A Critical Examination of the Employment Equity Act

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Abstract

The *Employment Equity Act* obliges employers to undertake affirmative action to combat employment discrimination. On October 31st, 1991, a Parliamentary Committee was appointed to review the *EEA* and make recommendations for its improvement. This thesis assesses the *EEA* within the historical context of discrimination remedies. The thesis argues that the solution to systemic discrimination in employment cannot consist merely of measures that increase the representation of minorities in the workplace. Rather, the solution must also include measures designed to change traditional attitudes and stereotypes about the employment of minority groups, whether these attitudes take the form of prejudice, paternalism, or inhibitions. A change in attitudes among employers will also help to eliminate apparently neutral employment policies and practices that nevertheless have an adverse effect on the opportunities of women and minorities. The *EEA* incorporates aspects of all three strategies in a hands-off approach that invites employers to become equal partners in the quest to overcome discrimination in the work place.

Sommaire

En vertu de la *Loi sur l'équité en matière d'emploi*, les employeurs doivent prendre des mesures d'action positive pour lutter contre la discrimination dans l'emploi. Le 31 octobre 1991, un comité parlementaire a été chargé d'examiner la *Loi sur l'équité en matière d'emploi* et de faire des recommandations destinées à améliorer celle-ci. La présente thèse évalue cette loi dans le contexte historique des recours en matière de discrimination. Selon cette thèse, la solution à la discrimination systémique ne consiste pas à prendre simplement des mesures visant à accroître la représentation des minorités en milieu de travail. Il faut plutôt que la solution envisagée comporte des mesures destinées à changer les attitudes traditionnelles, notamment les préjugés, les attitudes paternalistes, les interdits et les stéréotypes quant à l'embauche des minorités. Le changement d'attitudes chez les employeurs aidera également à éliminer les politiques et les pratiques d'emploi qui sont à première vue inoffensives, mais qui ont, en réalité, des répercussions négatives sur les possibilités d'emploi des femmes et des minorités. La *Loi sur l'équité en matière d'emploi* intègre les aspects des trois stratégies dans une approche de non-intervention qui incite les employeurs à devenir des partenaires égaux dans la lutte contre la discrimination en milieu de travail.

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Table of Contents

Introduction

August 13th, 1991 marked five years since the Canadian Parliament enacted the *Employment Equity Act* of 1986.[1] On October 30th, a Parliamentary Committee was appointed to review "the provisions and operation of this Act including the effect of such provisions".[2] The *EEA* is the first Canadian piece of legislation devoted exclusively to employment discrimination. It is also the first legislation in Canada to approach the problem of discrimination in a proactive fashion, placing the onus of implementing a solution on the shoulders of employers. In its proactive and systemic conception, the *EEA* constituted a bold initiative. However, in its design and mechanism, the *EEA* could hardly be characterized as bold, amounting to little more than an Act requiring employers to make annual reports about the make-up of their work forces. The Act requires that employers create and implement plans to increase the representation of disadvantaged minorities in their work places, but the Act provides for no enforcement mechanism to back up those obligations.

The *Canadian Human Rights Act*[3] and other provincial human rights codes address various forms of discrimination. However, among the various types, the field of employment discrimination has attracted considerable attention. It became the venue for introducing the concept of systemic discrimination. Instead of blaming delinquent individuals for behaviour that is below the required standard of conduct, systemic discrimination has recognized that the present standard of conduct is itself

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1 R S , 1985, c.23 (2nd Supp.), hereinafter EEA

2 R.S., 1985, c.23, s.13(1)

3 R S 1985 C. H-6, amended R.S., c.1985, c.31 (1st Supp), R S , c 1985, c 32 (2nd Supp)

discriminatory.[4] The study and pursuit of employment discrimination has brought about the realization that prosecuting individuals through a quasi-criminal complaints process fails to get at the root causes of employment barriers faced by disadvantaged persons. Those root causes lie in widely held prejudicial and paternalistic attitudes that are perpetuated in society, and manifested in long-standing employment practices and policies.

Employment equity is at the cutting edge of social policy. The desire to address employment discrimination is infused with a moral imperative that will sustain the public's attention. That may be so because, on one hand, formerly disadvantaged minorities have become politically empowered, and on the other hand because employment discrimination may stimulate a feeling of collective guilt over the long history of racism towards visible minorities and paternalism towards women. Employment equity is also generating controversy over choices of solutions and remedies. On one hand, affirmative action is criticized as producing its own version of discrimination by placing its costs on innocent victims. On the other hand, it is argued that since everyone can be considered innocent, having inherited the discriminatory attitudes from the previous generation, everyone should therefore bear the burden of remedying the social problem.

Arguments about the methods of solving employment discrimination occupy the a broad spectrum of views and appear to dominate most of the discussion that revolves around this topic. The Parliamentary Committee will not be considering whether employment discrimination should be eliminated. Rather, it will consider the question of how that should be accomplished. It is on that basis that the committee will review the *EEA*, seeking to establish whether the Act has been

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[4] William Black, Employment Equality A Systemic Approach, Human Rights Research and Education Centre, University of Ottawa, (Ottawa, 1985)

successful in serving its goals, and analyze whether and which new methods should be attempted to achieve tangible results.

The first part of this thesis will provide background for considering the federal employment equity scheme. In particular, it will review the development of the law relating to discrimination in Canadian courts and legislatures. It will then trace the evolution of the concept of discrimination, first in the United States, and then in Canada, with some attention being devoted to developments in Ontario.

The thesis will then consider the transformation of the concept from being based on motive to one of a systemic nature. That discussion will be lead off by an introduction of the systemic remedies and their manifestations in the United States, where they first arose. Of particular interest is the shift in the method of fighting discrimination from the individual case-by-case approach to the use of systemic remedies. The thesis will then focus upon the rise of desire for mandatory programs. The Abella Report[5] and the *Action Travail des Femmes*[6] case are the two key elements that brought this realization to the forefront.

Next, the thesis will look at the Canadian government's response, in the form of the *Employment Equity Act*. First, it will sketch the main features of that Act. Following that will be a comment on the lack of an effective enforcement mechanism. The thesis will then consider the tendency of the current employment equity scheme to concentrate upon changing the representativeness of the work place, as opposed to changing the practices and policies that give rise to that representativeness, and the attitudes that underly those practices.

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5 Rosalie Abella, Report of the Commission on Equality in Employment, Ministry of Supply and Services, (Ottawa 1984)

6 [1987] 1 S.C.R. 1114

Finally, the thesis will outline options available for expanding the scope of the *EEA* to deal more effectively with discriminatory attitudes and practices. Those options will be discussed in light of the political considerations that may affect the choices to be made by the Parliamentary Committee.

Part 1, Section A.1

Discrimination and the Courts

Before the advent of human rights commissions, victims of discrimination had almost no formal legal recourse. Except for rare exceptions, Canadian courts were unsympathetic to the plight of minorities. They paid more attention to such traditional concepts as freedom of commerce than to the equal treatment of minority persons. Most often, courts considered such matters to be moral questions that were beyond their jurisdiction:

> Doubtless, mutual goodwill and esteem among the people of numerous races that inhabit Canada is greatly to be desired, and the same goodwill and esteem should extend abroad, but what is so desirable is not a mere show of goodwill or a pretended esteem, such as might be assumed to comply with a law made to enforce it. To be worth anything, either at home or abroad, there is required the goodwill and esteem of a free people, who genuinely feel, and sincerely act upon, the sentiments they express. A wise appreciation of the impotence of laws in the development of such genuine sentiments, rather than mere formal observances, no doubt restrains our legislators from enacting, and should restrain our Courts from propounding, rules of law to enforce what can only be of natural growth, if it is to be of any value to anyone.[7]

Members of the Judicial Committee of England's Privy Council refrained from expressing their sentiments so openly. They simply stated that such questions were not for them to consider.[8]

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7 As per Robertson, C J O in Re Noble and Wolf [1949] 4 D L R 375 (Ont C A), at page 386

8 A -G for British Columbia v Tomey Homma and A G for Canada [1903] A C 151 (P C)

Nevertheless, the common law required persons engaged in serving the general public to refrain from discrimination.[9] That duty obliged those who held themselves out to serve the public generally not to refuse service except on "reasonable grounds". It was reasonable, for example, to refuse service to prevent misconduct and immorality, and to protect the proper functioning of the business.[10] This "innkeepers" doctrine sought to shield individuals from the arbitrary and unreasonable power of private entities, especially in cases where access to a public necessity was monopolized. Thus, while that principle originally bound innkeepers, common carriers, and public warehouses, more recently American courts expanded the category to include monopolies that had exclusive control over employment opportunities or other "practical necessities" (eg. unions and professional associations).[11]

English courts applied that principle to two separate categories of entities. On one hand, innkeepers were obliged to receive and lodge all travellers short of a reasonable excuse.[12] On the other hand, persons who operated a monopolistic or privileged business that affected the public interest were obliged to serve all who applied for its services.[13] Courts often restricted the application of the "innkeeper" principle by defining the two categories narrowly. That tactic served well those courts that were not willing to grant a plaintiff relief from discrimination.

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9 See generally, Doug Schmeiser, Civil Liberties in Canada, Chapter 6, pages 262-274, and Notes, "The Anti-discrimination Principle in the Common Law", (1989) 102 Harvard Law Review 1993, at page 1997

10 Uston v Resorts International Hotel, Inc 89 N J 163, at 174, 445 A 2d 370, at page 75 (1982)

11 Notes from the Editors, "The Antidiscrimination Principle in the Common Law", supra, note 9, at page 1997 ff

12 Schmeiser, supra note 9, at page 262

13 See, Bolt v Stennett, (1800) 101 E R. 1572, Allnutt v Inglis (1810) 104 E R 206, Simpson v Attorney-General, (1904) A C 476

One notable Canadian exception to a narrow interpretation of the innkeepers doctrine was *Sparrow v. Johnson*.[14] That case involved a black couple who were not allowed to take their alloted orchestra seats for a concert at the Montreal Academy of Music, even though the couple bought their tickets in advance. The couple sued for breach of contract pursuant to section 1053 of the Civil Code of Lower Canada. On the basis of that section, Judge Archibald held that when entertainment is publicly advertised and ticket purchases publicly solicited, management forfeits the right of a private club to exclude anyone it chooses from the premises.

In addition to finding a breach of contract, Judge Archibald relied upon the two parts of the English "innkeepers" doctrine. First, he drew an analogy between the obligation of an inn-keeper to receive a traveller and a theatre's obligation not to turn away patrons. Finally, he held that the licence to operate a theatre deprived its owner of the right to discriminate or to adopt regulations to that effect:

> ... a theatre is licensed by public authorities for the use of the public, and is not so far a strictly private enterprise as to justify the owner to admit one and exclude another member of the public.
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> . . .
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> ... [the] defendants had no right to make any regulation excluding negroes from their theatre, or from any part of it, and ... any such regulation was and is unreasonable and illegal.[15]

Judge Archibald also took the liberty to express some general views on the subject of racial discrimination:

> ... the regulation in question is undoubtedly a survival of prejudices created by the system of negro slavery. ... Our constitution is and always has been essentially democratic, and it does not admit of distinctions of races or classes All men are equal before the law and each has equal rights as a member of the community. ...

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14 (1899), 15 Que S C 104 (Que S C).

15 (1899), 15 Que S C 104, (Que S C), at page 112

> I should certainly hold any regulation which deprived negroes as a class of privileges which all other members of the community had a right to demand, was not only unreasonable but entirely incompatible wiht our free democratic institutions.[16]

In the end, the plaintiff was awarded fifty dollars in damages for breach of contract. However, it would be some time before the sentiments expressed by Judge Archibald would receive further endorsement from the bench.

Two decades later, the trial judge in *Loew's Montreal Theatres Ltd. v. Reynolds* faced the same factual situation as was presented in *Sparrow*.[17] He awarded a black man ten dollars in damages when he was refused an orchestra seat pursuant to the theatre's rule that restricted non-whites to balcony seats. However, Quebec's Court of King's Bench reversed that decision because, in its view, the manager's rule did not offend morality or public order.[18] No reference was made to section 1053, and no attention was paid to the principles enunciated in *Sparrow*. Instead, the Court held that, "the management has the right to assign particular seats to different races and classes of men and women as it sees fit".[19] In their approach to racial discrimination, the decisions of Canadian courts resembled such decisions as *Plessy v. Ferguson*, in which the United States Supreme Court sanctioned racial segragation.[20]

While *Reynolds* peeled back Judge Archibald's ruling on the civil law of contract, *Franklin v. Evans* accomplished the same with respect to common law

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16 (1899), 15 Que S.C. 104, (Que.S.C), at pages 107-8.

17 30 Que.C.B R 459, (Queen's Bench).

18 (1921) 30 Que K.B. 459

19 (1921) 30 Que K.B. 459, as per Martin J., at page 466.

20 (1896), 163 U S. 537, (U S.S.C).

principles.[21] In that case, a London restaurant owner refused to serve a Negro. Justice Lennox held that the presence of a licence to operate had no relevance to the licencee's freedom of commerce. He went on to state that "a restaurant-keeper is not at all in the same position as person who, in consideration of the grant of a monopoly or quasi-monopoly, takes upon themselves definite obligations, such as supplying accommodation of a certain character, within certain limits, and subject to recognized qualifications, to all who apply".[22] *Franklin* exhibited how easy it was for courts to render the common law principles of no use.

Higher courts were not more sympathetic on the issue of discrimination. *Union Colliery Co. of British Columbia, Limited v. Bryden* was the first major decision in that area.[23] In that case, the Judicial Committee of the Privy Council considered an 1890 amendment to the British Columbia *Coal Mines Regulation Act*, which added the phrase "and no Chinaman" to the following section:

> (4) No boy under the age of 12 years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be, for the purpose of employment in any mine to which the Act applies, below ground.

The Judicial Committee decided the case solely on the grounds of its constitutionality, namely that legislation with reference to aliens and naturalized citizens was *ultra vires* the provincial legislature. Unlike Judge Archibald in *Sparrow*, the Judicial Committee said nothing about the discriminatory aspect of the

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21 (1924), 55 O.L.R. 349.

22 (1924), 55 O.L.R., at page 350.

23 [1899] A.C. 580, (P.C.).

amendment. In fact, the Committee was neutral to the exclusionary nature of the amendment.[24]

Four years later, the treatment of Asian immigrants in British Columbia again came to the attention of the Judicial Committee in *A.-G. for British Columbia v. Tomey Homma and A.G. for Canada.*[25] That case concerned section 8 of the British Columbia *Provincial Elections Act* which provided that: "No Chinaman, Japanese or Indian shall have his name placed on the Register of Voters for an Electoral District, or be entitled to vote at any election...".[26] As in *Bryden*, the Judicial Committee approached the cases strictly on constitutional grounds. It expressly distanced itself from any consideration of the merits or substance of the provision: "... the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider".[27] In the end, the Judicial Committee upheld the constitutionality of the provinicial legislation distinguishing *Bryden* on the basis that the provision at issue in *Tomey Homma* dealt with political rights that are within the province's jurisdiction.[28]

In 1914, the Supreme Court of Canada also refrained from considering the merits of an overtly discriminatory provision. *Quong-Wing v. The King* presented the

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24 [1899] A.C., at 587-88.

25 [1903] A.C 151

26 R S B C 1897, c 67

27 [1903] A C , at 155-56.

28 This reasoning was subsequently followed in Brooks-Bidlake and Whittall, Ltd v A G for B C [1923] A C 450, where the Judicial Committee upheld a provision in a provincial timber licence prohibiting Chinese and Japanese labour This type of "hands-off" attitude was employed by the Judicial Committee as late as 1947 in Co-operative Committee on Japanese Canadians v A G Canada, [1947], A C 87, (P C) See generally, J P McLaren, "The Early British Columbia Supreme Court and the Chinese Question", (1991) 20 Manitoba Law Journal 107

Court with section 1 of the Saskatchewan *Act Respecting the Employment of Female Labour in Certain Capacities*, which provided:

> No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman [29]

The majority of the Court proceeded to find that provision *intra vires* the provincial legislature without reference to the substance or impropriety of the overt discrimination. In fact, the Judicial Committee's statement in *Tomey Homma* was quoted in support of this disposition.[30]

A civil law case concerning an incident of discrimination similar to that involved in *Sparrow* finally reached the Supreme Court of Canada in May 1933.[31] *Christie v. York Corporation* involved a tavern in the Montreal Forum and a black season-subscriber who regularly bought beer at the tavern during hockey games. On one occasion, when accompanied by another black man, the tavern refused to serve Christie. The trial judge awarded the plaintiff twenty-five dollars in damages. However, Quebec's Court of King's Bench reversed and dismissed Christie's claim. The Supreme Court of Canada upheld that reversal. In his reasoning for the majority, Justice Rinfret considered both *Loew's Theatres v. Reynolds* and *Franklin v. Evans*, and stated that:

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29 Quong-Wing v The King, [1914], 49 S C R. 440 S S 1912, c 17 Tarnopolsky, Discrimination and the Law, Richard De Boo Publ (Toronto 1985), page 1-10 Tarnopolsky notes that the Act originally referred to "Japanese or other oriental persons"

30 However, some justices did turn their attention to the substance Justice Duff found that the legislation was not designed to deprive Orientals of the opportunity of gaining a livelihood because the employment of white women was not necessary, in a business sense, to operate restaurants, laundries or other similar establishments, 49 S C R , at page 465 Chief Justice Fitzpatrick went further and held that while the legislation "may affect the civil rights of Chinamen, it is primarily directed to the protection of children and girls", 49 S C R , at page 444 Indeed, he compared it to municipal regulations designed to prevent disorders on Sundays, and to close drinking places at certain hours Justice Idington alone dissented against the Saskatchewan provision He maintained that aside from "political rights", other rights, powers and privileges that adhere to British subjects cannot be curtailed

31 Christie v York Corporation [1940] S C R 139

> In considering this case, we ought to start from the proposition that the general principle of the law of Quebec is that of complete freedom of commerce. Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law, or, in the carrying out of the principle, the adoption of a rule contrary to the good morals or public order.[32]

Justice Rinfret felt that the respondent's conduct was not contrary to such good morals or public order.[33] Instead, his ruling reaffirmed the supremacy of freedom of commerce. He also affirmed the narrow reading of the common law principles given in *Franklin v. Evans*. While Justice Rinfret acknowledged that section 33 of the Quebec *Licence Act* stated that: "No licencee for a restaurant may refuse, without reasonable cause, to give food to travellers", he nevertheless maintained that neither this provision nor the doctrine that it embodies affected the tavern owner in the Montreal Forum. In his opinion, a tavern was not a restaurant, because beer is not food, and Christie was not a "traveller".[34]

Justice Davis, who had earlier participated in upholding the discriminatory legislation in *Quong-Wing*, dissented in *Christie v. York*. He found that the tavern owner was not entitled to refuse to serve Christie. Reasoning along the lines suggested by Judge Archibald, he stated that the sole issue was whether a licenced tavern operator had the right to pick and choose whom he wanted to serve having been given a special privilege to sell beer. He held that:

> In the changed and changing social and economic conditions, different principles must necessarily be applied to the new conditions. It is not a question of creating a new principle but of applying a different but existing principle of the law. The doctrine

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32 [1940] S C R 139, at page 142.

33 [1940] S.C.R 139, at page 144

34 This reasoning was subsequently adopted by the Alberta Court of Appeal which also held that the inn-keeper doctrine did not apply to a motel that did not serve food, King v Barclay and Barclay's Motel (1961), 35 W W R 240

> that any merchant is free to deal with the public as he chooses had a very definite place in the older economy and still applies to the case of an ordinary merchant, but when the State enters the field and takes exclusive control of the sale to the public of such a commodity as liquor, then the old doctrine of the freedom of the merchant to do as he likes has in my view no application to a person to whom the State has given a special privilege to sell to the public
>
> If there is to be exclusion on the ground of colour or of race or religious faith or on any ground not already specifically provided for by the statute, it is for the legislature itself, in my view, to impose such prohibitions under the exclusive system of government control of the sale of liquor to the public which it has seen fit to enact [35]

While Justice Davis condemned the discriminatory action of the tavern, he did not retreat from the principle of freedom of commerce. In censuring the conduct of the tavern owner, Justice Davis relied more on the presence of a licence and the common law than on the impropriety of discrimination itself.

Lower courts continued to allow tavern and restaurant owners to turn away visible minorities.[36] For example, the British Columbia Court of Appeal applied the principle of commercial freedom in *Rogers v. Clarence Hotel Co.* to reject a claim of discrimination.[37] Except for Justice O'Halloran (in dissent), the Court found it unnecessary to even examine the common law.[38] The courts' restricted treatment of the innkeeper's doctrine was indicative of the general attitude that persisted even in the face of anti-discrimination legislation. In 1944, the Ontario Legislature passed the *Racial Discrimination Act*, to prohibit notices and signs that reflected on race, creed or ancestry.[39] Nevertheless, in *Re McDougall and Waddell*,

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35 [1940] S C R , at pp 152-3

36 Rogers v Clarence Hotel, [1940] 2 W.W R 545 (B.C.C A), King v Barclay and Barcly's Motel (1961), 35 W.W.R. 240 (Alta C A)

37 [1940] 3 D L R 583

38 See generally, Schmeiser, supra, note 9, pages 266 ff

39 S O 1944, c 24, s 1 Hereinafter RDA Section 1 states 'No person shall, (a) publish or display or cause to be published or displayed, or (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other representation indicating discrimination or an intention

Justice Chevrier refused invalidate a deed covenant that proscribed the sale of the land to "persons other than Gentiles".[40] He found that the registration of the deed did not constitute the type of publication prohibited by the *RDA* and held that the *Act* did not apply to racial discrimination in the purchase and sale of land.

In 1945, Justice Mackay created another exception to the trend of court decisions in *Re Drummond Wren*.[41] That case involved a restrictive covenant purporting to prohibit the sale of land to "Jews or persons of objectionable nationality". Even though *Re McDougall and Waddell* was on all fours with the facts of this case, Justice Mackay stated that it and all other Canadian or British decisions were of no assistance. Instead, after noting the developing nature of public policy, he turned to the United Nations Declaration of Human Rights (to which Canada was a signatory) and the statements of several prominent world leaders and organizations denouncing anti-semitism, as evidence that such restrictive covenants were against public policy.[42]

However, three years later, the courts' ambivalence to discrimination was reaffirmed in *Re Noble and Wolf*.[43] That case dealt with a restrictive covenant in a conveyance of a summer resort stating that the property "shall never be sold, assigned, transferred, leased to and ... occupied or used by any person of Jewish, Hebrew, Semitic, Negro or coloured race or blood [but restricted] to persons of the white or Caucasian race..." In the course of his judgment, Justice Schroeder

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to discriminate against any person or any clas of persons for any purpose because of the race or creed of such person or class of persons"

40 [1945], 2 D L R 244, (Ont H C.)

41 [1945], 4 D L R 674, [1945] O.R 778 (Ont H.C).

42 Justice MacKay cited statements from President Franklin D Roosevelt, Prime Minister Winston Churchill, General Charles de Gaulle, the World Trade Union Congress, the Latin American-U S Act of Chapultepec and the constitution of the Soviet Union

43 [1948] 4 D L R 123, (Ont H C)

denounced Justice Mackay's approach, and re-instated the pre-eminence of freedom of contract:

> We are not ... authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise.
>
> For a court to invent new heads of public policy and find therein nullification of established rights or obligations - in a sense embarking upon a course of judicial legislation - is a mode of procedure not to be encouraged or approved .. one is not lightly to interfere with the freedom of contract .[44]

The Court of Appeal upheld this decision. The Supreme Court of Canada reversed the Court of Appeal, but on other grounds (failure of the covenant for uncertainty).[45] Nothing was said of the public policy considerations despite the new legislative action in Ontario which moved to reaffirm Justice Mackay's position.[46]

The history of case law in Canada indicates that there were some judges that ready to publicly acknowledge the harm caused by discrimination. However, those judges were in the minority. It appears that for the most part, courts were more concerned with upholding freedom of commerce than with public policy. *Re Noble and Wolf* suggests that judges at all levels shared an indifference towards discrimination.

