



# Promoting Diversity and Inclusion in the Workplace

**Labour, Employment and Human Rights Group**

September 14, 2021

Nicole Singh

📞 +1 416 868 3481

✉ [nrsingh@fasken.com](mailto:nrsingh@fasken.com)

Sandeep Tatla

📞 +1 416 865 5137

✉ [statla@fasken.com](mailto:statla@fasken.com)

David G. Wong

📞 +1 604 631 4920

✉ [dwong@fasken.com](mailto:dwong@fasken.com)



# Promoting Diversity and Inclusion in the Workplace

Nicole Singh, Partner

Sandeep Tatla, Chief Equity, Diversity and Inclusion Officer

David Wong, Partner | Co-Leader, Labour, Employment & Human Rights

September 14, 2021

**FASKEN**  
Institute

## Agenda

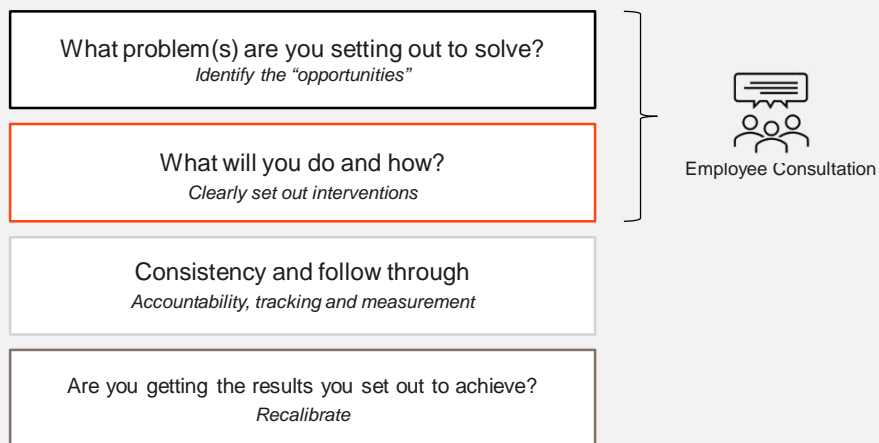
- Diversity & inclusion best practices designed to mitigate legal risk
- Collecting and tracking diversity demographics
- Legal considerations for diversity recruitment programs, such as diverse slates
- Evolving employer obligations around mitigating unconscious bias in talent decisions
- Potential risk and liability for organizations that do not appropriately account for diversity & inclusion

**FASKEN**  
Institute

Growing employee, consumer and shareholder  
EDI expectations.

FASKEN  
Institute

## ▼ Data-driven programmatic approach



FASKEN  
Institute

## ▼ Consistency and follow through

- Are you walking the talk?
- Who is responsible for what and are they aware?
- How are you holding yourself accountable to deliver on commitments? Actions?
- Has consultation with employees continued in program design and implementation?

FASKEN  
Institute

## ▼ Recalibrate

- Are your policies impeding or creating the culture or environment you set out? If not, why?
  - Training
  - Don't go far enough
  - Psychological safety
- Are programs achieving what they set out to do?
- Are there new issues?
- Do you have a feedback loop for employees to provide feedback?

FASKEN  
Institute

## ▼ Collection of Diversity Data

- Not illegal *per se* to collect EDI data but:
  - Compliance with privacy legislation (in jurisdictions where it exists)
    - informed consent
    - not mandatory
    - use/protection/disclosure obligations
  - Human Rights Considerations
    - risks from asking/knowing

FASKEN  
Institute

## ▼ EDI Policies

- Advantages
  - Define approach
  - Consistent application
- Risks
  - Over-promising
  - Excluded individuals/groups
- *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228

FASKEN  
Institute



# EDI Concepts

FASKEN  
Institute



## EDI Concepts to be Aware of

- Bias – Explicit and Implicit
- Racial Profiling
- Microaggressions

FASKEN  
Institute

## ▼ Explicit & Implicit Biases

- Explicit bias is a result of conscious and deliberate thought
- Implicit bias may be a result of past experiences, expectations or stereotypes that form an opinion in your mind that you are unaware of - it is involuntary and unconscious

