THE *EMPLOYMENT EQUITY ACT*: AN EXAMINATION OF ITS DEVELOPMENT AND DIRECTION

*Lubomyr Chabursky**

The Employment Equity Act *obliges employers to undertake affirmative action to combat employment discrimination. On 31 October 1991, a Parliamentary Committee was appointed to review the* EEA *and make recommendations for its improvement. This article assesses the* EEA *within the historical context of discrimination remedies. The article 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 workplace.*

En vertu de la Loi sur l'équité en matière d'emploi, *les employeurs et les employeuses 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. Le présent article évalue cette loi dans le contexte historique des recours en matière de discrimination. Selon cet article, 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 et les employeuses 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 et les employeuses à devenir des partenaires égaux dans la lutte contre la discrimination en milieu de travail.*

* The author wishes to thank Roderick Macdonald, Blaine Baker, and Rosalie Silberman Abella for in-depth discussions about employment equity.

INTRODUCTION

August 13th, 1991 marked five years since the Canadian Parliament enacted the *Employment Equity Act* of 1986.[1] 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, not in the lap of the victim. In its proactive and systemic conception, the *EEA* constituted a bold initiative. In its design and mechanism, however, 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 workforces. The *EEA* requires that employers create and implement plans to increase the representation of disadvantaged minorities in their workplaces, but the *EEA* provides for no enforcement mechanism to back up those obligations.

The *Canadian Human Rights Act*[2] and other provincial human rights codes address various forms of discrimination. Among the various types, however, 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 discriminatory.[3] 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.

---

[1] R.S.C. 1985 (2d Supp.), c. 23 [hereinafter *EEA*].

[2] R.S.C. 1985, c. H-6, [hereinafter *CHRA*].

[3] W. Black, EMPLOYMENT EQUALITY: A SYSTEMIC APPROACH (Ottawa: Human Rights Research and Education Centre, University of Ottawa, 1985).

Arguments about the methods of solving employment discrimination occupy a broad spectrum of views and appear to dominate most of the discussion that revolves around this topic. On 30 October 1991, a Parliamentary Committee was appointed to review "the provisions and operation of this Act including the effect of such provisions".[4] On 7 May 1992, the Committee tabled its report, *A Matter of Fairness*, in the House of Commons after hearing months of oral submissions and reading hundreds of pages of written briefs submitted on behalf of a wide cross-section of Canadians.[5] The Parliamentary Committee did not consider whether employment discrimination should be eliminated. Rather, it considered the question of how that should be accomplished. It is on that basis that the Committee reviewed the *EEA*, seeking to establish whether it has been successful in achieving its goals, and analyzed whether and which new methods should be attempted to achieve tangible results.

THE CONCEPT OF DISCRIMINATION

While all 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, Asians, or members of other racial minorities. Discrimination was seen to consist of blatant acts of exclusion causing harm to an individual.[6] As with most criminal offences, wrongdoers were punished not simply for having caused harm, but also for having engaged in morally reprehensible behaviour.[7] 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.[8]

---

[4] *Supra*, note 1, s. 13(1).

[5] Special Committee on the Review of the Employment Equity Act, *A Matter of Fairness* (Ottawa: Supply & Services Canada, 1992) [hereinafter *A Matter of Fairness*].

[6] *See generally* W. Tarnopolsky, DISCRIMINATION AND THE LAW (Toronto: Richard De Boo, 1985) at 4-29; A.W. Blumrosen, *Strangers in Paradise:* Griggs *v.* Duke Power Co. *and the Concept of Employment Discrimination* (1972) 71 MICH. L. REV. 59 at 61*ff*.

[7] Moral responsibility and criminal guilt attaches only to voluntary acts. Hence, intent was a key component of discrimination.

[8] *Britnell* v. *Rudolph and Michael Brent Personnel Placement Services* (7 June 1968) (Ont. Human Rights Bd of Inq.) at 3-4.

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.[9] It was hoped that a criminal penalty would deter future conduct of a similar nature. Intent acquired a morally neutral quality, however, that signified voluntariness and consciousness of an act, as opposed to malicious deliberation.[10] In conjunction with that change, human rights tribunals began to infer motive from the surrounding circumstances.[11]

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 similarly situated members of the majority group.[12] So long as a rule, practice, or requirement treated all persons in the same manner, it was not discriminatory.[13] That focus started to change in the 1960s, however, when the American Equal Employment Opportunity Commission (EEOC) began to develop a notion of discrimination based upon the effect and outcome of one's conduct. Title VII of the 1964 *Civil Rights Act* introduced the "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.[14]

This formulation does not involve the notion of intent. Instead, the wording of this provision impugned an act as discriminatory where its

---

[9] *Insurance Act*, R.S.O. 1937, c. 256; *Libel Act*, R.S.M. 1940, c. 113; *Racial Discrimination Act*, R.S.O. 1950, c. 328; *Saskatchewan Bill of Rights Act*, R.S.S. 1953, c. 345.