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44 [1948] 4 D L R , at page 136

45 [1951] S C R 64

46 Arnold Bruner, "The Genesis of Ontario Human Rights Legislation", (1979), 37 University of Toronto Faculty Law Review 236, at page 246

Early Legislation on Discrimination

Legislatures started to deal with discriminatory conduct before the Second World War. At first, laws dealing with discrimination were scant, limited, and generally ineffective. Legislators had to be pushed and coaxed into passing legislation and then making sure that it had some bearing in real life. The Federal and Provincial govenments enacted several pieces of legislation to address various aspects of discrimination. Those were, by-and-large, scattered attempts to control discrimination.

In 1932, the *Insurance Act* of Ontario made it an offence for an insurer to discriminate among risks "because of the race or religion of the insured".[47] That same year, the legislature in British Columbia legislature enacted a new *Unemployment Relief Act*, which provided that "in no case shall discrimination be made or permitted in the employment of any person by reason of their political affiliation, race or religious views".[48] In 1934, Manitoba added section 13A to its *Libel Act*, providing that "the publication of a libel against a race or creed likely to expose persons belonging to a race or professing the creed to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people" entitles the persons belonging to the race or creed to sue for an injunction.[49] This was the first time that a Canadian legislature explicitly declared that racial or religious discrimination was against public policy.[50] The 1945 British Columbia *Social*

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47 S O 1932, c 24 , s 4

48 S B C 1932, c 58

49 S.M 1934, c 23

50 See Ian A Hunter "Human Rights Legislation in Canada. Its Origin, Development and Interpretation", (1976), 15 Western Ontario Law Review 21

Assistance Act, provided in section 8 that "[i]n the administration of social assistance there shall be no discrimination based on race, colour, creed or political affiliations."[51] The variety of contexts in which anti-discriminatory provisions were enacted indicates that each government proceeded in a piece-meal fashion, which highlighted the lack of a true commitment to comprehensive protection. Needless to say, the lack of favourably pre-disposed courts further frustrated the effectiveness of such legislation.

The Second World War was a watershed that brought about a steady growth and consolidation of anti-discrimination legislation in Canada. The atrocities in Europe shocked the public conscience. But in addition, the War-time internment of various groups on ethnic and religious grounds (Jehovah's Witnesses) showed that discrimination was not a far-away phenomenon.[52] Under the pressure of lobby groups, the Ontario legislature started to enact statutes that dealt directly with discrimination itself. In 1944, Ontario enacted the *Racial Discrimination Act*, which prohibited publication, display, or broadcast of anything that showed the overt intention to discriminate on the basis of race or creed.[53]

It is interesting to note that by this time the public gradually became more attuned to the problem of discrimination.[54] In 1945 it greeted Justice Mackay's ground-breaking decision in *Re Drummond and Wien* with considerable acclaim.[55] And later, when the Court retreated to a more conservative position in *Re Noble*

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51 S B C. 1945, c 62.

52 Doug Smith, "The Defence of Canada' Civil Liberties During World War II', CBC Radio Ideas Program

53 S O 1944, c 24

54 Schmeiser, supra, note 9, page 256.

55 Bruner, supra, note 46, at page 245

and Wolf, public disappointment galvanized the Ontario legislature to bring back the *Drummond Wren* dicta by passing the *Conveyancing and Law of Property Amendment Act*, which declared covenants in deeds of land with restrictions based on race, religion, or ancestry to be void.[56] In another instance, the federal government issued Orders-in-Council for the deportation of Japanese persons in 1945. By the time the case challenging these Orders reached the Judicial Committee of the Privy Council two years later, there was widespread public criticism of the Orders.[57] In fact, it was reported that the government hoped that the Courts would quash the Orders. As it turned out, the Privy Council upheld the Orders, but the government abandoned their enforcement.

In 1947, Saskatchewan produced the first modern Canadian statute on discrimination: the *Saskatchewan Bill of Rights Act*.[58] In addition to addressing human rights, this act dealt with civil liberties, such as the fundamental freedoms of speech, press, assembly, religion, and association. It prohibited discrimination with respect to accommodation, employment, occupation, land transactions, education, businesses, and enterprises. However, early legislation, including the *Saskatchewan Bill of Rights*, relied upon traditional enforcement mechanisms which were weak in this setting. Some of the pre-War provisions, such as those in British Columbia's unemployment enactments, lacked any enforcement provisions at all. Others relied upon criminal sanctions and fines which were administered by the police and the courts.

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56 Act, S O 1950, c 11 Bruner, supra, note 46, at page 246

57 Schmeiser, supra, note 9, at pages 260-61; Co-operative Committee on Japanese Canadians v A G Canada [1947] A C 87, (P C)

58 S.S 1947, c 35

Experience showed that victims were reluctant to initiate criminal actions. Victims of discrimination did not have the resources to launch legal proceedings. It took considerable courage, if not recklessness, to "rock the boat" if one already suffered from a disadvantage in terms of employment and services. In any case, due to a lack of public education and promotion few people even knew that these anti-discrimination provisions existed.[59] Inasmuch as it was hard to prove that a person has not been denied access, service, or employment for some reason other than a discriminatory one, proof of the offence beyond a reasonable doubt was almost impossible. Furthermore, a meagre fine of twenty-five to fifty dollars did not help the victim of discrimination find a different job or home. The protections and sanctions of these various legislative instruments rang hollow in the face of a general unwillingness on the part of courts and the police to enforce them.[60] Since the courts did not really view discrimination as a criminal act, they were reluctant to impose sanctions.

The fair accommodation and fair employment practices Acts of the 1950s constituted a second wave of legislation in the form of special purpose statutes which applied to particular areas of activity. They were an attempt to provide a more effective scheme to redress discrimination. Impressed with the lobbying efforts of the Public Relations Committee of the Canadian Jewish Congress and the potential for political gain, the Ontario government became the first of the provinces to enact such legislation, the *Fair Employment Practices Act*.[61] The other provinces

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59 Tarnopolsky, supra, note 29, at page 2-4

60 Bruner, supra, note 46, page 249

61 S.O 1951, c 24 Tarnopolsky, supra, note 29, at pages 2-4/6

quickly followed suit.[62] The next step in Ontario was the *Fair Accommodation Practices Act*, which aimed at eradicating discrimination in the provision of accommodation, services or facilities "available in any place to which the public is customarily admitted".[63] Again the other provinces followed suit.[64] Quebec, on the other hand, did not enact a separate act. Instead, it included a section into a new *Hotels Act* to deal with discrimination in hotels, restaurants, and camping grounds.[65]

These Acts borrowed from methods and procedures that were used in labour relations regimes providing for an investigation, an assessment of complaints, and an attempt at conciliation. The commissions in charge of the accommodations and fair practices acts placed considerable attention on settlement and conciliation believing that it would be more effective in eliminating prejudice than the imposition of criminal sanctions.[66] Indeed, some officials viewed themselves more as conciliators than as enforcement officers.[67]

The acts provided for the setting up of boards of inquiry in the event that conciliation failed Those administrative procedures were designed to replace the laying of an information which initiated a prosecution under the previous statutes. In Saskatchewan, for example, the Minister responsible for administering the Accommodations Act could direct a departmental officer to inquire into the

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62 Manitoba (S M 1953 (2nd Session), c 18), Parliament (S C 1952-53, c 19), Nova Scotia (S N S 1955, c 5), New Brunswi ' (S N B 1956, c 9), British Columbia (S B.C 1956, c 16), Saskatchewan (S S 1956, c 69) and finally Quebec in 1964 (S Q 1964, c 46) Prince Edward Island, Alberta and Newfoundland did not enact legislation dealing exclusively with accommodation practices

63 S O 1954, c 28

64 Saskatchewan (S S 1956, c 68), New Brunswick (S.N B 1959, c.6), Nova Scotia (S.N.S. 1959, c 4), Manitoba (S.M. 1960), British Columbia (S.B C. 1961, c 50· although this statute was restricted only to public accommodation)

65 S Q 1963, c 40 , s 8

66 Black, supra, note 4, page 22

67 Black, supra, note 4, page 22

complaint and to endeavour to effect a settlement. If the officer failed, a commission could be appointed to try again. Failing a satisfactory resolution, a prosecution could be instituted with the permission of the Minister. The procedure under the fair employment practices acts was similar, except that before the initiation of a court proceeding, the Minister responsible could issue any order to give effect to an investigating commission's recommendations.

The next step involved the extension of these Acts to cover residential and commercial accommodation. Saskatchewan was the first in this endeavour. Its 1956 *Fair Accommodations Practices Act*[68] simply incorporated section 10 of the 1947 *Bill of Rights* which already secured the right of all persons to purchase, lease, rent, and occupy any land and every estate. The provisions dealing with residential and commercial accommodations were also included. In 1961, the Ontario legislature moved to include in its statute "occupancy of any dwelling unit in any building that contains more than six self-contained dwelling units".[69] Subsequent amendments to the *Ontario Human Rights Code* extended the provisions to include single self-contained dwelling units.[70]

Despite the administrative improvements of these fair employment and accommodation Acts, however, the onus of enforcing their provisions still rested upon the victimized individuals, who were in the least advantageous position to help themselves. Those individuals were responsible for engaging the administrative machinery to pursue the alleged discriminators. As a result, proceedings under these fair employment and accommodation Acts were minimized in the same fashion as under the preceding quasi-criminal statutes.

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68 1956, c 68, R S S 1978, c F-2

69 S.O 1960-61, c 28., s.2

70 S.O. 1961-62, c.85, s.2; S.O 1967, c.66, s.1

The courts were not very receptive to the few prosecutions that did arise.[71] In Saskatchewan, there was one prosecution in November 1961, in which a restaurant manager was fined twenty-five dollars for refusing to serve an Indian. In Ontario, only after the Labour Committee undertook extensive test cases concerning the discriminatory conduct of employers in Dresden did the Labour Minister finally give his consent to prosecute a Dresden restauranteur. There are three reported cases of prosecutions in Canada, all emanating from the Ontario city of Dresden (once the step-off point for the underground railroad for negro slaves). In two of the cases, the convictions were quashed by Judge Grosch, who was apparently one of the property owners who sought to uphold the restrictive covenant in *Noble v. Wolf*.[72] In general, discrimination continued more or less unabated despite the enactment of the *Fair Employment Practices Act*.[73]

The enactment of legislation prohibiting discrimination was of little effect without the creation of an enforcement mechanism. Although the anti-discrimination legislation was in place in Ontario, the administrative machinery was slow in the making. Four years after the enactment of the *F.A.P.A.* in Ontario, Premier Leslie Frost introduced the *Ontario Anti-Discrimination Commission Act*, which was to consolidate the administration of all fair practices legislation.[74] But the government did not intend to move quickly in setting up the Commission.[75] In fact, the Cabinet committee for establishing the Commission met for the first time

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71 See generally, Schmeiser, supra, note 9, page 281

72 Schmeiser, supra, note 9, page 281

73 Bruner, supra, note 46, page 248.

74 S.O 1958, c 70

75 Bruner, supra, note 46, page 250 In 1958, despite a Speech from the Throne announcing the Government's intention to introduce an educational program and to integrate administration of all fair practices legislation under an Anti-Discrimination Commission, Cabinet ministers reportedly stated that the government "will move very slowly in implementing the Act and setting up the Commission"

five months after the *Act*'s proclamation, and in the meantime the government continued to give the *FAPA* a narrow interpretation.[76] In 1959, one year after the *Anti-Discrimination Commission Act* was enacted, the first commission was appointed. It was composed of a Chairman, Louis Fine, and two staff members who had administered the fair practices legislation in the Department of Labour.

Present-day anti-discrimination legislation and human rights commissions started to take shape in 1962, with the enactment of the *Ontario Human Rights Code*.[77] The Ontario *Code* marked the beginning of a new wave of legislative action aimed at dealing with discrimination. The *Code* consolidated all human rights-related statutes, and established the Ontario Human Rights Commission. The Commission had the power to initiate a complaint. In conducting an investigation and pursuing a resolution of a complaint, the Commission could draw upon the experience of a staff that could develop an expertise by devoting itself exclusively to matters of human rights. The power to prosecute a complaint solved the problem of the reticent or anxious victim.[78] Also, the Commission had the capacity to educate the community about the procedure and pursue a violation where the victim's lack of knowledge and fear of process would have caused its end. The comprehensive nature of the *Code* approached the issues of discrimination as part of an over-all problem, not only as isolated ramifications. Dr. Daniel Hill, former Chairman of the Ontario Human Rights Commission summed up the objects and purposes of the *Code* and its 1965 Commission in this way:

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76 Bruner, supra, note 46, page 250

77 S O 1961-2, c 93.

78 It has turned out that few complaints are initiated by the human rights commissions, see generally, Black, supra, note 4, page 37.

> Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of dispassionate socioscientific materials that are used to challenge popular myths and stereotypes about people ... Human Rights legislation on this continent is the skillful blending of educational and legal techniques in the pursuit of social justice.[79]

On one hand, the broadness and generality of this statement is indicative of the wide and yet undefined scope of discrimination. On the other hand, it also indicates that no one was sure exactly how a human rights commission should go about fulfilling its mandate.

The difference in the numbers of complaints filed during the reign of the fair practices acts as compared to the number of complaints filed under the succeeding human rights codes illustrates the pervading limits of regimes that relied on the initiative and resources of the victim. In Ontario, there were five hundred and two complaints over a period of ten years under the fair employment and accommodation Acts. The first six years of the *Ontario Human Rights Code* produced six thousand complaints, of which 1267 fell within the terms of the *Code*. In New Brunswick, while 15 complaints were filed in the 10 years of the fair employment and accommodation Act, 52 formal complaints were processed in the first year of the *Human Rights Act*. The figures of complaints under fair employment and accommodation legislation in other provinces are comparable.[80] To a certain extent, the increase in the number of complaints filed and processed under the new human rights codes may be a result of increased publicity about discrimination emanating from the United States and its Civil Rights movement.

In general, human rights codes in Canada prohibit discrimination in areas concerning the gaining of a livelihood, such as employment. They also deal with

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79 Ontario Human Rights Commission, "Merchants of Hate", Human Relations June 1965

80 See generally Tarnopolsky, supra, note 29, page 2-6

one's acquisition of shelter (housing and rental accommodation), or consumption of goods and services. The prohibition was first based on race, colour, ethnicity, and religion. Later all codes also included sex, age, and physical handicap. The number of grounds listed in various codes has increased to thirty with such examples as sexual orientation, mental handicap, family status, pregnancy, and place of residence.[81]

While other provinces also enacted human rights codes, not all of them initially provided for a commission. In 1966, Alberta enacted it first human rights legislation with an administor to oversee its implementation.[82] However, the administrator did not have a professional staff until 1972, when the *Human Rights Act* was replaced by the *Individual's Rights Protection Act*.[83] In 1967 New Brunswick established a commission along with its *Act*.[84] While Nova Scotia preceded New Brunswick in enacting its *Act* (in 1963), it was not until 1967 that Nova Scotia established a full-time Director to administer the *Act*. British Columbia's human rights machinery developed slowly. However, in 1969, its *Human Rights Code* did provide for a full-time administration and Commission.[85] Unlike the other commissions, the Human Rights Commission in British Columbia was given a wide discretion with the authority to decide what was a reasonable cause of discrimination, although it was ultimately boards of inquiry that decided what

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81 Rainer Knopff, Human Rights & Social Technology, Carleton University Press, (Ottawa 1989), page 76 The full list is as follows race, colour, nationality, national/ethnic origin, ancestry, place of origin, religion, creed, citizenship, language, sex, marital status, family status, etat civil, pregnancy, age physical handicap, mental handicap, pardoned offence, criminal record, sexual orientation, drug/alcohol dependence, political belief, source of income, public assistance, attachment of pay, social origin, social condition, place of residence, "without reasonable cause"

82 S A 1966, c 39

83 S A 1972, c 2

84 S.N B. 1967, c 13

85 S.B.C. 1969, c.10

grounds were covered.[86] A year later, Manitoba also established a Commission and administration for its *Human Rights Act*.[87] While Saskatchewan had the *Bill of Rights* since 1947, it established a Commission to administer its various human rights legislation in 1972.[88] Several years later, these various statutes were consolidated in *The Saskatchewan Human Rights Code*.[89] Newfoundland had a human rights code in 1969, but did not have a Commission until 1974.[90] Likewise, Prince Edward Island had legislation since 1968, but established it Commission in 1975.[91] That same year, Quebec passed the *Charter of Human Rights and Freedoms* which provided for a Commission. Like the Saskatchewan *Act*, this *Charter* covered fundamental human rights and freedoms in addition to discrimination. However, unlike other provincial commissions, the Quebec commission is only involved in the investigation, conciliation and settlement of complaints. Recently, Quebec has created a Human Rights Tribunal and gave the Human Rights Commission the authority to prosecute the complaints before the Tribunal.[92] Finally, Parliament created its Commission under the *Canadian Human Rights Act*.[93]

Even though the federal government was the last of the Canadian jurisdictions to create a comprehensive human rights scheme, it nevertheless enacted

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86 S B C 1973, c 119, s 8. See generally, Hunter, supra, note 50, at pages 28-29

87 S.M 1970, c.104.

88 S S. 1972, c.108.

89 R.S.S. 1978, c. S-24 1.

90 S.Nfld. 1969, No.75; S.Nfld. 1974, No.114.

91 S.P E.I 1968, c 24, S P.E I 1975, c.72.

92 1989, c 51, 1990, c 4.

93 S.C. 1976-77, c.33 Federal legislation will be looked at in more detail later in the paper

its own anti-discrimination provisions and statutes dealing with various aspects. Of particular interest to this thesis are Parliament's initiatives with respect to employment discrimination. Parliament enacted employment-related statutes to deal with matters that fall within the federal heads of power listed in sections 91 and 92(10) of the *Constitution Act, 1867.* The list includes such areas as, banking, shipping, inter-provincial commerce, and telecommunication. Under that jurisdiction, the federal government enacted the *Canada Fair Employment Practices Act*, and the *Female Employee's Equal Pay Act.*[94] The government supplemented these statutes with regulations under the *Fair Wages and Hours of Labour Act*, which provided that every contract with the government would contain a provision that there shall be no discrimination in the hiring and employment of workers on the grounds of race, national origin, colour, religion, age, sex or marital status of the worker or of any person having any relationship or association with the worker.[95]

In 1970, the government moved to incorporate the *CFEPA* and the *FEEPA* into the new *Canada Labour Code.*[96] In the *Public Service Employment Act*, the government forbade discrimination in the establishment of standards for merit hiring and promotion.[97] Likewise, section 140(2)(b) of the *Unemployment Insurance Act*, ensured that the national employment service would not discriminate in referring a worker seeking employment.[98] The National Housing Loan Regulations set a condition for each loan insured by the Central Mortgage and Housing Corporation that the borrower would not, in the sale or lease of any house or unit in a multiple-

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94 S C 1952-3, c 19, hereinafter CFEPA, S C 1956, c 38, hereinafter FEEPA

95 C R.C 1978, c 1015

96 R.S C. 1970, c L-1.

97 S.C. 1966-67, c.71, section 12(2).

98 S.C. 1970-1, c.48.

family dwelling constructed with the aid of that loan, discriminate against any person by reason of race, colour, religion, national origin, sex, or marital status."[99]

While discrimination was dealt with in a number of statutes, the flagship legislation in each jurisdiction was the human rights code or act. In addition to providing a general prohibition of discrimination, those codes spelled out various aspects of discrimination. Those codes also provided for the mechanism to be employed in its redress.

Employment Discrimination: Scope of Legislation

All human rights codes in Canada prohibit discrimination with respect to employment. They use phrases such as "the employer may not refuse to employ", "to continue to employ", "to refer", "recruit", "train, promote or transfer", "maintain separate lines of progression for advancement". The following is a sampling of provisions dealing with employment from various provincial human rights codes:

> Ontario s 4(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap [100]

> Quebec. s 16 No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.[101]

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99 Consolidated Regulations of Canada (C.R C) 1978, c.1108, s 53

100 1981, c 53, s 4(1), 1986, c.64, s.18(5).

101 R S Q 1977, c C-12, s 16

Saskatchewan: s.9 Every person and every class of persons shall enjoy the right to engage in and carry on any occupation, business or enterprise under the law without discrimination.[102]

The *Canadian Human Rights Act* prohibits employment discrimination in two sections:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

> 10. It is a discriminatory practice for an employer, employee organization or organization of employers
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

While section 7 is specific to the individual contract of employment, section 10 is a catch-all provision to cover any policy or practice of employers or employee organizations. Section 10 contemplates both individual acts and general policies, systems or processes of any entity that could have an adverse impact on certain individuals because of their personal characteristics.

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102 1989, c.23, s 5

All jurisdictions have sections that deal with trade unions and other employee organizations, because these associations often determine one's employment opportunities. Provisions dealing with this matter usually forbid discrimination by way of exclusion, expulsion or suspension. The *Canadian Human Rights Act* goes further in subsection (c):

> 9 (1) It is a discriminatory practice for an employee organization on a prohibited ground of discrimination
>
> (a) to exclude an individual from full membership in the organization;
>
> (b) to expel or suspend a member of the organization; or
>
> (c) to limit, segregate, classify or otherwise act in relation to an individual in a way that would deprive the individual of employment opportunities, or limit employment opportunities or otherwise adversely affect the status of the individual, where the individual is a member of the organization or where any of the obligations of the organization pursuant to a collective agreement relate to the individual

This provision recognizes that under collective bargaining, employers are not the only entity which determines the composition of the workforce. Unions have the power determine who will work for a particular employer by virtue of union membership, as well as the power to determine workplace conditions, promotion, and other aspects of employment that may be discriminatory.

The various codes also deal with the pre-employment phase, by requiring that all aspects of employment advertising and inquiries, including the conduct and operation of employment agencies, be free of discrimination. Section 8 of the *Canadian Human Rights Act* states:

> 8. Its is a discriminatory practice
>
> (a) to use or circulate any form of application for employment, or
>
> (b) in connection with employment or prospective employment, to publish any advertisement or to make any written oral inquiry

> that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination.

Such provisions are significant, not only in preventing the distribution or use of material that is discriminatory on its face, but also because they limit the effect of cultural inhibition that causes many not even to apply for non-traditional jobs. It should be noted that publishers of such material are also bound by these sections.[103]

Discrimination in employment is multi-dimensional. It may permeate through any one of the various processes involved in the search for and maintenance of work. In recognition of that, legislatures have attempted to draft broad provisions in their human rights legislation to deal with all aspects of employment discrimination.

Enforcement: The Canadian Human Rights Commission Process

The substantive prohibition of discrimination is only as effective as the enforcement mechanism provided in the legislation. Employment discrimination in the federal sector is governed by the *Canadian Human Rights Act* administered by the Canadian Human Rights Commission. The *Canadian Human Rights Act* extends its jurisdiction to all government operations and the federally-regulated sector. That includes: federal departments and agencies, crown corporations, chartered banks, the nuclear industry, interprovincial transportation companies, interprovincial and international pipelines, and federally regulated telecommunications companies. In

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103 Alberta Human Rights Commission v Whitecourt Star (1976), Hope v Gray-Grant Publishers (1981), 2 C.H R R. D/256

all, there are over 400 employers and close to a million employees. The Canadian Human Rights Commission reports that of the various aspects of discrimination covered by the *Act*, employment related matters prevail. In each of the past five years, close to 80% of the complaints accepted were related to employment.[104]

Part II of the *Act* sets up the Commission itself. Section 26 provides that Cabinet will appoint between five and eight commissioners, of whom one will be the Chief Commissioner and another the Deputy Chief Commissioner, both on a full-time basis. The Chief Commissioner heads an organization numbering close to 200 people, consisting of several departments. There is the Complaints Procedures Branch, which conducts investigations and conciliation efforts. When a complaint develops into a hearing or court appeal, the Legal Services Branch litigates on behalf of the Commission. The Employment Equity and Pay Equity Branch, on the other hand, deals with employers' entire compensation and employment schemes to ensure compliance with the *Pay Equity Act* and the *Employment Equity Act*. Keeping in touch with domestic and international human rights issues is handled by the Research and Policy Branch. The Communications Branch takes care of all public relations and public education aspects. Finally, the Commission has Regional Offices across Canada to deal with some local complaints. As indicated by the organization of these departments, the Commission carries out two general mandates, namely, research and public education, and administration and enforcement of the *Act*.