## ▼ Unconscious Bias

- Implicit attitude or motivation
- It is not deliberate – it is unintentional
- People often don't realize they are making unfair assumptions or stereotypes
- Examples include: gender, age, ethnic or cultural bias
- Types of bias include: affinity bias, beauty bias, perception bias, confirmation bias, halo/horns effect, performance bias

## ▼ Avoiding Unconscious Bias

- Be honest with yourself – Do you have unconscious biases?
- Avoid snap judgments and base decisions on facts/observations

## ▼ Racial Profiling

- Differential treatment or scrutiny because of negative stereotypes related to their race
- Not specifically recognized by human rights legislation, but often manifests as discrimination
- May occur through statements, signs, symbols, applications or employment practices



## ▼ Microaggressions

- A behaviour or communication (spoken or unspoken) that feed into stereotypes
- Can be intentional or unintentional, demonstrating unconscious bias or stereotyping
- Experienced as racism, sexism, ageism or ableism
- Slight, indignities, put downs experienced in day-to-day interactions
- Can make workplace feel uncomfortable, unsafe and toxic

FASKEN  
Institute

## ▼ Microaggressions

- Key: People are often unaware they have engaged in an offensive or demeaning way
- Often communicated through language – important to pay attention to how we talk and what we say in the workplace
- Recipient often feels insulted but doesn't know how to respond

FASKEN  
Institute

## ▼ Examples of Workplace Microaggressions

- “You’re so articulate.”
- “You’re transgender – You don’t look like it at all.”
- “Did you get in because of a quota or affirmative action?”
- “Oh you’re gay. You should meet my friend Anne. She’s gay too.”
- Calling women hysterical, shrill, etc.
- Where are you actually from?
- Are you in the right room?
- Interrupting: “well, actually I think...”

FASKEN  
Institute

▼  
Where may these  
Issues Arise?

FASKEN  
Institute

## ▼ Where may these issues arise?

- Recruitment / Hiring
- Promotions
- Customer and Employee Relations

## ▼ Recruitment, Hiring & Promotions

- Applications
- Hiring for “fit” or a “culture”
- The “Halo Effect” and “Horn Effect”
- Performance and reviews

## ▼ Employee and Customer Relations

- Organizations should be mindful of EDI concepts when engaging with employees, customers, and clients
- Workplaces should remain safe, inclusive and professional for everyone – what some may consider playful banter may be offensive to others

FASKEN  
Institute

## ▼ Human Rights Complaints

FASKEN  
Institute

## ▼ Special Programs

Jurisdiction	Special programs?	Act Provision	Pre-approval available?
BC	Yes	s. 42	Yes
Alberta	Yes	s. 10.1	No
Saskatchewan	Yes	ss. 55-56	Yes
Manitoba	Yes	s. 11	No
Ontario	Yes	s. 14	Yes
Quebec	Yes	Part III	Assist
New Brunswick	Yes	s. 14	Yes
Nova Scotia	Yes	s. 25	Yes
PEI	Yes	s. 20	Yes
Newfoundland	Yes	s. 8	Yes
Yukon	Yes	s. 13	No
NWT	Yes	s. 67	No
Nunavut	Yes	s. 7	No
Canada	Yes	S. 16	Advise/Assist

FASKEN  
Institute

## ▼ EDI Shift in Processing HR Complaints

- *Expanding our Vision: Cultural Equality & Indigenous Peoples' Human Rights*
  - Addressing access to justice issues relating to Indigenous Peoples
  - Shift in HRT processes to be more open and responsive to the experiences of Indigenous Peoples

FASKEN  
Institute

## ▼ EDI Shift in Assessing HR Issues

- *Campbell v. Vancouver Police Board (No. 4)*, 2019 BCHRT 275
  - Consideration of social context
  - Colonialism and historical trauma
  - Effects of perpetuating historical disadvantage
  - Lack of training and awareness
  - Misunderstanding of complainant's conduct

FASKEN  
Institute

## ▼ EDI Shift in Assessing HR Issues

- *Fraser v. Canada (Attorney General)*, 2020 SCC 28
  - Proving systemic discrimination
    - 2 types of evidence:
      - Situation of the group
      - Outcomes of the law or policy including statistics
    - Does the law or policy have the effect of reinforcing, perpetuating or exacerbating disadvantage – prejudice or stereotyping not necessary