[10] R. Knopff, HUMAN RIGHTS & SOCIAL TECHNOLOGY (Ottawa: Carleton University Press, 1989) at 46.

[11] *Kennedy* v. *Bd of Governors of Mohawk College of Applied Arts and Technology* (31 October 1973) (Ont. Human Rights Bd of Inq.).

[12] 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 supra*, note 10 at 71*ff*.

[13] *Simms* v. *Ford of Canada Ltd* (4 June 1970) (Ont. Human Rights Bd of Inq.).

[14] 42 U.S.C. s. 2000e (1982).

effects had an adverse impact on the employment opportunity of a member of a minority.[15]

Despite Congress's express intention to the contrary,[16] the "effects" conception of discrimination was endorsed by the United States Supreme Court in *Griggs* v. *Duke Power Co.*.[17] The Court ruled, in that case, 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 tests 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.[18]

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. The first in-depth analysis of adverse effects discrimination in Canada came from Professor Peter Cumming, the Board Chair in *Singh* v. *Security and Investigation Services Ltd.*[19] 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:

> [E]ven 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....If proof of deliberate

---

[15] The new "effects" approach appeared to gain some currency among those concerned with discrimination. The United Nations *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted by a United Nations' General Assembly Resolution 2106A (XX) on 21 December 1965, produced the following definition of racial 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."

[16] *See generally* M. Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws* (1985) 8 HARV. J. OF L. & PUB. POL. 627 at 642*ff.*; T. Sowell, Weber *and* Bakke, *and the Presuppositions of "Affirmative Action"* (1980) 26 WAYNE L. REV. 1309 at 1312.

[17] 401 U.S. 424 (1971).

[18] *Ibid.* at 429-30 & 432.

[19] (31 May 1977) (Ont. Human Rights Bd of Inq.).

> 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.[20]

Subsequently, in *Colfer* v. *Ottawa Bd of Comm'rs 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.[21] Within a year of that decision, several other tribunals followed suit, extending the effects approach to other areas covered by human rights codes.[22] The concept of adverse effect discrimination was also adopted by Justice Rosalie Silberman 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.[23]

In 1985, the Supreme Court of Canada endorsed the adverse effect doctrine in *Ontario Human Rights Comm'n* v. *Simpsons-Sears*.[24] 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

---

[20] *Ibid.* at 19-20.

[21] (12 January 1979) (Ont. Human Rights Bd of Inq.).

[22] *Khalsa* v. *Assoc. Toronto Taxi-Cab Co-operative* (1980), 1 C.H.R.R. D/167 (Ont. Human Rights Bd of Inq.); *Malik* v. *Ministry of Gov't Services* (1981), 2 C.H.R.R. D/374 (Ont. Human Rights Bd of Inq.); *Foreman* v. *VIA Rail Canada Inc.* (1980), 1 C.H.R.R. D/111 (Can. Human Rights Trib.); *Parent* v. *Dept of National Defence* (1980), 1 C.H.R.R. D/121 (Can. Human Rights Trib.); *Barton* v. *New Brunswick Elec. Power Comm'n* (1981), 2 C.H.R.R. D/541 (N.B. Human Rights Bd of Inq.). *See generally* R.G. Juriansz, *Recent Developments in Canadian Law: Anti-Discrimination Law Part I* (1987) 19 OTTAWA L. REV. 447; *supra*, note 3 at 27.

[23] (Ottawa: Supply & Services Canada, 1984) at 2.

[24] [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 [hereinafter *Simpsons-Sears* cited to S.C.R.].

> 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, it is discriminatory.
>
> [T]here 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.[25]

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.[26]

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 right.[27]

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.

---

[25] *Ibid.* at 547 & 551.
[26] R.S.O. 1990, c. H.19, s. 11(1) (emphasis added).
[27] R.S.Q., c. C-12.

> 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.[28]

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 part of an employer's operating procedures.

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

> [D]iscrimination 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.[29]

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

> [D]iscrimination 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.[30]

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

In *Andrews*, however, Justice McIntyre added that the adverse effects conception of discrimination encompasses only those distinctions "which involve prejudice or disadvantage".[31] Under the effects approach where malice and intent are no longer relevant, the pejorative or invidious characteristic of discrimination plays a significant role in distinguishing it from the many other benign forms of differentiation that exist

---

[28] *Supra*, note 2 (emphasis added).

[29] [1989] 1 S.C.R. 143 at 174, 56 D.L.R. (4th) 1 [hereinafter *Andrews* cited to S.C.R.]. This augmented definition was subsequently quoted with approval by Justice Wilson in *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8, and by Chief Justice Dickson in *Brooks* v. *Can. Safeway Ltd*, [1989] 1 S.C.R. 1219, 4 W.W.R. 193.