The first mandate is much broader than the label "public education". It involves a range of aspects that are set out in section 27 of the *Act*, which includes fostering public understanding of the *Act*, its principles and the Commission's role

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104 Canadian Human Rights Commission, Annual Report, 1989, Ministry of Supply and Services, (Ottawa 1989), at page 73.

promoting them, sponsoring research and carrying out studies into discrimination and methods of preventing it, and finally, reviewing primary and secondary legislation to ensure compliance with the *Act*. Subsection 27(h) provides the authority to "... endeavour by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices...". From time to time, the Commission issues guidelines which describe how the *Act* applies to particular situations. Every year, the Commission reports to Parliament, through the Minister of Justice, on its activities and the state of discrimination in the federal sector.

Despite the Commission's wide mandate for public education, most attention has been devoted to processing individual complaints. Part III of the *Act* outlines the machinery to handle individual complaints and seek resolutions. According to section 40, a complaint of discrimination can be initiated by anyone, even the Commission itself, so long as there are "reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice". The ability for anyone to bring a complaint under the *Act* facilitates the exposure of incidents of discrimination which might otherwise not have come to the fore on account of the victim's own anxiety or unwillingness to become involved in a quasi-legal process. Section 59 is aimed at alleviating such unwillingness by prohibiting anyone from threatening or intimidating an individual with respect to a complaint.

Section 41 outlines the conditions under which the Commission can refuse to deal with a complaint. They include trivial, frivolous, vexatious complaints; complaints that are beyond the Commission's jurisdiction, or could be more appropriately dealt with under another Act; and, complaints that have not passed through available grievance and review procedures. If the Commission decides not to deal with a complaint, it must set out its reasons in a notice to the complainant.

If the Commission decides to deal with the complaint, it will undertake an investigation pursuant to section 43. The Commission's investigator may carry out inquiries and searches that are reasonably necessary, seek a search warrant, and require the production of documents. Anyone who obstructs the investigator is guilty of an offence under subsection 60(1)(c). Upon completing the investigation, the investigator shall report the findings to the Commission.

Upon receipt of this report, the Commission has several options. It can direct the complaint to other more appropriate procedures of redress. It can dismiss the complaint on the basis that it is not warranted; that it is beyond the Commission's jurisdiction; that it is either trivial, frivolous, vexatious or made in bad faith; or, that one or more years have passed between the incident and the receipt of the complaint. Section 44(4) requires the Commission to notify the parties of its decision to dismiss. However, nothing is said about the need to provide reasons for the dismissal, or the process by which that decision is reached.[105]

If the Commission feels that the complaint is warranted, it will cause a Human Rights Tribunal to inquire into the complaint. The Commission itself can make representations to the Tribunal pursuant to section 51. On the other hand, the Commission has the option of trying to effect conciliation. It is interesting to note that the Federal *Act* is unique in separating the conciliation and investigation functions. Section 47(2) provides that the conciliator cannot be the person who investigated the complaint. An investigation attempts to ascertain whether the complainant's allegation carries any substance. At this stage, there would be no talk of conciliation on the part of the respondent, because that would amount to an

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105 This raises issues of natural justice and procedural fairness. Radulesco v. Canadian Human Rights Commission [1984] 2 S.C.R. 407, held that the Commission was obligated to act fairly when dismissing a complaint. That entailed giving the complainant an opportunity to make written submissions before the decision to dismiss was taken. That position was reaffirmed in Syndicat des employes de production du Quebec et de L'Acadie v. Canadian Human Rights Commission [1989] 2 S.C.R. 879.

admission with respect to the allegation (not to mention the initial hostility that arises upon the start of the investigation).

To provide further protection for the integrity, effectiveness, and sincerity of the conciliation process, subsections 47(3) and 50(2) provide that any information acquired through attempts of conciliation would be kept confidential. The knowledge that anything said at this stage will be kept confidential fosters the cooperation and openness that is key to an effective conciliatory process. If a settlement is reached between the parties, it will have to be approved by the Commission. That supervision ensures that strong-arm tactics or uneven bargaining positions do not result in an unfair or inequitable settlement.

At any time after a complaint was filed it may be referred by the Commission to the Human Rights Tribunal. The Tribunal is chosen from a panel of members who are appointed by Cabinet. No one connected with either the Commission, or the investigation or conciliation of a particular complaint can be a member of the Tribunal considering that complaint. Pursuant to section 50, the Tribunal will hold a hearing at which all parties will have "...full and ample opportunity ... to present evidence and make representations...". The *Act* vests the Tribunal with the power to "... summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce such documents and things as the Tribunal deems requisite to the full hearing and consideration of the complaint".

The Tribunal has the option of dismissing the complaint. If, on the other hand, the Tribunal finds that the complaint is substantiated, it may make an order according to section 53. That order may, for example, prohibit particular conduct that is found to be discriminatory, or require the adoption of a special program to ameliorate the condition of an individual or group that was victimized by the respondent's practice or policy. Also, the Tribunal may order financial

compensation, and in cases of wilful or reckless discriminatory conduct, the Tribunal can order up to an additional $5,000 in damages. Where the Tribunal consisted of less than three members, its decision can be appealed within thirty days to a three member Review Tribunal. Pursuant to section 57, the decision and order of either the Tribunal or the Review Tribunal is enforceable as an order of the Federal Court.

The procedure for processing a complaint is complex. Considerable emphasis is placed on attempting to settle a dispute and avoid costly litigation. However, even in the context of litigation, the Commission has a role to play. Instead of standing-by while the disputing parties do battle before the Human Rights Tribunal, the Commission actively participates to promote the public interest. In this fashion, the Commission combines its role of educating society about discrimination, with its role of prosecuting offenders.

Part 1, Section A.2

The Concept of Discrimination

While all the Canadian human rights acts today prohibit "discrimination", it was not always clear what actions and types of behaviour fell within the definition of "discrimination". Attitudes towards minorities changed such that conduct that may have appeared to be the standard at one time, later became unacceptable. The legal definition of discrimination grew to encompass practices and policies that at one time were seen as the norm of doing business. Thus, even if human rights legislation remained static, its scope increased.

At first, discrimination was synonymous with racial prejudice against blacks, orientals, or members of other racial minorities. Discrimination was seen to consist of blatant acts of exclusion causing harm to an individual.[106] As with most criminal offences, wrong-doers were punished not simply for having caused harm, but also for having engaged in morally reprehensible behaviour.[107] Proof of discrimination required showing not only the act of denial and the ensuing harm, but also the motive based on racial prejudice:

> One of the most difficult facts to determine are motives. And yet, discrimination, whether it be with respect to employment or accommodation, cannot be ascertained from the mere act of denial; there must also be the fact of intention or motive.[108]

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106 See generally, Tarnopolsky, supra, note 29, at page 4-29, and Alfred Blumrosen, "Strangers in Paradise Griggs v Duke Power Co and the Concept of Employment Discrimination" (1972), 71 Michigan Law Review 59, at pages 61 ff

107 Moral responsibility and criminal guilt attaches only to voluntary acts Hence, intent was a key component of discrimination

108 Britnell v Michael Brent Personnel Placement Services, Ontario Board of Inquiry, June 7, 1968, unreported

Inevitably, offenders were rarely prosecuted successfully because motive could easily be ascribed to a number of non-prejudicial factors. This motive-based view of discrimination inspired the quasi-criminal approach that dominated the early anti-discriminatory statutes.[109] It was hoped that the criminal penalty would deter future conduct of a similar nature. However, intent acquired a morally neutral quality that signified voluntariness and consicousness of an act, as opposed to malicious deliberation.[110] In conjunction with that change, human rights tribunals began to infer motive from the surrounding circumstances:

> Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every descriminatory situation or occurrence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue ... such conduct to be held discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature and purpose of such conduct.[111]

Tribunals followed their instincts in determining that a particular incident involved racial malice. They were not willing to allow the offender to escape liability easily. Reversing the onus of proof in blatant cases was the first method of achieving that end.

The 1950s saw the rise of the "equal treatment" concept of discrimination in the United States. According to this conception, discrimination consisted of treating a member of a minority group in a different and less favourable manner than

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109 Insurance Act, S O 1932, c 24, Libel Act, S M 1934, c 23, Racial Discrimination Act, S O 1944, c 24, Saskatchewan Bill of Rights Act, S S 1947, c.35

110 Knopft, supra, note 81, at page 46

111 Kennedy v The Board of Governors of Mohawk College of Applied Arts and Technology, Ontario Human Rights Tribunal, (Sidney Lederman, 1973)

similarly situated members of the majority group.[112] So long as a rule, practice or requirement treated all persons in the same manner, it was not discriminatory:

> In my opinion the word "discriminate" in the context of the Code means to treat differently or, in the particular context of s.4(1) to make an employee's working conditions different (usually, in the sense of less favourable) from those under which all other employees are employed.[113]

However, that focus started to change in the 1960s when the American Equal Employment Opportunity Commission (EEOC) began to develop a notion of discrimination that was based upon the effect and outcome of one's conduct. Title VII of the 1964 *Civil Rights Act* introduced that "effects approach" by making it unlawful for an employer to "adversely affect" an individual's employment because of a prohibited ground:

> 703 (a) It shall be an unlawful employment practice for an employer,
>
> > (2) to limit, segregate, or classify his employees 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.[114]

This formulation does not involve the notion of intent. Instead, the wording of this provision impugned an act as discriminatory where its effects had an adverse impact on the employment opportunity of a member of a minority.[115]

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112 The term "minority" is not used in its quantitative sense Rather, it refers to groups that have a group awareness and a consciousness of oppression Thus women are considered a "minority" for the purpose of this thesis See generally, Knopff, supra, note 81, at pages 71 ff

113 Simms v Ford of Canada Ltd , Ontario Human Rights Tribunal, 1970

114 42 U S C , s 2000e-2(a)(2)

115 This The new "effects" approach appeared to gain some currency among those concerned with discrimination In 1965, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination produced the following definition of discrimination 'Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life "

Despite Congress's express intention to the contrary,[116] the "effects" conception of discrimination was endorsed by the United States Supreme Court in *Griggs v. Duke Power Co.*[117] That case involved an education requirement and aptitude test which effectively restricted blacks to lower paying jobs at the Duke Power Co. The Court ruled that an education requirement and aptitude test was discriminatory because it had the effect of restricting blacks to lower paying jobs at the Duke Power Company:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or test neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
>
> ...Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.[118]

This effects conception of discrimination came to be known as the "adverse impact doctrine".

In the late 1970s, the notion of effects discrimination started taking root in Canada. In *Bukwa v. Lornex Mining Corporation Ltd.*[119], the British Columbia Human Rights Commission ordered Lornex Mining to provide camp accommodation to female employees on the same terms and conditions as male employees. This meant that Ms. Tharp had to share the toilet and washroom facilities with the men, in the name of "equal treatment". Ms. Tharp complained, and a new inquiry was

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116 See generally, Martin Schiff, "Reverse Discrimination Re-Defined as Equal Protection The Orwellian Nightmare in the Enforcement of Civil Rights Laws", (1985) 8 Harvard Journal of Law and Public Policy 627, pages 642 ff, Thomas Sowell, "Weber and Bakke and the Presuppositions of 'Affirmative Action'", 26 Wayne Law Review, 1309, at page 1312

117 (1972) 401 U S 424

118 401 U S , at pages 429-30 and 432

119 British Columbia Board of Inquiry, 1974.

held.[120] Lornex maintained that there could be no discrimination if everyone receives identical treatment. The flawed logic of the "differential treatment" approach became patently clear in the Board of Inquiry's finding:

> ... Lornex failed to offer to the Complainant toilet and washroom facilities which could be used with the same degree of privacy provided to the male residents of the other bunkhouses and, indeed, to all male residents prior to her arrival The privacy that was missing was freedom from intrusion from the opposite sex. We have concluded that Ms. Tharp was discriminated against by virtue of the nature of the accommodation provided to her and that the basis for that discrimination was Ms. Tharp's sex. She was inserted into an exclusively male domain and denied the privacy extended by Lornex to most of her male residents on the campsite Ms Tharp was therefore discriminated against on the basis of her sex
>
> ...
>
> It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination.[121]

The doctrine of differential treatment did not so much vanish, as simply cease to govern the definition of discrimination. Victims of direct discrimination, whether based on motive or unequal treatment, may still appeal to these conceptions in appropriate circumstances. However, cases such as *Tharp* prevented offenders from escaping liability when the effect of equal treatment resulted in harm.

In 1976, four years after *Griggs*, the doctrine of adverse impact discrimination started to take hold in Canada. *Re Attorney General for Alberta and Gares* was the first Canadian court decision to adopt the effects approach in the place of intent.[122] In considering a complaint under the equal pay provisions of the Alberta *Individual's Rights Protection Act*, Justice McDonald was faced with an argument from the respondent hospital that while it had no intention to discriminate, the difference in the wages earned by male orderlies and female nurse's aides resulted from the

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120 Tharp v Lornex Mining Corporation Ltd , (1975) British Columbia

121 Tharp v Lornex Mining Corporation Ltd (B C , 1975), at page 12

122 (1976), 67 D L R (3d) 635, (Alta S C.)

separate negotiation of collective agreements for the two groups (which performed essentially the same tasks). Justice McDonald found a violation "even in the absence of present or past intent to discriminate on the ground of sex. It is the discriminatory result which is prohibited and not a discriminatory intent."[123] This was the first clear statement that results, not intentions, were to be the sign posts of discrimination. Discrimination in this sense arises where there is a strong co-relation between a characteristic or trait used in a screening process and a protected group. That co-relation becomes evident in the results of the screening process.

Human rights tribunals seemed to adopt this new approach more quickly than other courts. The first indepth analysis of the adverse effects discrimination in Canada came from Professor Peter Cumming, the Board Chairman in *Singh v. Security and Investigation Services Ltd.*[124] Singh, a Sikh, was refused employment because according to his religion he could not wear a special cap, or shave his beard. In his decision, Professor Cumming rejected both the differential treatment and the motive doctrines:

> Ontario, as a society, encourages every person to practise the faith of his or her choice. To truly respect and value different faiths is also to respect the different codes of dress and grooming dictated by those faiths. We cannot profess to encourage religious freedom, yet, at the same time, refuse employment to persons who are exercising that freedom. If we allow Sikhs to worship as they wish because we respect their right to have religious beliefs which differ from those held by the majority of people in our society, and yet place Sikhs in a disadvantageous position by not employing them simply because their beliefs require them to have beards and wear turbans, we are being hypocritical.
>
> Thus, even though Security bears no ill will towards the Sikh religion, its refusal to offer employment to Mr. Singh because of Sikh dress and grooming practices has the effect of denying Mr. Singh his right to practice the religion of his choice. Discrimination in fact exists even though Security did not intend to discriminate.
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> ...

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123 67 D L R (3d) 695

124 Ontario Human Rights Tribunal, 1977

> If proof of deliberate intent to discriminate were required, a biased person could fairly easily cloak their bias to come within the "no intent to discriminate" standard and to evade the law.

Subsequently, in *Colfer v. The Ottawa Board of Commissioners of Police and Police Chief Seguin* Professor Cumming applied this same reasoning to declare police height and weight requirements as discriminatory in effect against women.[125] Within a year of these decisions, several other tribunals followed suit, extending the effects approach to other areas covered by the human rights codes.[126] The concept of adverse effect discrimination was also adopted by Justice Rosalie Abella in her *Report of the Commission on Equality in Employment*:

> Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it
>
> . . .
>
> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.
>
> It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems.[127]

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125 Ontario Human Rights Tribunal, 1979

126 Khalsa v Co-op Cabs (Ont , 1980), 1 C H R R D/167, Malik v Ministry of Government Services et al (Ont., 1980), 2 C H R R D/374, Foreman v Via Rail (Fed , 1980), 1 C H R R D/111, Parent v Department of National Defence (Fed , 1980), 1 C H R R. D/121, Barton v New Brunswick Electric Power Commission, (1981), 2 C H.R R. D/541. See generally, Russell Juriansz, "Recent Developments in Canadian Law Anti-Discrimination Law Part I", 19 Ottawa Law Review 447, and Black, supra, note 4, at page 27

127 Abella, supra, note 5, at page 2

In 1985, the Supreme Court of Canada endorsed the adverse effect doctrine in *Re Ontario Human Rights Commission and Simpsons-Sears, (O'Malley)*.[128] O'Malley was released from her employment when she joined the World Church of God which recognized its Sabbath on Saturday (a day of work at Simpsons-Sears). Justice William McIntyre stated in his judgment what was already known and embraced by human rights tribunals across Canada:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination It is the result or the effect of the action complained of which is significant If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community
>
> . . .
>
> To take the narrower view and hold that intent is a required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards would create, . injustice and discrimination by the equal treatment of those who are unequal. . . Furthermore, as I have endeavoured to show, we are dealing here with consequences of conduct rather than with punishment for misbehaviour. In other words, we are considering what are essentially civil remedies. The proof of intent, a necessary requirement in our approach to criminal and punitive legislation, should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination.
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> . . .
>
> .. there is the concept of adverse effect discrimination It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[129]

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128 [1985] 2 S.C R 536; 23 D.L.R. (4th) 321.

129 [1985] 2 S.C R 536, at pages 547, 549, 551

In summarizing the adverse impact doctrine, Justice McIntyre points out that rather than seeking to punish misbehaviour, anti-discrimination policies aim to deal with the consequences of discriminatory conduct.

As a result of the events that gave rise to the *O'Malley* case, the Ontario government amended section 10 of its *Human Rights Code* in 1981 to refer directly to adverse effect discrimination:

> s.10(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that **results in the exclusion, restriction or preference of a group of persons** who are identified by a prohibited ground of discrimination and of whom the person is a member...[130]

This amendment brought the Ontario legislation closer to the more modern formulation which had already been used in the Quebec *Charter*:

> s.10 Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race..
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right.

The 1977 Federal *Human Rights Act* seems also to recognize adverse impact discrimination in its sections 7 and 10:

> 7. It is a discriminatory practice, directly **or indirectly**,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, **to differentiate adversely** in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> (emphasis added)

> 10. It is a discriminatory practice for an employer, employee organization or organization of employers
>
> (a) to establish or pursue a policy or practice, or

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130 S.O. 1986, c 64, section 18(8), (emphasis added)

> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> **that deprives or tends to deprive** an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> (emphasis added)

The references to a requirement, qualification, distinction, exclusion, preference, policy, or practice make it clear that the adverse effect conception of discrimination goes beyond the actions of one person. It contemplates a broad range of factors and mechanisms that may be a part of an employer's operating procedures.

Justice McIntyre reiterated the definition of effects-based discrimination in *Andrews v. Law Society of British Columbia*:

> Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.[131]

In *Janzen v. Platy Enterprises Ltd.*, Chief Justice Dickson related the effect-based definition of discrimination specifically to the employment context:

> ... discrimination on the basis of sex may be defined as practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender.[132]

That definition would apply equally to any ground of discrimination, such as race, religion, or handicap.

However, in *Andrews*, Justice McIntyre added that the adverse effects conception of discrimination encompasses only those distinctions "which involve

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131 [1989] 1 S C R 143, at 174 This augmented definition was subsequently quoted with approval by Justice Wilson in R v Turpin [1989] 1 S C R 1296 and by Chief Justice Dickson in Brooks v Can Safeway Ltd , [1989] 4 W W.R 193

132 [1989] 1 S C R 1252, at page 1279

prejudice or disadvantage".[133] Under the effects approach where malice and intent are not longer relevent, the pejorative or invidious characteristic of discrimination plays a significant role in distinguishing it from the many other benign forms of differentiation that exist in society. Indeed there are many acceptable distinctions in society, such as, excluding men from female locker-rooms, or denying drinking privileges to persons under a certain age. Following upon this reasoning, Professor Cumming distinguished *Alder v. Metropolitan Board of Commissioners of Police and Policy Chief Adamson* from its campanion case, *Colfer* on the basis that the separate height and weight requirements for female applicants to the police force were not discriminatory because they were not prejudicial to men:

> *Colfer* dealt with a single, neutral standard which had the discriminatory result because of the disparate effect upon women Mr Adler was subjected to a *different*, more stringent and onerous provision than female applicants simply because he was a male applicant At first impression, this discrimination on the facts suggests unlawful discrimination. In most cases, a finding of discrimination would easily follow from the simple fact of different treatment because of sex, to the complainant's disadvantage
>
> However, on closer scrutiny, it is important to realize that female and male applicants to the Toronto police force, as groups, are treated equally No matter what the gender of the applicant, she or he is measured by reference to the statistical "average" height and weight of the applicant's gender Neither gender is put at a disadvantage vis-a-vis the other gender
>
> The result of the application of the minimum height and weight requirements of the Toronto police force is not to cause a disparate effect from the standpoint of gender insofar as entry into the police force is concerned In fact, the utilization of a single size standard, no matter how relaxed it might be, would arguably always discriminate against women because of the difference in the statistical averages and the resulting disproportionate effect in exclusion to women through the application of the uniform standard There is no prejudice to any applicant for the position of police constable because of that person's gender through the application of the minimum height and weight standard of the Toronto police force

However, the words "prejudice", "perjorative", and "invidious" are not clear in themselves. All those terms connote some form of harm or offence. But while it

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133 [1989] 1 S C R , at page 181

is clear that excluding men from female locker-rooms does not cause harm, the line becomes less clear when considering employment policies and practices. That problem has been partly resolved through concepts of "work relatedness" that play a role in the *bona fide* occupational requirement. If an employment rule is not related to the performance of work, it will be considered discriminatory. That issue is discussed further in the next section. The notion of "reasonableness" has also been related to discrimination. "Reasonableness" plays a key role in the doctrine of reasonable accommodation that recently has taken the place of the *bona fide* occupational requirement. However, Justice McIntyre avoided relying upon reasonableness in defining discrimination in *Andrews* because of the role that that concept plays in the delicate relationship between sections 15 and 1 of the *Charter*.

The concept of prejudice again came to the Court's attention in *McKinney v. University of Guelph*.[134] But the precise role of "prejudice" in the definition of discrimination was glossed over by Justice Gerald La Forest in his majority judgment. Justice Wilson held that "prejudice" is an essential element of discrimination.[135] In her view, prejudice renders a distinction discriminatory. However, even she was rather brief on the precise nature of prejudice, as if its nature and meaning are commonly understood. But at one point in her reasons, Justice Wilson associated prejudice with human dignity. One could infer that a distinction is prejudicial where human dignity is harmed. At the present time, the precise meaning of the terms "prejudicial", "pejorative", and "invidious" in the context of discrimination remains rather elusive. Some intuitive insight is gained from the association of these terms with words such as "unfair", "irrational", and "capricious". However even these terms will have to be discerned in light of actual cases and the

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134 [1990] 3 S C R 229, at page 279

135 [1990] 3 S C R 392

values of society that are perceived and expressed by human rights tribunals and courts.

The adverse impact doctrine swept through all levels of adjudication and created a new standard by which to evaluate conduct. The victim's harm ceased to be the focus of inquiry. Instead, attention was turned to results. The development of the conception of discrimination illustrates how the law relating this area changes with a better understanding of the nature of the harm caused by discrimination.

The *Bona Fide* Occupational Requirement Exception

For some time, an individual's entitlement to relief from discrimination under the complaint process or in the courts has been limited by the *bona fide* occupational requirement (BFOR) exception. Since the mid 1980s the BFOR has dominated the landscape of legislation, judgments and academic writing. According to the BFOR exception, an employer can defend against an allegation of intended or unintended discrimination by showing that a particular employment rule or practice is necessary for the safety its employees or for the operation of its business.