FASKEN  
Institute



# Risk & Liability

FASKEN  
Institute



## Risk & Liability

- Legal Liability
  - Human rights damages
  - Special damages
  - Aggravated damages
  - Constructive dismissal
- Reputational Harm

FASKEN  
Institute

## ▼ Potential Liability?

- The type of remedy (or remedies) and amount of damages will depend on factors such as:
  - The nature of the behaviour
  - The frequency of the behaviour
  - The circumstances of the victim of the behaviour
  - The vulnerability of the victim
  - The psychological impact of the behaviour upon the victim

FASKEN  
Institute

## ▼ Customer Relations

- ***Graham v. Enterprise Rent A Car Canada Company (2020 HRTO 424)***
  - Applicant alleged she was discriminated against on the basis of, among other grounds, race, colour and place of origin, as a customer
    - Was asked for additional ID
    - Two white men with briefcases rented a vehicle without issue
    - Rented another vehicle from a different location with same ID and credit card without additional requirements

FASKEN  
Institute



## ▼ *Graham v. Enterprise Rent A Car Canada Company*

- Finding
  - The applicant was subject to discrimination and unconscious bias

FASKEN  
Institute

## ▼ *Graham v. Enterprise Rent A Car Canada Company*

### • Tribunal's commentary on discrimination:

"Where there is no direct evidence of discrimination, the question to be asked is whether an inference of racial discrimination is more probable than the respondent's explanation for their actions. **The Tribunal must take into account the nature of racial discrimination and the fact that it can be the product of learned attitudes and biases, which often operate on an unconscious level when making this determination.**" [emphasis added]

**"I find that the applicant was subject to discrimination and unconscious bias.** As noted above in Sinclair, anti-Black racism and its subtle manifestations are **well-recognized in Canadian law, including the recognition that a Black person can be treated adversely by a service-provider because of a conscious or an unconscious stereotype.** It appears that the applicant's race and colour were factors in the CSR's exercise of his discretion to request additional ID and his subsequent refusal to consider the health card which the manager testified could have been adequate in the circumstances." [emphasis added]

FASKEN  
Institute

## ▼ *Graham v. Enterprise Rent A Car Canada Company*

- Finding
  - The applicant was subject to discrimination and unconscious bias
- Remedy
  - \$2,500 for injury to dignity, feelings and self-worth
  - Enterprise must provide Human Rights related training to all management and customer service staff

FASKEN  
Institute

## ▼ Employee Relations

- ***Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213* [2021 CanLII 16916 (BC LA)]**
  - Unionized bottling plant employee dismissed for wearing a COVID-19 mask embroidered with a Confederate flag and the words “The South Will Rise Again”, while at work. Incident occurred several weeks after the death of George Floyd.
  - Employer viewed the wearing of Confederate mask as form of blatant racism, in violation of workplace policies on discrimination.
  - The Union, in part, argued this behaviour was on the “low end of the scale” and, while improper, did not warrant termination. The employee argued he had no “intention at all to offend anyone or go against policies”.

FASKEN  
Institute

▼ *Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213*

- Arbitrator reduced discipline to five-day suspension, in part because the employee:
  1. Removed the mask;
  2. Apologized;
  3. Had no intention of using mask to promote racism; and
  4. Did not conclusively lead to a poisoned work atmosphere.

FASKEN  
Institute

▼ *Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213*

- “There is no doubt that the symbolic meanings of things change over time and that the Confederate flag now bears symbolic significance that may not have been obvious in society as a whole even a few years ago. Perhaps it should always have borne the same racist connotation it bears now. **Societal views are changing, and education seems an appropriate method of helping workers and others to understand the historical meaning and the reasons for the negative symbolism of the Confederate flag.** Indeed, not only did Ms. Allen say that she would bring that specific issue to crew talks to clarify that the Confederate flag is an inappropriate symbol, but the **Employer planned to hold educational sessions on subjects such as unconscious bias and racism later in 2020. I certainly commend the Employer for those efforts, and I have no doubt the Grievor would have benefitted from such education.**” [emphasis added]

FASKEN  
Institute

## ▼ *Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213*

- “The Union submits that the appropriate disciplinary penalty is a letter of reprimand. In earlier times, the Union may well have been right. However, **we are in an era of heightened awareness of systemic and individual discrimination.**” As Arbitrator Casey put it, in Calgary (City), at para. 107