[30] [1989] 1 S.C.R. 1252 at 1279, 59 D.L.R. (4th) 352 [hereinafter *Janzen* cited to S.C.R.].

[31] *See Andrews*, *supra*, note 29 at 181.

in society. Indeed there are many acceptable distinctions in society, such as, excluding men from women's locker-rooms, or denying drinking privileges to persons under a certain age. Following upon this reasoning, Professor Cumming distinguished *Adler* v. *Metropolitan Bd of Comm'rs of Police and Policy Chief Adamson*[32] from its companion case, *Colfer* on the basis that the separate height and weight requirements for women applicants to the police force were not discriminatory because they were not prejudicial to men:

> *Colfer* dealt with a single, neutral standard which had a 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-à-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 standards of the Toronto police force.[33]

The words "prejudice", "pejorative", and "invidious", however, are not clear in themselves. All those terms connote some form of harm or offence. But while it is clear that excluding men from women's 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. The notion of "reasonableness" has also been related to discrimination. "Reasonableness" plays a key role in the doctrine of reasonable accommodation and has taken the place of the *bona fide* occupational requirement as a result of the Supreme Court of Canada's decision in *Central Alberta Dairy Pool* v. *Alberta (Human Rights Comm'n)*.[34] Justice McIntyre

---

[32] (12 January 1979) (Ont. Human Rights Bd of Inq.).

[33] *Ibid.* at 6-7.

[34] [1990] 2 S.C.R. 489, 72 D.L.R. (4th) 417 [hereinafter *Dairy Pool* cited to S.C.R.].

avoided relying upon reasonableness in defining discrimination in *Andrews*, however, because of the role that that concept plays in the delicate relationship between sections 15 and 1 of the *Charter* that were being considered in that case.

The concept of prejudice again came to the Court's attention in *McKinney* v. *University of Guelph*.[35] 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.[36] In her view, prejudice renders a distinction discriminatory. Even she was rather brief, however, 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". These terms will have to be discerned in light of actual cases and the values of society that are perceived and expressed by human rights tribunals and courts.

The precise nature of the term "prejudicial" may occupy more attention in the future given that the adverse impact doctrine has swept through all levels of adjudication. In doing so, it has created a new standard by which to evaluate conduct where the victim's harm ceased to be the focus of inquiry. Instead, attention was turned to results.

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 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.
>
> "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 prac-

---

[35] [1990] 3 S.C.R. 229 at 279, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to S.C.R.].

[36] *Ibid.* at 392.

> tices 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.[37]

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

---

[37] A. Adams, Employment Equity: Some Models for Consultation in a Unionized Environment, Masters Thesis, Queen's University, May 1988 at 25-26.

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.[38] The concept of systemic discrimination started taking root in Canada in 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.[39]

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

In the early 1980s the Canadian Human Rights Commission raised the issue of systemic discrimination in a case involving allegations that Canadian National Railways (CN) engaged in hiring and promotion practices that discriminated against women. When that case reached the Supreme Court of Canada,[40] 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.[41]

> [S]ystemic 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.[42]

He described the various systemic barriers that faced women complainants.[43] First, there was outright discouragement that was combined with an attempt to withhold information about certain positions. Added to that was the practice of recruiting at schools with a predominately male enrolment. Additionally, CN imposed unnecessary conditions of employment that were unrelated to the job itself, but which had the effect of disqualifying women.

---

[38] *See generally supra*, note 3 at 126.

[39] Canadian Human Rights Commission, *Annual Report: 1978* (Ottawa: Supply & Services Canada, 1979).

[40] *Action Travail des Femmes* v. *Canadian National Ry Co.*, [1987] 1 S.C.R. 114, 40 D.L.R. (4th) 193 [hereinafter *Action Travail* cited to S.C.R.].

[41] *Ibid.* at 1118.

[42] *Ibid.* at 1139.

[43] *Ibid.* at 1124.

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.[44] 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*, Justice Rosalie Silberman Abella used a particularly incisive metaphor to describe the inadequacy of the complaints process:

> 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.[45]

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.
>
> 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.[46]

The complaints process relied on individuals to bring forth allegations of particular discriminatory conduct. The practices and mechanisms, however, 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

---

[44] *See generally* D. Rhys Phillips, "Equity in the Labour Market: The Potential of Affirmative Action" in *Research Studies of the Commission on Equality in Employment* (Ottawa: Supply & Services Canada, 1985) 51 at 63 (Commissioner: Judge R. Silberman Abella) [hereinafter *Research Studies*]; Canadian Human Rights Commission, *Annual Report: 1988* (Ottawa: Supply & Services Canada, 1989) at 11-12 (Chief Commissioner: M. Yalden) [hereinafter *1988 Annual Report*].

