racialized power over people of colour. The exploitation of identity hierarchies to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination.

<sup>24</sup> See e.g. Salvador Vidal-Ortiz, “On Being a White Person of Color: Using Autoethnography to Understand Puerto Ricans’ Racialization” (2004) 27:2 *Qualitative Sociology* 179 at 180, n 2 (contrasting racial systems in the United States that focus on a Black/White one-drop framework with Latin American systems which also include a stronger Indigenous background, socioeconomic status, familial social position and citizenship).

<sup>25</sup> See *Brothers*, *supra* note 10 at para 24 (noting that “there are some who also extend the ‘colourist’ or ‘shade-ist’ idea to include a racial and perhaps even a cultural element. ... [A]s a person appears more deeply

example, “not black enough” should not be presumed to relate solely to skin pigmentation.<sup>26</sup> Indeed, in the intra-group context, such accusations are understood by some to be demands for authenticity and group solidarity and by others as demands for conformity to stereotypes.<sup>27</sup>

Nevertheless, as our discussion in Part IV of the discrimination claims brought on colour grounds will show, those claims appear to have been argued and decided simply in terms of the phenotype. This narrow understanding of the colour ground may be pragmatic, because discrimination based on culture is not a prohibited ground.<sup>28</sup> However, in some cases it is evident that a restricted or even simplistic focus is based upon a lack of understanding of the many linkages between race and colour and a lack of familiarity with the large body of both theoretical and empirical research that interrogates both concepts. Discussing that large body of literature is beyond the scope of this paper’s introduction to the work that colour might do as a discrete ground of discrimination. What we attempt to do in this introduction is sketch out some of the basics of the two concepts and their relationships.

## A. The Concept of “Race”

We begin with the concept of race itself and the now discredited view of race as biology or genetics.<sup>29</sup> This understanding is referred to by critical race

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completed in a non-white hue, she is considered more purely and more fully a member of the other race or ethnicity, and more fully integrated into, or more completely a part of that other racial or ethnic culture.”) The authors would like to credit one of the anonymous reviewers for prompting this point.

<sup>26</sup> The “not black enough” insult is one that is also heard within Australian Aboriginal and Torres Strait communities. For example, Shannon Dodson, a fair-skinned Yawuru activist with a family name that is well known in political circles, writes about how she has been greeted with a disappointed “I thought you would be a lot darker” or dismissed at a community presentation with the words “I don’t have to listen to you coconuts”, with “coconuts” being a derogatory term that implies a person is “acting white” despite being brown on the outside. See Jack Latimore, “Shannon Dodson: Too White, Too Black, or Not Black Enough? This is Not a Question for Others to Decide” *IndigenousX* (13 June 2017), online: <<https://www.theguardian.com/commentisfree/2017/jun/09/too-white-too-black-or-not-black-enough-this-is-not-a-question-for-others-to-decide>>. For another example, in a context perhaps more familiar to readers, see Ron Walters, “Barack Obama and the Politics of Blackness” (2007) 38:1 *J Black Studies* 7 (assessing the debate over the relevance of Barack Obama’s “Blackness,” defined as the cultural cues in his personal identity).

<sup>27</sup> See generally E Patrick Johnson, *Appropriating Blackness: Performance and the Politics of Authenticity* (Duke University Press, 2003) (describing how diverse constituencies persistently try to prescribe the boundaries of “authentic” blackness); Kimberly Jade Norwood, “The Virulence of *Blackthink*<sup>TM</sup> and How Its Threat of Ostracism Shackles Those Deemed Not *Black Enough*” (2004–2005) 93:1 *Kentucky L Rev* 143 at 149 [Norwood, “The Virulence of *Blackthink*”] (discussing how her blackness was questioned based on opinions she held or was suspected of holding by self-appointed guardians of blackness). See also Stephen L Carter, in *Reflections of an Affirmative Action Baby* (Basic Books, 1992) at 30: “If you know the color of somebody’s skin, you know what the person values (or should value), what causes the person supports (or should support), and how he or she thinks (or should think).”

<sup>28</sup> While “culture” is not a protected ground, race, ancestry, place of origin, ethnic origin and national origin are. And it is likely that a discrimination claim based on the intersection of “colour” and “culture” could be re-articulated as a discrimination claim based on one or multiple of these alternate protected grounds.

<sup>29</sup> See e.g. Ian F Haney-López, “The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29:1 *Harv CR-CLL Rev* 1 at 11 (reviewing evidence that there are no genetic characteristics possessed by all Blacks but not by non-Blacks and no gene or gene cluster common to all Whites but not

scholars as the “naïve concept of race,” meaning that we talk and act as if our racial categories simply mirror distinct biological and hereditary divisions.<sup>30</sup> For example, a 1995 decision of the Ontario Human Rights Tribunal accepted, based upon expert evidence, that race is “a biological concept which refers to the inherited physical and physiological characteristics of a group of people.”<sup>31</sup>

Colour is just one of the characteristics that has contributed to the construction of racial categories and the categorization of individuals into racial groups. The same 1995 human rights decision which accepted a biological definition of race also saw colour as one of the most common defining features of race and therefore “a characteristic within a race.”<sup>32</sup> People often use race and colour interchangeably because colour is the most visible physical feature associated with race, despite race’s correlation with other phenotypic features such as eye colour or shape, hair texture, nose width, lip fullness, etc.<sup>33</sup> Phenotypic prototypicality, or the degree to which people look like archetypal members of their racial group, plays a significant role in how group members and non-members make racial identifications.<sup>34</sup> However, defining racial categories by phenotypes does not tell us how those particular features came to be considered racially significant,<sup>35</sup> and is incomplete in so far as it misses the cultural and social attributes that also inform racial categories and racial identification.<sup>36</sup>

The prevailing view of race is that it is a social construct – a phenomenon that humans have created because of our values and interests and not a

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to non-Whites); Sandra Soo-Jin Lee, Joanna Mountain & Barbara A Koenig, “The Meanings of ‘Race’ in the New Genomics: Implications for Health Disparities Research” (2001) 1 Yale J Health Policy L & Ethics 33 at 39 (the “widely accepted consensus among evolutionary biologists and genetic anthropologists is that biologically identifiable human races do not exist”).

<sup>30</sup> Gowder, *supra* note 5 at 327. See also Anderson, *supra* note 19 at 352 (arguing that the Canadian concept of citizenship is strongly connected to a biological concept of race that involves an essentialization with consequences for how the Métis are imagined as part of a race, rather than as part of a nation).

<sup>31</sup> *Espinoza v Coldmatic Refrigerator of Canada Ltd*, 1995 CarswellOnt 4202, 29 CHRR D/35 (WLNext) [*Espinoza*] at para 225 (Ont Board of Inquiry), aff’d [1998] OJ No 4019, 1998 CarswellOnt 3825 (Ont Div Ct).

<sup>32</sup> *Ibid* at para 225.

<sup>33</sup> See Harpalani, *supra* note 1 at 609, 612 (arguing that colour is the most common visual feature and symbol of race); Cedric Herring, (2004) “Skin Deep: Race and Complexion in the ‘Colourblind’ Era” in C Herring, VM Keith, & HD Horton, eds, *Skin Deep: How Race and Complexion Matter in the “Color-Blind” Era* (Urbana and Chicago: University of Illinois at Chicago, 2004) at 18–19, n 1 (noting skin colour is the most visible, enduring and difficult to change of the many phenotypic features).

<sup>34</sup> Clara L Wilkins, Cheryl R Kaiser & Heather Riecke, “Detecting Racial Identification: The Role of Phenotypic Prototypicality” (2010) 46:6 J Experimental Social Psychology 1029 (discussing three studies showing that the degree to which an individual looks like a prototypical member of his or her racial group shapes inferences about racial identification); Matthew S Harrison and Kecia M Thomas, “The Hidden Prejudice in Selection: A Research Investigation on Skin Color Bias” (2009) 39:1 J Applied Social Psychology 134 at 134 (noting that in-group homogeneity is required to construct race as a social category).

<sup>35</sup> Jayne Chong-Soon Lee, “Review: Navigating the Topology of Race” (1994) 46:3 Stanford L Rev 747 at 761.

<sup>36</sup> Geller, *supra* note 17. See also Norwood, “The Virulence of *Blackthink*”, *supra* note 27 at 149 (discussing proxies for race that include wealth, academic success, place of residence, speech patterns, music preferences and political positions); Angela Onwuachi-Willig, “Volunteer Discrimination” (2007) 40:5 UC Davis L Rev 1895 at 1913–14 (arguing that the “performance of identity” is as important to racialization and racial identification as are genealogy and phenotype).

naturally existing fact.<sup>37</sup> Thus, Haney-López, in his review of the creation, maintenance and experience of race, defines “a ‘race’ as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry,”<sup>38</sup> and Lee calls racial classifications “[locations] for a series of beliefs and judgments about the nature of the people within those categories.”<sup>39</sup>

Many examples illustrate the social construction of race: the oppression of Africans with albinism, whose ancestors are Black but whose skin colour is white;<sup>40</sup> the perceived metamorphosis of the Irish from non-White/subjugated to White/non-subjugated;<sup>41</sup> and discrimination against white-skinned individuals with medical disorders which darken their skin.<sup>42</sup> The fluidity inherent in socially constructed identities can give rise to controversies over the illegitimacy of deliberately changing how one’s identity is perceived by others. A recent and well-known example is that of Rachel Dolezal, formerly an African studies instructor and head of the Spokane, Washington chapter of the National Association for the Advancement of Colored People (NAACP), who was “outed” as being White after years of phenotypically and culturally presenting herself as a Black woman.<sup>43</sup>

Race is socially constructed through a process that weighs the subjective perspective of both the individual whose race is being assigned and, even more so, the individual(s) assigning that race.<sup>44</sup> Perceptions of race are necessarily imprecise and subjective.<sup>45</sup> Only the perception of race is required to trigger racial stereotypes.<sup>46</sup> Indeed, some human rights statutes specifically recognize that discrimination occurs when a person suffers disadvantage flowing from

<sup>37</sup> *Ibid* at 8–9.

<sup>38</sup> Haney-López, *supra* note 29 at 7.

<sup>39</sup> Lee, *supra* note 35 at 762.

<sup>40</sup> See e.g. *Through Albino Eyes: The Plight of Albino People in Africa’s Great Lakes Region and a Red Cross Response, Advocacy Report* (Geneva: International Federation of Red Cross and Red Crescent Societies, 2009), online: <[www.ifrc.org/Global/Publications/general/177800-Albinos-Report-EN.pdf](http://www.ifrc.org/Global/Publications/general/177800-Albinos-Report-EN.pdf)>; Aceves, *supra* note 1.

<sup>41</sup> Noel Ignatiev, *How the Irish Became White* (New York: Routledge Classics, 2009). See also Sébastien Grammond, “Disentangling ‘Race’ and Indigenous Status: The Role of Ethnicity” (2008) 33:2 *Queens LJ* 487 (reviewing the continuous and discomfoting use of “race” by Canadian courts to describe Indigenous peoples).

<sup>42</sup> Banton, “Race Relations Problematic”, *supra* note 4 at 288. These examples also illustrate the use of race as a tool for subjugating those of purportedly inferior races. See Bill Ashcroft, Gareth Griffiths & Helen Tiffin, *Post-Colonial Studies: The Key Concepts* (London: Routledge, 2000) at 180–86.

<sup>43</sup> Khaled A Beydoun & Erika K Wilson, “Reverse Passing” (2017) 64:2 *UCLA L Rev* 282. See also Rogers Brubaker, *Trans: Gender and Race in an Age of Unsettled Identities* (Princeton, NJ: Princeton University Press, 2016).

<sup>44</sup> Geller, *supra* note 17 at 43.