**‘We live in an era where much more is being expected of companies and organizations to eliminate racism and discrimination in our diverse, multicultural workplaces. That also means much more is expected of employees.’** [emphasis added]

FASKEN  
Institute

## ▼ *Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213*

“The Employer acted in pursuit of a noble cause – the elimination of racism and harassment in the workplace. **That goal, however, does not detract from requirement that any discipline imposed must be just and reasonable in all the circumstances.**” [emphasis added]

FASKEN  
Institute

## ▼ Employee Relations

- ***Loiselle v. Windward Software Inc. (2021 BCHRT 7)***
  - Allegations that applicant was treated differently than her male counterparts
  - Allegations that some male coworkers bullied and harassed the applicant

FASKEN  
Institute

## ▼ *Loiselle v. Windward Software Inc.*

- “Human rights law recognizes that discrimination can be subtle. It can be the result of unconscious biases and prejudices that are not displayed openly and can be inferred from circumstantial evidence.”
- “*The burden is on the employer who chooses to give questionable materials to an employee to ensure there is a meeting of the minds so that there is no misunderstanding.*”

FASKEN  
Institute

## ▼ *Loiselle v. Windward Software Inc.*

- Remedy: \$15,000 for injuries to dignity, feelings and self-respect
- Injury to dignity awards have been increasing over time.

## ▼ Institutional Bias

- *Ahmed v. Magellan Aerospace Corporation* (2019 HRTO 794)
  - Applicant was a visible minority, dual citizen of Canada and Bangladesh
  - Alleged that he and racialized employees were subject to racial discrimination that was built into the workplace
  - Applicant submitted detailed complaint to human resources
  - Employer responded by conducting lengthy investigation

## ▼ *Ahmed v. Magellan Aerospace Corporation*

- Investigation revealed racial discrimination in the workplace
- Employer took steps to address the issues:
  - Restructured department
  - Granted applicant salary increase
  - Obtained verbal and written apologies
  - Offered applicant a lump sum payment and additional week of vacation in exchange for release

FASKEN  
Institute

## ▼ *Ahmed v. Magellan Aerospace Corporation*

- Admissions from the employer and investigation demonstrated that the workplace was racially segregated
  - Racially segregated reporting structure and lines of communication
  - The applicant was excluded from client facing events
  - Priority work was given to white employees
  - Performance reviews were affected by racist filter

FASKEN  
Institute

## ▼ *Ahmed v. Magellan Aerospace Corporation*

- Remedy: \$30,000 for injury to dignity, feelings and self-respect
- Mitigating factors included:
  - Prompt and reasonable reaction to applicant's internal complaint
  - Acceptance of investigation results and acting on applicant's requests
  - Employer apologized to the applicant

FASKEN  
Institute

## ▼ Reputational Harm

- Hard to quantify but potentially more significant consequences
- Organizations are responsible for their employees and their actions reflect on them
- No social tolerance for a lack of diversity and inclusion

FASKEN  
Institute



## ▼ Cancel Culture

- Cancellings: a term coined and popularized by Twitter users as a public call for accountability, in the form of boycotting of individuals and/or entities for allegedly engaging in behaviours or expressing opinions in conflict with, or not supportive of, the evolving social landscape

## ▼ Reputational Harm

- Headline in the Toronto Star regarding *Elias Restaurant v. Keele Sheppard Plaza Inc.*: “Black business owners win against racism in Ontario Superior Court decision”

## ▼ Increasing Liability Risk

- BC
  - *Francis v. B.C. Ministry of Justice (No. 5)*, I2D \$176,000
  - In 2020 I2D awards:
    - \$17,500; \$35,000; \$40,000; \$25,000; \$20,000; \$15,000+\$7,500; (4x\$1000 and \$1000 because all asked)

FASKEN  
Institute

## ▼ Increasing Liability Risk

- NS
  - *Y.Z. v. Halifax Regional Municipality*
    - \$400,000 in lost wages and \$80,000 I2D racial slurs, graffiti, vandalism and assault because his wife was black. Wife, not a complainant, awarded \$25,000.