The BFOR originated in section 703(e)(1) of the 1964 American *Civil Rights Act*.[136] Unlike the Canadian BFOR, the American version applied only to instances of direct discrimination, and could not be raised as a defence in cases of adverse

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136 "Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise " (42 USCS Par 2000e-2) (emphasis added)

impact. The American courts limitated the circumstances that could be considered a BFOR to two categories: "ability to perform" and "same sex".[137]

The Canadian BFOR had broader application. It could be relied upon as a defence in cases of both direct and indirect or "effects" discrimination. In *Ontario Human Rights Commission v. Borough of Etobicoke*, the Supreme Court of Canada set out the following two-branch, subjective-objective test:

> To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety, and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job, without endangering the employee, his fellow employees, or the general public.[138]

The Court later elaborated on the objective branch of this test in *Commission des Droits de la Personnne v. Ville de Brossard*.[139]

In *Re Bhinder and Canadian National Railway Co.*, the Supreme Court of Canada established a controversial method of applying the test, which made it easier

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137 The latter applied in cases where interests of privacy required a that an employee be of a particular sex Such was the case in Dothard v Rowlinson, 433 U S 321 (1977, U S S C), involving security guards in an all male prison The 'ability to perform" exception has also been narrowly interpreted The employer had to show "that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved' Weeks v Southern Bell Telephone & Telegraph Company, 408 F 2d 228 (1969, 5th cir) That test was further tighten by the requirement that the employer consider the individual attributes of the particular complainant seeking the job Bowe v Colgate-Palmolive Company, 416 F 2d 711 (1969, 7th Cir), Rosenfeld v Southern Pacific Company, 444 F 2d 1219 (1971, 9th Cir)

138 [1982] 1 S C R 202, at page 208

139 "The respondent must also demonstrate that the aptitude or qualification is related in an objective sense to the performance of the employment concerned McIntyre J suggested in Etobicoke that the purpose of the objective test is to determine whether the employment requirement is "reasonably necessary" to assure the performance of the job In the case at bar, I believe that this "reasonable necessity" can be examined on the basis of the following two questions (1) Is the aptitude or qualification rationally connected to the employment concerned? This allows us to determine whether the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question In Etobicoke, for example, physical strength evaluated as a function of age was rationally connected to the work of being a fireman (2)Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question The sixty-year mandatory retirement age in Etobicoke was disproportionately stringent, for example, in respect of its objective which was to ensure that all firemen have the necessary physical strength for the job " [1988] 2 S C R 279, at pp 311-312

for employers to satisfy the BFOR threshold.[140] Justice McIntyre held that the BFOR analysis does not admit the consideration of the individual complainant's personal circumstances. If a hard hat rule was a BFOR for employees in general, it did not matter that such a rule would not be a BFOR in Bhinder's own case. The rule bound Bhinder even though the evidence showed that neither he, nor his co-workers were endangered by him wearing a turban instead of a hard hat. In addition, Justice McIntyre ruled that once an employer established a BFOR, no duty to accommodate individual employees arises.

Recently, however, the Supreme Court of Canada ruled in *Central Alberta Dairy Pool* that the BFOR defence would be available only in cases of direct discrimination.[141] In all cases of indirect discrimination, which have an adverse effect on a designated group, the employer must fulfill its duty to accommodate the particular individual, short of undue hardship:

> ... where a rule discriminates directly it can only be justified by a statutory equivalent of the BFOQ, i.e. a defence that considers the rule in its totality. ... However, where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

Justice Wilson's decision applies regardless of whether the human rights code differentiates between direct and indirect discrimination for the purposes of the BFOR clause. Individuals seeking redress from the Canadian Human Rights Commission against a hiring policy or employment practice need not contend with the *Bhinder* standard any longer.

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140 [1985] 2 S.C R 561

141 [1990] 2 S.C.R 489.

Duty of Accommodation

The restriction of the BFOR has elevated the importance of the duty of accommodation. The duty of accommodation first arose in the 1966 Equal Employment Opportunity Commission guidelines on religious discrimination.[142] However, since courts were not willing to enforce the duty of accommodation,[143] the EEOC convinced Congress to amend Title VII of the *Civil Rights Act* to provide:

> 701(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

In conjunction with this amendment, the EEOC issued new guidelines, which restated in more certain terms the obligation of the employer to accommodation:

> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.[144]

According to EEOC guidelines the employer carried the onus of proving that accommodation would cause undue hardship:

> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden

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142 31 Fed Reg 8370 (1967)

143 The standard remained one of intention to discriminate, Dewey v Reynolds Metals Co 429 F 2d 324 (6th Cir 1970), affirmed by an equally divided Court, 402 U S 689 (1971), Riley v Bendix Corp 330 F Supp 583 (1971), reviewed 464 F 2d 1113 (5th Cir 1972), Richards v Griffith Rubber Mills, 300 F Supp 338 (D Ore 1969)

144 24 C F R 1605 1

> of proving that an undue hardship renders the required accommodation to the religious needs of the employee unreasonable.[145]

In the leading American case interpreting the duty of accommodation, *TWA v. Hardison*, the United States Supreme Court found that undue hardship exists when an employer cannot accommodate an employee's religious needs without: violating the seniority provision of a valid collective bargaining agreement; suffering more than "de minimus" costs in terms of money or efficiency in attempting to replace the absent worker; and, requiring employees of other religions, or nonreligious employees, to work at times which are undesirable to them, in place of the absent worker.[146]

In 1980, the Equal Employment Opportunity Commission issued new guidelines, *Guidelines on Discrimination Because of Religion*.[147] According to these guidelines, the EEOC would consider two factors in determining whether the accommodation offered by an employer was reasonable: the alternatives offered the employee; and, whether the employer offered the alternative that least disadvantaged the employee. The guidelines suggest the use of voluntary substitutes and shift swaps, flexible scheduling, holiday and work breaks, and lateral transfers and changes of job assignments as possible measures of accommodation.

However, regardless of the EEOC's attempt to expand the duty to accommodate, the Supreme Court made it easier for employers to fulfill the duty

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145 24 C F R 1605 1

146 (1979) 432 U S 63 Other courts have held that, in determining what constitutes reasonable accommodation and undue hardship, it is reasonable to consider the practices of similarly situated employers (Minkus v Metropolitan Sanitary Dist of Greater Chicago, (1979) 600 F 2d 80), the burden that a proposed accommodation would place on a union (Yott v North American Rockwell Corp , (1979) 602 F 2d 904, and the number of employees to whom work can be transferred in accommodation (Cross v Hailar, (1979) 477 F Supp 748) Also, in accommodating an employee's religious belief's, the employer must preserve the employee's terms, conditions and privileges of employment (American Postal Workers Union v Postmaster General, (1986) 781 F 2d 722)

147 29 C F R §1605 (1977) as amended by 45 Fed Reg 72,610 (1980)

in *Ansonia Board of Education v. Philbrook*.[148] For instance, the Court held that an employer's accommodation could be reasonable even though it did not minimize the amount of compensation lost by an employee. Further, undue hardship could be found regardless of whether the proposed accommodation imposed any costs on the employer. Finally, the duty can be said to be met once the employer proposes a reasonable method of accommodation, without regard for proposals made by the employee

The duty of accommodation lacks clarity in Canada, because it was imported by human rights tribunals in the shadow of the BFOR. In *Singh*, Professor Cumming considered the duty of accommodation. After reflecting upon American case law he said:

> Security is bound to accommodate its employee's and prospective employee's religious practice unless Security can demonstrate that it is unable to reasonably accommodate an employee's or prospective employee's religious practices without undue hardship on the conduct of business.[149]

The issue of reasonable accommodation appeared again in *Ontario Human Rights Commission v. Simpson-Sears (O'Malley)*. Although Professor Edward Ratushny found that the Commission had not made out a case for discrimination, he stated that an employer must act reasonably in attempting to accommodate the employee.[150] He accepted the *TWA v. Hardison* standard of *de minimus* cost for measuring undue hardship. However, he acknowledged that without a specific legislative standard, he was dealing with a legal vacuum.

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148 (1986), 479 U.S. 60.

149 Ontario Board of Inquiry, 31 May 1977, unreported, page 34

150 Ontario Board of Inquiry, (1981), 2 C.H R.R D/267.

Indeed, that legal vacuum came to haunt his decision when it was reviewed by the Divisional Court where Justice Southey held that the Board erred when it imported a duty of reasonable accommodation and undue hardship from the United States without legislative basis.[151] The Court of Appeal endorsed the Divisional Court's judgment, stating that the vacuum in Canadian statutes made it impossible to read in any standard of reasonable accommodation.[152]

Despite resistance on the part of the courts, human rights commissions and tribunals continued to rely upon the duty of accommodation. In 1981, the Canadian Human Rights Commission issued guidelines on bona fide occupational requirements which incorporated the idea of reasonable accommodation and undue hardship:

> Where an employer finds that he or she cannot make reasonable accommodation in order to offer an employment opportunity to a person on the basis of that person's religion, the employer shall, before he or she refuses such employment opportunity based on a "bona fide" occupation requirement, support his or her findings based on evidence that to make an accommodation would impose an undue hardship involving either financial cost or inconvenience to the employer [153]

According to this construction, the BFOR defence was not available to employers that did not fulfill the duty of accommodation.

In *Bhinder*, Professor Cumming found that the BFOR defence was not made out.[154] Instead, he used the BFOR provision in the Federal *Act* to fashion a duty to accommodate:

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151 (1982), 36 O R (2d) 59, at page 65

152 (1982), 38 O R (2d) 423 Perhaps this approach by the Courts prompted the Canadian Human Rights Commission to request Parliament to amend the Canadian Human Rights Act and add a specific provision on reasonable accommodation Canadian Human Rights Commission, Annual Report, 1983, at page 14

153 Canada Gazette Part II, vol 116, No 1 (1982), at page 313

154 Federal Board of Inquiry, (1981), 2 C H R R D/546

> ... the accommodation of an individual in the work place is the natural product of a narrow interpretation of exceptions to prohibited discrimination The accommodation of employees really means that certain impositions on employers will not be accepted as *bona fide* if to grant an exception in the circumstances would be to give effect to principles at cross purposes with those of human rights legislation
>
> . . .
>
> The employer's duty to accommodate an employee's religion flows from the strict construction of the bona fide occupational requirement in the *Act* and other human rights legislation generally.[155]

Professor Cumming took *de minimus* cost as a standard to measure undue hardship. But Justice Heald of the Federal Court of Appeal chastised the tribunal for importing American concepts without legislative directives:

> In my respectful view the Tribunal was in error in reading into Canadian legislation a provision which is clearly and patently not there. As stated earlier herein, the proper tests to be applied in respect of subsection 14(a) are those laid down by the Supreme Court of Canada in the *Etobicoke* case supra Those tests make no mention of a duty to accommodate on the part of the employer. Had Parliament intended to impose such an addition obligation, it could and would have done so in clear and unmistakable language. In the absence of such language, it would be wrong for the Court, in my view to usurp the function of Parliament under the guise of judicial interpretation.[156]

Justice Heald read human rights legislation narrowly.

Nevertheless, human rights tribunals did not follow the courts' pronouncements. In another 1981 case, *Pritam Singh v. Workman's Compensation Board Hospital and Rehabilitation Centre*, Professor Fred Zemans stated that the hospital "should meet a standard of reasonableness... in its efforts to accommodate particular religious practices", which in this case was the wearing of a ceremonial

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155 (1981), 2 C.H R.R , at pages D/571 and D/582.

156 [1983] 2 F C 531, at page 541.

dagger, the "kirpan".[157] In 1983, in a case where the complainant was refused work because he did not speak English proficiently, the British Columbia Board of Inquiry ruled that the duty to accommodate is designed to prevent the type of inaction that can lead to a discriminatory violation:

> The danger is that by refusing to take any steps at all to accommodate the disabilities (or religious sensitivities) of an applicant, an employer may achieve in practice what the Act prohibits. Deep seated prejudice, perhaps based on uninformed and untested assumptions as to capability, may be cloaked by a refusal to make any changes, whether in physical layout of the plant, or scheduling, or otherwise, which would permit a person to function effectively. It is this kind of insidious discrimination at which the "duty to accommodated" is directed.[158]

But as in other tribunal decisions, the Board of Inquiry went on to associate the duty of accommodation with the bona fide occupational requirement.

This association was again made by Professor Cumming in *Iancu v. Simcoe County Board of Education*.[159] However, in that case, the association was justified on the basis of a new amendment to the Ontario *Code* which made specific reference to "reasonableness" in connection with a BFOR:

> 10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
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> (a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances, or
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> (b) it is declared in this Act that to discriminate because of such ground is not an infringement of a right.[160]

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157 (1981), 2 C H R.R D/459, at page D/466.

158 Dhaliwal v B C Timber Ltd (1983) 4 C H R.R. D/1520, (British Columbia Board of Inquiry), at page D/1549.

159 Ontario Board of Inquiry, (1983), 4 C H.R.R D/1203

160 S O. 1981, c 53

This amendment to section 10 of the *Ontario Human Rights Code* was the first legislative provision to make reference to adverse effect discrimination and to the standard of reasonableness in assessing the BFOR. On the basis of that provision, Professor Cumming found that:

> ... the "reasonable...in the circumstances" standard of section 10 of the new Code embraces two facets - the employer must show not only that there is an objective requirement that constructively discriminates against the particular employee, but also that this need of the employer cannot be met (in the circumstances, it is not "reasonable" to be able to do so) by an accommodation of the particular employee (Alternatively, the employer would have a successful defence if he could show that while reasonable accommodation was possible, it was offered and refused) [161]

The employer who did not attempt to accommodate the employee would be found liable for discrimination.

The tribunals' acceptance of the duty of accommodation was vindicated in the Supreme Court of Canada's decision in *O'Malley* where, despite the legislative vacuum, Justice McIntyre recognized both the concept of adverse effect discrimination and the duty of reasonable accommodation. Justice McIntyre justified the new approach in the interest of balancing the interests of the employee with those of the employer, in order to preserve "...a social structure in which each right may receive protection without undue interference with others." The test was articulated as distinct from any reference to the BFOR (which at that time the matter arose did not exist in the Ontario legislation):

> The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: in other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer.

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161 (1983), 4 C H R R at page D/1213

Under the duty of accommodation, it was not possible to ignore the particular characteristics or needs of employees.

In the companion case *Bhinder*, however, Justice McIntyre ruled that where a BFOR arises, there necessarily cannot be a duty to accommodate. Since by this time all jurisdictions had a BFOR clause, the duty to accommodate was rendered practically defunct. Nevertheless, as discussed above, the Supreme Court of Canada recently overturned *Bhinder* in *Central Alberta Dairy Pool*. Writing for the majority, Justice Wilson made it clear that an employer must satisfy the duty of accommodation short of undue hardship in every case of indirect and adverse effect discrimination. That means that the impugned rule must be rationally connected with the performance of the job, and the employer must accommodate the employee up to the point of undue hardship. Justice Wilson adopted Justice McIntyre's definition of rational connection, which requires that "an employment rule [be] honestly made for sound economic or business reasons, [and be] equally applicable to all to whom it is intended to apply".[162] With respect to reasonable accommodation, Justice Wilson again adopted Justice McIntyre's reasoning in *O'Malley*. The employer carries the onus of showing that it made efforts to accommodate the religious beliefs (or any other pertinent trait) short of undue hardship. While she preferred not to provide a definitive definition of undue hardship, Justice Wilson listed several factors that may be relevant to the issue, including financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities, the size of the employer's operation, and the magnitude and subjects of risk if safety is at issue. These factors are to be balanced on a case by case basis against the right of the employee to be free from discrimination.

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162 [1985] 2 S C R 536, at page 551

The duty of accommodation is the forerunner of affirmative action. It obliges employers to take steps to accommodate the different characteristics or special needs of employees, so that the employer's rules or practices do not deny employment on the basis of those characteristics. The duty arises in relation to individuals. Without the BFOR defence, employers must now scrutinize their practices carefully to ensure that no individual is adversely effected.

The evolution of discrimination occurred not because the conduct changed, but rather because the understanding about the nature of discriminatory conduct and the harm it inflicts grew deeper. At first, discrimination was perceived as the malicious motive of one individual to harmfully prejudice another. The appropriate response was to set up quasi-criminal procedures to hunt down and punish the offender. Most often, the act was considered bigotry against one's race, ethnic origin or religion. Slowly, it was recognized that certain acts, rules or practices were discriminatory in effect even in the absence of malicious intent. The adverse impact doctrine swept through all levels of adjudication and created a new standard by which to evaluate conduct. The victim's harm ceased to be the focus of inquiry. Instead, attention was turned to results.

The evolution of the conception was partly reflected in legislation. At first, discrimination was prohibited in some statutes. Later, legislatures developed comprehensive codes and administrative schemes to deal with discrimination in all facets of social interaction. However, even with the various human rights codes in place, the conception of discrimination continued to expand. Human rights commissions extended the scope of their action in response to that expansion even though the legislation itself remained unchanged. Since intent ceased to be an essential element, more acts fell within the perview of discrimination.

Part 1, Section B.1

Systemic Discrimination

The emergence of the effects approach to discrimination challenged the view that employment discrimination consisted of discrete incidents of conduct. In some instances, these incidents were interconnected and grounded in the a whole system of employment mechanisms and procedures. This phenomenon has come to be known as systemic discrimination:

> The term "systemic discrimination" describes the fact that many employment barriers are hidden, usually unintentionally, in the rules, procedures, and sometimes even the facilities that employers provide to manage their human resources. Discrimination can result if these "systems" encourage or discourage individuals because they are members of certain groups, rather than because of their ability to do a job that the employer needs done.
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> "Employment systems" or "employment practices" consist of the employer's standard ways of carrying out such personnel activities as recruitment, hiring, training and development, promotion, job classification and salary level decisions, discipline and termination. Some of these practices are formally described in personnel manuals and collective agreements while others remain more informal and are based on traditional practices.

Systemic discrimination consists of barriers that may be latent in traditional practices or informal operating procedures relied upon in the course of training, hiring, or promoting employees. A broader view of systemic discrimination encompasses structural features of society, such as societal and cultural attitudes, values, and expectations that arise as a result of the socialization process in public education and family settings. These various factors combine to create general societal patterns and institutions which restrict the opportunities of some minority groups.

While it is difficult to produce an exhaustive and satisfactory definition of systemic discrimination, examples speak eloquently. Anne Adams has provided the following illustration based upon a paper mill in a small town:

> The town's economy is based on and around the paper industry, the only industry in town. Women, with few exceptions, are totally absent from the main work force in the mill, except in the traditionally female occupations of clerks and secretaries. If one was to enquire as to the numbers of women who were refused a non-traditional job at this mill, the answer would probably be "none" because none had applied In this instance, the system is so well established that it goes so far as to permeate the culture of the town. The mill is known as where the "men" work and where boys make enough money in one summer to pay for a whole year of university education There are also some structural barriers to women entering the traditionally male dominated occupations These are the heavy work requirements of certain entry level positions and in some instances, the lack of relevant vocational skills on the part of the women The women would not ever dream of preparing for, or applying for one of those jobs, in spite of the fact that in most instances, they could do the work. This employment system has immense social and economic repercussions on women in "one industry" towns The example of the female single parent of girls in such a town may further illustrate the point Because of the systemic barriers to her ever working at "the mill", the single parent is ghettoised into the low paying, low status service industry Her family's income is fixed at a fraction of that of the families with a male breadwinner When her daughters have attained university age, they too are "systematically" barred from working at the mill and thus from an education The low family income and their access to only low paying jobs act as a deterrent to higher education They enter the service sector as maids, waitresses or clerks in low paying, low status jobs, in the secondary labour market perpetuating the never ending cycle of systemic discrimination [163]

Anne Adams' example illustrates the pervasiveness and interconnectedness of the various factors comprising systemic discrimination.

The systemic conception can be distinguished from the earlier conceptions of discrimination based on its focus, not only on isolated and occasional sources of exclusion, but rather on sources of exclusion that form a part of an ongoing system.[164] The concept of systemic discrimination started taking root in Canada in

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163 Anne Adams, Employment Equity Some Models for Consultation in a Unionized Environment, Masters Thesis, Queen's University, May 1988, at pages 25-6

164 See generally, William Black, supra, note 4, at page 126

the late 1970s. The Canadian Human Rights Commission made reference to it in its 1978 *Annual Report*:

> From the list of grounds it can be concluded that discrimination under the Act is not defined purely in terms of intentional bigotry or irrational prejudice Discrimination includes, rather, any adverse differential treatment or impact, whatever its motivation. ... We cannot therefore define discrimination purely in terms of behaviour motivated by evil intentions; the definition has to include the impact of whole systems on the lives of individuals - what is called structural or systemic discrimination.[165]

However, even the Commisson's efforts were, at that time, primarily directed towards resolving and adjudicating individual complaints. It devoted its attention to prosecuting particular practices or actions.

In the early 1980's the Canadian Human Rights Commission raised the issue of systemic discrimination in a case involving allegations that Canadian National Railways engaged in hiring and promotion practices that discriminated against women. When that case reached the Supreme Court of Canada,[166] Chief Justice Brian Dickson delivered a decision that directly recognized systemic discrimination:

> The complaint was not that of a single complainant or even of a series of individual complainants; it was a complaint of systemic discrimination practised against an identifiable group.[167]
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> . . .
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> ... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination.[168]

He described the various systemic barriers that faced the female complainants:

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165 Canadian Human Rights Commission, Annual Report, 1978, at page 5

166 Action Travail des Femmes v Canadian National Railway Co [1987] 1 S C.R 1114, 40 D L R (4th) 193.

167 [1987] 1 S.C.R , at page 1118

168 [1987] 1 S.C R , at page 1139

> The markedly low rate of female participation in so-called "non-traditional" occupations in which women typically have been significantly under-represented considering their proportion in the work force as a whole, was not fortuitous. The evidence before the Tribunal established clearly that the recruitment, hiring and promotion policies at Canadian National prevented and discouraged women from working on blue-collar jobs. The Tribunal held, a finding not challenged in this Court, that CN had not made any real effort to inform women in general of the possibility of filling non-traditional positions in the company. For example, the evidence indicated that Canadian National's recruitment program with respect to skilled crafts and trade workers was limited largely to sending representatives to technical schools where there were almost no women. When women presented themselves at the personnel office, the interviews had a decidedly "chilling effect" on female involvement in non-traditional employment; women were expressly encouraged to apply only for secretarial jobs. According to some of the testimony, women applying for employment were never told clearly the qualification which they needed to fill the blue-collar job openings. Another hurdle placed in the way of some applicants, including those seeking employment as coach cleaners, was to require experience in soldering. Moreover, the personnel office did not itself do any hiring for blue-collar jobs. Instead, it forwarded names to the area foreman, and Canadian National had no means of controlling the decision of the foreman to hire or not to hire a woman. The evidence indicated that the foremen were typically unreceptive to women.[169]

First, there was outright discouragement, that was combined with an attempt withhold information about certain positions. Added to that was the practice of recruiting at schools with a predominately male enrolement. As well, C.N. imposed unnecessary conditions of employment that were unrelated to the job itself, but had the effect of disqualifying women.

The recognition of the systemic nature of discrimination in the *Action Travail* decision answered the concerns raised in the political arena. In 1983, the Federal-Provincial-Territorial Ministerial Conference on Human Rights recognized the need to include the concept of systemic discrimination into human rights codes. A year later, the Special Parliamentary Commission on Visible Minorities in Canadian Society praised the human rights commissions for forging ahead to deal with systemic discrimination. The report recommended that sections 7 and 10 of the

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169 [1987] 1 S C R , at page 1124

Canadian Human Rights Act should be amended to include "remedies for the effects of systemic discrimination on visible minorities".[170] The reference in section 10 of the *Canadian Human Rights Act* to "a policy or practice ... that deprives or tends to deprive an individual or class of individuals of any employment opportunities" firmly established the concept of systemic discrimination in the law relating to human rights in the federal jurisdiction.

Special Programs

The appreciation of the systemic nature of discrimination gave rise to new methods of tackling the problem. The case-by-case approach that formed the basis of the complaints system in all the Canadian human rights codes was ill-suited to the task of eliminating systemic discrimination.[171] Designated groups continued to experience higher unemployment rates, lower occupational status, and lower income levels relative to the majority. Individual complaints were insufficient to root out general and pervasive practices that were steeped in long-standing societal attitudes, expectations, and socio-economic structures. In her *Report on Equality in Employment*, Judge Rosalie Abella used a particularly incisive metaphor to describe the inadequacy of the complaints process:

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170 Special Parliamentary Commission on Visible Minorities in Canadian Society Equality Now, Ministry of Supply and Services, (Ottawa 1984), page 77 Credit should be given to the Canadian Ethnocultural Council which conducted many surveys and studies to promote the concept of systemic discrimination

171 See generally, D Rhys Phillips, 'Equity in the Labour Market The Potential of Affirmative Action' in Report on Equality in Employment Research Papers, Ministry of Supply and Services, (Ottawa 1984), page 51, at page 63, Canadian Human Rights Commission, Annual Report, 1988, at pages 11-12

> Resolving discrimination . . on a case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.[172]

She then went on to write the following often-quoted passage, which calls for systemic remedies to deal with systemic discrimination:

> Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.
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> . .
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> Remedial measures of a systemic and systematic kind . . are meant to improve the situation for individuals who by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices.[173]

The complaints process relied on individuals to bring forth allegations of particular discriminatory conduct. However, the practices and mechanisms were often too subtle or too pervasive to be perceived by individual complainants.