<sup>45</sup> Ellis P Monk, Jr, “The Cost of Color: Skin Color, Discrimination, and Health among African-Americans” (2015) 121:2 *American J Sociology* 396 at 409; See also Barbara Kay, “Delaware students can now choose their own race. This should end well” *National Post* (15 February 2018), online: <<http://nationalpost.com/opinion/barbara-kay-delaware-students-can-now-choose-their-own-race-this-should-end-well>> (describing the subjectivity of transracial and transgender identities).

<sup>46</sup> Onwuachi-Willig & Barnes, *supra* note 6 at 1324–25; Paola Loriggio, “Federal government to test name-blind hiring for public service”, *The Globe and Mail* (20 April 2017), online: <[www.theglobeandmail.com/](http://www.theglobeandmail.com/)>.



either their “actual” or their perceived race.<sup>47</sup> The Supreme Court of Canada affirmed the importance of perception when it analogized the ground of disability, which was at issue in the case before it, with the ground of race:

When an employer refuses to hire someone because it considers the candidate’s skin to be too brown, *regardless of whether the candidate actually has brown skin or whether the employer subjectively perceives it as such, the employer has engaged in discriminatory practices on the basis of colour* and it must then justify the exclusion as a requirement of the employment. Thus, whether the exclusion is based on race, colour, sex, sexual orientation, civil status, religion, political convictions, language, ethnic or national origin or social condition, *discrimination exists whether the employer’s identification of that race, colour, sex, or sexual orientation is objective or purely subjective.*<sup>48</sup>

The social construction of race does not make racism any less real. As Geller explains: “Perhaps there are no races; but there are certainly black people.”<sup>49</sup> In other words, race is legally salient, despite its social construction, because it causes “specific social harms to concrete groups of human beings.”<sup>50</sup>

## B. The Concept of “Colour” and Colourism

The colour ground of discrimination – like most grounds – is undefined in international instruments and domestic legislation.<sup>51</sup> However, courts and tribunals assume it refers to the visible physical characteristic of skin tone or hue<sup>52</sup> – the physical appearance alone, without a cultural component.<sup>53</sup> Skin colour is seen as an immutable, objective, biological quality.<sup>54</sup> It is a physical feature that “varies along a gradated scale when measured by a light meter.”<sup>55</sup> But, although colour is a continuous variable on a spectrum of imperceptible differences, it can be used discontinuously to assign individuals to one discrete racial category or another.<sup>56</sup>

<sup>47</sup> See *infra* note 128.

<sup>48</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, 2000 SCC 27, [2000] 1 SCR 665 at para 56, quoting *Commission des droits de la personne du Québec v Ville de Laval*, [1983] CS 961 at 966 [emphasis added].

<sup>49</sup> Geller, *supra* note 17 at 8.

<sup>50</sup> Sadat, *supra* note 4 at 560.

<sup>51</sup> The EEOC’s 2008 E-RACE initiative defines colour; see *infra* text accompanying note 130.

<sup>52</sup> See e.g. EEOC, “Race and Color Discrimination”, *supra* note 14; *Brothers*, *supra* note 10 at para 23.

<sup>53</sup> In *Brothers*, *supra* note 10 at para 24, the Nova Scotia Human Rights Commission acknowledged that some “include a racial and perhaps even a cultural element” in the concepts of colour and colourism. However, in its summary of the evidence, the Commission did not find cultural components to comments that the claimant was “too light skinned to ‘officially represent them’”, the Black Educators’ Association, or that the community “wanted a black person in the Regional Educator job that was actually black,” even though such comments might have been references to Ms. Brothers’ class or education or where she lived, rather than or in addition to references to her skin colour. *Ibid* at paras 42–43.

<sup>54</sup> This view is vulnerable, given the common use of chemical agents to lighten skin pigmentation, known as skin whitening, skin lightening and/or skin bleaching. See e.g. Yaba Amgborale Blay, “Skin Bleaching and Global White Supremacy: By Way of Introduction” (2011) 4:4 J Pan African Studies 4.

<sup>55</sup> Banton, “Race Relations Problematic”, *supra* note 4 at 291.

<sup>56</sup> *Ibid* at 291–92.

The most important point, however, is that the recognition of different skin colours is not colourism. It is not the infinite differences in skin tone that are the source of colour-based discrimination, but rather the social meaning ascribed to those differences.

Colourism usually refers to hierarchies based on the spectrum of skin colour within a racialized group, namely, intra-group differentiation.<sup>57</sup> However, colour-based discrimination does not only happen within non-White racial groups and, when it does, it is often an adaptation to a colonial history of colour-based discriminatory practices by Whites.<sup>58</sup>

Alice Walker is usually credited with coining the term “colourism,” and her definition – “prejudicial or preferential treatment of same-race people based solely on their color”<sup>59</sup> – is an example of colourism restricted to intra-group discrimination. In an oft-cited definition that sees colourism as uni-directional, Hunter described it as “a process that privileges light-skinned people of colour over dark in areas such as income, education, housing, and the marriage market.”<sup>60</sup> However, another well-received definition – that colourism is “the tendency to perceive or behave towards members of a racial category based on the lightness or darkness of their skin tone”<sup>61</sup> – focuses on differential treatment rather than light-skinned privilege, acknowledging that skin tone bias may sometimes disadvantage lighter-skinned individuals.<sup>62</sup> Perhaps the most expansive understanding of colourism is that of Chanbonpin

<sup>57</sup> Harpalani, *supra* note 1 at 609.

<sup>58</sup> Lance Hannon, “White Colourism” (2015) 2:1 *Social Currents* 13 (arguing both White racism and White colourism must be acknowledged); Trina Jones, “Shades of Brown, The Law of Skin Color” (2000) 49:6 *Duke LJ* 1487 [Jones, “Shades of Brown”] (tracing the historical development of colourism in the United States); Kimberly Jade Norwood “If You Is White, You’s Alright...’ Stories about Colorism in America” (2015) 14:4 *Wash U Global Studies L Rev* 585 at 592 [Norwood, “Colourism in America”] (arguing that “colonialism in the new world played a pivotal role in the centuries-old preference we see ... for white and light skin”). The origin of colourism practices in India and other parts of South Asia is contested, with some arguing that colour-based discrimination pre-dated colonial rule and colonialism only exacerbated existing colourist attitudes. For examples of various perspectives on the issue, see Tony Ballantyne, *Orientalism and Race: Aryanism in the British Empire* (London: Palgrave Macmillan, 2017) (tracing the emergence and dissemination of Aryanism within the British Empire in the 19th century); Neha Mishra, “India and Colourism: The Finer Nuances” (2015) 14:4 *Wash U Global Studies L Rev* 725 (arguing skin colour prejudice in India exists irrespective of class or caste); Banks, “Colorism among South Asians”, *supra* note 21 at 671 (arguing that earlier theories, now largely discredited, linked colourism practices to India’s caste system); Joan Leopold, “British Application of the Aryan Theory of Race to India” (1974) 89:352 *The English Historical Rev* 578; Doug Coulson, “British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act: United States v. Thind Revisited” (2015) 7 *Georgetown JL & Modern Critical Race Perspectives* 1 (discussing immigrants from India in the early 20th century who applied for American citizenship on the basis that they were White).

<sup>59</sup> Alice Walker, “If the Present Looks like the Past, What Does the Future Look Like?” in *In Search of Our Mother’s Gardens: Womanist Prose* (Orlando: Harcourt Inc, 1983) 290 at 290–91.

<sup>60</sup> Hunter, “Persistent Problem”, *supra* note 23 at 237. See also Hochschild, “Not Protest Unfairness?”, *supra* note 8 at 474 (noting that colourism can be defined both uni-directionally (i.e. exhibited only by those with power and status) and multi-directionally).

<sup>61</sup> Keith Maddox & Stephanie Gray, “Cognitive Representations of Black Americans: Re-exploring the Role of Skin Tone” (2002) 28:2 *Personality and Social Psychology Bulletin* 250 at 250.

<sup>62</sup> Sadat, *supra* note 4 at 551, n 6.

who describes colourism as “a multifaceted system of subordination that influences not only the way that in-group members treat each other, but also how outsiders treat in-group members, and how in-group members treat outsiders.”<sup>63</sup> We understand colourism to be multi-directional, with light-skinned individuals sometimes disadvantaged and sometimes advantaged, and to be inter-group and well as intra-group. We also note that, although colourism is usually thought of as a binary of light and dark, there is some empirical evidence that three categories – light, medium and dark – are required to account for the differential effects of colourism.<sup>64</sup>

Colourism operates around the world. The world-wide market for chemicals that lighten skin tones is one illustration of this reach.<sup>65</sup> However, every country’s cultural and historical context informs how colourism manifests there. For example, in India, colourism now appears to be a customary practice perpetuated by cultural beliefs and social institutions such as the family, marriage, education and the media.<sup>66</sup> Qualitative research has found that, irrespective of class or caste, lighter skin colour is related to higher rates of acceptance in society, with darker-skinned females being more adversely affected than darker-skinned males.<sup>67</sup>

There is extensive interdisciplinary literature on colourism, most of it written by American scholars dealing with Black and White Americans.<sup>68</sup>

<sup>63</sup> Kim D Chanbonpin, “Between Black and White: The Coloring of Asian Americans” (2015) 14 Wash U Global Studies L Rev 637 at 643.

<sup>64</sup> See e.g. Sarita Sahay & Niva Pirhan, “Skin-Color Preferences and Body Satisfaction Among South Asian-Canadian and European-Canadian Female University Students” (1997) 137:2 J Social Psychology 161 (finding that medium-skinned women had the lowest body image because they were too dark to attain the ideal of lightness but not dark enough to reject it); JeffriAnne Wilder, “Revisiting ‘Color Names and Color Notions’: A Contemporary Examination of the Language and Attitudes of Skin Color Among Young Black Women” (2010) 41:1 J Black Studies 184 (finding that language and beliefs indicate that colourism operates as a three-tiered structure rather than the tradition binary paradigm); Ekeoma E Uzogara & James S Jackson, “Perceived Skin Tone Discrimination across Contexts: African-American Women’s Reports” (2016) 8:2 Race & Social Problems 147 at 149 (summarizing research that indicates colourism may operate on a three-layered structure of dark, medium, and light skin).

<sup>65</sup> See e.g. Evelyn N Glenn, “Yearning for Lightness: Transnational Circuits in the Marketing and Consumption of Skin Lighteners” (2008) 22:3 Gender & Society 281 [Glenn, “Yearning for Lightness”]; Margaret L Hunter, “Buying Racial Capital: Skin-Bleaching and Cosmetic Surgery in a Globalized World” (2011) 4:4 J Pan African Studies 142.

<sup>66</sup> Cynthia Sims & Malar Hirudayaraj, “The Impact of Colorism on the Career Aspirations and Career Opportunities of Women in India” (2016) 18:1 Advances in Developing Human Resources 38 at 39 (reviewing the literature on colourism in Asia). See also Herring, *supra* note 33 at 12.

<sup>67</sup> Mishra, *supra* note 58 at 745 (noting that colourism in India hides among other variables and is gendered); Anna Holmes, “Black With (Some) White Privilege” *New York Times* (10 February 2018), online: <<https://www.nytimes.com/2018/02/10/opinion/sunday/black-with-some-white-privilege.html>> (describing the greater societal acceptance and thus greater success of mixed race African-Americans over non-mixed African-Americans in the arts, sports, music and politics).

<sup>68</sup> For analysis of colourism in other contexts, see e.g. Evelyn N Glenn, ed, *Shades of Difference: Why Skin Color Matters* (Stanford: Stanford University Press, 2009) [Glenn, *Shades of Difference*] (looking at how colourism impacts people’s lives in Latin America, Asia, Africa, and North America); Kimberly Jade Norwood, ed, *Color Matters: Skin Tone Bias and the Myth of a Post Racial America* (New York: Routledge, 2014) (using evidence from around the world to demonstrate that in most cultures lighter is better);

We cannot do justice to that huge body of work here, but we do want to highlight some of the harms of colourism, to indicate why it is a significant type of discrimination.