FASKEN  
Institute

## ▼ Increasing Liability Risk

- Manitoba
  - *T.M. v. Manitoba (Justice)*, 2019 MBHR 13
    - \$75,000 I2D
    - ER failed to address allegations of harassment on basis of sexual orientation
    - Manitoba introduced bill limiting I2D to \$25,000

FASKEN  
Institute

## ▼ Increasing Liability Risk

- Ontario
  - *Joe Singer Shoes Limited v. A.B.*, 2019 ONSC 5628
    - \$200,000 I2D
    - Retail employee who experienced severe post-traumatic stress disorder as a result of being sexually assaulted over the course of many years by her employer, who was also her landlord

FASKEN  
Institute

## ▼ Increasing Liability Risk

- Alberta
  - *Kvaska v Gateway Motors (Edmonton) Ltd.*, 2020 AHRC 94 (CanLI).
  - “I cite them as support for the principle that damage awards for human rights violations are increasing and that without a legislative cap there is no limit to the damages so long as they remain compensatory in nature.”

## ▼ Strategies to Consider

## ▼ Proactive Strategies

- Equity, Diversity and Inclusion initiatives
  - Be aware of other risks these may present
- Update all relevant policies
- Be aware of legal obligations

## ▼ Defensive Strategies

- Anti-racism and systemic discrimination awareness
  - Training
  - Policies
- Take complaints seriously and respond quickly



Nicole Singh

- Partner
- +1 416 868 3481
- [nrsingh@fasken.com](mailto:nrsingh@fasken.com)

Sandeep Tatla

- Chief Equity, Diversity and Inclusions Officer
- +1 416 865 5137
- [statla@fasken.com](mailto:statla@fasken.com)

David G. Wong

- Partner | Co-Leader, Labour, Employment & Human Rights
- +1 604 631 4920
- [dwong@fasken.com](mailto:dwong@fasken.com)

FASKEN  
Institute

FASKEN  
Institute

## Biographies



## Area of Expertise

Labour, Employment & Human Rights

## Education

2013, JD, University of Ottawa

2009, BA (Honours), cum laude, Criminology, York University

## Jurisdiction

Ontario, 2014

## Language

English

Nicole Singh has a broad labour and employment practice. She regularly advises public and private sector employers on a wide range of issues, including labour disputes, grievance arbitrations, human rights and accommodation, employment standards, employment contracts and terminations, collective agreement interpretation, and wrongful dismissals. Nicole has represented clients before arbitrators, courts, the Ontario Labour Relations Board and the Ontario Human Rights Tribunal.

Nicole has specialized experience in the health care sector. She spent over a year at a large acute care hospital where she managed the hospital's labour and employment litigation, and provided day-to-day legal advice to the hospital's human resources department.

Nicole is passionate about diversity and inclusion in the workplace. She regularly advises clients on achieving a more diverse workforce and eliminating systemic barriers. Nicole is a member of the firm's Equity, Diversity and Inclusion Committee.

Nicole also co-leads the LAWS mentorship program at Fasken, which aims to support, guide and motivate high school students who face various barriers to educational advancement.





## Sandeep Tatla

CHIEF EQUITY, DIVERSITY AND INCLUSION OFFICER

### Toronto

📞 +1 416 865 5137

✉ [statla@fasken.com](mailto:statla@fasken.com)

[www.fasken.com/en/sandeep-tatla](http://www.fasken.com/en/sandeep-tatla)

### Area of Expertise

Canada

### Education

2004, LLB, Western University

2001, BA (Honours), Double Major in Psychology and Law & Society, York University

### Accreditations

2020, Certificate, Associate Diversity Coach Certification, Howard University

2009, Certificate, Alternative Dispute Resolution, University of Windsor

### Languages

English | Punjabi

Sandeep Tatla is the Chief Equity, Diversity and Inclusion Officer at Fasken. Sandeep works with the firm's leadership to develop and implement a strategy that further solidifies a culture of equity, diversity and inclusion at the Firm.

A catalyst for change, Sandeep is a forward-thinking executive leader with demonstrated experience successfully leading diversity, equity and inclusion change strategies across different and complex industries. Her focus is on systemic and sustainable change.

Sandeep has held leading roles in the field, including with an industry leading financial services firm, provincial regulatory body and most recently at one of Canada's largest privately held technology companies.