Systemic remedies differ from remedies provided under the complaints process in several respects. Whereas the latter provides compensation to the complainant victim for discriminatory harm suffered in the past, systemic remedies are designed to prevent discriminatory harm from befalling a group of potential victims in the future. Unlike the complaints process, findings of blame or tort-like liability are irrelevent to the systemic approach. Instead of viewing a particular incident of discrimination as an exception to the standard of conduct, the systemic approach assumes discriminatory systems to be the standard. Systemic remedies are

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172 Abella, supra, note 5, at page 8

173 Abella, Report, note 5, at page 9

active rather than reactive. Human rights commissions that focus upon resolving individual complaints are reacting to incidents of discrimination. Preventing discriminatory practices and structures from continuing to inflict harm requires seeking them out and taking steps to change them regardless of whether they are implicated in an individual complaint.

The best known systemic remedy is affirmative action, which usually involves giving a preference to members of designated minorities in enrollment, hiring, and promotion opportunities. On one hand, affirmative action take the form of a numerical quota, where an employer sets aside a certain number of placements for minorities. On the other hand, it could consist of an evaluation procedure that gives extra points to a minority candidate. Affirmative action type programs arose in Canada after the Second World War, though not as a response to discrimination. In a gesture of gratitude, returning veterans were given preferential treatment in hiring for jobs in the public service.[174] That preferential treatment for persons who served in the military persists today.[175] Another affirmative action program was Prime Minister Pierre Trudeau's initiative to increase the number of Francophone Canadians in the federal public service in order to promote bi-culturalism.[176]

The first systemic responses to discrimination arose in the United States, in what is known as the contract complaince program. It was developed through a series of Presidential executive orders, starting with Executive Order No. 8802, issued by President Franklin Delano Roosevelt in 1941, and culminating in President

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174 See generally, Abella, supra, note 5, at page 197, the other side of the coin, was that the women who had taken up non-traditional work in factories, were all sent home to make room for the returning men

175 Task Force on Barriers to Women in the Public Service, Beneath the Veneer Report and Recommendations, Ministry of Supply and Services, (Ottawa 1990)

176 See generally, Tarnopolsky, supra, note 29, at page 4-79

Lyndon Johson's 1965 Executive Order No. 11246.[177] According to the contract compliance program, entities seeking government contracts were obliged to undertake affirmative action programs to avoid discrimination in all their operations.

Executive Order No. 8802 required all defence contracts with federal agencies to include a provision which obliged the contractor not to discriminate in employment because of race, creed, colour, or national origin. In 1953, President Dwight Eisenhower took the next step in strengthening the contract compliance program by creating the Government Contract Committee to supervise compliance with the contractual conditions. At this stage, the contract compliance program did not yet have a systemic perspective because it focused on individual incidents of intentional discrimination.

President John Kennedy's 1961 Executive Order No. 10,925 introduced a new approach to fighting discrimination. Employers were obliged to take positive steps to avoid discrimination:

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, colour, or national origin. Such action shall include, but shall not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other compensation; and selection for training including apprenticeship.

This executive order appeared to cover the gamut of areas in which an employer could differentiate between employees and candidates in a discriminatory manner. The President's Equal Employment Opportunities Committee (EEOC) was given responsibility for enforcing such compliance.

The fourth and final stage of contract compliance was ushered in by President Lyndon Johnson's 1965 Executive Order No.11246. It established the Office of

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177 In the interrim there were President John F. Kennedy's Executive Order No. 10,925 in 1961

Federal Contract Compliance Programs (OFCCP) to supervise certain types of contracts, such as ones dealing with construction. The Order covered all employers connected with federally-assisted projects and any subcontractor or vendor dealing with such employers or contractors. Contractors were required to inform their employees and employee organizations of the contractual obligations. The order also required all of the contractor's operations to implement affirmative action, not just those connected with the particular contract.

At first, the OFCCP set about its task by processing individual complaints, and conducting compliance reviews where complaints were substantiated.[178] If it did find a lapse, conciliation was attempted. However, where conciliation failed, the OFCCP was authorized to impose sanctions, such as cancelling, terminating or suspending a contract, or even "debarment" which prevented the contractors from entering into any further contracts with government agencies.[179]

However, gradually the obligation to implement affirmative action received more attention. In 1968, the OFCCP issued guidelines that switched the focus from equal opportunity to equal results. It relied less on individual complaints and started targeting employers by comparing the composition of the workforce with statistical data. Contractors were obligated to evaluate their work force to determine whether women or minorities were "underutilized". These obligations were further clarified in more guidelines issued in 1970 and 1971.[180] In cases of large contracts, the OFCCP conducted "pre-award reviews" before awarding a

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178 See generally, Marilyn Leitman, "A Federal Contract Compliance Program for Equal Employment Opportunities', in Vol 2 Report of the Commission on Equality in Employment Research Studies, Ministry of Supply and Services, (Ottawa 1984)

179 Lynn Bevan, "Employment Discrimination Laws in the United States An Overview", in Vol 2 Report of the Commission on Equality in Employment Research Studies, Ministry of Supply and Services, (Ottawa 1984), at page 458

180 41 C F R , part 60-2, Bevan, supra, note 179, at page 462

contract to a bidder. And, to make it easier to track compliance, the OFCCP required contractors to submit written affirmative action plans.[181] Generally, this type of affirmative action was successful because the government could refuse or extinguish its much sought-after contracts.

However, the majority of American government and non-government employers and other entities did not enter into contracts with the government, and thus were beyond the reach of the contract compliance program. The Equal Employment Opportunities Commission (EEOC) carried the responsibility to redress discrimination among those entities. The EEOC is credited with developing the concept of adverse impact discrimination in the mid-1960s, through a series of guidelines. However, The EEOC spent most of its energies on pursuing offenders through the court system because it did not have a mandate to order employers to implement affirmative action programs.[182] If an employer did not want to cooperate in a review of its employment practices, the EEOC would launch litigation proceedings in the hope that a court would order affirmative action under section 706(g) of the *Civil Rights Act*.[183] That strategy extracted the cooperation of employers, such as American Telephone and Telegraph, that preferred to settle a problem out of court rather than to risk wasting resources and losing good-will in a long and drawn-out court battle.

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181 Peter Robertson, The Canadian Human Rights Commission as the Enforcement Mechanism Under the Employment Equity Act Canadian Human Rights Commission, (Ottawa 1987), at page 5

182 See generally, Alfred Blumrosen, Improving Equal Employment Opportunity Laws Lessons From The United States Experience", in Vol 2 Report of the Commission on Equality in Employment Research Studies, Ministry of Supply and Services, (Ottawa 1984), page 426 In 1972, Title VII was amended to give the EEOC the power to bring suits against companies violating the provisions of Civil Rights Act

183 See generally, Robertson, supra, note 181, 42 U S C 2000e-5(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate " The reference to "intentional", did not connote the "intent model as we know it today Rather, it came to connote volition as opposed to accident

The EEOC issued *Affirmative Action Guidelines* to protect voluntary affirmative action programs from attacks of reverse discrimination based on the equal protection clauses of the *Bill of Rights* and the general prohibition in the *Civil Rights Act* against using race or sex for the purposes of classification or preference.[184] These *Guidelines* entitled an employer to respond to an imbalance in its work force with any affirmative action program that was approved by the Department of Labour, or that met the standards established by the Department's regulations under Executive Order 11246.[185] When challenged, the employer could then rely upon the good faith reliance defence under section 713(b) of the *Act*.[186]

Soon after the EEOC issued these *Guidelines*, the United States Supreme Court ruled in *United Steelworkers of America v. Weber* that section 703 of the *Civil Rights Act* could not be construed to prohibit all voluntary, race-conscious affirmative action efforts.[187] However, the Court stipulated that a voluntary affirmative action program had to be specifically designed to break down traditional patterns of segregation. In addition, such a program had to have a minimal impact upon third parties, and it was to be temporary in nature, so as to only attain a racial balance, not maintain it.[188]

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184 29 C F R pt 1608

185 Mack Player, Employment Discrimination Law, West Publishing Co , (St Paul Minnesota 1988), at page 315

186 42 U S C 2000e-12(b)

187 (1979) 443 U S 193 However, the Court stipulated that a voluntary affirmative action program had to be specifically designed to break down traditional patterns of segregation In addition, such a program had to have a minimal impact upon third parties, and it was to be temporary in nature, so as to only attain a racial balance, not maintain it

188 443 U S , at pages 208-9

Part 1, Section B.2

Systemic Remedies in Canada

In 1974, Ontario became the first Canadian jurisdiction to embark upon an affirmative action designed to remedy discrimination.[189] The program aspired to increase the number of women in the public sector by setting numerical targets for 1980. The Federal government followed suit a year later, when the then president of the Treasury Board, Jean Chretien, announced directives intended to increase the representation of women in the public service.[190]

The year 1975 also witnessed the launch of the Northern Careers Program that trained natives for permanent jobs in federal departments operating in the Yukon and Northwest Territories. In 1976 the Cabinet established the voluntary Federal Contracts Program to increase the number of women in the employ of federal contractors and crown corporations.[191] In 1979, the Canadian Employment and Immigration Commission (CEIC) in the Department of Employment and Immigration, started persuading employers to undertake affirmative action programs voluntarily. The program involved offering wage subsidies or training to upgrade

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189 Carol Agocs, "Affirmative Action, Canadian Style A Reconnaissance", (1986), 12 Canadian Public Policy 148, at page 153

190 Agocs, supra, note 189, at page 152, also, see generally, Margaret Young, Affirmative Action/Employment Equity, Law and Government Division, Library of Parliament, Research Branch (October 8, 1984, revised February 1, 1989)

191 Agocs, supra note 189, at page 152 It is interesting to note that activity in the United States had its ramifications in Canada as well For instance, the American Telephone and Telegraph settlement incited Bell Canada to embark on its own affirmative action program in 1975 A year later, Syncrude Canada Ltd signed an agreement with the Indian Association of Alberta and the Department of Indian Affairs and Northern Development to provide training, counselling and hiring of qualified Indians in the oil sands project Similar agreements appeared in Saskatchewan

the qualifications of disadvantaged workers.[192] The Treasury Board followed this lead by announcing voluntary internal affirmative action pilot projects.[193] The full-scale program for women, natives, and disabled persons was established in 1983. Two years later, the program was expanded to include visible minorities. More recently, the Treasury Board instituted its own contract compliance program to further employment equity.[194] Pursuant to Treasury Board Directive no. 802984, all suppliers of goods and services who employ more than 100 people and are seeking government contracts worth $200,000 must commit themselves to implement employment equity.[195]

The issue of reverse discrimination did not attract controversy in Canada. In the 1981 case of *Re Athabasca Tribal Council and Amoco Canada Petroleum Company Ltd.*, several judges of the Supreme Court of Canada rejected the notion that affirmative action constituted reverse discrimination:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a

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192 The Canada Mortgage and Housing Corporation was the first to sign such an agreement, in 1980.

193 Agocs, supra, note 189, at page 152.

194 See generally, Russell Juriansz, "Recent Developments in Canadian Law: Anti-Discrimination Law", (1987) 19 Ottawa Law Journal 667, at page 685. Section 23 of the Canadian Human Rights Act provided Cabinet with the authority to institute contract compliance programs: s. 23. The Governor in Council may make regulations respecting the terms and conditions to be included in or applicable to any contract, licence or grant made or granted by Her Majesty in right of Canada providing for (a) the prohibition of discriminatory practices described in sections 5 to 14, and (b) the resolution, by the procedure set out in Part III, of complaints of discriminatory practices contrary to such terms and conditions.

195 Treasury Board Directive no. 802984, Federal Contractors Program for Employment Equity - Departmental Responsibilities Concerning Contracting for Goods and Services of $200,000 or More (25 August, 1986) Circular Letter no. 1986-44.

> competitive position to obtain employment without regard to the handicaps which their race has inherited.[196]

The four judges who concurred in the minority judgment would have cleared the way for affirmative action programs, even in the absence of permissive provisions in human rights legislation for special programs.

The majority of the Court, on the other hand, avoided that question altogether by holding that subsequent additions of permissive provisions to the *Individual's Rights Protection Act* rendered the issue moot. Perhaps those judges were anticipating section 15(2) of the *Charter* which exempts special programs from the right to equality:

> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

That provision was first recommended by the Lamontagne-McGuigan Committee in the wake of the debate and controversy stirred by the 1978 United States Supreme Court *Bakke* decision.[197] That recommendation was incorporated into Bill C-60, in 1980, and remained in all subsequent drafts of the *Charter*.

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196 [1981] 1 S C R , at page 711

197 Regents of the University of California v Bakke (1978) 438 U S 265 Dale Gibson, The Law of the Charter Equality Rights, Carswell (Toronto, Calgary, Vancouver 1990), at page 288

Today, every jurisdiction in Canada has a provision in its human rights legislation allowing for affirmative action-type programs.[198] The *Canadian Human Rights Act* permits special programs under section 16:

> 16. (1) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group

As a result of these sections Canadian employers do not face court challanges based on claims of reverse discrimination like their counterparts in the United States.

However, affirmative action programs were not in abundance in Canada. Aside from the contract compliance program, the various legislative and administrative initiatives with respect to affirmative action were limited in effect. Few employers "volunteered" to expend considerable resources on an introspective analysis of discriminatory barriers. Nor did they reach out to the disadvantaged through special programs. Notwithstanding the CEIC's efforts and wage incentives, after three years only thirty-four of the 900 employers that were approached actually signed agreements to implement affirmative action programs. By June, 1984, there were sixty-seven agreements, but only five of these had actually developed affirmative action plans.[199] A 1985 survey of 199 employers in the Toronto area revealed that only three percent had developed affirmative action programs. Only

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198 Saskatchewan, s 47, Manitoba s 11, Ontario s 13(1), Quebec s 86, Nova Scotia s 19. Many seem to follow the general outline of subsection 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination: Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Adopted by a United Nation's General Assembly Resolution 2106A (XX), on December 21, 1965

199 Agocs, supra, note 189, at page 154

six percent even knew that affirmative action consisted of a comprehensive strategy for eliminating barriers to the participation of designated groups. Thus, not only was voluntary affirmative action a failure, the educational drive to teach employers about the need to remove systemic barriers seems to have had little impact.

Mandatory Systemic Remedies

The dismal results of voluntary affirmative action programs and the realization that the individual case-by-case approach simply lacked the capacity to fight systemic discrimination created a general dissatisfaction with the current attempts at curbing employment discrimination. That dissatisfaction culminated in the creation of the Royal Commission on Equality in Employment, chaired by Judge Rosalie Abella. The terms of reference of the Royal Commission on Equality in Employment made explicit reference to mandatory programs:

> ..to inquire into the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting all individuals to compete for employment opportunities on an equal basis by:
>
> > b) inquiring into means to respond to deficiencies in employment practices, including without limiting the generality of the foregoing means, such as an enhanced voluntary program, possibly linked with mandatory reporting requirements and a mandatory affirmative action program [200]

Abella set out to determine whether mandatory programs were the only effective method of eradicating systemic barriers and creating equal opportunity in employment. At the outset, she introduced the term "employment equity" in order to avoid any association with affirmative action in the United States.

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200 Abella, supra, note 5, at page 11

After reviewing the unsatisfactory record of voluntary programs, Abella concluded that "Given the seriousness and apparent intractability of employment discrimination, it is unrealistic and somewhat ingenuous to rely on there being sufficient public goodwill to fuel a voluntary program."[201] Abella pointed to three American reports and accompanying statistics which show that enforceable legal requirements are essential to the success of affirmative action programs, and that they encourage the private sector to engage in such programs voluntarily.[202] She concluded that the time for the mere expression of good intentions is past. If the government is serious about ameliorating the position of historically disadvantaged groups, it must legislate positive action to dismantle systemic barriers:

> The sense of urgency expressed by individuals in the designated groups across Canada and validated by the evidence of their economic disadvantage is irreconcilable with the voluntary and gradual introduction of measures to generate more equitable participation. The choice for government is between imposing and hoping for equality in employment, between ensuring the right to freedom from discrimination and its mere articulation. In a society committed to equality, the choice is self-evident.
>
> A government genuinely committed to equality in the workplace will use law to accomplish it and thereby give the concept credibility and integrity.
>
> This Commission recommends that a law be passed requiring all federally regulated employers, including crown corporations, government departments, agencies, and businesses and corporations in the federally regulated private sector, to implement employment equity.[203]

The statutory obligation to undertake steps to eliminate discriminatory practices and barriers would extend to all facets of employment. Abella recommended that the onus be placed on the employer to design its own program to suit its particular

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201 Abella, supra, note 5, at page 197

202 Abella, supra, note 5, at page 200, footnote 23

203 Abella, supra, note 5, at pages 202-203.

circumstances.[204] These various recommendations were supported by the Parliamentary Committee on Equality Rights in its report *Toward Equality*.[205]

The discussions about mandatory affirmative action seemed to have had an immediate echo in the *Action Travail* case. In August 1984, for the first time since the enactment of the *Canadian Human Rights Act*, a human rights tribunal used its powers under section 41(2)(a),[206] to order an offender to take affirmative action.[207] The Tribunal in *Action Travail* found that discriminatory practices were pervasive and deeply rooted in the hiring process of Canadian National Railways (C.N.).[208] The Tribunal heard considerable evidence about those hiring practices, such as the use of the Bennett Mechanical Aptitude test and physical strength tests that were only administered to female applicants, and the Tribunal also heard testimony about the discriminatory treatment of women in non-traditional jobs. Evidence showed that C.N. was aware of these problems since 1974 and yet took not corrective steps. In 1981, women held only 0.7% of blue collar jobs at C.N. in the St. Lawrence region, while the national average for female blue collar workers was at 13%. The Canadian Human Rights Tribunal ordered C.N. to discontinue the use of the mechanical aptitude test and drop the welding experience requirements for jobs that did not warrant such qualification.

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204 Abella, supra, note 5, pages 203 ff

205 Parliamentary Committee on Equality Rights, Towards Equality Report of the Parliamentary Committee on Equality Rights, Ministry of Supply and Services, (Ottawa 1986)

206 Today section 53(2)(a)

207 41(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate (a) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including, (i) adoption of a special program, plan or arrangement referred to in subsection 16(1) Manitoba [s 43(2)(c), CCSM, c H175] and Quebec [s 86(3), 1982 c 61, s 21] also have provisions authorizing a competent court or tribunal to impose mandatory affirmation action

208 (1984) 5 C H R R D/2327

In addition, the Tribunal ordered C.N. to solicit women for non-traditional jobs and to hire one woman for every four positions filled. Also, C.N. was required to report the results of the program to the Canadian Human Rights Commission. This was the first time that affirmative action was imposed upon an employer under Canadian law. The order attracted considerable excitement and consternation as it was the first time that a human rights tribunal had imposed a mandatory affirmative action program. At the Federal Court of Appeal, Justice James Hugesson, ruled against the affirmative action, taking a narrow view of section 41(2)(a) of the *Canadian Human Rights Act*.[209] In his opinion, since that section only permitted "preventive" measures, it was "impossible, or in any event inappropriate, to apply it in cases of group or systemic discrimination where, by the nature of things, individual victims are not always readily identifiable".[210] In dissent, Justice Mark MacGuigan would have left the order undisturbed on the basis that the Tribunal had the scope to provide the affirmative action remedy.

The Supreme Court of Canada agreed unanimously with Justice MacGuigan and took a wide view of the Tribunal's powers. In his ruling upholding the order, Chief Justice Dickson cautioned against narrow interpretations of human rights legislation:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law . We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given

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209 [1985] 1 F C 96

210 [1985] 1 F C , at page 102.

> such fair, large and liberal interpretation as will best ensure that their objects are attained [211]

Chief Justice Dickson explained that in light of those concepts, the issue about the nature of the order should focus upon the ability of the order to prevent the effect of discrimination. In his opinion, preventive and remedial measures often converge when dealing with cases of systemic discrimination:

> When confronted with such a case of "systemic discrimination", it may be that the type of order issued by the Tribunal is the only means by which the purpose of the *Canadian Human Rights Act* can be met In any program of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention" Indeed there is no prevention without some form of remedy [212]

The Tribunal made an uncontested finding that the lack of women in blue-collar jobs at C.N. contributed to other practices in perpetuating the systemic barriers faced by women Chief Justice Dickson ruled that, in addition to the prohibition of certain employment practices, increasing the number of women in non-traditional jobs at C.N. was an appropriate preventive measure designed to overcome those systemic barriers.

However, since the *Action Travail* order in 1984, no tribunal or court in Canada has imposed systemic remedies on offenders. Perhaps this indicates that the legal and political climate in Canada was not yet ready to accept the imposition of affirmative action.

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211 [1987] 1 S C R., at page 1134.

212 [1987] 1 S.C.R., at pages 1142-3.

Part 2, Section A.1

The *Employment Equity Act*

In August 1986, the Federal government responded to the *Report of the Commission on Equality in Employment* by enacting the *Employment Equity Act*. The *EEA* covers all employers in the federally regulated sector with more than one hundred employees. That includes all crown corporations and any employer involved in a federal work, undertaking or business, such as banking, communications, or transportation, or as otherwise defined in the *Canada Labour Code*.[213] This legislative scheme is designed to provide equal employment opportunity to all persons regardless of their characteristics:

> 2. The purpose of this Act is to achieve equality in the work place so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences

The *EEA* has both a preventive and a remedial aspect. On one hand it aims to prevent employers from discriminating against an individual on the basis of a characteristic that is unrelated to that individual's ability. Employers are to identify and eliminate discrimination in employment policies and procedures. On the other hand, the *EEA* obliges employers to take positive measures to remedy existing

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213 R.S.C. 1985, c. L-2.

disadvantage by ensuring an appropriate representation of women, aboriginal persons, the disabled, and visible minorities in the work place:

> 4. An employer shall, in consultation with such persons as have been designated by the employees to act as their representatives or, where a bargaining agent represents the employees, in consultation with the bargaining agent, implement employment equity by
>
> (a) identifying and eliminating each of the employer's employment practices, not otherwise authorized by a law, that results in employment barriers against persons in designated groups, and
>
> (b) instituting such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment with the employer that is at least proportionate to their representation
>
> (i) in the work force, or
>
> (ii) in those segments of the work force that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw or promote employees

Neither of those two tasks depend upon the filing or substantiation of a complaint against a specific incident of discrimination. Rather, the employers are obliged to take the initiative to remove any traces of discrimination and to achieve a representative work force.

In fulfilling its obligations under subsection 4(a) of the *EEA*, an employer must scrutinize all aspects of the employment process, including such pre-employment stages as recruiting, hiring, and training, as well as promotions and job conditions. Also, the *EEA* requires that employers establish support systems to accommodate differences arising from race, colour, gender, aboriginal background, or disability. That may involve such measures as adapting the work place for wheelchairs, providing for daycare facilities and expenses, or adjusting work schedules and job duties to accommodate cultural, religious, or family needs of employees. Recently, the Supreme Court of Canada has elevated the importance

of the employer's duty to accommodate special needs of its employees within the scope of employment rules and conditions.[214] Subsection 4(b) is more concerned with the representation of minorities in the work place. Under that subsection employers are to achieve statistical parity, where the employed work force reflects the make-up of the available work force.

A second prong of the *EEA* consists of extensive reporting requirements. Employers are obliged to submit annually a certified copy of a report on the make-up of the work force. Failure to do so may result in a fine of $50,000. In that report, employers are to categorize their work force by industrial sector, location, occupational groups, and salary ranges, paying particular attention to the representation of the designated groups in each category. The report must also indicate the proportion of employees hired, promoted, and terminated that belongs to the designated groups. The records used in the compilation of the report are to be kept by the employer for three years. The Canada Employment and Immigration Commission collects and consolidates all the reports and statistical data. Each year, the Minister responsible for the *Act* submits a report to Parliament for public scrutiny.

The *EEA* underscores the importance of developing an employment equity strategy by requiring employers to prepare a plan that sets out the goals that are to be achieved. Such a plan must specify a timetable for the attainment of the goals. The plan should describe the special measures and reasonable accommodations that will be implemented, as well as the modification of personnel systems designed to eliminate employment barriers. The plan should also provide for mechanisms to monitor its implementation.