### C. The Harms of Colourism

Since there are very few Canadian empirical studies on the impact of race and ethnicity in areas such as incarceration and health,<sup>69</sup> little is known about the material impacts of colourism in Canada.<sup>70</sup> However, in the United States there is a growing body of evidence demonstrating that, on average, darker-skinned Blacks and Latinos have lower incomes, less education, and fewer prestigious jobs than lighter-skinned Blacks and Latinos.<sup>71</sup> The impact of these three factors is as great between lighter- and darker-skinned Blacks as it is between Blacks and Whites in the United States.<sup>72</sup> Other American studies have indicated that light-skinned Blacks are consistently privileged over dark-skinned Blacks when it comes to student punishment and adult incarceration.<sup>73</sup> Studies also show that darker skin-colour prejudice negatively

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Debito Arudou, "Japan's Under-Researched Visible Minorities: Applying Critical Race Theory to Racialization Dynamics in a Non-White Society" (2015) 14:4 Wash U Global Studies L Rev 695 (examining the contribution of skin colour to how one "looks Japanese"); Angela Aujla, "Others in Their Own Land: Second Generation South Asian Canadian Women, Racism, and the Persistence of Colonial Discourse" (2000) 20:2 Canadian Women's Studies 41 (discussing internalized racism among multigenerational South Asian Canadian women); Jeremiah Chin et al, "Terminus Amnesia: Cherokee Friedman, Citizenship, and Education" (2016) 55:1 Theory into Practice 28 (looking at the influence of colourism on the Dawes Rolls); Hall, "Eurocentrism", *supra* note 21 (arguing that those with darker skin experience significant impacts that are not acknowledged by mainstream social science due to its Eurocentric bias); Vidal-Ortiz, *supra* note 24 (using his own experience as a Puerto Rican to illustrate the limitations of American race and ethnic constructs).

<sup>69</sup> The main problem appears to be that data on race in Canada is not routinely collected and available, at least in the criminal justice context: see Charles Reasons et al, "Race and Criminal Justice in Canada" (2016) 11:2 Intl J Criminal Justice Sciences 75 at 78; Gerry Veenstra, "Black - White Health Inequalities in Canada" (2016) 18:1 J Immigrant & Minority Health 51.

<sup>70</sup> Exceptions include Statistics Canada, "The 2006 Canadian Immigrant Labour Market: Analysis by Region or Country of Birth", 13 February 2008, online: <<http://www.statcan.gc.ca./daily-quotidien/080213/dq080213b-eng.htm>> (revealing that the unemployment rates of Black youth are more than twice as high as those of White youth); Gerry Veenstra, "Mismatched Racial Identities, Colourism, and Health in Toronto and Vancouver" (2011) 73:8 Social Science & Medicine 1152 (finding that darker-skinned Black respondents were more likely than lighter-skinned Black respondents to report poor health outcomes); CE James, "Students 'at Risk': Stereotypes and the schooling of black boys" (2011) 47:2 Urban Education 464 (examining Black Canadian youths' lived experiences of racism in the school setting); Julian Hasford, "Dominant Cultural Narratives, Racism, and Resistance in the Workplace: A Study of the Experiences of Young Black Canadians" (2016) 57:1-2 Community Psychology 158 (finding that race is a defining aspect of the lived work experience for young Black Canadians and the impact of slavery and colonization continues to play out in the modern workplace).

<sup>71</sup> See e.g. M Hughes & BR Hertel, "The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness among Black Americans" (1990) 68:4 Social Forces 1105; Baynes, *supra* note 5 at 160-62; Hochschild, "Not Protest Unfairness?", *supra* note 8 at 476-79; Harrison & Thomas, *supra* note 34 at 136-38; Norwood, "Colourism in America," *supra* note 58 at 593-98.

<sup>72</sup> Hughes & Hertel, *supra* note 71 at 1109, 1112, 1114 (finding that skin colour overshadows educational background and prior work experience in hiring decisions).

<sup>73</sup> Uzogara & Jackson, *supra* note 64 at 150.

affects Latinx mental health,<sup>74</sup> as it does the mental and physical health of Black Americans.<sup>75</sup>

These negative effects are usually the result of stereotyping.<sup>76</sup> In an influential article, Hunter traced the roots of colourism back to European colonialization and the maintenance of a white supremacy that was “predicated on the idea that dark skin represents savagery, irrationality, ugliness, and inferiority.”<sup>77</sup> White skin, on the other hand, was constructed as civility, rationality, beauty, and superiority.<sup>78</sup> Today there are well-documented stereotypes of darker-skinned Blacks as unintelligent, unattractive, impoverished, criminal and lazy.<sup>79</sup> The association of dark skin with criminality for males is particularly well documented.<sup>80</sup> American studies have found that darker skin colour, in general, is linked with “incompetence and hostility, as well as disfavoured political viewpoints, such as a lack of patriotism and disloyalty.”<sup>81</sup> In addition, the more that individuals are perceived to have the typical phenotypic features of a stereotyped group, the more accessible the stereotypes become.<sup>82</sup>

While anecdotal, similar biases appear to be present in at least some members of the Canadian judiciary. Justice Eidsvik of the Alberta Court of Queen’s Bench recently remarked that she felt uncomfortable entering an informal hearing room “full of big dark people”.<sup>83</sup> Similarly, Shain Jackson, an Indigenous lawyer in British Columbia, recounted how the judge at a sentencing hearing assumed that a darker-skinned Indigenous colleague, dressed as he was and standing next to him, was the accused at a sentencing hearing.<sup>84</sup> These troubling examples are seemingly rooted in the same stereotypes summarized above – that darker-skinned persons, and especially males, are more threatening and more likely to be criminals.

<sup>74</sup> Nayeli Y Chavez-Dueñas, Hector Y Adames & Kurt C Organista, “Skin-Color Prejudice and Within-Group Racial Discrimination: Historical and Current Impact on Latino/a Populations” (2014) 36:1 *Hispanic J of Behavioral Science* 3.

<sup>75</sup> Monk, Jr. *supra* note 45; Norwood, “Colorism in America,” *supra* note 58 at 597.

<sup>76</sup> Leland Ware, “‘Color Struck’: Intragroup and Cross-Racial Color Discrimination” (2013) 13:1 *Conn Pub Int LJ* 75 at 76.

<sup>77</sup> Hunter, “Persistent Problem,” *supra* note 23 at 238.

<sup>78</sup> *Ibid.*

<sup>79</sup> Norwood, “The Virulence of *Blackthink*”, *supra* note 27 at 163; Harrison & Kecia M Thomas, *supra* note 34 at 155–56.

<sup>80</sup> See e.g. Onwuachi-Willig & Barnes, *supra* note 6 at 1905; JL Eberhardt et al, “Seeing Black: Race, Crime, and Visual Processing” (2004) 87:6 *J Personality & Social Psychology* 876; Kimberly Barsamian Kahn & Paul G Davies, “Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias among Ingroup and Outgroup Members” (2011) 14:4 *Group Processes Intergroup Relations* 569.

<sup>81</sup> Michelle Goodwin, “Race as Proxy: An Introduction” (2004) 53:3 *DePaul L Rev* 931 at 933.

<sup>82</sup> Kahn & Davies, *supra* note 80 at 569–70.

<sup>83</sup> Meghan Grant, “Calgary judge apologizes to law students for comments ‘insensitive to racial minorities’” (2018) *CBC News*: <<http://www.cbc.ca/news/canada/calgary/judge-university-calgary-law-students-comments-kristine-eidsvik-apology-1.4474760>>.

<sup>84</sup> The Continuing Legal Education Society of BC, “But I Was Wearing a Suit” (November 23, 2017), online: YouTube <<https://www.youtube.com/watch?v=HTG7fi-5c3U&feature=youtu.be>> at 00h:00m00:58s.

In contrast to those negative stereotypes, lighter-skinned Blacks are typecast as motivated, educated, and attractive.<sup>85</sup> These positive stereotypes associated with lighter-skinned individuals also help explain why Asian-Americans are often viewed as the “model minority” – “Honourary Whites” whose success purports to prove the absence of racism in the United States.<sup>86</sup>

However, colourism is not a one-way phenomenon, as we have already noted. Light-skinned people do experience some disadvantages due to colourism. For example, light-skinned Black American women and men are often subject to interrogations about their racial authenticity or legitimacy.<sup>87</sup> While skin tone is just one of the many dimensions upon which authenticity is judged, it was found to be the most common reason for the rejection of biracial individuals by darker-skinned group members.<sup>88</sup> In Canada, Métis people have been excluded by First Nations communities for being “too White” or “wannabe Indians.”<sup>89</sup> Some experimental studies have indicated that experiencing rejection by same-race individuals may be especially harmful to mental and emotional well-being.<sup>90</sup> The advantages and disadvantages are not equal; the disadvantages attached to lighter skin do not have the significant economic impacts that systemic discrimination against darker-skinned individuals does.<sup>91</sup>

The differences that gender makes to colourism are understudied.<sup>92</sup> Nevertheless, research has shown that the influence of skin colour on educational, occupational, and financial outcomes is greater for African-American women than men.<sup>93</sup> Studies indicate that, in the workplace, colourism plays one role for black women because of beliefs about

<sup>85</sup> Monk, Jr, *supra* note 45 at 405.

<sup>86</sup> Baynes, *supra* note 5 at 134; Chanbonpin, *supra* note 63 at 656–57.

<sup>87</sup> Chanbonpin, *supra* note 63 at 642, n 28; Hunter, “Persistent Problem,” *supra* note 23 at 244 (arguing that ‘proving’ oneself to be an authentic member is a significant burden for the light-skinned in Latino, African-American, and Asian American communities); Hadiya Roderique, “Dating While Black: What I Learned About Racism from my Online Quest for Love” *The Walrus* (15 February 2017), online: <<https://thewalrus.ca/dating-while-black/>> (describing how people question the racial authenticity of mixed race women).

<sup>88</sup> Cherise A Harris & Nikki Kahanna, “Black Is, Black Ain’t: Biracials, Middle-Class Blacks, and the Social Construction of Blackness” (2010) 30:6 *Sociological Spectrum* 639 at 643–44 (identifying skin tone, social class, and five other dimensions upon which authenticity is judged); Kevin R Johnson, “‘Melting Pot’ or Ring of Fire?: Assimilation and the Mexican American Experience” (1998) 10:1 *La Raza LJ* 173 at 204, 206 (discussing how light-skinned Mexican-Americans may be challenged by other Mexican Americans as being too White). One of the authors, a light-skinned Trinidadian-Canadian, has had the authenticity of his racial identity repeatedly questioned. On one occasion during the drafting of this article a stranger volunteered that the author only had dreadlocks to pretend he was “hood” and exclaimed: “You’re not even black. You’re some half black, barely black, bullshit.”

<sup>89</sup> Cathy Richardson, “Metis Identity Creation and Tactical Responses to Oppression and Racism” (2006) 2 *Variations* 56 at 61.

<sup>90</sup> Uzogara & Jackson, *supra* note 64 at 156.

<sup>91</sup> Hunter, “Persistent Problem,” *supra* note 23 at 246.

<sup>92</sup> Uzogara & Jackson, *supra* note 64 at 151.