Sandeep's work and views on diversity and inclusion have been published in the Harvard Business Review and HR Professional as well as through interviews with journalists from several major news outlets including: The Globe & Mail, National Post, Financial Post and CBC Radio.

Prior to specializing in diversity and inclusion, Sandeep practiced labour and employment law for several years focusing on employment, human rights law and equity legislation.



## David G. Wong\*

PARTNER | CO-LEADER, LABOUR, EMPLOYMENT & HUMAN RIGHTS

**Vancouver**

+1 604 631 4920

[dwong@fasken.com](mailto:dwong@fasken.com)

[www.fasken.com/en/david-wong](http://www.fasken.com/en/david-wong)

\*Law Corporation

### Areas of Expertise

Labour, Employment & Human Rights | Human Rights | ESG and Sustainability

### Education

2006, LLB, University of British Columbia

2001, BSc, University of British Columbia

### Jurisdiction

British Columbia, 2007

### Language

English

David G. Wong is a Partner and co-leader of the Labour, Employment and Human Rights group, he is also the leader of the firm's national Human Rights practice. His practice includes advice to and representation of organizations in all areas of human rights law as well as in the areas of labour and employment law.

David has appeared before all levels of court, including the Supreme Court of Canada. He is a ranked lawyer by Lexpert in Human Rights and in labour by Best Lawyers and was a recipient of Business in Vancouver's 2016 Forty Under 40 Award and recognized as a Wesbrook Scholar.

### Human Rights Law

David provides strategic advice and guidance to organizations in all matters relating to human rights and defends organizations before the BC Human Rights Tribunal and at all levels of Court on judicial reviews and appeals relating to human rights law. He also has experience defending organizations before the Canadian Human Rights Commission and Alberta Human Rights Commission.

### Labour Relations


David provides strategic advice and guidance to employers on issues involving unionized workers and union negotiations. He regularly represents employers before labour arbitrators and the Labour Relations Board. David has acted as lead negotiator in a number of rounds of collective bargaining for different employers and draws on that experience in the advice he provides.

# FASKEN

## **Employment**

David also regularly advises employers on issues involving non-unionized workers, from the duty to accommodate to terminations, including representation on wrongful dismissal claims. David takes a strategic and practical approach in providing guidance to employers and working towards a solution to whatever employment issue they are faced with.





# Ten offices Four continents One Fasken

> [fasken.com](http://fasken.com)



## ▼ Canada

**Vancouver, BC**  
550 Burrard Street, Suite 2900  
T +1 604 631 3131  
[vancouver@fasken.com](mailto:vancouver@fasken.com)

**Calgary, AB**  
350 7th Avenue SW, Suite 3400  
T +1 403 261 5350  
[calgary@fasken.com](mailto:calgary@fasken.com)

**Ottawa, ON**  
55 Metcalfe Street, Suite 1300  
T +1 613 236 3882  
[ottawa@fasken.com](mailto:ottawa@fasken.com)

**Québec, QC**  
140 Grande Allée E., Suite 800  
T +1 418 640 2000  
[quebec@fasken.com](mailto:quebec@fasken.com)

**Surrey, BC**  
13401 - 108th Avenue, Suite 1800  
T +1 604 631 3131  
[surrey@fasken.com](mailto:surrey@fasken.com)

**Toronto, ON**  
333 Bay Street, Suite 2400  
T +1 416 366 8381  
[toronto@fasken.com](mailto:toronto@fasken.com)

**Montréal, QC**  
800 Victoria Square, Suite 3500  
T +1 514 397 7400  
[montreal@fasken.com](mailto:montreal@fasken.com)

## ▼ Global

**London, United Kingdom**  
15th Floor, 125 Old Broad Street  
T +44 20 7917 8500  
[london@fasken.com](mailto:london@fasken.com)

**Johannesburg, South Africa**  
Inanda Greens, 54 Wierda Road  
West Sandton 2196  
T +27 11 586 6000  
[johannesburg@fasken.com](mailto:johannesburg@fasken.com)

**Beijing, China**  
Level 24, China World Office 2  
No. 1 Jianguomenwai Avenue  
T +8610 5929 7620

# FASKEN

Institute