[45] (Ottawa: Supply & Services Canada, 1984) at 8.

[46] *Ibid.* at 9.

complaints process, findings of blame or tort-like liability are irrelevant 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 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 enrolment, hiring, and promotion opportunities. On one hand, affirmative action takes 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.[47] That preferential treatment for persons who served in the military persists today.[48] 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 biculturalism.[49]

The first systemic responses to discrimination arose in the United States in what is known as the contract compliance 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 Lyndon Johnson's 1965 Executive Order No. 11246.[50] According to the contract compliance program, entities seeking government contracts were obliged to undertake affirmative action programs to avoid discrimination in all their operations. At first, the Office of Federal Contract Compliance Programs (OFCCP) set about its task by processing individual complaints, and conducting compliance reviews where complaints were substantiated.[51] In 1968, however, the OFCCP issued guidelines under which it started targeting employers by comparing the composition of the workforce with statistical data. Contractors were obligated to evaluate their workforce

---

[47] *See generally ibid.* at 197. The other side of the coin was that women who had taken up non-traditional work in factories, were all sent "home" to make room for the returning men.

[48] Task Force on Barriers to Women in the Public Service, *Beneath the Veneer*, vol. 1 (Ottawa: Supply & Services Canada, 1990).

[49] *See generally* Tarnopolsky, *supra*, note 6 at 4-79.

[50] In the interim there was President John F. Kennedy's Executive Order No. 10925 in 1961.

[51] *See generally* M. Leitman, "A Federal Contract Compliance Program for Equal Employment Opportunities" in *Research Studies*, *supra*, note 44 at 183.

to determine whether women or minorities were "under-utilized". These obligations were further clarified in more guidelines issued in 1970 and 1971.[52] In cases of large contracts, the OFCCP conducted "pre-award reviews" before awarding a contract to a bidder. Also, to make it easier to track compliance, the OFCCP required contractors to submit written affirmative action plans.[53] Generally, this type of affirmative action was successful because the government could refuse or extinguish its much sought-after contracts.

The United States government also established the Equal Employment Opportunity Commission (EEOC) to track discrimination in entities that did not enter into contracts with the government.[54] The EEOC spent most of its energies in pursuing offenders through the court system because it did not have a mandate to order employers to implement affirmative action programs.[55] 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 subsection 706(g) of the *Civil Rights Act*.[56] 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 goodwill in a long and drawn-out court battle.

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.[57] These *Guidelines* entitled an employer to respond to an imbalance in its workforce with any affirmative action program that was approved by the Department of Labour, or

---

[52] 41 C.F.R. part 60-2; L. Bevan, "Employment Discrimination Laws in the United States: An Overview" in *Research Studies*, *supra*, note 44 at 462.

[53] Canadian Human Rights Commission, *The Canadian Human Rights Commission as the Enforcement Mechanism Under the Employment Equity Act: Recommendations Based on the U.S. Experience* by P. Robertson (Ottawa: 21 May 1987) at 5.

[54] In the mid-1960s, the EEOC developed the concept of adverse impact discrimination through a series of guidelines.

[55] *See generally* A.W. Blumrosen, "Improving Equal Employment Opportunity Laws: Lessons From The United States Experience" in *Research Studies*, *supra*, note 44 at 426. In 1972, Title VII was amended to give the EEOC the power to bring suits against companies violating the provisions of the *Civil Rights Act*.

[56] *See generally supra*, note 53; 42 U.S.C. 2000e-5(g) (1982): "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.

[57] 29 C.F.R. part 1608.

that met the standards established by the Department's regulations under Executive Order No. 11246.[58] When challenged, the employer could then rely upon the good faith reliance defence under subsection 713(b) of the *Act*.[59] 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.[60]

In 1974, Ontario became the first Canadian jurisdiction to embark upon affirmative action designed to remedy discrimination.[61] 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 then president of the Treasury Board, Jean Chrétien, announced directives intended to increase the representation of women in the public service.[62] That same year saw the launch of the Northern Careers Program that trained Aboriginal people for permanent jobs in federal departments operating in 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.[63] 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 the qualifications of disadvantaged workers.[64] The Treasury Board followed this lead by announcing voluntary internal affirmative action pilot projects.[65] The full-scale program for women, Aboriginal, and disabled persons was established in 1983. Two years later, the program was expanded to include visible minorities.

---

[58] M.A. Player, EMPLOYMENT DISCRIMINATION LAW (St. Paul, Minn.: West, 1988) at 315.

[59] 42 U.S.C. 2000e-12(b) (1982).

[60] 443 U.S. 193 (1979). 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 only to attain a rational balance, not maintain it.

[61] C. Agocs, *Affirmative Action, Canadian Style: A Reconnaissance* (1986) 12 CAN. PUB. POL. 148 at 153.