<sup>93</sup> Mark E Hill, “Skin Color and the Perception of Attractiveness Among African Americans: Does Gender Make a Difference?” (2002) 65:1 *Social Psychology Quarterly* 77 at 88.

attractiveness,<sup>94</sup> and another for black men because of stereotypes about threat potential.<sup>95</sup> Many studies have confirmed that skin tone influences attractiveness ratings assigned to black women far more than it does for men, indicating that fair skin is perceived to be a particularly feminine characteristic.<sup>96</sup> Light skin tones are interpreted as beauty, and attractiveness is social capital for women, who can convert it to educational, economic or other types of capital.<sup>97</sup> This point can perhaps be seen most starkly in the demand by darker-skinned women for skin lightening products.<sup>98</sup> This demand appears to be increasing despite the publicized adverse effects on health and importation bans on these products by many countries.<sup>99</sup>

Notwithstanding the harms of colour discrimination, some scholars and activists oppose recognition of intra-group colourism claims. Banks and McCray argue that such claims undercut race-based claims and divert attention from larger issues.<sup>100</sup> Hochschild notes that any discussion of differentiation for skin colour can appear to be a “divide and conquer” tactic, threatening solidarity.<sup>101</sup> Harris worries that a shift from categorical racism to differentialist racism will lessen the sense of a “linked fate” among members of racialized groups.<sup>102</sup> Also, many people of colour see colourism as an “in house” issue that is either embarrassing, a tragedy, or a sign of racial self-hatred.<sup>103</sup>

Despite these important reservations about pursuing colourism claims, there are good reasons to do so. Banks also argues that their non-recognition

<sup>94</sup> See e.g. Margaret Hunter, “Colorstruck: Skin Color Stratification in the Lives of African American Women” (1998) 68:4 Sociological Inquiry 517; Margaret Hunter, “If You’re Light You’re Alright: Light Skin Color as Social Capital for Women of Color” (2002) 16:2 Gender & Society 175; Alfiee M Breland-Noble, “The Impact of Skin Color on Mental and Behavioral Health in African American and Latina Adolescent Girls: A Review of the Literature”, in Ronald E Hall, ed, *The Melanin Millennium: Skin Color as 21st Century International Discourse* (Dordrecht: Springer, 2013) 219.

<sup>95</sup> Harrison & Thomas, *supra* note 34 at 138, 155.

<sup>96</sup> Hill, *supra* note 93 at 88.

<sup>97</sup> Sims & Hirudayaraj, *supra* note 66 at 41. See also Ronald E Hall, “Skin Color Bias: A New Perspective on an Old Social Problem” (1998) 132:2 J Psychology: Interdisciplinary & Applied 238 at 239 (finding a significant relationship between skin colour and perceptions of physical beauty among African-American college freshmen).

<sup>98</sup> Ronald E Hall, “The Bleaching Syndrome Among People of Color: Implications of Skin Color for Human Behavior in the Social Environment” (2006) 13:3 J Human Behavior in the Social Environment 19 at 27.

<sup>99</sup> The products often contain mercury, corticosteroids, or high doses of hydroquinone, but use rates by women around the world are high, ranging from 24 percent in Japan to 77 percent of traders in Lagos, Nigeria. See Glenn, “Yearning for Lightness”, *supra* note 65 at 285; Levashni Naidoo, Nokubonga Khoza & Ncoza C Dlova, “A Fairer Face, a Fairer Tomorrow? A Review of Skin Lighteners” (2016) 3:3 Cosmetics 33.

<sup>100</sup> Banks, “Colorism”, *supra* note 21 at 1741; McCray, *supra* note 8 at 176.

<sup>101</sup> Hochschild, “Not Protest Unfairness?”, *supra* note 8 at 488. See also Jennifer L Hochschild, “The Skin Color Paradox and the American Racial Order” (2007) 86:2 Social Forces 643 (finding that Blacks’ perceptions of discrimination, belief that their fates are linked, and attachment to their race almost never varies by skin colour despite the adverse impacts of colourism on dark-skinned Blacks at 643) [Hochschild, “Skin Color Paradox”].

<sup>102</sup> Harris, *supra* note 2 at 63.

<sup>103</sup> Hunter, “Persistent Problem”, *supra* note 23 at 250; Chavez-Dueñas, Adames & Organista, *supra* note 74 at 4–5, 17; Hochschild, “Not Protest Unfairness?”, *supra* note 8 at 474, 483–84.

trivializes the economic implications that result from the social capital granted at birth to lighter-skinned group members.<sup>104</sup> Baynes believes that, even if race were to no longer matter, “color will still be a problem because darkness casts a longer discriminatory shadow than lightness.”<sup>105</sup> Hochschild argues that “there are too many cases in history in which the demand for group solidarity inhibited fights against injustice well past the point of necessity,” and that there is no persuasive reason to ignore the unfair situation of the worse off.<sup>106</sup> She also notes that while overt racism has declined significantly in the United States over the past 50 years, colourism has not.<sup>107</sup> Norwood questions what we are willing to pay to achieve unity and how much must be sacrificed to obtain it.<sup>108</sup>

Pursuing colourism claims may be difficult. Racial minorities, especially women, have historically been under represented in Canadian human rights cases.<sup>109</sup> The causes have been varied, but include observations of police mistreatment of racial minorities and complaint systems that fail to respond to the realities of their lives.<sup>110</sup> Nevertheless, despite those difficulties, such claims should still be brought by those harmed and should be recognized by tribunals and courts. Neither the continuing relevance of racism, nor the difficulties that colour discrimination complainants will face, warrant precluding claims based on colour discrimination when such claims – like those based on race or on race in conjunction with colour – capture a form of discrimination resulting in tangible harm. Indeed, the purposes of human rights legislation speak very loudly to what is to be gained by resisting discrimination in any setting, including the intra-group context. For example, the preamble of the Ontario *Human Rights Code* reminds us:

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.<sup>111</sup>

<sup>104</sup> Banks, “Colorism,” *supra* note 21 at 1741.

<sup>105</sup> Baynes, *supra* note 5 at 133.

<sup>106</sup> Hochschild, “Not Protest Unfairness?,” *supra* note 8 at 489.

<sup>107</sup> Hochschild, “Skin Color Paradox,” *supra* note 101 at 661.

<sup>108</sup> Norwood, “The Virulence of *Blackthink*,” *supra* note 27 at 180.

<sup>109</sup> Nitya Duclos, “Disappearing Women: Racial Minority Women in Human Rights Cases” (1993) 6:1 CJWL 25 (commenting on the federal record).

<sup>110</sup> *Ibid* at 38; “Hundreds in Canada protest against police brutality after death of black man,” *The Guardian* (31 July 2016), online: <<https://www.theguardian.com/>>; “Canadian police officer charged in death of mentally ill black man,” *The Guardian* (6 March 2017), online: <<https://www.theguardian.com/>>.

<sup>111</sup> *Human Rights Code*, RSO 1990, c H 19.



Having explored the impact of colourism, we now turn to international and domestic legislative efforts that have been made to combat this form of discrimination.

### III. International Instruments and Domestic Legislation

At the end of the Second World War, the United Nations Charter declared in its opening article that one of the purposes of the United Nations is to promote respect for human rights “without distinction” based on four enumerated grounds: race, sex, language, and religion.<sup>112</sup> Three years later, the 1948 Universal Declaration of Human Rights (UDHR) was adopted, prohibiting discrimination on an expanded list of ten grounds, including both race and colour.<sup>113</sup> In turn, the UDHR inspired the wording in many other international human rights instruments, which reproduce the UDHR’s list – including both colour and race – in their non-discrimination clauses.<sup>114</sup>

Several scholars have examined what led the drafters of the UDHR to add “colour” to its non-discrimination article, rather than simply adopting the language of the UN Charter.<sup>115</sup> Deliberations about including “colour” revolved around three main points. The first point – that race and colour differ – supported including colour in order to capture this distinct aspect of human identity. The second and third points – that race includes colour, and that including colour would suggest the UN Charter did not address colour discrimination because that ground was not included in the Charter’s non-discrimination clause – opposed including colour as a stated ground.<sup>116</sup> The drafting history thus indicates mixed views on whether colour and race are distinct grounds of discrimination, but also shows that the inclusion of colour was deliberate and extensively negotiated.<sup>117</sup>

Despite its deliberate inclusion 70 years ago, colour is an underdeveloped ground at the international level, with race and colour usually being used interchangeably.<sup>118</sup> A recent review of the reports of organizations which

<sup>112</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 art 1, para 3.

<sup>113</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948). Art 2 states, in part: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>114</sup> Article 1 of the 1963 *Convention on the Elimination of all Forms of Racial Discrimination* is an exception, defining “racial discrimination” as distinctions “based on race, colour, descent, or national or ethnic origin.” *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106(XX), 20th Sess, Supp No 14, UN Doc A/6014 (1965) 47 (entry into force for Canada, 13 November 1970).

<sup>115</sup> See e.g. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press, 1999) at 102–03; Stephanie Farrior, “‘Colour’ in the Nondiscrimination Provisions of the Universal Declaration of Human Rights and the Two Covenants” (2015) 14:4 Wash U Global Studies L Rev 751.

<sup>116</sup> Farrior, *supra* note 115 at 757; Morsink, *supra* note 115 at 102–03.

<sup>117</sup> Sadat, *supra* note 4 at 557.

<sup>118</sup> Aceves, *supra* note 1 at 563.

monitor compliance with the relevant instruments did not reveal any cases where those organizations expressed concern about discrimination based on colour alone; instead, colour was always grouped together with race and ethnic origin.<sup>119</sup>

Domestically, Canadian jurisdictions gradually introduced legislation prohibiting discrimination based on enumerated grounds, including colour.<sup>120</sup> The timing of the introduction of domestic human rights legislation coincided with its advent in the international arena, and for many of the same reasons.<sup>121</sup>

The implementation of “fair practices” anti-discrimination laws in New York in the 1940s was critical to the form that Canadian legislation took in the 1950s.<sup>122</sup> The New York initiative implemented then President Franklin D Roosevelt’s 1941 Executive Order 8802 which prohibited discrimination in the defense industry “because of race, creed, color, or national origin.”<sup>123</sup> Thus, both race and colour appeared as grounds in the model used for the first Canadian fair practices legislation in Ontario.<sup>124</sup> By 1960, five other Canadian provinces and the federal government had enacted anti-discrimination legislation of the fair practices variety.<sup>125</sup>

Fair practices legislation was followed by the first human rights code in the country, proclaimed in 1962 in Ontario, which continued to prohibit

<sup>119</sup> Farrior, *supra* note 115 at 769. Farrior quotes a current member of the Committee on Civil and Political Rights, which monitors compliance, as stating they “never thought about a separate violation on grounds of colour, if only because of the almost automatic assumption that colour equals race”. *Ibid* at 769, n 135.

<sup>120</sup> The struggle against fascism and the extent of the Holocaust in World War II, as well as the subsequent formation of the United Nations, played significant roles in the introduction of anti-discrimination legislation in Canada. See e.g. Walter Tarnopolsky, “Discrimination and the Law in Canada” (1992) 41 UNBLJ 215 at 226; Robert Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 3, 6; Carmela Patrias & Ruth A Frager, “‘This Is Our Country, These Are Our Rights’: Minorities and the Origins of Ontario’s Human Rights Campaigns” (2001) 82:1 Canadian Historical Rev 1 at 1. But see James W St G Walker, “The ‘Jewish Phase’ in the Movement for Racial Equality in Canada” (2002) 34:1 Canadian Ethnic Studies 1 (cautioning against exaggerating the effects of the international context on the campaign to eliminate racial discrimination at 25).

<sup>121</sup> *Ibid*.

<sup>122</sup> Tarnopolsky, *supra* note 120 at 227.

<sup>123</sup> “The President Establishes the Committee on Fair Employment Practice and Reaffirms the Policy of Full Participation in the Defence Program by All Persons, Regardless of Race, Creed, Color, or National Origin”. Exec Order 8802, 1941 Pub Papers 233 (25 June 1941) at 234. For discussions of the developments leading up to this Executive Order, see generally Louis Ruchames, *Race, Jobs and Politics: The Story of the FEPC* (New York: Columbia Press, 1953); Arthur Earl Bonfield, “The Origin and Development of American Fair Employment Legislation” (1967) 52:6 Iowa L Rev 1043.