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214 Central Alberta Dairy Pool v. Alberta Human Rights Commission [1990] 2 S.C.R. 489

Employers are encouraged to consult with the Department of Employment and Immigration on the creation of an adequate plan. The Department has issued guidelines that provide step-by-step instructions on the implementation of employment equity.[215] Step one consists of preparing the work place for employment equity. Acquiring the support and commitment of senior management is perhaps the most important element of the preparation. Indeed, the guidelines suggest that an employer establish a senior level program manager, with access to senior management and labour officials or employee representatives.

Step two calls upon an employer to conduct an analysis of its work force. To this end, the employer should collect personnel information that will indicate the current make-up of its work force, and the trends of change that are taking place in that make-up. It is crucial for employers to create a climate of trust so that employees will be willing to identify themselves as members of the designated groups. The work force profile should then be compared to the number of qualified minority individuals available for work and promotion in the various job and salary categories. That comparison should indicate areas where the employer's work force falls short of the goal of representativeness.

Once those weak areas are identified, an employer can undertake a closer examination of the employment practices that may be responsible for retarding the opportunities of the designated groups. The guidelines suggest that an employer assess policy or system according to the following criteria: Is it job related? Does a test, or required qualification, have a direct relationship to job performance? Is it consistently applied? Does it have an adverse impact on designated groups? Is it a business necessity? Does it conform to human rights and employment standards

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215 Department of Employment and Immigration, Employment Equity A Guide for Employers, Ministry of Supply and Services (Ottawa 1989)

legislation? The process of asking those questions should indicate what measures should be taken to remove discriminatory barriers. The analysis would then be incorporated into the employer's employment equity plan.

One praise-worthy feature of this scheme is the extent to which it seeks to involve the employers in the investigation of systemic discrimination and in the design of special remedies. In addition to relieving the Federal government of the daunting task of fighting systemic discrimination single-handedly, one would hope that the involvement of employers in the design of remedies will make employers more willing to implement them. Not only are such programs bound to accord more closely with the particular situation faced by the employer, but also such programs would lack the malevolent overtones that are associated with remedies that are imposed from "above".

Results Under the *Employment Equity Act*

The Department of Employment and Immigration and the Canadian Human Rights Commission have endeavoured to summarize the results of the *Employment Equity Act* in their annual reports. In 1988, the Commission found significant under-representation in all of the 368 employment equity reports filed. In October 1988, the Commission invited eleven employers, including five federal departments, to join with it in a review of their equity data and employment systems.[216] Eventually all employers agreed to proceed with a joint review, although some had to be cajoled to a considerable degree.

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216 Canadian Human Rights Commission, Annual Report 1988, at page 33, Transport Canada, The Department of National Defence, Fisheries and Ocean, Revenue Canada (Taxation), External Affairs, National Bank of Canada, Canadian National Railways, Canadian Pacific Express, Denison Mines, Marine Atlantic, Saskatchewan Wheat Pool

By the year's end, a group representing the disabled filed discrimination complaints against nine companies.[217] The Commission instituted investigative processes, but also invited these companies to review the situation concerning other designated groups. The fourteen companies and five federal departments involved in the joint reviews represent 48% of all employees within the Commission's jurisdiction.[218]

At the end of 1989, six of the employers against whom the disabled filed a complaint agreed to co-operate. However both Bell Canada and the Canadian Broadcasting Corporation resisted. Bell Canada questioned the validity of what the Commission proposed to do and simply refused to provide any information requested.[219] The CBC went even further, and launched a challenge to the Commission's investigation in the Federal Court. When the Commission launched its own complaint against both companies, Bell Canada joined the CBC in the challenge. After some procedural wrangling CBC has agreed to proceed with a joint review of its practices. However, the Bell case is still pending at the Federal Court. No Court date has yet been set.

The other entities that were asked to cooperate with reviews complied voluntarily. In fact, by the end of the year, Canadian Pacific was already finalizing plans for its employment equity systems, while Denison Mines had established a union-management committee to oversee its systems review.[220] Other employers have gone ahead with some aspects of their affirmative action programs. For

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217 Canadian Imperial Bank of Commerce, Bank of Montreal, The Royal Bank of Canada, Scotia Bank, The Toronto Dominion Bank, Bell Canada, Canadian Broadcasting Corporation, Canadian National Railways and Canada Post

218 Canadian Human Rights Commission, Annual Report 1988, at page 33

219 Canadian Human Rights Commission, Annual Report, 1989, at page 36

220 Canadian Human Rights Commission, Annual Report, 1989, at page 37

example, pursuant to its plan, the Royal Bank hired twenty natives in Alberta. The Toronto Dominion Bank, for its part, added thirteen disabled persons to its workforce in Montreal. Recently, the Assembly Manitoba Chiefs filed complaints against twenty-eight Federal Departments, involving twenty-three employers. That brings the number of actions carried by the Commission to seventy-eight, involving forty-five employers. Two of these actions, against Bell Canada and the CBC were initiated by the Commission. Seventeen others are proceeding according to a co-operative review

But for all this talk about the co-operation of employers, the Commission's *Annual Reports* are conspicuously lacking on hard figures about changes in the composition of the workforce. Those figures are set out in the Department of Employment and Immigration *Annual Report* on the *EEA*. The *Report* for 1990 shows that the representation of women in the workplace increased from 40.9% in 1987 to 41.95% in 1988 and then to 42.55% in 1989.[221] The representation of Aboriginal peoples rose from 0.66% to 0.79% over the three years. In that same period, persons with disabilities increased their representation from 1.59% to 2.34%. Finally, the proportion of visible minorities rose from 4.99% in 1987 to 5.67% in 1988. In 1989 their representation jumped to 6.68% which is above their 6.30% representation in the Canadian Labour Force.[222]

The story behind these stark figures is more telling. The increase in representation of women still falls below their 44% representation in the Canadian labour force.[223] In fact, women predominate in the lower-paying part-time jobs.[224]

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221 Department of Employment and Immigration, Annual Report, 1990, at page 27

222 Department of Employment and Immigration, Annual Report, 1990, at page 58

223 Department of Employment and Immigration, Annual Report, 1989, at page 27.

This corresponds with their high representation in clerical occupations, specifically almost two-thirds (76.37%). Few were to be found in non-traditional occupations, such as skilled crafts and trades (1.96%), semi-skilled manual (3.95%) and manual occupations (7.06%). They were also poorly represented in upper level management positions (6.85%), although 37.72% of middle managers and 41.02% of professionals were women.[225] The women's share of overall full-time promotions, 54.65%, was higher than their 44% representation in the Canadian labour force. But their share of hirings, 41.54%, was less.

Similar patterns are to be found behind the numbers for the aboriginal peoples and the disabled. The overall aboriginal representation of 0.79% fell far below their 2.1% share of the Canadian labour force. For disabled persons, the 2.34% representation also falls far below their 5.4% representation in the labour force. These two groups had a smaller share of full-time hirings and promotions than their representation in the Canadian labour force.[226] Visible minorities fared better. They topped their 6.3% representation in the Canadian labour force, and got 11.01% of full-time hirings and 9.52% of full-time promotions.[227] However, this can be attributed to their high representation in clerical levels of the banking industry.[228]

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224 Women comprise 74.21% of all reported part-time employees, Department of Employment and Immigration Employment Equity Act Annual Report, 1989, Ministry of Supply and Services (Ottawa 1989), at page 28

225 Department of Employment and Immigration, Employment Equity Act, Annual Report 1990, at page 33, table 5

726 Department of Employment and Immigration, Employment Equity Act, Annual Report, 1990 Aboriginal, at page 46 table 8, 1.17% hirings, 0.79% promotions, the disabled, at page 56, table 8, 1.33% hirings, 2.44% promotions

227 Department of Employment and Immigration, Employment Equity Act, Annual Report, 1990, at page 65, table 8

228 Canadian Human Rights Commission Annual Report 1990, at page 32

On the whole, these statistics show improvement in terms of an increased representation of all the designated groups in the general composition of the work place. However, behind the general view lie infinitely more subtle and particularized statistics which reveal that designated groups predominate in part-time and low paying positions, with variations across the several sectors and job categories. In assessing the results, the Department of Employment gave sixty-eight per cent of employers the lowest mark for current representation of women, and only thirty-four per cent of these employers received a good mark for trying to improve the situation.[229] Eighty per cent of employers received the lowest mark for the current representation of aboriginal poeple, and only fifteen of these got a good mark for progress.

Upon reading these statistics, one is tempted to conclude that employment equity is not successful. However, since the *EEA* has only existed for five years, it is perhaps to early to come to any definite conclusions based on statistics alone. At most, these statistics should raise questions about what results it would be reasonable to expect in a given time-frame. A more important question concerns what role should statistical analysis play in the area of employment equity. That question will be addressed later in this thesis.

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229 Department of Employment and Immigration, Employment Equity Act, Annual Report, 1990, at page 79.

Enforcement of the *Employment Equity Act*

While the *EEA* obliges employers to implement employment equity, no mechanism was established to enforce that obligation. In 1986, the Parliamentary Committee on Equality Rights made several recommendations to the Government in the wake of Justice Abella's *Report of the Commission on Equality in Employment*. In its report *Toward Equality*, the Committee noted that a principal shortcoming of the proposed *EEA* was "the absence of enforcement mechanisms". It noted that without sanctions, the *EEA* amounts to a voluntary scheme.[230] The Committee recommended that the *EEA* grant the Canadian Human Rights Commission with the mandate and capacity to enforce employment equity:

> 62. We recommend that legislation on employment equity contain enforcement mechanisms providing for the review of special programs by the Canadian Human Rights Commission, and that the Commission be given additional financial and human resources for this purpose.[231]

The Committee felt that the absence of an enforcement mechanism was major shortcoming of the *EEA* which at that time was in the stage of a proposal.

Responding to the Committee's concern, the Department of Justice had this to say:

> The Government is of the view that the reporting requirements in Bill C-62 [*EEA*], together with making such reports available to the public, are sufficient to ensure compliance
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> The risk of adverse publicity that an employer would face unless progress in implementing employment equity is demonstrated in the reports, as well as the possibility that such reports will provide the Canadian Human Rights Commission with information upon which to initiate an investigation under the *Canadian Human*

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230 Parliamentary Committee on Equality Rights, Towards Equality, note 205, at page 110

231 Towards Equality, supra, note 205, at page 110.

> *Rights Act*, will provide adequate inducement to employers to achieve the desired results.
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> This Bill is a first step toward the Government's goal of employment equity. It attempts to balance the needs of the designated groups against the Government's desire not to interfere unduly in the operations of employers. The Government will review the results of Bill C-62 after several years [232]

Since the Department of Justice was not convinced that a new enforcement mandate was necessary, it did not follow the recommendation of the Parliamentary Committee.

Indeed, the Canadian Human Rights Commission has inferred a role for supervising employer compliance with the *EEA*. In its *Operational Procedures for Ensuring Compliance with Employment Equity*, the Commission rationalizes its role in employment equity as an extension of its mandate to combat discrimination and promote equality in employment:

> To ensure employers change their employment systems and practices which have discriminated against these groups, so that discrimination does not continue in the future; and to ensure employers provide opportunities as quickly as possible for disadvantaged groups to remedy the effects of past discrimination.[233]

By defining its role as including both aspects, the Commission by-passes the debate over whether the imposition of affirmative action is remedial or preventative.

In fact, the *EEA* scheme avoids the question of "imposition" at all. Unlike the situation in *Action Travail*, where the Human Rights Tribunal ordered affirmative action, under present situation the *EEA* itself "imposes" the general obligation of affirmative action or employment equity, and the Commission is only

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232 Department of Justice, Toward Equality The Response to the Report of the Parliamentary Committee on Equality Rights, Ministry of Supply and Services, (Ottawa 1986), at page 51

233 Canadian Human Rights Commission, Operational Procedures for Ensuring Compliance with Employment Equity, (Ottawa June 1, 1988), at page 1

responsible for ensuring that employers do not engage in discriminatory conduct. The Commission's preferred approach to ensuring compliance is a non-confrontational voluntary review of employment systems:

> Because the Commission is committed to pursuing a co-operative approach with employers and to speeding up the implementation of employment equity, it will invite an employer with possible problems to undertake a joint review of its employment equity analysis with the Commission. The review, an alternative to initiating a complaint, will follow the same fact-gathering steps as a formal complaint. In both cases, the numbers resulting from a comparison of data will not constitute proof that an employer is discriminating but merely indicate where there may be problems.[234]

> It remains our view that accepting to cooperate in a review of employment practices is no more than the first step in a common sense approach to resolving problems of employment equity that have been under discussion for years. No one is looking for admissions of guilt. The purpose is to move ahead in a systematic way to overcome problems of systemic discrimination that cannot be dealt with adequately in an adversarial context. We continue to hope that all the institutions covered by the Act will come to agree that this makes sense, and that all concerned will benefit from a collaborative approach rather than waste time in prolonged legal skirmishes.[235]

In making this statement, the Commission expressed its wish to avoid the draining of its scarce resources on confrontation, as had been the case with its counterpart, the EEOC.

In *Operational Procedures for Ensuring Compliance with Employment Equity*, the Commission has set out the process in which selected employers are invited to undertake a joint reviews of their employment systems.[236] The voluntary review process provides the employer with the opportunity to follow a thorough and structured investigation, outside the formal and potentially confrontational complaint process. In that process, the Commission walks the employer through the steps that

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234 Procedures, note 233, at page 11

235 Canadian Human Rights Commission, Annual Report, 1989, at page 37

236 Operational Procedures, note 233.

it should have taken on its own pursuant to the *EEA*. While the steps of the joint review process essentially replicate the steps that would be taken in an investigation, it is hoped that the process would operate more smoothly and efficiently with an employer that has agreed to co-operate, than with one that is resisting an investigation that might lead to prosecution. The Commission stands to gain from convincing an employer to undertake a voluntary review, because it would avoid expensive and time-consuming litigation. However, if at any point the employer veers from its voluntary disposition the Commission can either request the employer to confirm that an analysis and a plan has been or will be prepared, or it could initiate a complaint process In essence, the "confirmation" process provides the employer with a second chance to comply with the *EEA*. However, that process may also be a prelude to a complaint process if the employer does not co-operate.

While the Commission favours the non-confrontational manner of dealing with systemic discrimination, it clearly expressed its intention to initiate a complaint under section 40(3) of the *Canadian Human Rights Act* should that be necessary:

> Wherever possible, both with government departments, Crown corporations and the private sector, the Commission has tried to avoid unnecessary adversarial proceedings and to work with those institutions to bring about the changes required by the Act. ... We have not chosen it out of a desire to avoid rough dealings; rather, we have calculated that the confrontational route is, by and large, likely to waste more time for all concerned and to be of greater interest to litigation lawyers than to the potential beneficiaries of the Act. At the same time, we have made it clear to those who choose not to offer some measure of cooperation . that we will not hesitate to proceed via tribunals and the courts if that becomes necessary.[237]

The complaint process follows the steps set out in the *CHRA*. If at any time in the process the employer indicates a willingness to settle the matter by submitting a plan, the Commission will appoint a conciliator, and the investigation will be

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237 Canadian Human Rights Commission, Annual Report, 1989, at page 33

suspended. All matters will be ultimately resolved only upon the submission of an acceptable plan; that is, a plan which includes an appropriate organizational structure, the removal of problematic systems, their replacement with non-discriminatory ones, remedial initiatives to overcome the effects of past discrimination, and goals and timetables.[238]

However, such a plan, whether devised voluntarily or extracted through the threat of litigation lacks teeth. The current regime relies exclusively upon the employers' willingness and initiative to pursue employment equity. Under the *EEA*, employers are only open to a sanction if they fail to file their annual report. Even though employers are obliged to consult with employees, there is no penalty for failing to do so. Also, there are no sanctions for failure to set out or achieve employment equity objectives. Furthermore, there is no mechanism to guard against plans which may be poorly devised with meaningless goals or timetables. The *EEA* does not give the Commission the authority to define or impose employment equity goals. Neither does the *EEA* create a new basis of discrimination that could be derived from a statistical imbalance in the make-up of the work force. Thus, while the *EEA* obliges employers to achieve a representative work force, there is no provision for prosecution for failure to do so. If the goals in an employment equity plan are not fulfilled, the most that the Commission can do under the authority of the *EEA* is urge the employer to revise the plan. Currently, employers are still willing to co-operate with the Commission on voluntary reviews of their systems, if only to preserve a good public image. However, that apparent co-operative mood may be seriously undermined should Bell Canada succeed in its challenge to the Commission's jurisdiction to initiate complaints concerning employment equity.

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238 Operational Procedures, note 233, at page 13

A few years of experience under the *EEA* without a clear enforcement mandate has prompted the Commission to raise those concerns once again. In both its 1988 and 1989 *Annual Reports*, the Commission asked the government to increase and clarify its role with respect to monitoring and enforcing the *EEA*:

> The requirements of the *Employment Equity Act* are a major step forward in that they place the onus squarely on employers to identify, account for and redress inequities in the way the designated groups are treated. From the Commission's point of view, however, they may appear to presuppose a complaint-driven process of investigation on our part. The Commission will of course undertake complaint-based investigations, but it would like to add to its operational repertoire a more systemic approach to systemic discrimination, on which would put the emphasis more immediately on the constructive correction of inequities - on problem-solving rather than problem identification.[239]

In this regard, the Commission requested Parliament to give it new tools with which to be more effective in eradicating systemic discrimination. Essentially, the Commission is asking for an expansion of its powers to give it more freedom to act and to bolster the legitimacy of pro-actively pursuing systemic discrimination. For those who support the mandatory imposition of affirmative action programs, the *EEA* without an enforcement mechanism is inadequate.

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239 Canadian Human Rights Commission, Annual Report, 1988, at page 17

Part 2, Section A.2

Affirmative Action Based on Statistical Comparisons

Despite the discussions about mandatory affirmative action, the Canadian government was not convinced that such an approach would provide an answer to systemic discrimination. However, while the *EEA* does not replicate the American experience with its proliferation of mandatory affirmative action programs, the *Act* nevertheless has inherited certain principles that favour the use of hiring quotas and goals. The adverse impact doctrine created a focus on results in terms of the make-up of the workplace. Inevitably employment discrimination became associated with the "under-representation" of minorities in the work place. The term "under-representation" is used in the context of this principle to describe the situation where there is proportionally less of a particular group in the work place as compared to that group's representation in the local population.

It is believed by some that, but for discrimination, the make-up of employees in the work place would reflect the make-up of the local population:

> ... since there is no reason to assume that, absent past discrimination, blacks, as a group, would not succeed in the competitive job market as well as whites do as a group, the most sensible approach is to equalize the prospects of the two groups by insuring that the proportion of blacks in the workforce is equivalent to the proportion of blacks in the general population.[240]

According to this line of reasoning, achieving representation is the solution for employment discrimination because that is the state of affairs that would have

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240 Michel Rosenfeld, "Affirmative Action, Justice, and Equalities A Philosophical and Constitutional Analysis', 46 Ohio State Law Journal 845, at page 907

existed had there been no discrimination. Hiring quotas and other measures designed to alleviate under-representation appeared to be the most effective method of fighting discrimination. Those measures and their underlying philosophy can be called the "numbers approach", because they concentrate upon altering the numerical representation of minority groups in the work place. Under this approach, employers are said to have achieved "statistical parity" when the minorities are proportionally represented in the work place.

In the late 1960s and early 1970s, affirmative action in the United States came to be closely associated with quotas, timetables, and goals. Statistics on the make-up of the local population played an increasing role in discrimination cases. Even in the face of section 703(j) of the 1964 *Civil Rights Act*,[241] the United States Supreme Court approved statistical comparisons for the sake of proving that an employment pattern or practice was discriminatory.[242] Such comparisons had been common place within the American contract compliance program. In 1970 and 1971, the OFCCP issued guidelines that legitimized the comparison between the proportion of women and minorities that were employed to their proportion in the community.[243] Contractors were obliged to evaluate their work force and ensure that neither women nor minorities were "under-utilized". In 1979, the EEOC gave

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241 42 USCS 2000e-2(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area, or in the available work force in any community, State, section, or other area.

242 See Alexander v Louisiana, (1972) 405 U S 625, International Brotherhood of Teamsters v United States (1977) 431 U S 324 and Hazelwood School District v United States, (1977), 433 U S 299

243 See Bevan supra, note 179 at page 462

more legitimacy to such statistical comparisons in its *Affirmative Action Guidelines*.[244] Under those guidelines, employers were entitled to defend their voluntary affirmative action programs from allegations of reverse discrimination by demonstrating a "statistical imbalance" in the work place.[245]

The reasoning behind the numbers approach lead American courts to use section 706(g) to impose numerical quotas, goals and timetables as a sanction against discrimination.[246] In 1984, the United States Supreme Court restricted the scope of section 706(g).[247] But, two years later, the Supreme Court held that a history of "persistent or egregious discrimination" on the part of an employer presented a "compelling need" for judicial action, and that such remedies as numerical admissions ratios were constitutional even though non-victims stood to benefit.[248]

In 1987, the United States Supreme Court explicitly endorsed the numerical principles of the *Affirmative Action Guidelines* in *Johnson v. Transportation Agency, Santa Clara County*.[249] That case involved a voluntary affirmative action program that awarded women a "plus factor" in the hiring process to rectify their under-representation in "traditionally segregated job categories". In upholding the program against a statutory challenge, the Court stated that it was proper to assail a

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244 29 C F R 1608

245 29 C F R pt 1608 See generally, Player, supra, note 185, at page 315

246 42 U S C 2000e-5(g) "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay or any other equitable relief as the court deems appropriate The reference to 'intentional' did not connote the 'intent' model as we know it today Rather, it came to connote volition, as opposed to accident

247 Firefighters Local Union No 1784 v Stotts, (1984) 467 U S 561

248 Local 28, Sheet Metal Workers v EEOC, (1986), 106 S Ct 3019

249 (1987) 480 U S 616

"manifest imbalance" in the work place. The Court agreed that such an imbalance could be established by comparing the percentage of women in the employer's work force with their percentage in the labour market. In *United States v. Paradise*, the Supreme Court applied this same type of reasoning to challenges under the constitution, in cases where the court-ordered affirmative action combined with government action.[250]

The Employment Equity Scheme and the Numbers Approach

The numbers approach came to Canada along with the adverse impact doctrine. In its *Affirmative Action Training Manual*, the Canadian Employment and Immigration Commission overtly adopts the presumption that in the absence of discrimination, the work place would be representative:

> The basic premise of affirmative action is that the operation of discriminatory social, educational and employment practices is the force which causes disproportionate representation of groups of people in the labour force. In the absence of such discrimination, which is interwoven throughout the fabric of our society, women, Natives and disabled people would be randomly distributed throughout the labour force in approximately the same proportion as they are distributed in the population - with rare exceptions reflecting genuine preferences of some women and Natives people and actual limitations of some disabled individuals.[251]

According to this premise, the composition of the work place would reflect the composition of society in the absence of discrimination, then it would follow that where there is a statistical imbalance, necessarily there must be some form of

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250 (1987) 107 S Ct 1053. Constitutional cases had to meet the strict scrutiny test of the equal protection clause. That problem does not arise in Canada on account of the explicit exemption provided for in section 15(2) of the Charter.

251 Canadian Employment and Immigration Commission, Affirmative Action Technical Training Manual, Ministry of Supply and Services, (Ottawa 1982), at pages 60-1

systemic discrimination. Judge Abella appears to come to the same conclusion in her study about equality in employment. She referred to statisical comparisons as indicators of the presence of discriminatory conduct:

> If a barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory
>
> This is why it is important to look at the results of a system In these results one may find evidence that barriers which are inequitable impede individual opportunity These results are by no means conclusive evidence of inequity, but they are an effective signal that further examination is warranted to determine whether the disproportionately negative impact is in fact the result of inequitable practices, and therefore calls for remedial attention, or whether it is a reflection of a non-discriminatory reality [252]

In her opinion, under-representation serves as a flag to point out areas where discrimination exists. However, she was cautious not to equate under-representation with discrimination as appears to be done in the United States.