[62] *Ibid.* at 152; *see also* M. Young, "Affirmative Action/Employment Equity", Law & Gov't Div., Library of Parliament, Research Branch (8 October 1984, revised 1 February 1989).

[63] *Ibid.* 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.

[64] The Canada Mortgage and Housing Corporation was the first to sign such an agreement in 1980.

[65] *Supra*, note 61 at 152.

More recently, the Treasury Board instituted its own contract compliance program to further employment equity.[66] Pursuant to Treasury Board Directive No. 802984, all suppliers of goods and services who employ more than one hundred people and are seeking government contracts worth $200,000 must commit themselves to implement employment equity.[67]

The issue of reverse discrimination did not attract controversy in Canada. In the 1981 case of *Athabasca Tribal Council* v. *Amoco Canada Petroleum Co. Ltd*, several judges of the Supreme Court of Canada rejected the notion that affirmative action constituted reverse discrimination.[68] Those judges were anticipating subsection 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.[69]

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.[70] That recommendation was incorporated into Bill C-60 in 1980, and remained in all subsequent drafts of the *Charter*. Today, every jurisdiction in Canada has a provision in its human rights legislation allowing for affirmative action-type pro-

---

[66] *See generally* Juriansz, *supra*, note 22 at 685. Section 23 of the *CHRA* provided Cabinet with the authority to institute contract compliance programs: 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 or discriminatory practices contrary to such terms and conditions.

[67] *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.

[68] [1981] 1 S.C.R. 699 at 711, 6 W.W.R. 342: 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 competitive position to obtain employment without regard to the handicaps which their race has inherited.

[69] The Lamontagne-McGuigan Committee recommended that exemption in the wake of *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). *See generally* D. Gibson, THE LAW OF THE CHARTER: EQUALITY RIGHTS (Toronto: Carswell, 1990) at 288.

[70] Gibson, *ibid.*

grams.[71] The *Canadian Human Rights Act* permits special programs under section 16:

> 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.[72]

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

Affirmative action programs, however, 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 nine hundred 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.[73] A 1985 survey of 199 employers in the Toronto area revealed that only 3% had developed affirmative action programs. Only 6% even knew that affirmative action consisted of a comprehensive strategy for eliminating barriers to the participation of designated groups.[74] 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.

---

[71] *The Saskatchewan Human Rights Code*, 1979 c. S-24.1, s. 47; *Human Rights Act* (Manitoba), S.M. 1987-88, c. 45, s. 11, C.C.S.M. H175; *Human Rights Code* (Ontario), R.S.O. 1990, c. H.19, s. 14(1); *Charter of Human Rights and Freedoms* (Quebec), R.S.Q. c. C-12; *The Human Rights Act* (Nova Scotia), S.N.S. 1969, c. 11, s. 19, as am. S.N.S. 1991, c. 12, s. 6(i). Many seem to follow the general outline of Art. 1, s. 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.

[72] *Supra*, note 2.

[73] *Supra*, note 61 at 154.

[74] *Ibid.* at 156.

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 Silberman Abella. The terms of reference of the Royal Commission on Equality in Employment made explicit reference to mandatory programs:

> [T]o 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.[75]

Abella J. 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.

After reviewing the unsatisfactory record of voluntary programs, Abella J. concluded that "[g]iven 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."[76] Abella J. 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.[77] 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

---

[75] *Supra*, note 45 at ii.
[76] *Ibid.* at 197.
[77] *Ibid.* at 200 & n. 23.

> 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.[78]

The statutory obligation to undertake steps to eliminate discriminatory practices and barriers would extend to all facets of employment. Abella J. recommended that the onus be placed on the employer to design its own program to suit its particular circumstances.[79] These various recommendations were supported by the Parliamentary Committee on Equality Rights in its report *Equality for All*.[80]

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 *CHRA*, a human rights tribunal used its powers under paragraph 41(2)(a)[81] to order an offender to take affirmative action.[82] The Tribunal in *Action Travail* found that discriminatory practices were pervasive and deeply rooted in the hiring process at CN.[83] 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 women applicants, and the Tribunal also heard testimony about the discriminatory treatment of women in non-traditional jobs. Evidence showed that CN was aware of these problems since 1974 and yet took no corrective steps. In 1981, women held only 0.7% of blue-collar jobs at CN in the St. Lawrence region, while the national average for female blue-collar workers was 13%. The Canadian Human Rights Tribunal ordered CN to discontinue the use of the mechanical aptitude test and to drop the welding experience requirements for jobs that did not warrant such qualifications.

---

[78] *Ibid.* at 202-03.

[79] *Ibid.* at 204-05.

[80] (Ottawa: Supply & Services Canada, October 1985) (Chair: J.P. Boyer, M.P.) [hereinafter *Equality for All*].