<sup>124</sup> *Fair Employment Practices Act*, SO 1951, c 24; *Fair Accommodation Practices Act*, SO 1954, c 28. For the impetus and actors behind these first statutes, see e.g. Howe & Johnson, *supra* note 120 at 7–8; I A Hunter, “Human Rights Legislation in Canada: Its Origin, Development and Interpretation” (1976) 15 UWO L Rev 21 at 24; Arnold Bruner, “The Genesis of Ontario’s Human Rights Legislation: A Study in Law Reform” (1979) 37:2 UT Fac L Rev 236.

<sup>125</sup> Dominique Clément, “History of Canadian Human Rights Laws”, *Canada’s Human Rights History* at 2, online: <[historyofrights.ca/history/human-rights-law/](http://historyofrights.ca/history/human-rights-law/)>.

discrimination on the same grounds, including both race and colour.<sup>126</sup> By 1977, each provincial and federal jurisdiction had human rights codes and a human rights commission in place.<sup>127</sup> And each of those codes prohibited – and continue to prohibit – discrimination on the basis of both race and colour, as well as related categories (though some jurisdictions subsume both within an “ancestry” category).<sup>128</sup>

In the first decade following the enactment of the human rights codes legislation, there was little or no interpretation of the race or colour grounds.<sup>129</sup> However, as various reviews of human rights commissions illustrate, these grounds began to be used in the 1980s, albeit with inordinately low success rates compared to claims on other grounds.<sup>130</sup> In their review, Sangha and Tang concluded that the success rates of claims of racial and colour discrimination were so low due to a number of factors: the perception of racism as being abnormal and a very serious threat to respondents’ reputations; a focus on the attitudinal problems of the complainant; a requirement for corroboration; insensitivity to how words and images can be interpreted in very different ways by people of colour because of associated racist stereotypes; and an assumption that if employers already had employees who were persons of colour, they did not discriminate.<sup>131</sup> All of these reviews analyzed claims alleging race and colour discrimination together, as one type of claim, which was in keeping with the approach of the tribunals of the day.<sup>132</sup>

<sup>126</sup> *Ontario Human Rights Code*, SO 1962, c 93, ss 1–4. See also Howe & Johnson, *supra* note 120 at 9–10; IA Hunter, *supra* note 124 at 27.

<sup>127</sup> Tarnopolsky, *supra* note 120 at 228; Clément, *supra* note 125.

<sup>128</sup> Eleven of fourteen statutes enumerate both race and colour as prohibited grounds: *Human Rights Code*, RSBC 1996, c 210, ss 7–11; *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss 3–5, 7–8; *Human Rights Code*, RSO 1990, c H 19, ss 1–3, 5–6; *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10; *Human Rights Act*, RSNS 1989, c 214, s 5; *Human Rights Act*, RSNB 2011, c 171, ss 4–8; *Human Rights Act*, RSPEI 1988, c H-12, s 1(1)(d); *Human Rights Act*, 2010, SNL 2010, c H-13.1, s 9(1); *Human Rights Act*, SNWT 2002, c 18, s 5(1); *Human Rights Act*, SNU 2003, c 12, s 7(1); *Canadian Human Rights Act*, RSC 1985, c H-6, s 3(1). *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 2(1)(m.01) lists, *inter alia*, colour and “race or perceived race.” *The Human Rights Code*, CCSM c H175, s 9(2) includes “colour and perceived race” within the category of “ancestry” and the *Human Rights Act*, RSY 2002, c 116, s 7 includes “colour and race” within the category of “ancestry.”

<sup>129</sup> IA Hunter, *supra* note 124 at 34.

<sup>130</sup> Internal reviews by the federal, Nova Scotia, Quebec and British Columbia human rights commissions, conducted between 1988 and 2000, found that race-based claims were disproportionately rejected for lacking substance and also dismissed without a hearing more often than those based on other grounds – and the differences were large. See Dave Sangha & Kwong-Leung Tang, “Race Discrimination and the Human Rights Process” (Paper delivered at the Canadian Critical Race Conference 2003, University of British Columbia, Canada, 2 May 2003) for a discussion of these reviews. For example, the British Columbia study found that only three percent of race complaints were successful in their final disposition, as compared to 53% of the sexual harassment complaints, and only three percent of race harassment complaints were settled, while 56% of sexual harassment complaints were settled: Sangha & Tang, *ibid*, citing Ana Mohammad, *The Investigation of Race Complaints at the BC Human Rights Commission* (Vancouver: BC Human Rights Commission, 2000).

<sup>131</sup> Sangha & Tang, *supra* note 130 at 5–6.

<sup>132</sup> See e.g. Mitchell, *supra* note 1 (treating race, colour and ethnic origin as synonymous when looking at the dismissal of Black employees of West Indian origin); *Frank v AJR Enterprises Ltd* (1993), 23 CHRR D/228

In addition to the human rights legislation in each jurisdiction, section 15 of the *Canadian Charter of Rights and Freedoms* prohibits discrimination based on enumerated grounds, including race and colour.<sup>133</sup> Unlike the human rights codes which apply only in specific contexts, such as employment, accommodations, and services available to the general public, the *Charter* applies to government actors, as well as non-government actors implementing government policies or programs.<sup>134</sup> However, like almost all of the human rights codes, there has been no discussion of colour as a discrete ground under section 15 of the *Charter*.

#### IV. Judicial Treatment of the Colour Ground

We now turn to the judicial treatment of the colour ground of discrimination. Before looking at Canada's much smaller body of jurisprudence, we offer a brief overview of the claims, litigation and settlements that deal with colour as a discrete ground in the United States, focusing on Title VII of the *Civil Rights Act of 1964*.<sup>135</sup> We chose to look for lessons in the American jurisprudence for three reasons. First, unlike other possible comparator jurisdictions, the United States has a history of grappling with complaints based solely on the ground of colour.<sup>136</sup> Second, its critical race theory scholarship, which is more robust than elsewhere,

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(BCCHR) (failing to distinguish among race, colour, ancestry in a complaint about a hotel's treatment of Aboriginal women).

<sup>133</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11, s 15(1) [*Charter*].

<sup>134</sup> *Pridgen v University of Calgary*, 2012 ABCA 139 at paras 62–78, 350 DLR (4th); *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at paras 17–41, [2016] 8 WWR 678.

<sup>135</sup> *Civil Rights Act of 1964*, 42 USC §§ 2000e et seq.

<sup>136</sup> See generally Jean R Sternlight, "In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis" (2004) 78:5 Tulane L Rev 1401 (comparing the legislation and dispute resolution processes in the United States, Great Britain and Australia). The high profile Australian Federal Court decision in *Eatock v Bolt*, *supra* note 9 was brought on behalf of fairer-skinned Aboriginal persons in connection with two inflammatory newspaper articles – one titled "White is the new black" and the other titled "White fellas in the black" – which suggested the fair skin colour of the plaintiff and others like her indicated they were not genuinely Aboriginal. The articles repeatedly drew attention to the plaintiffs' skin colour and colour was the point of contrast between the plaintiffs and those the articles intimated were "real" Aboriginal people. The claim was brought under s 18C of the *Racial Discrimination Act 1975 (Cth) (RDA)* which targets offensive behaviour that is based on "race, colour or national or ethnic origin." The meanings of "race," "ethnic origin" and "colour" were analyzed: *ibid* at paras 309–16. The court determined that "colour" was used in 18C "to refer to skin-colour when used as an indicator of race including as an indicator of a broad racial sub-species like the Caucasians. Accordingly, an act based on the skin-colour of a person when used to connote race, is an act done 'because' of the 'colour' of the person. . .": *ibid* at para 316. This statutory interpretation therefore treated colour and race as almost entirely overlapping concepts. Commentators have noted that there have been very few successful claims based on the race or colour grounds of the *RDA*, which appear to be treated as synonymous grounds, and which require overt and explicit references to race or colour for success. See Beth Gaze, "The *RDA* at 40 Years: Advancing Equality or Sliding into Obsolescence?" in *Perspectives on the Racial Discrimination Act: Papers from the 40 Years of the Racial Discrimination Act 1975 (Cth) Conference* (Australian Human Rights Commission, 2015) 66 at 78.

has analyzed the relevant jurisprudence.<sup>137</sup> Finally, its experience with slavery, segregation and other forms of racial discrimination is closer to the Canadian experience than that of any other jurisdiction, despite Canada and the United States having very different histories.<sup>138</sup>

## A. Judicial Treatment of Colour in the United States

### i. *Statutory Foundation for Colourism Claims*

In the United States, the first colourism cases were brought under section 1981 of the *Civil Rights Act of 1866*,<sup>139</sup> which guarantees non-white citizens the same rights to make and enforce contracts as white citizens have. However, colour discrimination claims most frequently arise in the employment context.<sup>140</sup> Today, they are most commonly brought under Title VII of the *Civil Rights Act of 1964*,<sup>141</sup> which prohibits discrimination on the basis of both colour and race, as well as other grounds. However, Title VII claims are dealt with by the United States Equal Employment Opportunity Commission (EEOC), established in 1965 as the main federal agency charged with enforcing laws prohibiting employment discrimination.

<sup>137</sup> See e.g. Mathias Möschel, "Color Blindness or Total Blindness? The Absence of Critical Race Theory in Europe" (2007) 9:1 Rutgers Race & L Rev 57 at 70–76, 83 (noting that racism in continental Europe is primarily associated with anti-Semitism and article 13 of the Treaty and the consequent Council Directive speaks of "racial or ethnic origin", but not colour); Shanthy Elizabeth Senthe & Sujith Xavier, "Re-Igniting Critical Race in Canadian Legal Spaces: Introduction to the Special Symposium Issue of Contemporary Accounts of Racialization in Canada" (2013) 31:2 Windsor YB Access Just 1 at 2.

<sup>138</sup> See e.g. Eric Fong, "A Comparative Perspective on Racial Residential Segregation: American and Canadian Experiences" (1996) 37:2 The Sociological Quarterly 199 at 204–05 (noting the similarities in the historical context of slavery and segregation in the two countries); RN Lalonde, JM Jones & ML Stroink, "Racial Identity, Racial Attitudes and Race Socialization among Black Canadian Parents" (2008) 40:3 Canadian Journal of Behavioural Science 129 at 129–30 (acknowledging the differences between the United States and Canada but pointing out a "shared cultural experience" of discrimination). But see Sharon J Boatswain & Richard N Lalonde, "Social Identity and Preferred Ethnic/Racial Labels for Blacks in Canada" (2000) 26:2 J Black Psychology 216 at 218–19 (discussing factors that make the Canadian context distinct from the American context for Blacks, including more recent immigration, more prevalent West Indies ancestry, smaller relative numbers and less residential segregation); Sonia Lawrence, "Lost and Found" (2013) 31:2 Windsor YB Access Just 97 (arguing that Canadians cannot rely on critical race work done in the United States because of divergent historical, demographic and legal contexts; proof and the lack of Canadian data which illustrates differential treatment; and the need for local praxis).

<sup>139</sup> *Civil Rights Act of 1866*, 42 USC § 1981 (1866).

<sup>140</sup> Jones, "Intra-Group Preferencing," *supra* note 6 at 662, n 19. The other major source of colourism claims is the *Fair Housing Act*, 42 USC § 3602 (2012). See *ibid*.

<sup>141</sup> *Supra* note 135. Section 2000e-2(a) states that "It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." For a review of the legislative and jurisprudential history of the *Civil Rights Act of 1964* that is focused on the ground of colour, see Kate Sablosky Elengold, "Branding Identity" (2015) 93:1 Denver L Rev 1.

