

BY EMAIL

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July 23, 2021

Complaint Services  
Canadian Human Rights Commission  
344 Slater Street, 8<sup>th</sup> Floor  
Ottawa, ON K1A 1E1

To Whom it May Concern:

**Re: George Hutcheson**  
**CHRC File: 20210125**

I write in response to the Commission's July 13, 2021, email attaching the further submissions of George Hutcheson (the "Complainant") with respect to the above-referenced matter.

The CBC's further representations regarding the application of section 40/41 of the *Canadian Human Rights Act* (the "Act") to the present matter are set out below.

***i. "Colour" as a protected characteristic***

The legal test for the Commission to exercise its discretion pursuant to section 41(1)(d) is whether it is plain and obvious that the complaint does not have a chance of success (see: *Hagos v. Canada (Attorney General)*, 2014 FC 231 (CanLII), at para. 6; *Canada Post Corporation v Canadian Human Rights Commission (1997)*, 130 FTR 241 (FC)). CBC submits that the present matter is such a case and urges the Commission to exercise its section 41 discretion.

The Complainant alleges that the CBC's journalistic decision to capitalize "Black" but leave "white" lowercase when referring to people is discriminatory to those who identify as, or who are identified by others as, "white" (see: page 7, para. 2 of the amended complaint). The Complainant alleges that this typography decision is discriminatory on the protected characteristic of colour. The Complainant initially alleged that this practice was contrary to sections 5, 7, 8, 10, and 12 of the Act; however, his amended Complaint limits the alleged discrimination to sections 5 and 12 of the Act.

The CBC submits that the Complaint fails to meet the requirements of the Act. The Complainant's allegations of discrimination against "white or European Canadians" (see: page 2, para. 1 of the

Complaint) fails to disclose discriminatory or adverse treatment within the meaning of the Act against an individual with a protected characteristic.

Although “colour” is not defined in the *Act*, courts and tribunals interpret colour to refer to the “visible physical characteristic of skin tone or hue”.<sup>1</sup> As stated by the Nova Scotia Human Rights Commission in *Brothers v Black Educators’ Association*, 2013 CanLII 94697 (NS HRC) (“*Brothers*”) at para. 23:

**It is generally accepted in the human rights context that “colour” refers to visible “skin colour”.** As discussed in some of the evidence at this hearing, the making of distinctions among people on the basis of “colour” has come to us directly from our shared heritage of the slavery relationships which were created and maintained by dominant “white” populations. **Even today, in the absence of legal slavery and in the absence of legal designations as to racial purity, colourism survives as the concept of classifying people on the basis of their apparent “colour” or “shade” in a continuum away from “white” and towards some other definable hue.** It is suggested by colourist thinking that the closer one’s skin tone is to that of a pure white, the better access one will have to the jobs and accommodation and opportunities available to actual “white” people. At the same time, colourist thinking suggests that the more visibly black, or more visibly East Indian, or more visibly American Indian, or more visibly Asian, one is, the greater potential there will be for discriminatory distinctions to be made based on “colour”.

**[emphasis added]**

At issue in the *Brothers* decision, *supra*, was the distinction between concepts of race and colour and how the interplay of these concepts adversely impacted Ms. Brothers’ employment; however, this decision underscores that the Complaint before the Commission does not meet the requirements of the *Act* since being “white” does not, in the human rights context, mean that a person has the protected characteristic of “colour”.

Also relevant to the Commission’s analysis regarding the application of section 41 is the more recent decision of the British Columbia Human Rights Tribunal (the “Tribunal”), *Miller v. Union of BC Performers*, 2020 BCHRT 133 (“*Miller*”). The Complainant in *Miller* described herself as bi-racial but indicated to the Tribunal that she presents as white. Miller alleged that the Union of BC Performers discriminated against her because it had advertised a writers’ workshop for its members but stated in the advertisement that “preference will be given to Indigenous, LGBTQ+ and diverse Members” (see: *Miller*, *supra*, at para. 2).

The Complainant in *Miller* alleged she was discriminated against on the basis of, *inter alia*, colour and gender. The Tribunal dismissed her complaint because it had no reasonable prospect of

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<sup>1</sup> Canadian Journal of Human Rights, 2018 7-1, 2018 CanLIIDocs106, page 9.

success, stating at paragraphs 24 to 26 that:

[24] **First, in today’s society, being white, cisgender and/or heterosexual are not barriers to full and free participation in social life – they are the opposite. These are not characteristics that, understood in context, ordinarily result in discrimination.**

...

[25] By targeting Indigenous, LGBTQ+, and “diverse” members, UBCP was responding to historical, and ongoing, patterns of exclusion in the television and film industries in a way that furthers, rather than detracts from, the [Code](#)’s purposes. The preference did not send any message that white, cisgender, heterosexual women are less worthy of respect and dignity. It did not discriminate against Ms. Miller.

[26] In sum, Ms. Miller’s complaint has no reasonable prospect of success. She will not be able to prove at a hearing that she was adversely impacted because of her protected characteristics in a way that attracts the protection of the [Code](#). I dismiss it under [s. 27\(1\)\(c\)](#).

**[emphasis added]**

The Complainant in the present matter identifies as “white”, which, as per the above authorities, is not a characteristic that attracts the protection of human rights legislation, including that of the *Act*. CBC submits that, on this basis alone, the Complaint must be dismissed.

***ii. Identical treatment is not required for non-discrimination***

The Complainant alleges that the typographical treatment by CBC of “Black” and “white” when used as descriptors for people must be identical or it is discriminatory. CBC disputes this allegation and submits that its typographical decision is consistent with the objective of the *Act*, and human rights legislation in general, to support the dignity and self-worth of historically disadvantaged groups.

As the Commission is aware, the concept of identical treatment being required for non-discrimination was rejected by the Supreme Court of Canada in *R v. Kapp*, 2008 SCC 41 (“*Kapp*”) at paras. 27 and 37; *A v. Québec*, 2013 SCC 5 at para. 180. As the Supreme Court explained in *Kapp*, there is a distinction between “formal equality” and “substantive equality”, with the concept of equality not necessarily meaning identical treatment.

The distinction was eloquently described by the Tribunal in *Miller*, *supra*, at para. 8:

[W]e continue to live in a deeply unequal society. In the [Code](#), the Legislature has chosen to confer protection on some of the characteristics that have marked

groups historically disadvantaged in significant areas of social activity. Features like race, religion, disability, sexual orientation and gender expression have long been used – and continue to operate – to oppress, exclude, and marginalize. **To ignore the unique context of discrimination against groups – historical and present day – and suggest that equality simply requires everyone to be treated the same would result, inevitably, in further discrimination and deeper inequality.**

**[emphasis added]**

The Complainant's assertions that the "asymmetrical" treatment of "Black" and "white" is discriminatory within the meaning of human rights legislation is inconsistent with the established jurisprudence. This further supports CBC's position that the Complaint ought to be dismissed.

### **Conclusion**

In light of the above, and without prejudice to its prior submissions, CBC submits that the Complaint of alleged discrimination is trivial and has no reasonable prospect of success. The Commission should therefore exercise its discretion under section 41(1)(d) of the Act and decline to deal with the allegations contained in the Complaint.

We will remain available should any additional information be required and await your report under section 40/41. We reserve CBC's rights to provide additional submissions to the forthcoming report.

Kind regards,

*Jennifer Pantin per Paula Pettit*

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