[81] Paragraph 41(2)(a) is now paragraph 53(2)(a).

[82] Subsection 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 such order any of the following terms that it considers appropriate: (a) that such person cease such discriminatory practice and, in consultation with the Commission on the general purposes thereof, take measures, including adoption of a special program, plan or arrangement referred to in subsection 15(1), to prevent the same or a similar practice occurring in the future; Manitoba and Quebec also have provisions authorizing a competent court or tribunal to impose mandatory affirmation action: *supra*, note 71.

[83] (1984), 5 C.H.R.R. D/2327.

In addition, the Tribunal ordered CN to solicit women for non-traditional jobs and to hire one woman for every four positions filled. CN was also 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 Hugessen ruled against the affirmative action, taking a narrow view of paragraph 41(2)(a) of the *CHRA*.[84] 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".[85] 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 such fair, large and liberal interpretation as will best ensure that their objects are attained.[86]

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.[87]

---

[84] [1985] 1 F.C. 96, 20 D.L.R. (4th) 668 [hereinafter cited to F.C.].
[85] *Ibid.* at 102.
[86] *Supra*, note 40.
[87] *Ibid.* at 1141-42.

The Tribunal made an uncontested finding that the lack of women in blue-collar jobs at CN 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 CN was an appropriate preventive measure designed to overcome those systemic barriers.

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

THE *EMPLOYMENT EQUITY ACT*

In August 1986, the Federal government responded to the Abella Report 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*.[88] 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.[89]

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 disadvantage by ensuring an appropriate representation of women, Aboriginal persons, the disabled, and visible minorities in the workplace:

> 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

---

[88] R.S.C. 1985, c. L-2.
[89] *Supra*, note 1.

> (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.[90]

Neither of those two tasks depends 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 workforce.

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, or disability. That may involve such measures as adapting the workplace 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.[91] Subsection 4(b) is more concerned with the representation of minorities in the workplace. Under that subsection employers are to achieve statistical parity, where the employed workforce reflects the make-up of the available workforce.

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 workforce. Failure to do so may result in a fine of $50,000. In that report, employers are to categorize their workforce 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

---

[90] *Ibid.*

[91] *Supra*, note 34. *See Central Okanagan School Dist. No. 23* v. *Renaud* (24 September 1992), No. 21682 (SCC).

be kept by the employer for three years.[92] 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.

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.[93] Step one consists of preparing the workplace 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 workforce. To this end, the employer should collect personnel information that will indicate the current make-up of its workforce, 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 workforce 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 workforce 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 its 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 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.

---

[92] *Supra*, note 1, ss. 6 & 7.

[93] *Employment Equity: A Guide for Employers* (Ottawa: Supply & Services Canada, 1986).

One praiseworthy 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 *EEA* 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.[94] Eventually all employers agreed to proceed with a joint review, although some had to be cajoled to a considerable degree.

By the year's end, the Disabled People for Employment Equity Human Rights Groups filed discrimination complaints against nine companies.[95] The Commission instituted investigative processes, but also invited these companies to review the situation concerning other designated groups. Recently, the Assembly of Manitoba Chiefs filed fifty-one complaints, including twenty-nine against federal departments.[96] The fourteen companies and five federal departments involved in the joint reviews represent 48% of all employees within the Commission's jurisdiction.[97]

By the end of 1989, six of the employers against whom the disabled filed a complaint agreed to cooperate. However, both Bell Canada and the Canadian Broadcasting Corporation (CBC) resisted. Bell Canada questioned the validity of what the Commission proposed to do and

---

[94] *1988 Annual Report*, *supra*, note 44 at 33; Transport Canada, The Department of National Defence, Fisheries and Oceans, Revenue Canada (Taxation), External Affairs, National Bank of Canada, Canadian National Railways, Canadian Pacific Express and Transport, Denison Mines, Marine Atlantic, Saskatchewan Wheat Pool.

[95] *Ibid.*; 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.

[96] Canadian Human Rights Commission, *The Canadian Human Rights Commission and Employment Equity 1987–1991: A Background Paper*, (Ottawa: January 1992) at 5 [hereinafter *Background Paper*].

[97] *1988 Annual Report*, *supra*, note 44 at 33.

simply refused to provide any information requested.[98] 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 and Bell have agreed to proceed with a joint review of their practices. However, in response to the complaints by the Assembly of Manitoba Chiefs, Air Canada, Canadian Air, Canadian Pacific Express, Canadian Pacific Rail, and Greyhound have launched Federal Court challenges to the Commission's jurisdiction to proceed with its investigations.