Of the few colour discrimination complaints the EEOC initially received, nearly all included race discrimination complaints.<sup>142</sup> Nonetheless, a slow rise in the number of colour discrimination claims – from 762 in 1997 to 1,735 in 2007<sup>143</sup> – led the EEOC to develop its E-RACE (Eradicating Racism and Colorism for Employment) Initiative. As part of that Initiative, the EEOC added the following multi-directional definition of colour discrimination in 2008 that includes both inter- and intra- group claims:

Color discrimination occurs when a person is discriminated against based on his/her skin pigmentation (lightness or darkness of the skin), complexion, shade, or tone. Color discrimination can occur between persons of different races or ethnicities, or even between persons of the same race or ethnicity. For example, an African American supervisor violates Title VII if [s/]he refuses to hire other African Americans whose skin is either darker or lighter than her/his own.<sup>144</sup>

Charges of colour discrimination surged immediately after the E-RACE Initiative raised awareness about colour as a potential discrete source of discrimination. The number of claims doubled in 2008 and they have continued to number between 2,600 and 3,200 each year since then.<sup>145</sup> Not only did the number increase, but so did the percentage of charges of colour discrimination that did not also include race.<sup>146</sup>

Despite these increases in number of claims, colourism charges are inordinately unsuccessful. Since the Initiative, the EEOC has determined that in only two-and-a-half to six percent of cases is there reasonable cause to believe that colour discrimination occurred. In contrast, roughly two-thirds of claims based on other grounds meet the reasonable cause threshold.<sup>147</sup>

Of the few colourism complaints assessed as having reasonable cause, most are resolved without trial, and very few have been decided by courts. Still, commentators have reached some conclusions based on the relatively small number of trials, a slightly larger number of motions to strike and some publicized settlements.<sup>148</sup>

<sup>142</sup> Joni Hersch, "Characteristics of Color Discrimination Charges Filed with the EEOC" in Hall, ed, *supra* note 94 at 231.

<sup>143</sup> EEOC, "Color-based charges FY 1997 – FY 2017", online: <<https://www.eeoc.gov/eeoc/statistics/enforcement/color.cfm>>.

<sup>144</sup> EEOC, "Questions and Answers About Race and Color Discrimination in Employment", online: <[https://www.eeoc.gov/policy/docs/qanda\\_race\\_color.html](https://www.eeoc.gov/policy/docs/qanda_race_color.html)>.

<sup>145</sup> EEOC, "Color-based charges FY 1997 – FY 2017," *supra* note 143. There is no indication whether the claims were intra- or inter-group claims.

<sup>146</sup> Hersch, *supra* note 142.

<sup>147</sup> EEOC, "Color-based charges FY 1997 – FY 2017", *supra* note 143. Colour charges do fare better than race charges. Since 2008, EEOC has annually determined there is reasonable cause for only two to four percent of race-based charges. *Ibid.*

<sup>148</sup> Detailed analyses of the influential cases have been undertaken by Banks, "Colorism," *supra* note 21; Trina Jones, "Shades of Brown," *supra* note 58; Jones, "Intra-Group Preferencing," *supra* note 6; Cynthia E Nance, "Colorable Claims: The Continuing Significance of Color Under Title VII 40 Years After Its Passage" (2005) 26:2 BJELL 435; Hersch, *supra* note 142 at 233–34.

## ii. *The Jurisprudence Considering Colourism*

In the earlier cases, which were brought under section 1981 of the *Civil Rights Act of 1866*, courts often refused to recognize colour discrimination claims. For example, in *Sere v Board of Trustees of the University of Illinois*,<sup>149</sup> the trial court dismissed a discrimination claim by a darker-skinned Nigerian plaintiff against his lighter-skinned African-American supervisor, holding that intra-group colour-based claims were not actionable under section 1981. The appeal court did recognize the possibility that intra-group colour discrimination might exist but was reluctant to engage in “the unsavory business of measuring skin color.”<sup>150</sup> In contrast, in an earlier claim by a Puerto Rican individual, a court had acknowledged the possibility of her colour discrimination claim, stating that “considering the mixture of races and ancestral national origins in Puerto Rico, [colour] may be the most practical claim for a Puerto Rican to present.”<sup>151</sup>

These early cases illustrate two points that persist in the American case law: that courts are more willing to recognize a colourism claim when the claimant is racially ambiguous,<sup>152</sup> or comes from a country where racial classifications are less clear cut (making Latinx and South Asian claimants more likely to succeed than Black claimants),<sup>153</sup> and that when individuals of the same race are involved the expected preferential treatment of those with lighter skin does not always hold.<sup>154</sup>

The reluctance to consider colour claims changed slowly following the United States Supreme Court decision in *Saint Francis College v Al-Khazraji*,<sup>155</sup> when a United States citizen born in Iraq sued his former employer alleging discrimination on the basis of his Arabian ancestry. The lower court had granted summary judgment for the employer on the basis that Arabs were Caucasians and a Caucasian could not sue another Caucasian under section 1981. In recognizing that a claim could lie between parties who were members of the same race, the court acknowledged that “clear-cut [racial] categories do not exist” and that “racial classifications are for the most part sociopolitical, rather than biological, in nature.”<sup>156</sup> It then made the oft-cited point that section 1981, at a minimum, prohibited “discrimination against an individual because he or she is genetically part of an ethnically or physiognomically distinctive sub-grouping of homo sapiens . . . [but] a distinctive physiognomy is

<sup>149</sup> 628 F Supp 1543 at 1546 (ND Ill 1986) [*Sere*], *aff'd* on other grounds, 852 F 2d 285 (7th Cir 1988).

<sup>150</sup> *Ibid* at 1546.

<sup>151</sup> *Felix v Marquez*, 1981 WL 275 at para 7; 24 Empl Prac Dec (CCH) 31,279 (DDC1980).

<sup>152</sup> Banks, “Colorism,” *supra* note 21 at 1726–27.

<sup>153</sup> Jones, “Intra-Group Preferencing,” *supra* note 6 at 662, n 19.

<sup>154</sup> Hersch, *supra* note 142 at 234.

<sup>155</sup> 481 US 604 (1987).

<sup>156</sup> *Ibid* at 610, n 4.

not essential to qualify for § 1981 protection."<sup>157</sup> Subsequent courts understood *Saint Francis* to mean that discriminatory behaviour based on an employer's belief that a claimant belonged to a certain race was the actionable behaviour, rather than the employee's physical characteristics.<sup>158</sup>

One of the earliest Title VII intra-group colourism cases was *Ali v National Bank of Pakistan*.<sup>159</sup> Its approach paralleled that of the early section 1981 cases. The claimant, a light-skinned citizen of Pakistan claimed that his employer preferred dark-skinned citizens. The court explained that, even if Ali's claim of intra-racial colour discrimination was valid, the colourism practices complained of fell outside the realm of the "American experience,"<sup>160</sup> indicating a need for cultural evidence that was emphasized in later cases.<sup>161</sup> The court added that, even if Ali could establish skin tone discrimination, these claims are "usually mixed with or subordinated to claims of race discrimination,"<sup>162</sup> questioning the viability of colour as a discrete ground.

*Walker v Internal Revenue Service*<sup>163</sup> is perhaps the best known of all the American colourism cases, even though Tracy Walker ultimately lost her case after a trial on the merits.<sup>164</sup> The complainant, a light-skinned Black woman, charged that she had been treated badly because of her colour by her supervisor, a darker-skinned Black woman. The employer argued that the plaintiff had no claim because colour in Title VII had generally been interpreted to mean the same thing as race and because "there simply is no cause of action pursuant to Title VII available to a light-skinned Black person against a dark-skinned Black person."<sup>165</sup> However, relying on *Saint Francis*, the court concluded that "it is not controlling that in the instant case a black person is suing a black person."<sup>166</sup> Subsequent courts have read *Walker* to stand for the proposition that "intra-racial color discrimination claims are authorized by both Title VII and existing Supreme Court precedent."<sup>167</sup>

<sup>157</sup> *Ibid* at 613 [emphasis added].

<sup>158</sup> See e.g. *Franceschi v Hyatt Corp*, 782 F Supp 712 at 720 (DPR 1992). See also Banks, "Colorism," *supra* note 21 at 1729. In discussing the perception of race, the court in *Perkins v Lake County Department of Utilities*, 860 F Supp 1262 at 1273 (ND Ohio 1994) wrote, "subjective perception of an individual's race clearly plays an important role in racial classification where discrimination is involved. This Court has never encountered an instance in which an employer admittedly first checked the pedigree of an employee before engaging in discriminatory conduct."

<sup>159</sup> 508 F Supp 611 at 613 (SD NY 1981) [*Ali*].

<sup>160</sup> Banks, "Colorism among South Asians", *supra* note 21 at 675, citing *Ali*, *supra* note 159.

<sup>161</sup> *Ibid* at 680, citing *Muhammad v Islamic Society*, No G036534, 2008 Cal App Unpub Lexis 2693.

<sup>162</sup> *Ibid* at 675, citing *Ali*, *supra* note 159 at 614.

<sup>163</sup> *Walker v Secretary of the Treasury* 713 F Supp 403 at 405-08 (ND GA 1989) [*Walker*], affirmed 953 F.2d 650 (11th Circuit, 1992).

<sup>164</sup> *Walker v Secretary of the Treasury*, 742 F Supp 670 (ND Ga. 1990) [*Walker Trial*], aff d, 953 F 2d 650 (11th Cir. 1992). See e.g. Amy Weinstein, "Must Employers Be Colorblind?: Title VII Bars Intra-Racial Employment Discrimination: *Walker v Secretary of Treasury*, IRS, 713 F Supp 403 (ND Ga. 1989)" (1990) 68 Wash U Global Studies L Rev 213; Banks, "Colorism," *supra* note 21 at 1713-14, 1722, 1732.

<sup>165</sup> *Walker*, *supra* note 163 at 405.

<sup>166</sup> *Ibid* at 408.

<sup>167</sup> *Walker Trial*, *supra* note 164 at 671.



*Ali* and *Walker* involved intra-group claims by lighter-skinned plaintiffs. In contrast, *Arrocha v City University of New York*<sup>168</sup> involved a darker-skinned Afro-Panamanian instructor who sued his employer for failing to renew his appointment as an adjunct instructor, claiming that the Latino department head discriminated against Black Hispanics and favoured lighter-skinned Hispanics. The instructor's claim survived a summary judgment application because the employer produced no evidence of the skin colour of the adjuncts who were hired, but lost at trial.<sup>169</sup> *Arrocha* illustrates the misconception that an employer cannot discriminate on the basis of colour so long as it has hired one or more employees who are as dark-skinned as the claimant.

Evidence is often the problem in Title VII cases, as it was for the claimant in *Brack v Shoney's Inc.*<sup>170</sup> who was described as a gay, dark-skinned Black male who was demoted from his position as a restaurant manager. Evidence showed that his supervisor called him "the little black sheep," compared him with a lighter-skinned Black male employee by saying the two were "like night and day," described the lighter-skinned employee's hair as "nice and wavy and straight" instead of "nice too" and said the claimant would do well at one store because it was a "first of the month store,"<sup>171</sup> whereas another store needed a "fair skinned" manager who would be closer to the background of the customers.<sup>172</sup> The court denied the discrimination claim because it found that each of the statements, except the one about the need for a fair-skinned manager, could be interpreted as referring to something other than skin colour.

We quote the exact language complained of in *Brack* in order to contrast it with the language used in cases where the claimant succeeded. For example, discrimination on the basis of an African-American employee's dark skin colour was acknowledged in a settlement between the employer and the EEOC.<sup>173</sup> The employee claimed that his lighter-skinned African-American manager called him such derogatory names as "tar baby" and "black monkey" and told him to bleach his skin.<sup>174</sup> Another case that settled was based on allegations that a lighter-skinned Black female manager told one of her darker-skinned African-American employees that she looked as "black as charcoal"

<sup>168</sup> 2004 US Lexis 4486 (EDNY 2004).