In *Action Travail*, the Human Rights Tribunal and the Supreme Court of Canada did not replicate the approach taken in American courts where statistical parity became the rationale for imposing affirmative action. While it is true that in *Action Travail*, the Human Rights Tribunal referred to the low proportion of female blue collar employees in C.N.'s work force, and even fashioned a remedy on the basis of those statistics, nevertheless the Tribunal made its finding of discrimination on the basis of the considerable evidence about employment practices and attitudes at C.N. Similarly, the under-representation of women in C.N.'s work place did not figure prominently in Chief Justice Dickson's reasons for upholding the Tribunal's findings and order. Therefore, while the statistics on women at C.N. may have signaled the presence of discrimination, as suggested by Judge Abella, and while such statistics have served as a benchmark for the affirmative action remedy, it is

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252 Abella, supra, note 5, at pages 2-3 This reasoning was incorporated into the 7th recommendation set out on page 255

less clear what role the under-representation of women played in the Tribunal's factual finding that C.N. was engaging in discrimination.

Despite the cautious approach exhibited in the *Report of the Commission on Equality in Employment* and in *Action Travail* towards the role of statistics in defining discrimination, the numbers approach has been incorporated into the *EEA*. In the *EEA*, statistical parity plays much greater role than that of a signal or indicator. Subsection 4(b) renders statistical parity a specific goal of the federal employment equity scheme:

> 4. An employer shall, .. implement employment equity by
>
> (b) instituting such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment with the employer that is at least proportionate to their representation
>
> (i) in the work force, or
>
> (ii) in those segments of the work force that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw or promote employees

The language of subsection 4(b) echoes the *Affirmative Action Training Manual* which states that: "It should be remembered that the long-term quantitative objective is representativeness of target-group participation in the workforce".[253] This association between discrimination and representativeness is qualitatively different from the treatment of statistics as a flag or signal of systemic discrimination. Rendering representativeness a specific goal for achievement under the *EEA* fosters the belief that representativeness is the solution to systemic discrimination. Such a belief, in turn, causes one to focus attention on measures that increase

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253 Ibid, at page 102

representation of minorities, and given less attention to the elimination of discriminatory employment practices.

That impression is strengthened by the degree of attention that the *EEA* pays to the achievement of representativeness, as compared to the attention given to the elimination of systemic discriminatory barriers. While the language of section 4 does not give preference to subsection (b) over subsection (a), that preference seems to be borne out by the remaining sections of the *EEA* which are devoted to matters concerning the achievement of a representative work force. Section 5 instructs employers to prepare a plan of goals and a timetable for implementing those goals. Section 6 requires employers to file annual reports dealing with the degree of representation of minority groups in the various occupational categories and salary ranges. In addition, employers are to report on the degree of representation of minority groups among the employees that are hired, promoted, and terminated. By contrast, nothing more is said in the *Act* concerning the goal of subsection 4(a), namely, the elimination of discriminatory barriers.

The same is true of the *Employment Equity Annual Report* produced by the Canadian Department of Employment and Immigration. The *Report* is dominated by statistics showing the current state of representativeness of designated groups. The language of that analysis hails success where the representation of the designated groups increases. That pattern is repeated in the Department of Employment *Employment Equity: Guide for Employers*. The *Guide* instructs employers to achieve a "representative labour force". That means a labour force that:

> ... reflects the demographic composition of the external work force, that is, when it contains roughly the same proportions of women, visible minorities, aboriginal peoples and persons with disabilities in each occupation as are known to be available in the external work force, either by reason of their skills, qualifications, union membership,

> licences, permits or other bona fide occupational requirement, or by their geographic accessibility to the employer [254]

The balance of the *Guide* is devoted to explaining how an employer should go about collecting data, developing a plan, and monitoring its implementation. Throughout this explanation, the *Guide* focuses exclusively on the representation of the work force.

Employment Practices and Discriminatory Attitudes

While a representative work force can be a legitimate goal of a government policy, it should not be confused with or taken to be synonymous with the goal of eliminating employment discrimination. A common adage holds that treating a symptom is not necessarily a cure for the ailment. Similarly, measures designed to achieve a representative work force are not necessarily a remedy for employment discrimination. Indeed, most of those measures focus upon increasing the representation of minorities in the work place instead of considering or dealing with the causes of employment discrimination.

Employers seeking to increase the representation of minority groups in their work place may address discriminatory practices to the extent that those practices have an impact on the number of minorities recruited or promoted. However, while some employers may make such adjustments, it is possible that others seek to increase the representation of minorities solely by implementing a schedule of hiring and promotion goals or quotas. Such measures serve the objective of increasing the

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254 Department of Employment and Immigration Employment Equity A Guide for Employers, supra, note 215, at page 10

representation of minorities, but they do not address directly the restrictive practices that caused the representative deficiency in the first place. Thus it is conceivable that through the use of quotas an employer would be able to achieve the objective of section 4(b) of the *EEA* and be considered to have attained the goal of employment equity, without having made significant inroads into persistent restrictive practices.

In the United States, employers took advantage of the dichotomy between achieving a representative work force and removing discriminatory barriers. Restrictive employment practices were protected by the "bottom-line" defence when an employer could show that the practice adversely affected less than twenty per cent of the designated group. Thus, as long as an employer can achieve such approximate representativeness, it would not matter whether it engages in discriminatory conduct. In *Connecticut v. Teal*, a Connecticut state agency required candidates for supervisory positions to pass a written test which disproportionately excluded black employees.[255] In order to preserve a certain representativeness, the agency promoted twenty-three per cent of the blacks who passed the test, whereas it promoted only fourteen per cent of the whites. The agency relied upon the bottom-line defence as many employers had done before it. However, the United States Supreme Court invalidated the bottom-line defence. The test itself had to be reviewed for its discriminatory impact. Increasing the representation of minorities in the work place is no substitution for eliminating the practices that restrict employment opportunities for minorities and lead to their under-representation.

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255 The bottom-line defence was rejected by the United States Supreme Court in Connecticut v Teal, 102 S.Ct 2525 (1982)

That is not to say that measures designed to increase the representation of minorities in the work place are wrong or ineffective. In *Action Travail*, Chief Justice Dickson gave considerable credit to such measures because they help overcome discriminatory attitudes in the work place and inhibitions among the minorities.[256] In addition, the influx of minorities creates a "critical mass" that may break the "continuing cycle of systemic discrimination".[257] However, while *Action Travail* at the level of the Supreme Court of Canada, concentrated upon the special temporaray measures for increasing the representation of women in blue collar jobs at C.N., one must not lose sight of the eight permanent measures that the Human Rights Tribunal ordered which were designed to neutralize discriminatory policies and practices.[258] Those measures included restricting the use of the Bennett and mechanical aptitude tests, abandoning the physical strength tests for women, discontinuing the welding experience requirement for all entry level positions, increasing the dissemination of information to the general public, and improving the procedures involved in receiving and interviewing candidates for employment. The imposition of the hiring quota would not have accomplished any of those permanent changes ordered by the Human Rights Tribunal. And yet, the impugned practices and policies at C.N. that are addressed by the permanent sectioni of the Tribunal's order were responsible in the first place for the under-represention of women in blue-collar jobs. Indeed, subsection 4(a) of the *EEA* calls for the elimination of discriminatory practices and policies. While the achieving representativeness under subsection 4(b) may contribute to the reduction of employment discrimination, the elimination of discriminatory practices under subsection 4(a) should not be

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256 [1987] 1 S C R , at page 1143

257 [1987] 1 S C R , at page 1144

258 (1984) 5 C H R R D/2327, at page D/2414-5

overlooked in the shadow of the faulty assumption that representativeness constitutes a solution to employment discrimination.

While employment practices are contemplated by the current employment equity scheme to some degree, discriminatory attitudes are all but ignored. Chief Justice Dickson recognized the role of discriminatory attitudes in *Action Travail*. He cited the *Boyle/Kirkman Report* which, in addition to pointing to personnel policies and procedures, placed considerable blame for discrimination against women at C.N. on prevailing negative attitudes:

> Our interviews revealed a disturbing degree of negative attitudes resulting in obvious discriminatory behaviour. ... Until the negative environment that these attitudes create is improved, equal opportunity for women will never occur.[259]

After quoting that passage, Chief Justice Dickson went on in his judgment to implicate attitudes directly in the problem of discrimination:

> ... systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job" .. To combat systemic discrimination, it is essential to create a climate in which both negative attitudes can be challenged and discouraged.[260]

The attitudinal dimension of discrimination is multi-faceted. On one hand, discriminatory attitudes give rise to restrictive practices. On the other hand, restrictive patterns of conduct nurture discriminatory attitudes. Chief Justice Dickson dealt with second aspect of the attitudinal dimension. The C.N. employment practices that were implicated had a tendency to keep the number of

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259 [1987] 1 S C R , at page 1119

260 [1987] 1 S.C.R., at page 1139. The Chief Justice repeated that point on page 1143

female employees low. The absence of women from the work place, in turn, engendered and reinforced the traditional stereo-types of women that maintains that they cannot perform physically demanding labour intensive work in sectors of heavy industry. That stereo-type is detrimental to the opportunity of women to seek employment at C.N. because it discourages C.N. personnel managers from hiring women for "non-traditional" positions.

Those attitudes are associated with paternalism as opposed to hatred or bigotry.[261] The Chief Justice reasoned that those attitudes may be eliminated by the example of women who are able to perform the type of work required on the job at C.N:

> ... if women are seen to be doing the job of "brakeman" or heavy cleaner or signaller at Canadian National, it is no longer possible to see women as capable of fulfilling only certain traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.[262]

The numerical remedies used to increase the representation of women at C.N. were expected to dismantle the paternalistic attitudes that support some restrictive employment practices, by challenging the stereotypes that certain jobs can only be performed by men.

However, it is not certain that an increase in the representativeness of women will by itself unsaddle traditional gender stereo-types. Psychological studies have shown that stereotypes tend to reinforce themselves even when the stereotype is itself incorrect. The behaviour of a minority group that a stereotype portrays in an unfavourable fashion will often be viewed differently from the same behaviour of

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261 See generally, Task Force on Barriers To Women in the Public Service, supra, note 175, chapter 6

262 [1987] 1 S C R , at page 1144

a majority group.[263] Also, those with stereotyped visions of identifiable groups will tend to remember evidence which confirms the stereotypes and forget evidence to the contrary.[264] Once a discriminatory practice is in place, it will tend to reaffirm the beliefs that gave rise to it. Those practices usually derive from a belief about the relative skill levels of various groups. Given the greater difficulty to succeed, members of some groups will lack the incentive to improve themselves. Thus, even if the beliefs about a group's aptitude were inaccurate to start with, those beliefs may be confirmed by the greater improvement among the group for whom it is easier to excel.[265]

There is another problem with failing to address the attitudinal dimension of discrimination directly. Some discriminatory attitudes, such as those associated with outright prejudice, lie beyond the reach of numerical remedies of the type sanctioned in *Action Travail*. The *Boyle/Kirkman Report* provided a list of comments which exemplified those attitudes.[266] It is argued that even though those prejudicial attitudes may persist, a quota will bury their effect:

> To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the

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263 See generally B L Duncan, "Differential Social Perception and Attribution of Intergroup Violence Testing the Lower Limits of Stereotyping of Blacks", (1976) 34 Journal of Personality and Social Psychology 590, H A Sagar and J W Schofield, "Racial Behaviour Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts', (1980) 39 Journal of Personality and Social Psychology 590

264 See generally M Rothbart, M Evans and S Fulero, "Recall for Confirming Events Memory Processes and the Maintenance of Social Stereotypes", (1979), 15 Journal of Experimental Social Psychology 343, W G Stephan and D Rosenfield, 'Racial and Ethnic Stereotypes", in A G Miller, ed , In the Eye of the Beholder (New York Praeger, 1982) 92

265 J G MacIntosh, "Employment Discrimination An Economic Perspective , 19 Ottawa Law Review 275, at page 286

266 [1987] 1 S C R , at page 1120 The following is a sampling of some of the examples 'Women are generally disruptive to the work-force", "The best jobs for women are coach cleaners - That's second nature to them", "One big problem adding women to train crews would be policing the morals in the cabooses , Women have no drive, no ambition, no initiative", 'A woman can't combine a career and family responsibilities', 'My department is all male - they don't want a woman snooping around', Railroading is a man's sport there's no room for women", "Unless I'm forced, I won't take a woman"

> unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.[267]

Unfortunately, foreman's battle is *not* lost. He and other male employees can continue to make life difficult for the women who get jobs at C.N. In fact, the evidence in *Action Travail* showed that to be the case. The thirteen women who testified before the Tribunal told stories about the continued problems and barriers that they faced while on the job.[268] This is not a phenomenon unique to C.N. Most women in any position that is not considered traditional for them encounter negative attitudes and a generally hostile atmosphere.

Women will find it more difficult to prove their worth because they are under constant close scrutiny, leaving little room for mistakes.[269] The pressure to out-perform their male counterparts tends to be especially heavy on those women who acquired their positions with the aid of an affirmative action program, because they are perceived as undeserving of their position.[270] In out-performing her male cohorts, a woman risks enraging them. They, in turn, may try to humiliate her and seek to devalue her work to maintain their attitude of superiority, or at least to prove that she got her position not because of merit, but because of special preference. Stories of that type of treatment abound.[271] Those types of pressures

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267 [1987] 1 S C R , at page 1143

268 [1987] 1 S C R , at page 1123

269 See generally, Linda Greene "Equal Employment Opportunity Law Twenty Years After the Civil Rights Act of 1964 Prospects for the Realization of Equality in Employment", 18 Suffolk University Law Review 593

270 See generally, MacIntosh, supra, note 265, at page 288

271 See generally, Sylvia Law, "'Girls Can't Be Plumbers' - Affirmative Action for Women in Construction Beyond Goals and Quotas , Eva Kracow, 'Whistles While You Work", 6 15 Montreal Mirror 5, October 4, 1990 Stephanie M Wildman Integration in the 1980's The Dream of Diversity and the Cycle of Exclusion", 64 Tulane Law Review 1625 On March 8th, 1990, the Canadian Broadcasting Corporation program Ideas ran a story on women trying to make-it in non-traditional jobs "Journey of Women", written by Kate Braid

are as much a barrier to women and the members of other minority groups as the employment practices that restrict their chances of being hired or promoted.

In *Janzen v. Platy Enterprises Ltd.*, the Supreme Court of Canada recognized the effect of sexist attitudes and conduct on the employment of women.[272] The Court ruled that sexual harassment is discrimination because it detrimentally affects the work environment and leads to adverse consequences. Chief Justice Dickson characterized sexual harassment as both a practice and an attitude that constitute a barrier to the employment of women:

> The sexual harassment the appellant suffered fits the definition of sex discrimination offered earlier: "practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic related to gender".[273]

The Task Force on Barriers to Women in the Public Service found that the attitudes and beliefs of managers and supervisors were the main barrier to promotion and advancement.[274]

A scheme that focusses upon increasing the representation of minorities in the work place may allow major attitudinal barriers to persist unabated. It may be argued that legal schemes should concentrate on changing behaviour rather than attitudes, because behaviour can be legislated through the imposition of quotas and other obligations. But can that behaviour be enforced effectively or efficiently? In fact, it is equally arguable that quotas and goals exacerbate prejudicial attitudes and engender resentment among employees and employers. Unless such measures aimed at changing behaviour are accompanied by other measures designed to re-

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272 Janzen v Platy Enterprises, [1989] 1 S C R 1252

273 [1989] 1 S C R 1252, at page 1290

274 Task Force on Barriers to Women in the Public Service, supra, note 175, at page 53

educate employers and employees and make them willing partners in the quest for employment equity, then the attempt to change behaviour through legislative edicts will meet considerable resistance. If the attitudinal dimension is not addressed directly, then strides to increase the representation of minorities either through numerical remedies alone, or through combined effort of numerical remedies and the elimination of restrictive practices is bound to fail to achieve a long term solution to employment discrimination.

Part 2, Section B

Employment Equity and Regulatory Action

The absence of the attitudinal dimension from the employment equity agenda, and the cursory attention paid to the elimination of restrictive practices within the framework of the *EEA*, prompts one to re-consider the method and scope of the employment equity scheme. As already pointed out, currently, the federal employment equity scheme appears to concentrate on increasing the representation of minorities in the work place. Approaching employment equity as a matter of representativeness assumes that there is a "correct proportion" for each designated group. The work place should then be divided into "pieces of pie" which would then be allotted to each designated group according to their proportion in the local population. It follows that each group's "piece of pie" can be numerically determined so that an employer has a standard by which to measure the progress and success of a employment equity plan.

Even though it is unclear whether the Human Rights Tribunal in *Action Travail* espoused the numbers approach, the remedy fashioned in that case reflects the type of orders that might follow from this type of reasoning. Since at the time of the hearing before the Federal Tribunal women held thirteen per cent of blue-collar jobs nation-wide, the remedy used that as a benchmark for setting the quota. What is the rationale for choosing the national representation of women in blue-collar jobs as a measuring stick, as opposed to their representation in the work force

generally?[275] Often the proportion of women in any given population changes over time. Thus the measuring standard is a moving target. Moreover, it is somewhat dubious to look towards the thirteen per cent figure as a measuring standard for employment equity when that figure itself may be a reflection of a discriminatory practices and attitudes nation-wide.

Attempting to determine the correct representation of the work place raises a collateral problem. Why do only women, visible minorities, natives, and the disabled deserve a piece of the pie? Those who favour the numbers approach must justify why only those four categories are relevant to the vision of a discrimination-free society. Given the logic of statistical parity, why should not other ethnic groups, short persons, or persons of particular religious denominations be apportioned a share of the workplace? When one considers that the numbers approach essentially substitutes the goal of a representative work force as a proxy for the goal of eliminating discriminatory barriers to employment opportunity, then those questions loom large. The inability to answer those questions adequately should dampen the enthusiasm for striving towards representativeness as a goal in itself. It should also raise some concern about relying so exclusively upon numerical solutions.[276]

These doubts do not attach to the removal of discriminatory attitudes and restrictive practices. The elimination of those barriers is bound to benefit any person who suffers as a result of systemic discrimination regardless of which group that person belongs to. It would not be necessary to determine the proper

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275 At the time of the hearing, women represented 40 7 per cent of the total Canadian labour force, [1987] 1 S C R , at page 1123 Today, that figure has increased to 44 per cent, Department of Employment and Immigration, Employment Equity Act, Annual Report 1990, at page 28

276 See generally Canadian Human Rights Commission, Annual Report, 1989, and Annual Report, 1990 The 1989 Report noted that employment equity planning must proceed as an integral part of human resources management, that it is not a numbers game, at page 37 The 1990 Report notes that "It takes no mathematical genius to realize that even the smallest improvement for a given group is an amalgam of many factors changes in the way data are collected or presented, for instance, or the statistical averaging of discrepancies between occupational sectors or levels, or simply the net results of varying hiring and firing rates" at page 43

representations of chosen groups, because the removal of barriers is not predicated upon such calculations. In the ensuing freedom to pursue employment, the composition of the work place would reflect the preferences and inclinations of the work force. It may be helpful to consider the degree of representation of the designated groups for the purpose of identifying problematic areas and focusing attention. However, it should not necessarily follow that the groups whose statistics assist in flagging discriminatory attitudes, practices, and policies are the only ones that are suffering adverse effects. Similarly, it should not be assumed that a remedy designed to increase the representativeness of those groups will also relieve other individuals from the effects of discrimination.

The unanswered question is how should the employment equity scheme be changed or adjusted in order to treat the disease, as opposed to soothing the symptoms. In other words, how can the scheme give more practical emphasis to the goal of eliminating the barriers that are engendered in discriminatory attitudes and restrictive practices? Currently, a Parliamentary Committee is conducting the first review of the *Employment Equity Act*. It will consider whether or not to amend the *Act*, along with various proposals for expanding the current scheme.

In its last several *Annual Reports*, the Canadian Human Rights Commission has been advocating a greater role for itself in the enforcement of the *EEA*. In particular, it proposed that the Commission be granted a formal mandate under the *EEA* to target, investigate, and pursue employers who engage in systemic discrimination. While well-suited to deal with individual incidents of discrimination, the current complaints system has limitations in dealing with systemic discrimination. The Commission is entitled to initiate a complaint, but usually lacks the reasonable grounds necessary to launch an investigation. Thus it must wait for an aggrieved

party to file a complaint. If a particular barrier is subtle, it may be that no individual is conscious of its adverse effect.

Currently, there is a debate over whether the statistical under-representation of minorities constitutes reasonable grounds for initiating a complaint. It was noted that the *EEA* obliges employers to achieve statistical parity, but provides no authority to the Commission to prosecute an employer that fails to do so. The Canadian Human Rights Commission must therefore rely upon its existing jurisdiction under the *Canadian Human Rights Act* for authority to enforce employment equity standards. While the Commission has the authority to initiate its own investigation and complaint, it appears that in order to do so under section 10, the Commission must find a policy, practice, or agreement which has the intent or effect of reducing employment opportunities.[277] Section 10 does not appear to fault an employer for maintaining a work force that does not reflect the make-up of the federal labour market or for failing to fulfill any other obligations under the *EEA*.

Had the prosecution of C.N. in *Action Travail* relied exclusively upon the under-representation of women, then there would have been less doubt that the Commission could rely exclusively upon the statistics gathered through the annual reporting requirements under the *EEA* to initiate a complaint in cases where there was a significant statistical imbalance in the composition of an employer's work force. The authority of the Commission to initiate and prosecute a complaint on the basis of statistics alone is currently being challenged by Bell Canada in a long and drawn-out case. While the Human Rights Commission claims that statistical

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277 10 It is a discriminatory practice for an employer, employee organization or organization of employers, (a) to establish or pursue a policy or practice, or (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination

data fulfills the "reasonable grounds" standard, that issue has yet to be addressed by any court or tribunal. Indeed, the Commission itself has expressed concerns over the lack of a clear mandate, and requested legislative clarification:

> If the Canadian Human Rights Commission is to have the tools to deal with systemic barriers in a comprehensive way, consideration must also be given to appropriate changes that will recognize its authority to initiate a review or audit to ensure that employers are in compliance with the Human Rights Act, and allow it to approve a resulting plan and give assurances that matters dealt with in that plan will not, unless circumstances change, constitute the basis for a complaint under the Act.[278]

The Commission is sensitive to criticism of its activities, and has admitted that some feel it goes about its task too zealously.[279]

Great Britain has attempted to render its human rights agencies more effective by giving them the power to launch general strategic investigations in addition to handling individual complaints. Both the Commission for Racial Equality (CRE) and the Equal Opportunities Commission (EOC) were granted the power to carry out formal investigations on their own initiative.[280] These investigations could target the activities of a particular person or industry with or without an allegation of discrimination. Upon finding an unlawful act of discrimination, the Commissions were authorized to issue non-discrimination notices. These formal investigations are considered more important than the resolution of indivdual complaints because it was thought that they would be able to deal with pervasive practices that were practiced as the norm of doing business.[281]

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278 Canadian Human Rights Commission, Annual Report, 1989, at page 59

279 Canadian Human Rights Commission, Annual Report, 1989, at page 12

280 Sex Discrimination Act (U K) 1975, c 65, Race Relations Act (U K) 1976, c 74

281 George Appleby, Evelyn Ellis, "Formal Investigations The Commission for Racial Equality and the Equal Opportunities Commission as Law Enforcement Agencies', in (1984) Public Law 236, at page 262

In practice, these formal investigations came under considerable attack from both the judiciary and the private sector. Like the Canadian Broadcasting Corporation and Bell Canada, British companies resented general investigations into their affairs. The judiciary, on the other hand, were uncomfortable with the administrative scheme that summarily dealt with what appeared to be quasi-criminal matters, an area left traditionally to the courts. The Commissions' ability to choose its target and thus to attach a stigma appeared arbitrary. And yet, the ability to choose a target for a formal investigation was crucial to the successful prosecution of discrimination given the limited resources on one hand and, on the other, the industry-wide nature of the discrimination. The proper choice of targets would enable the Commissions to achieve a considerable degree of exposure, and publicity.[282] This is precisely the strategy pursued by the EEOC in the United States, where the threat of litigation "persuaded" many employers to pursue affirmative action voluntarily. The British courts expressed their displeasure by restricting the Commissions' ability to launch and pursue their formal investigations.