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.[99] Other employers have gone ahead with some aspects of their affirmative action programs. For example, pursuant to its plan, the Royal Bank hired twenty Aboriginal people in Alberta. The Toronto Dominion Bank, for its part, added thirteen disabled persons to its workforce in Montreal.[100]

But for all this talk about the cooperation 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 *Annual 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.[101] That figure continued to increase in 1990, reaching 43.7%.[102] The representation of Aboriginal people rose from 0.66% to 0.9% over the four years.[103] In that same period, persons with disabilities increased their representation from 1.59% to 2.4%. Finally, the proportion of visible minorities rose from 4.99% in 1987 to 5.67% in 1988.[104] In 1989 their representation jumped to 6.68%, and in 1990 to 7.1% which is above their 6.3% representation in the Canadian labour force.[105]

The story behind these stark figures is more telling. The increase in representation of women in employment covered by the *EEA* still falls below their 44% representation in the Canadian labour force, while their

---

[98] Canadian Human Rights Commission, *Annual Report: 1989* (Ottawa: Supply & Services Canada, 1990) at 36 (Chief Commissioner: M. Yalden) [hereinafter *1989 Annual Report*].

[99] *Ibid.* at 37.

[100] *Ibid.* at 38.

[101] *Employment Equity Act: 1990 Annual Report* (Ottawa: Supply & Services Canada, 1990) at 28 (Hon. M. Vezina, Min. of State for Employment and Immigration) [hereinafter *1990 Annual Report*].

[102] *Supra*, note 96 at 9.

[103] *Supra*, note 101 at 38; *supra*, note 96 at 15.

[104] *Supra*, note 101 at 48; *supra*, note 96 at 18.

[105] *Supra*, note 101 at 58; *supra*, note 96 at 12.

representation in federal departments rose slightly above.[106] In fact, women predominate in lower paying part-time jobs.[107] 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.[108] 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.[109]

Similar patterns are to be found behind the numbers for Aboriginal people and the disabled. The overall Aboriginal representation of 0.9% fell far below their 2.1% share of the Canadian labour force.[110] For disabled persons, the 2.4% representation also falls far below their 5.4% representation in the labour force.[111] These two groups had a smaller share of full-time hirings and promotions than their representation in the Canadian labour force.[112] Visible minorities fared better. They topped their 6.3% representation in the Canadian labour force,[113] and got 11.01% of full-time hirings and 9.52% of full-time promotions.[114] This can be attributed to their high representation in clerical levels of the banking industry.[115]

On the whole, these statistics show improvement in terms of an increased representation of all the designated groups in the general composition of the workplace. Behind the general view, however, 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 and Immigration gave 68% of employers the lowest mark for current representation of women, and only 38% of these employers received a good mark for trying to improve the situation. Eighty per cent of employers received the lowest mark for the current representation of Aboriginal people, and only fifteen of these got a good mark for progress.[116]

---

[106] *Supra*, note 101 at 28; *supra*, note 96 at 10.

[107] Employment and Immigration Canada, *Employment Equity Act: 1989 Annual Report* (Ottawa: Supply & Services Canada, 1989) at 28 (Hon. M. Vezina, Min. of State for Employment and Immigration) (women comprise 74.21% of all reported part-time employees).

[108] *Supra*, note 101 at 33 (Table 5).

[109] *Ibid.* at 35 (Table 8).

[110] *Supra*, note 96 at 15; *supra*, note 101 at 38.

[111] *Supra*, note 96 at 18; *supra*, note 101 at 48.

[112] *Supra*, note 101 at 46 (Aboriginal people, Table 8: 1.17% hirings, 0.79% promotions) and 56 (Disabled persons, Table 8: 1.33% hirings, 2.44% promotions).

[113] *Ibid.* at 58.

[114] *Ibid.* at 66 (Table 8).

[115] Canadian Human Rights Commission, *Annual Report: 1990* (Ottawa: Supply & Services Canada, 1991) at 32 (Chief Commissioner: M. Yalden).

[116] *Supra*, note 101 at 79.

Upon reading these statistics, one is tempted to conclude that employment equity is not successful. Since the *EEA* has only existed for five years, however, it is perhaps too 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 statistical analysis should play in the area of employment equity. That question will be addressed later in this article.

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 *Equality for All*, 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.[117] The Committee recommended that the *EEA* grant the Canadian Human Rights Commission 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.[118]

The Committee felt that the absence of an enforcement mechanism was a 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.
>
> 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 Rights Act*, will provide adequate inducement to employers to achieve the desired results.
>
> 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

---

[117] *Supra*, note 80 at 110.
[118] *Ibid.*

> employers. The Government will review the results of Bill C-62 after several years.[119]

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.[120]

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" altogether. Unlike the situation in *Action Travail*, where the Human Rights Tribunal ordered affirmative action, under the present situation the *EEA* itself "imposes" the general obligation of affirmative action or employment equity, and the Commission is only 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.[121]

> 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.[122]

---

[119] Department of Justice, *Towards Equality: The Response to the Report of the Parliamentary Committee on Equality Rights*, (Ottawa: Supply & Services Canada, 1986) at 51 (Hon. J.C. Crosbie, Min. of Justice & A.G. of Canada).