<sup>169</sup> Judgment in a Civil Case, *Arrocha v City University of New York*, No 02-CV-868 (SJF) (LB) (EDNY 2004).

<sup>170</sup> 249 F Supp 2d 938 (WD Tenn 2003) [*Brack*].

<sup>171</sup> I.e., a store primarily serving customers dependent on government payments that arrive at the end or beginning of the month.

<sup>172</sup> *Brack*, *supra* note 170 at 947–48.

<sup>173</sup> EEOC, "Rare Bias Case Involves Dark Skin Color of African American Employee", Press Release (August 7, 2003), online: <<https://www.eeoc.gov/eeoc/newsroom/release/archive/8-07-03.html>>.

<sup>174</sup> See Donnamaria Culbreth, *Employment Discrimination in the 21st Century: An Empirical Investigation of the Presence of Intraracial Color Discrimination Among Black Americans in the Workplace* (PhD Dissertation, Capella University, 2006) at 28. See also Kathy Russell-Cole, Midge Wilson & Ronald E Hall, *The Color Complex: The Politics of Skin Color in a New Millennium*, revised edition (New York: Anchor Books, 2013) at 198–99.

and repeatedly called her “charcoal” until she quit.<sup>175</sup> A third case that also settled involved an estimator and project manager for a stone contracting company who was from Pakistan, Muslim and brown-skinned.<sup>176</sup> The EEOC sued on the employee’s behalf on the basis of national origin, religion and colour, alleging, in connection with the colour ground, that the employee was told he was the same colour as human feces.<sup>177</sup>

The extreme nature of these examples is reflected in the fact that they were settled, rather than fought, by the employer. But they also illustrate a point made by Delgado: since racism is a normalised part of American society, it is only “extreme and shocking” instances of racism that are recognised as such by the law.<sup>178</sup> Despite the number of colourism claims, in 2010 Jones was unable to find more than four claims dealt with by the EEOC where the claimant won after a trial on the merits.<sup>179</sup>

Other barriers to colourism claims have been identified that are applicable beyond the context of the American statutory provisions and the country’s history and culture. Jones notes that anti-discrimination law has traditionally been concerned with the categorical *exclusion* of group members, whereas discrimination based on colour operates through inter- and intra-group *preferences* that identify which members of more clearly defined racial categories are not acceptable members of that category.<sup>180</sup> Jones found that colourism claims based on preferences for subsets of people of colour – for example, people with lighter skin – are very difficult to prove unless everyone with darker skin is excluded and everyone with lighter skin is treated better.<sup>181</sup> This obstacle therefore stems from trying to force colourism claims into a familiar mould, that is, comparing the treatment of groups defined by clear boundaries. Another obstacle is the common assumption that employers who are people of colour will not discriminate against employees of the same colour.<sup>182</sup> Because such employers do not match people’s expectations of what discrimination looks like, Jones posits that decision-makers may be skeptical and consider other reasons for the behaviour, or they may be

<sup>175</sup> *EEOC v Family Dollar Stores Inc. No. 1: 02-CV-829* (D Ga 2003), cited in EEOC, “Race and Color Discrimination,” *supra* note 14.

<sup>176</sup> EEOC, Press Release “Rugo Stone to Pay \$40,000 to Settle EEOC National Origin, Religion and Color Bias Lawsuit”, Press Release (7 March 2012), online: <<https://www.eeoc.gov/eeoc/newsroom/release/3-7-12b.cfm>>.

<sup>177</sup> *Ibid.*

<sup>178</sup> Richard Delgado “Review Essay: Recasting the American Race Problem” (1991) 79:5 *Cal L Rev* 1389 at 1393–94. See also Sternlight, *supra* note 136 at 1422–23 (identifying problems meeting the burden of proof absent the rare “smoking gun” evidence).

<sup>179</sup> Jones, “Intra-Group Preferencing,” *supra* note 6 at 662, n 19. For a description of the tests and evidentiary burden under Title VII, see e.g. Roy L Brooks, *Rethinking the American Race Problem* (Berkeley: University of California Press, 1990) at 54–64.

<sup>180</sup> Jones, “Intra-Group Preferencing,” *supra* note 6 at 660.

<sup>181</sup> *Ibid* at 691–92.

<sup>182</sup> *Ibid* at 665.

indifferent because both employer and employee are people of colour, or they may be accepting of the conduct because other types of discrimination are more important.<sup>183</sup> There is also a tendency to assume that any employer who has hired a person of colour will not distinguish between people of colour.<sup>184</sup> Hernandez calls the latter the “diversity defence.”<sup>185</sup> Both of these assumptions may help explain Sternlight’s finding that courts are too willing to dismiss colourism claims through summary judgment.<sup>186</sup>

Banks also identified multiple barriers to colourism claims after examining 51 employment discrimination cases involving South Asians decided between 1981 and 2014. She too notes the evidentiary deficiencies that are typical of colourism cases and that are complicated because courts are uneasy about drawing distinctions based on skin tone.<sup>187</sup> Courts’ unfamiliarity with colourism practices is another problem identified by Banks.<sup>188</sup> That problem could be remedied, at least partially, by expert evidence. However, McCray notes that the lack of lawyers who know how to produce the right type of evidence is itself a problem.<sup>189</sup>

## B. Judicial Treatment of Colour in Canada

The treatment of colour discrimination in Canadian tribunals and courts is extremely limited.<sup>190</sup> In the vast majority of discrimination cases, colour appears in the judgment only where the decision-maker lists the multiple grounds of discrimination alleged by plaintiffs,<sup>191</sup> suggesting the colour ground has no discrete impact. However, some Canadian cases discuss colour more meaningfully and these decisions indicate that the colour ground impacts human rights jurisprudence in two ways: directly, in the resolution of three types of claims (colour discrimination claims themselves, intersectional claims and intra-group claims); and indirectly by influencing courts’ and tribunals’ understanding of identity and, in turn, discrimination.

<sup>183</sup> *Ibid* at 682–88.

<sup>184</sup> *Ibid* at 665.

<sup>185</sup> Tanya Kateri Hernandez, “Latino Inter-Ethnic Employment Discrimination and the Diversity Defense” (2007) 42 Harv CR-CLL Rev 259 at 266.

<sup>186</sup> Sternlight, *supra* note 136 at 1422–23.

<sup>187</sup> Banks, “Colorism among South Asians,” *supra* note 21 at 680.

<sup>188</sup> *Ibid*.

<sup>189</sup> McCray, *supra* note 8 at 166.

<sup>190</sup> Using both the LexisNexis Quicklaw and WestlawNext Canada databases, we searched for “colour /4 discrim!” in the former and “colour AND race AND discrimination” in the latter. Then we reviewed the list of our search terms in context and examined only those cases that used “colour” in more than a general reference to enumerated grounds (e.g. a quote of the legislation). We examined a total of 32 cases but found that most of them simply used race and colour as synonyms.

<sup>191</sup> See e.g. *Adams v Metropolitan Regional Housing Authority*, 2001 NSSC 134 at para 6, 108 ACWS (3d) 452; *Economic Development Edmonton v Baah*, 2003 ABQB 721 at para 9, [2003] AJ No 1270; *University of British Columbia v Chan*, 2013 BCSC 942 at para 7, [2013] BCJ No 1118; *Ibrahim v Shaw Cablesystems GP*, 2010 FC 1220 at para 1, 195 ACWS (3d) 790; *Pieters v University of Toronto*, [2003] OJ No 1316 at para 3, 226 DLR (4th) 152.

### i. *The Direct Impact of Colour as a Ground of Discrimination*

The presence of colour in the jurisprudence obviously facilitates the resolution of colour discrimination claims. In the United States, the increase in the number of colourism claims following the EEOC's E-RACE Initiative illustrates this point.<sup>192</sup>

Being able to claim colour as the ground of discrimination, rather than relying on the broader and more complex category of race, might lessen the evidentiary burden on claimants, who need not link discrimination based on colour to a specific racial category. Indeed, in the *Brothers* decision discussed in the next section, the tribunal held that Ms. Brothers' termination on account of her skin colour did not amount to racial discrimination because she was unable to establish that multiple overt colourist remarks necessarily implied a "concurrent qualitative evaluation of racial or cultural purity or connectedness."<sup>193</sup> In other words, proving racial discrimination was more difficult in that case because race is a complex concept to link seemingly discriminatory conduct to. In contrast, skin colour is much simpler to describe because of its objective nature, and much easier to connect to the enumerated ground of colour, assumed to be simply skin pigmentation.<sup>194</sup>

For example, in *Sibayan v Cusmano*,<sup>195</sup> a Filipino man described as having "brown skin" resisted an application to dismiss his complaint, which alleged "that [the defendant] made fun of or ridiculed [the plaintiff] for what he assumes is his skin colour."<sup>196</sup> The plaintiff did not have to adduce independent evidence to demonstrate that a protected ground such as race or ethnic origin was a factor in the alleged discriminatory behaviour, as required by *Moore v British Columbia (Education)*,<sup>197</sup> because the behaviour itself was explicitly linked to the colour ground. If we are correct that almost all discrimination on the basis of colour will be direct discrimination, then this aspect of a colour claim should always be easier to prove.

<sup>192</sup> See *supra* text accompanying note 132.

<sup>193</sup> *Brothers*, *supra* note 10 at para 83. Many other cases have not required such a high standard of proof and have viewed race and colour as more intimately linked. See e.g. *Espinoza*, *supra* note 31 at para 225 (describing colour as "a characteristic within a race"); *Williams v North Vancouver (City)*, 2004 BCHRT 441 at para 59, [2004] BCHRTD No 465 (discussing both race and colour indistinguishably under the umbrella of "racial discrimination"); *Uzoaba v Canada (Correctional Service)*, [1994] CHRD No 7 at paras 49, 297, 26 CHRRR D/361 (also discussing both race and colour indistinguishably under the umbrella of "racial discrimination").

<sup>194</sup> *Brothers*, *supra* note 10 at para 23 (describing how colour simply "refers to visible 'skin colour'").

<sup>195</sup> 2011 BCHRT 288, [2012] BCWLD 1508.

<sup>196</sup> *Ibid* at para 14.

<sup>197</sup> 2012 SCC 61 at para 33, [2012] 3 SCR 360 (requiring the complainant to demonstrate that they have a characteristic that is protected from discrimination, they experienced an adverse impact with respect to a service, and that the characteristic was a factor in that adverse impact in order to demonstrate *prima facie* discrimination and shift the burden to the respondent).

Still, as the American experience illustrates, even with colour as a ground, it is difficult to prove discrimination because it is often subtle or understood to mean more than simply skin pigmentation. The subtlety of discrimination based on colour and race has been noted in Canadian judgments.<sup>198</sup> For example, a respondent may overtly discriminate based on the colour of someone's skin or they may subtly discriminate based on "cultural or other characteristics" that they associate, consciously or unconsciously, with persons of that skin colour,<sup>199</sup> making it more difficult to prove a prohibited ground was a factor in their behaviour.

Second, the presence of colour in the enumerated grounds facilitates the resolution of claims of intersectional discrimination, that is, discrimination based on multiple overlapping grounds.<sup>200</sup> This phenomenon of multiple concurrent grounds as factors in one or more instances of discriminatory conduct has been considered by Canadian courts in the context of colour discrimination.<sup>201</sup>

In *CSWU Local 1611 v SELI Canada Inc.*,<sup>202</sup> the Union filed a complaint on behalf of a group of Latin American workers constructing the rapid transit expansion for the 2010 Winter Olympic Games in Vancouver. The complaint alleged that the Latin American workers were discriminated against as compared to European workers who received superior salaries, accommodations, meal arrangements and expense arrangements.<sup>203</sup> The presence of colour as a ground of discrimination contributed to the Court's ultimate ruling that the complainants shared identifiable characteristics related to enumerated grounds.<sup>204</sup> In particular, the complainant group distinguished itself from those who were not discriminated against by combining various grounds to create a unique group. Individual grounds

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<sup>198</sup> See e.g. *Morin v Canada (Attorney General)*, 2005 CHRT 41 at para 191, 54 CHRR D/351 ("[a] tribunal should ... consider all circumstances in determining if there exists a 'subtle scent of discrimination'"); *Zahedi v Xantrex Technology Inc.*, 2009 BCHRT 214 at para 22, [2009] BCWLD 6117 ("discrimination may be subtle, and may only reveal itself gradually over a series of events").