Canadian courts may not be ill disposed to formal investigations by the Canadian Human Rights Commission, so long as such investigations are explicitly mandated by legislation. Human rights codes enjoy an elevated status under the wing of the *Charter*. In addition, the Supreme Court of Canada has recognized the particular problem of systemic discrimination in *Action Travail* along with the need of special approaches and remedies to deal with it. Canadian courts are more likely to be comfortable with the Commission conducting formal investigation, because the use of tribunals for the imposition of sanctions approximates the various safeguards associated with court adjudication. However, while granting the Canadian Human Rights Commission the mandate to conduct formal investigations will enhance its

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282 Robertson supra, note 181, at page 23

ability to pursue employers who engage in systemic discrimination, that power will not overcome the other short-comings of a complaint-based process. Even if the complaint process was efficient, it would not make employers willing partners in employment equity. Ordering mandatory affirmative action will do little for changing discriminatory attitudes.

Regulation Through Education

An alternative approach to pursuing employers on the basis of complaints would be to motivate the employers to eliminate the discriminatory barriers that are latent in their practices and policies. Indeed, it appears that the *EEA* relies upon employers to take the initiative to find and alter their own restrictive practices. The employers are obliged to conduct an examination of their practices and produce a plan to implement employment equity. However, such an obligation does not instill the will to do so. The desire to eliminate discriminatory practices will arise only when employers come to recognize the value of employment equity alongside the traditional values of productivity and profitability. Nothing less than a fundamental change in attitudes will give rise to such a desire.

The *Guide for Employers* acknowledges the need for this attitudinal change:

> Employment Equity is most successful when commitment and support at senior levels is visible and consistent
>
> Senior management is most supportive when they believe that change is necessary and that Employment Equity will contribute to improved employee morale and productivity.[283]

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283 Department of Employment and Immigration, Employment Equity A Guide For Employers, note 215, at page 15.

However, the *Guide* says nothing more about how to achieve that commitment. Directing senior management to re-educate themselves about the virtue of eliminating restrictive practices is asking them to pull themselves up by the boot straps. Surely only one who is already convinced of the virtues of employment equity is in the position to teach those virtues to one who needs to be convinced.

Perhaps, this could be accomplished through a public education campaign, or through a program targeted specifically at the board room and executive officers. Employer workshops and seminars such as those instituted in the past year by the Canadian Human Rights Commission to explain what kinds of analysis is necessary for meaningful change could be expanded.[284] In addition, the curricula of studies in business administration could be augmented to provide students who may go on to take positions in the management of larger employers with an appreciation of the values of employment equity.[285]

Such education would help to make latent barriers visible to the employers. Most employment barriers do not arise as a result of a desire to discriminate, but rather because employers do not realize the detrimental effect that their long-standing practices and policies have on minorities. They could be provided with specific guidance on recognizing the restrictive nature of their practices. The goal of achieving representativeness benefits from a highly developed reporting scheme, complete with forms and detailed instructions for employers on how to classify employees into the various relevant categories. Such detailed and specific guidelines could also highlight practices that are susceptible to restricting the employment

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284 Canadian Human Rights Commission, Annual Report 1990, at page 48

285 Recently, the Task Force on Barriers to Women in the Public Service recommended that the Canadian Centre for Management Development integrate a course about employment equity into their curriculum for senior public servants, supra, note 175, at page 133

opportunities of disadvantaged individuals. Some strides are being made to help employers undertake such a review of their employment practices and procedures. In 1989, the Department of Employment and Immigration produced an *Employment Systems Review Guide*, to illustrate the ways in which various employment systems may be discriminatory.[286] The *Guide* addresses several areas where discriminatory barriers may arise, including, recruitment, training and development, upward mobility, job evaluation, compensation, benefits, conditions of employment, and procedures relating to lay-off, recall, disciplinary action and termination. For each of these areas, the *Guide* discusses possible forms of discrimination and suggests alternatives and solutions.

However, the effect and application of this *Guide* ultimately depends upon the volition of employers. It may help improve the efforts of those employers who are already committed to eliminating discrimination from their work environment. But it is unlikely to convince uncommitted employers to take up the task of fighting discrimination. Convincing employers of the need for employment equity is a separate problem from teaching them how to recognize employment barriers.

The education of employers is closely allied with the elimination of prejudicial and paternalistic attitudes generally, as these are the root causes of barriers to employment opportunity. It is possible that the influx of minority groups into the work place through affirmative action will help dispell the paternalistic stereo-types in the fashion anticipated by Chief Justice Dickson in *Action Travail*. But affirmative action and the creation of a "critical mass" may also polarize the work place between those employees who welcome the idea of employment equity, and those who are either firmly convinced in the traditional stereo-types or simply

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286 Canadian Employment and Immigration Commission, Employment Systems Review Guide Technical Training Manual on Employment Equity, Module 3, supra, note 251

prejudicial towards the designated minorities. The *EEA* calls upon employers to consult with employees and their representatives. However, it would be wrong to assume that current employees or their representatives would favour employment equity if they themselves carry discriminatory attitudes, or if they feel that their interests of promotion are threatened by employment equity programs. Any affirmative action-type program may be perceived as preferential treatment and resented as a form of reverse discrimination. Facilitating true integration of minority employees in the work place requires that measures for increasing representation of minorities be accompanied by steps to eradicate discriminatory attitudes among current employees and employer representatives, and educational measures to dispell their anxieties.

Discriminatory behaviour has also had reprecussions on the attitudes of those who belong to the designated groups. Those who stand to benefit from numerical targets and quotas resent the implication that they needed them to advance, while those who did not advance blame their fate on the targets and goals.[287] Perceiving that they have been unwanted in particular jobs or trades in the past, members of designated groups feel inhibited from applying for such employment. Such inhibitions arise also from exposure to stereo-types in the media, in the family and in school. Efforts to discredit stereo-types reduce those inhibitions, along with parternalistic or prejudicial attitudes. The curricula in schools have already been adjusted to remove racial and gender stereotypes. Similar efforts are evident in print, billboard, and electronic advertising. The presence of women in such visible positions as public transit drivers or police officers also contributes to the reduction of traditional stereotypes. Some women who have succeeded in non-traditional jobs are visiting secondary schools on their own initiative to talk with female students

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287 Task Force on Barriers to Women in the Public Service, supra, note 175, at page 128

about the opportunity to take up employment that had been earlier considered to be the preserve of males.[288] The elimination of inhibitions could have an impact on the number of disadvantaged individuals seeking higher education and applying for more advanced positions of employment.

The acquisition of job qualifications is also an important factor in the broadening of employment opportunities. However, currently the employment equity scheme does not address the barriers faced by minorities in acquiring those job qualifications. Subsection 4(b)(ii) of the *EEA* obliges employers to attain a proportional representation only with respect to the qualified pool of candidates in the work force. Thus, under the current scheme of the *Act*, it is not regarded as a problem if a designated group has been or continues to be excluded or discouraged from the special training programs needed to enter a particular pool of qualified candidates. Once an employer achieves a proportional representation with respect to the current qualified applicant pool, the goal of employment equity is considered accomplished. The Human Rights Tribunal in *Action Travail*, for example, fashioned its remedy based on the proportion of women in the blue collar work force. There was no inquiry into the reasons why that proportion was far below the proportion of women in the work force generally.

Women face the same discriminatory barriers to the entrance of training programs as to the entrance into the work place. There are reports of women being turned away from training programs because it involved a "man's trade".[289] Women often get routed into "dead-end" clerical positions without the time or opportunity

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288 Kate Braid. "Journey of Women", Canadian Broadcasting Corporation Ideas, March 8, 1990 Often one hears of career days or conferences which place a special emphasis on introducing women to non-traditional jobs.

289 See generally, Kracow, supra, note 271

to develop skills that may lead to an alternate career. One manager in the public service observed that:

> The training opportunities offered to women in the public service are limited and seem chiefly confined to making them better at their existing jobs - when what is really needed is to give them the marketable skills to break into other areas.[290]

On-the-job re-training programs could facilitate a woman's promotion into a better-paying job in those cases.

The accommodation of employees with responsibilities for raising and caring for children is another issue. While the traditional division of family roles prevails, those responsibilities are carried by women to a greater extent than men. Those responsibilities decrease their ability to acquire degrees of higher education that may be necessary for some employment positions, or specialized training that may be necessary for some skilled jobs. Often their entrance into the work force is delayed by the time it takes to raise a family to the school age. And then, a woman's opportunities is often restricted by on-going commitments to the family. Career advancement is tied to the traditional view of commitment which is gauged by ambition and the desire for increased salary.[291] The ability of women to pursue a successful career simultaneously with the such responsibilities has been linked to the provision of affordable child-care services and other flexible work arrangements.[292]

Perhaps the employment equity scheme could take a more concerted approach to finding and eliminating barriers faced by minorities in the acquisition of job qualifications. The current framework is limited because it relies upon the

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290 Task Force on Barriers to Women in the Public Service, supra, note 175, page 63

291 Task Force on Barriers to Women in the Public Service, supra, note 175, page 64

292 There is also an attitudinal problem connected with family commitments Time taken by women to tend to family needs is frowned upon as an interference work, but the same time taken by men is commended as an effort to be a good father See generally, Task Force on Barrier to Women in the Public Service, supra, note 175, page 80

initiative of employers. While employers do play a role in the acquisition of qualifications and skills training, much of that area lies beyond their realm. The provision of adequate and affordable child-care services, for example, falls outside the responsibility or concern of employers. Innovative solutions for accommodating parents could be recognized as part of the employment equity framework. Instead of relying on the altruism of employers, the federal government could provide financial incentives for education, job-training programs, and flexible work arrangements.[293]

Is More Regulation the Answer?

The Parliamentary Committee that is scheduled to begin a review of the *EEA* in the fall of 1991 will most likely hear these various suggestions for expanding the scope and jurisdiction of the employment equity scheme. Unlike those who make those proposals, the Committee will not be appraising the suggestions only on the basis of their academic merit or possible effectiveness on the long-term employment discrimination. Rather, in light of the limited resources that the federal government is expected to spend on any social problem, the Committee will have to ponder political considerations as well. Employment discrimination, after all, is not a greater problem than homelessness, crime, poverty, unemployment, and other social ills. Therefore, notwithstanding the merits or intellectual integrity of the proposals, the Committee will be most interested in whether they can produce tangible results for the resources that are expended.

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293 See generally, MacIntosh, supra, note 265, at page 294

The Abella *Report* has made it apparent that systemic employment discrimination is not the deficient conduct of some persons that can be brought into line with the standard of conduct through investigation and prosecution of complaints. Rather employment discrimination is the present standard of conduct. The practices and policies of employers are only one manifestation of society's value system. The ultimate solution therefore would lie in changing the attitudes and hence the standard of conduct of society in general.

From that position it could be argued that the regulatory agenda of the *EEA* should be expanded to include activities such as issuing comprehensive guidelines on acceptable employer conduct, and advertising standards. It could be argued that society in general should bear the cost of rectifying the problem inasmuch as no one in particular can be blamed for the attitudes and practices that compose employment discrimination. Since health, poverty, and unemployment are all societal problems, the general public bears the cost of addressing those concerns through public programs. The trend towards spreading the cost of societal phenomena is evident in other areas, such as no-fault automobile insurance and workers compensation. Both these schemes treat issues of blame as irrelevant, and treat the cost of dealing with the respective problems as the price one pays for living in a society where accidents are bound to happen.

The current employment equity scheme spreads the costs of eliminating discriminatory barriers among employers by requiring them to expend money to develop and implement employment equity plans. Some of that cost will be passed on to the general public through the price of consumer goods and services. However, society also bears the cost of supporting the public regulatory structure used in running the scheme. The cost of expanding the employment equity scheme

into such programs as education campaigns and training incentives would also be borne by society in general through the public purse.

However, those broad regulatory initiatives would expand the jurisdiction of the employment equity scheme beyond the present boundaries of federal powers, into matters of education, advertising, and the media. Those matters fall within provincial jurisdiction. Provinces already have their own human rights codes to deal with aspects of discrimination in those areas, and will likely challenge any expansion of the scope of the federal employment equity regime into provincial jurisdiction.

An attempt to eradicate all discriminatory attitudes also reaches beyond the intention and scope of the *EEA*. The Act was designed to deal with employment-related aspects of discrimination. Discriminatory attitudes are common to all types of discriminatory behaviour, not only that which is involved in employment situations. While the discriminatory attitudes that are at play in the employment context have their sources in the media, educational curricula, childhood experiences, and cultural conditioning, these areas lie beyond the reach and competency of employers. Efforts to change discriminatory attitudes generally will overlap with the mandate of the *Canadian Human Rights Act* that already carries the responsibility for the total range of discriminatory conduct. It could be argued that suggestions to eliminate discriminatory attitudes generally should be forwarded to the Canadian Human Rights Commission, and not divert the focus of the employment equity scheme. At the very least, however, the *EEA* could be directed to preventing the work place culture from transmitting discriminatory attitudes to new employees that seek to conform to their peers.

The parameters of the federal jurisdiction and the employment context will assist the Parliamentary Committee in resisting to recommend a bold expansion of the employment equity scheme. Given those parameters, however, one is still left

with a choice of approaches. On one hand there is the "hard" approach, characterized by the implementation and even imposition of affirmative action-type goals and quotas. The "hard" approach champions the goal of achieving representativeness, and aims to legislate conduct of employers. On the other hand, there is the "soft" approach, characterized by joint reviews and education programs. The soft approach aims to dismantle employment barriers through the elimination of the attitudes and stereo-types that underlie restrictive practices. The Parliamentary Committee will consider the advantages and disadvantages of the two approaches.

Effective education under the soft approach will result in a stronger and more lasting degree of compliance to a non-discriminatory standard of conduct on behalf of employers.[294] Employers that are committed to the ideal of employment equity as willing partners will be in a better position to make the necessary adjustments in the work place than the Human Rights Commission. Also, the soft approach avoids the calculation of correct proportions of minority representation. The issue of designating some groups as disadvantaged while leaving others outside the scope of employment equity would cease to be of concern, because presumably any person who is disadvantaged by restrictive practices and attitudes would benefit from their suppression.

However, the soft approach has been criticized as operating too slowily for a problem that is causing immediate harm and requires immediate solutions. The experience with voluntary affirmative action programs to-date does not inspire much confidence in the pace at which employers adhere to employment equity ideals In addition, there is no empirical method to measure the extent of impact of

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294 Rod Macdonald, "Understanding Regulation by Regulations", in Regulations, Crown Corporations and Administrative Tribunals, University of Toronto Press (Toronto 1985)

educational programs upon the opportunities of designated groups in the employment market. Thus, it would be difficult for politicians to justify the considerable expenditure on a regulatory scheme that does not readily make visible its results.

The hard approach is beneficial in providing tangible results in a short span of time. Parliament can legislate conduct to raise the representativeness of the designated groups. It cannot legislate attitudes. Achieving a representative work force seems to be a more administratively convenient task than dismantling employment barriers. One can quantify the objective of statistical parity and break it down into a timetable of goals. Relative to looking for employment barriers, the Department of Employment and Immigration will find it more straightforward to measure employers' progress towards a representative work force. Difficult subjective judgments about how certain practices tend to affect designated groups need not be made by the employer in the pursuit of its obligation under subsection 4(b).

However, in the absence of a true change in attitudes, representativeness once achieved is in danger of receeding unless affirmative action measures are sustained. Politically, the hard approach is bound not to be popular. The imposition of quotas would be perceived as heavy-handed government supervision and interference in the private market. Such "social technology and engineering" has been criticized as substituting the unregulated role modelling of society, with a state-supervised role modelling.[295] It is feared that a supervised policy mandating proper representation will create a guardian democracy and increase the power of administrative, judicial, and quasi-judicial agencies which would supervise employers.

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295 See generally, Knopff, supra, note 81

Perhaps the best solution would be to move towards both the soft and hard approaches. Current efforts of the Canadian Human Rights Commission are bound to increase the consciousness about employment barriers among employers. There are already signs that the next generation has shed some of the traditional stereotypes and prejudicial attitudes. The Canadian Employment and Immigration Commission could be given a stronger mandate and more resources to render educational programs for employers more effective. That will help those employers who are already willing to eliminate restrictive practices to do a better job. Demystifying employment equity will also go far towards reducing employer resistance to taking part in the elimination of employment barriers.

Both employers and employees may be apprehensive about the obligation to achieve a representative work force, under subsection 4(b) of the *EEA*. That subsection stipulates that an employer's work force should reflect the composition of the pool of qualified applicants for a job. The current composition of work forces most likely lags behind the composition of the qualified applicant pools because of the attitudes, practices, and policies that have inhibited the hiring and promotion of the designated minorities in the past and present. Also the proportion of minorities in qualified applicant pools have progressively increased and continue to do so. In order to "catch-up", employers would have to institute rather drastic affirmative action programs. For example, a university with a faculty where women are under-represented in comparison to their representation in society would have to hire female professors at a greater rate than their proportion in the pool of qualified applicants. Such a measure was ordered in *Action Travail*. Indeed, a university might even have to ignore all male applicants and hire exclusively women in order to achieve an over-all representation of female faculty members that would match their proportion in society. Such a measure would essentially reward current

female applicants for an injury caused to female applicants of the past, and it would penalize current male applicants for an advantage given to male applicants in the past.

If employment equity is about fairness and an equal playing field, then it would be more appropriate for the *EEA* to require that the rate of hirings correspond to the composition of the pool of qualified applicants. Similarly, promotions should match the composition of the pool of applicants that corresponds to that level or position. Eventually, the composition of the work force will be adjusted to reflect the representation of minorities in the pools of qualified applicants. Expediting the process has the appearance of punishing individuals who are not members of the designated minorities and compensating members of those minorities. As a systemic, forward-looking remedy, employment equity was not intended or designed to provide compensation to the designated minorities for wrongs visited upon other members of those minorities in the past. In *Action Travail*, Chief Justice Dickson captured this point when talking about employment equity: "The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past..."[296] Moreover, by appearing to penalize non-members, employment equity may not be popular employers and their current employees. Rather, it may generate the type of apprehension and resistance that is associated with affirmative action.

That apprehension and resistance can be reduced by clarifying the implications of subsection 4(b). Educating employers and employees about employment equity in general will compliment measures designed to eliminate discriminatory attitudes and stereotypes. Allying employers and employees will

296 [1987] 1 S C R., at page 1143

greatly assist the cause of employment equity. More benefit for all disadvantaged individuals will arise from the combination of small and consistent employment equity measures taken by willing employers than from the intensive resolution of a limited number of complaints.[297] However, it is also important to render the complaints systems more effective by explicitly recognizing a strong mandate for the Canadian Human Rights Commission to investigate employers for systemic discrimination. A more effective enforcement mechanism will persuade more employers not to risk consequences of not complying with their *EEA* obligations and the costly legal proceedings that may follow.

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297 Robertson, supra, note 161, at page 11.

Conclusion

When Judge Rosalie Abella introduced the term "employment equity" in her *Report on Equality in Employment*, she suggested that Canada should distance itself from the controversy that rages in the United States over affirmative action. In the area of employment discrimination, the Federal government has borrowed many concepts from the United States. But it has nevertheless incorporated them into a unique regime by combining a proactive tenor with a hands-off approach.

The *Employment Equity Act* promotes the achievement of a representative work force and the elimination of restrictive employment practices. However, the *EEA* avoids any heavy-handed imposition of quotas or goals, preferring to rely upon the initiative and good sense of employers. At first glance, one is tempted to label that approach as a typically Canadian, middle-of-the-road solution, that seeks to appease both the designated minorities and employers. On a second look, however, it becomes apparent that the approach taken in the *EEA* is an ingenious way of reducing employment discrimination without stirring debate, or attracting suspicion or resistance from employers.

Employers are the lynch-pin to removing discrimination from the work place, because that is their domain. What better way is there to dismantle discriminatory practices and policies which are the standard of conduct, than to persuade employers that such practices and policies are not in their own best interests. Employers have an inherent distrust of and dislike for government supervision. That supervision is perceived as unwarranted interference in the employer's business and freedom of choice. The experience of affirmative action in the United States showed that the imposition of quotas and hiring goals is particularly distasteful. That is precisely

why the term affirmative action has been avoided; employers get a knee-jerk reaction upon hearing the term.

By not imposing quotas, the *Employment Equity Act* avoids raising the guard of employers. While it obliges employers to implement employment equity, it leaves the details of devising a plan of action up to the employers. The *Act* only obligates an employer to file an annual report describing the state of its work force. By going through the steps of collecting and reporting the data on the composition of the work force, employers will become more conscious about trends and discrepancies. Perhaps, the employer would want to discover the reason for the particular patterns in its personnel policy.[298] Creating and filing an employment equity plan further heightens an employer's consciousness about its hiring and promotion policies. All this occurs in a non-threatening context, where the employer's decisions and choices remain formally unchallenged. It is anticipated that employers will be persuaded by this process to take creative steps to remove barriers that restrict the employment opportunities of some members of the work force.

The alternative is to impose stringent obligations that can be court-enforced. To do so, first requires the government to accomplish the impossible task of deciding who should be preferred and to what extent. It further requires the development of a policing mechanism capable of detecting transgressions against the established standard of representativeness. Assuming that such a mechanism is viable, the Canadian Human Rights Commission may be able to bring some employers before the Human Rights Tribunal, in the hope that other employers will implement employment equity rather than risk a similar prosecution. Under this approach, employers implement employment equity out of fear for prosecution, not upon a conviction that employment equity is a good policy in an of itself. Tougher

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298 Robertson, supra, note 181, at pages 11 and 36

and more expansive regulations cannot guarantee compliance either. An unwilling employer is likely to find ways of limiting their practical effect.[299]

If, on the other hand, the employers are persuaded to take the initiative in employment equity in their own interest and in the interest of fair play, then their measures are bound to be more effective and better suited to the particular circumstances of their work place. One public service executive expressed his support for persuasion in the following manner:

> Quotas do not work, a systems solution will not work. Managers are very adept at side-stepping systems to get what they want. Somehow, managers must develop a commitment to change. A good manager can walk around the system, but one committed manager will do more than all the systems.[300]

In addition to the inertia created by their commitment, employers will feel more comfortable about a plan and goals which they helped to develop. Granted, such a soft approach may not be effective with all employers. The CBC and Bell Canada, for example, were more willing to incur the expense of challenging the Commission's mandate to investigate, than to participate in a joint-review of personnel procedures. Such employers might have to be brought into compliance with the *EEA* through effective prosecutions.

If the success of the *Employment Equity Act* is to be measured in terms of the reduction of employment barriers, then the *Act* currently contains the essential elements necessary to become successful. Incremental and widespread reductions of those barriers are more beneficial to the affected minorities than the sporadic forced increase in representativeness of some minority groups in the work place of some employers. Voluntary measures taken by employers with an understanding of

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299 Task Force on Barriers to Women in the Public Service, supra, note 175, page 61

300 Task Force on Barriers to Women in the Public Service, supra, note 175, page 129

the problem of discrimination have a stronger foundation upon which to survive than measures taken in avoidance of litigation and sanctions.

The employment equity scheme can benefit from improvements on two fronts. First, the obligations set out in the *EEA* would be taken more seriously by indifferent employers if the Canadian Human Rights Commission is given an explicit mandate to investigate and prosecute employers that persist in ignoring discriminatory practices. Second, more emphasis needs to be given to the education of employers and employees. Any possibility of persuading an employer to adopt the cause of employment equity should be exhausted to its fullest extent. That would require increasing resources for such initiatives as workshops, seminars, joint-reviews, and guidelines. However, the Federal government should resist the temptation of increasing the profile of statistical parity. It is next to impossible to determine the correct composition of the work force. Moreover, the achievement of a representative work force will not guarantee the elimination of discriminatory practices or attitudes. Finally, any attempt to alot shares of the work place to designated groups through the imposition of quotas will turn employers against the cause of employment equity.

The last five years have provided an opportunity to step back from initial expectations and to take a critical look at the effectiveness of the *Employment Equity Act*. It is hoped that the government will realize that the employment equity scheme could benefit from an increased emphasis on the elimination of restrictive practices and discriminatory attitudes. The degree to which the scheme will be enhanced and funded will reflect the degree of commitment and priority that the government attaches to employment equity among the government's other public agendas. However, the political decision on whether or not augment the *Employment Equity Act* will not be taken under the false expectation that the

achievement of a representative work force will constitute a solution to employment discrimination.

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