<sup>199</sup> *R v Shergill*, 1996 CanLII 8167 at para 10 (ONSC), 40 CRR (2d) 308.

<sup>200</sup> Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 *Stan L Rev* 1241 at 1244. See also Rachel Kahn Best et al., "Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation" (2011) 45:4 *Law & Soc'y Rev* 991 (examining the impact of demographic intersectionality, in which overlapping demographic characteristics produce disadvantages that are more than the sum of their parts, and claim intersectionality, in which plaintiffs allege discrimination on the basis of intersecting ascriptive characteristics, and finding that both dramatically reduce claimants' success).

<sup>201</sup> Intersectionality appears to have two different meanings in Canadian jurisprudence. One sees discrimination based on multiple protected grounds resulting in a unique form of discrimination. See e.g. *Espinoza*, *supra* note 31 at para 224 and *Radek v Henderson Development*, 2005 BCHRT 302 at paras 463–87, 52 CHRR D/430. The other views the result as a more harmful form of discrimination. See e.g. *Turner v Canada*, 2012 FCA 159 at para 48, [2012] FCJ No 666 and *Canadian Human Rights Act*, *supra* note 128 at s 3.1.

<sup>202</sup> *SELI*, *supra* note 1 at para 238.

<sup>203</sup> *Ibid* at para 9.

<sup>204</sup> *Ibid* at para 248.

were insufficient to make that distinction on their own because, for example, the common ancestry of the group was only shared to “some degree.”<sup>205</sup> The Court held that the complainant group could only be identified based on “[t]he sum of these characteristics,” which included the fact that they were “relatively dark-skinned.”<sup>206</sup> Accordingly, while not decisive, colour played an important role in defining the complainant group intersectionally so that its members could form a “distinctive identifiable group,”<sup>207</sup> distinguishable from those who did not experience discrimination.

In *Pieters v Peel Law Association*,<sup>208</sup> two Black lawyers and a Black articling student entered the lawyer’s lounge of the Brampton Courthouse, which limits admission to lawyers and law students. Despite entering with a group of other (non-Black) lawyers, the Black lawyers and law student were singled out by the librarian and asked for identification to prove their right to be in the lawyer’s lounge.<sup>209</sup> The Human Rights Tribunal of Ontario held that the complainants were intersectionally discriminated against based on race and colour, but the Divisional Court quashed that decision.<sup>210</sup> On appeal, the Ontario Court of Appeal reinstated the decision of the Human Rights Tribunal. In so doing, the Court of Appeal relied in part on the colourism experienced by the complainants, and held that the race and colour of the complainants were both factors in the librarian’s questioning of them.<sup>211</sup> Accordingly, as in *CSWU*, the presence of colour in the enumerated grounds enabled the complainants in *Pieters* to make use of all relevant evidence to support a finding of discrimination linked to enumerated grounds.

Two other cases support the idea that the inclusion of colour in the enumerated grounds may help to capture a dimension of intersectional discrimination. In *Nassiah v Peel (Regional Municipality) Police Services Board*,<sup>212</sup> a police officer assumed a suspect lacked English language competency in part because of the colour of her skin. And, in *Balikama v Khaira Enterprises*,<sup>213</sup> an employer discriminated against a Black tree planter, in part due to his skin colour, which was a factor in the employer’s opposition to the tree planter’s intimate relationship with a White woman.<sup>214</sup>

Third, the presence of colour in the enumerated grounds facilitates the resolution of intra-group discrimination claims, as the *Brothers* case illustrates.

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<sup>205</sup> *Ibid* at para 240.

<sup>206</sup> *Ibid*.

<sup>207</sup> *Ibid* at para 245.

<sup>208</sup> *Pieters v Peel Law Association*, 2013 ONCA 396, 363 DLR (4th) 598 [*Pieters*]. For an analysis of *Pieters*, see Bhabha, *supra* note 6.

<sup>209</sup> *Pieters*, *supra* note 208 at paras 1-3.

<sup>210</sup> *Ibid* at paras 4-5.

<sup>211</sup> *Ibid* at para 128.

<sup>212</sup> *Nassiah v Peel (Regional Municipality) Police Services Board*, 2007 HRTO 14 at paras 100-06, 61 CHRR D/88.

<sup>213</sup> *Balikama v Khaira Enterprises*, 2014 BCHRT 107, 79 CHRR D/40.

<sup>214</sup> *Ibid* at para 612.

In *Brothers*, Rachel Brothers – an employee of the Black Educators' Association – was terminated primarily because she was “not as black as” one of her subordinates, Ms. Collier, who, with a stronger connection to the Association's head office, coordinated Brothers' termination.<sup>215</sup> This case involved intra-group discrimination based on skin colour, not race, because both Brothers and Collier were Black.<sup>216</sup>

The *Brothers* case therefore affords an opportunity to explore how the colour ground can be used to understand colourism within racial communities. Specifically, colour is a useful lens through which to view discrimination against bi-racial individuals like Brothers. As the tribunal noted, bi-racial individuals are exposed to a unique form of discrimination which sandwiches them between discrimination “equally from either those who self-identify with an historically dominant, or an historically oppressed, community.”<sup>217</sup> Individuals such as Brothers may be exposed to colourism by both Whites (for being too black) and Blacks (for not being black enough). For example, Collier described Brothers as not “black enough”, not a “black person”, and not “actually black.”<sup>218</sup>

In the end, the presence of colour in the protected grounds was crucial to Ms. Brothers' success before the Nova Scotia Human Rights Commission, which found that Brothers suffered discrimination based on colour, but not race:

I spoke earlier in this decision about the difficulty experienced by those who self-identify as bi-racial when colourist comments are made. Depending on the intent or perspective of the person making the comments, the bi-racial person must often be uncertain about whether the comment on colour also imports some concurrent qualitative evaluation of racial or cultural purity or connectedness. Based on the entirety of the evidence here, *I am not prepared to find that the BEA as an organization made any racial or cultural evaluation of Ms. Brothers when colourist comments were heard. In final submissions, I understood that Ms. Brothers has also fairly come to this view. This is a case about discrimination on the basis of colourism only. I do not find any discrimination here on the basis of race.*<sup>219</sup>

*Brothers* illustrates how the presence of colour as a ground with discrete force is critical for certain human rights and equality claims given that colour and race are not always synonymous.

## ii. *The Indirect Impact of Colour as a Ground of Discrimination*

The existence of colour as an enumerated ground also benefits equality-seekers indirectly because its presence affords decision-makers the opportunity to deepen their understanding of identity by distinguishing

<sup>215</sup> *Supra* note 10 at paras 1–6.

<sup>216</sup> *Ibid* at paras 4, 6, 51, 83.

<sup>217</sup> *Ibid* at para 25.

<sup>218</sup> *Ibid* at para 42.

<sup>219</sup> *Ibid* at para 83 [emphasis added].

race from colour. That in turn allows courts and tribunals to explore the relationship between hierarchy and discrimination because a graduated colour spectrum (e.g. from black to white) is a particularly well-recognized instance of an identity-based hierarchy. A continuous colour spectrum is a more easily understandable example of hierarchy as compared to race, which has often been constructed in binary formats (e.g. either Black or White).

*Brothers* provides a good example of this benefit. The Nova Scotia Human Rights Commission conducted a detailed exploration of the differences between the race and colour grounds,<sup>220</sup> an analysis that almost surely would have been absent without the presence of colour as a discrete enumerated ground. *Brothers*' ability to claim discrimination on the basis of colour motivated the tribunal to explore the concepts and their similarities, differences and connections, and that exploration, in turn, might enable subsequent courts and tribunals to do the same.

In *Brothers*, the claim of colourism also provided the tribunal with a unique opportunity to confront a particularly topical example of hierarchy and discrimination, namely, the perception of lighter skinned individuals as more attractive, a connection we explored in Part II.<sup>221</sup> The Board in *Brothers* specifically confronted this stereotype when discussing the colourism experienced by Ms. *Brothers*:

Even if some people continue to believe that it is a compliment to remark on the lighter colour of someone's skin, they should now realize that the recipients do not always receive the comments that way.<sup>222</sup>

A superficial analysis would conclude that a compliment could never be construed as a form of discrimination. For example, many people are often surprised when parents are offended by remarks about how attractive their multi-racial children will be.<sup>223</sup> But these comments can be problematic as they may be predicated on the perceived superiority of whiter or lighter skin.<sup>224</sup> That assumed superiority is arguably the primary reason why *Brothers* was "complimented" for her relatively lighter skin. That the Board in *Brothers* recognized this nuance, following its in-depth discussion of colourism, suggests that its exploration of this issue informed its members about subtler

<sup>220</sup> *Ibid* at paras 22–25.

<sup>221</sup> See *supra* text accompanying notes 70–75, 84–88.

<sup>222</sup> *Brothers*, *supra* note 10 at para 78. See also *ibid* at para 36 ("She also testified that ... 'realistically in my world' it was a benefit to have a colour closer to that of the 'dominant race.' ... She suggested that the 'go work for whittie' comment should actually be seen as a compliment.")

<sup>223</sup> Joy Stokes, "Why Fetishizing Mixed-Race Children Can Be Dangerous", *XO Necole* (May 23, 2016), online: <[xonecole.com/what-fetishizing-biracial-children-says-about-you/](http://xonecole.com/what-fetishizing-biracial-children-says-about-you/)>.

<sup>224</sup> Stokes, *supra* note 223; Jennifer Patrice Sims, "Beautiful Stereotypes: The Relationship Between Physical Attractiveness and Mixed Race Identity" (2012) 19:1 *Global Studies in Culture & Power* 61 (examining the "biracial beauty" stereotype, and reviewing British, Australian and Japanese studies that showed the mixed race phenotype was judged the most attractive).



aspects of discrimination that may have been misunderstood or ignored in the absence of colour as an enumerated ground.

## V. Conclusion

Domestic and international human rights instruments seek to deconstruct “identity hierarchies” based on protected grounds.<sup>225</sup> As we have shown, colour is one such hierarchy. Further, colour is a hierarchy that is uniquely capable of capturing certain forms of discrimination, including intersectional and intra-group discrimination, that we believe may be on the rise. Consequently, colour has an important role to play in human rights and equality law and policy, and we anticipate that role will expand in the future.

Discriminating against someone based on the colour of their skin, whether in the provision of employment, accommodation or services, or in distinctions made by governments, limits individuals’ ability and opportunities to fully participate in and contribute to our society. In the current era, where many multicultural societies from North America and Europe to Australia are struggling to embrace their diversity, it is critical to reflect on the various grounds on which people suffer discrimination and to articulate the harm and wrong precisely and remedy that discrimination. The presence of colour in various human rights instruments, constitutions and statutes is a critical tool in this effort.

We are cognizant that colourism, particularly in the context of intra-group discrimination, can undermine efforts at solidarity within racialized communities. But Canadians should not promote solidarity at the expense of members of marginalized communities. Nor do they need to. Colour discrimination appears to have a significant, material and negative impact on educational, occupational and financial outcomes, contributing to marginalization within disadvantaged groups, and to oppression. Opposing all forms of colour discrimination is the most effective means for achieving substantive equality.

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<sup>225</sup> See Schrenk, *supra* note 23 at para 43.