[120] (Ottawa: 1 June 1988) at i [hereinafter *Operational Procedures*].

[121] *Ibid.* at ii.

[122] *Supra*, note 98 at 37.

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*, the Commission has set out a cooperative process in which selected employers are invited to undertake joint reviews of their employment systems.[123] 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 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 cooperate, 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. To date, the Commission has successfully concluded five reviews.[124] If at any point the employer veers from its voluntary disposition, however, 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*. That process may also be a prelude to a complaint process if the employer does not cooperate.

While the Commission favours the non-confrontational manner of dealing with systemic discrimination, it clearly expressed its intention to initiate a complaint under subsection 40(3) 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.[125]

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 suspended. All matters will be ultimately resolved only upon the submission of an acceptable plan; that is, a plan

---

[123] *Supra*, note 120.
[124] *Supra*, note 96 at 4.
[125] *Supra*, note 98 at 33.

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.[126]

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. Thus, while the *EEA* obliges employers to achieve a representative workforce, there is no provision that provides 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 cooperate with the Commission on voluntary reviews of their systems, if only to preserve a good public image. That apparent cooperative mood, however, may be seriously undermined by the challenges to the Commission's jurisdiction to investigate complaints concerning employment equity.

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.[127]

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 the pro-active elimination of systemic discrimination. For those who support the mandatory imposition of affirmative action programs, the *EEA* without an enforcement mechanism is inadequate.

---

[126] *Supra*, note 120 at 3-4.

[127] *1988 Annual Report*, *supra*, note 44 at 17.

AFFIRMATIVE ACTION BASED ON STATISTICAL COMPARISONS

Despite the discussions about mandatory affirmative action, the Canadian government has not yet been convinced that such an approach would provide an answer to systemic discrimination. But while the *EEA* does not replicate the American experience with its proliferation of mandatory affirmative action programs, the *EEA* 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 workplace. The term "under-representation" is used in this context to describe the situation where there is proportionally less of a particular group in the workplace 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 workplace would reflect the make-up of the local population:

> [S]ince 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.[128]

According to this line of reasoning, achieving representation is the solution for employment discrimination because that is the state of affairs that would have 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 workplace. Under this approach, employers are said to have achieved "statistical parity" when the minorities are proportionally represented in the workplace.

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 increasingly important role in discrimination cases. Despite subsection 703(j) of the

---

[128] M. Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal* (1985) 46 OHIO ST. L.J. 845 at 906-07.

1964 *Civil Rights Act*,[129] the United States Supreme Court approved statistical comparisons for the sake of proving that an employment pattern or practice was discriminatory.[130] Such comparisons had been commonplace 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.[131] Contractors were obliged to evaluate their workforce and ensure that neither women nor minorities were "under-utilized". In 1979, the EEOC gave more legitimacy to such statistical comparisons in its *Affirmative Action Guidelines*.[132] 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 workplace.[133]

The logic of those guidelines influenced American courts to adopt the numbers approach and to use subsection 706(g) to impose numerical quotas, goals, and timetables as a sanction against discrimination.[134] In 1984, the United States Supreme Court took a step back from that trend by restricting the scope of subsection 706(g).[135] 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 remedies such as numerical admissions ratios were constitutional even though non-victims stood to benefit.[136] In 1987,

---

[129] 42 U.S.C.S. 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 or persons of any race, color, religion, sex, or national origin employed by an employer, referred 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.

[130] *See Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *International Bro. of Teamsters* v. *United States*, 431 U.S. 324 (1977); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977).

[131] *See* Bevan, *supra*, note 52 at 462.

[132] 29 C.F.R. s. 1608.

[133] *Ibid. See generally supra*, note 58 at 315.

[134] 42 U.S.C. 2000e-5(g) (1988): 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.

[135] *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984).

[136] *Local 28 of Sheet Metal Workers' Int'l Ass'n* v. *Equal Employment Opportunity Comm'n*, 478 U.S. 421 (1986).

the United States Supreme Court explicitly endorsed the numerical principles of the *Affirmative Action Guidelines* in *Johnson* v. *Transp. Agency, Santa Clara Cty, Cal.*,[137] where it stated that it was proper to use affirmative action to assail a "manifest imbalance" in the workplace as revealed by comparing the percentage of women in the employer's workforce 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 court-ordered affirmative action combined with government action.[138]

The numbers approach came to Canada along with the introduction of 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 workplace 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 Native people and actual limitations of some disabled individuals.[139]

According to this premise, the composition of the workplace would reflect the composition of society in the absence of discrimination. It would follow that where there is a statistical imbalance, necessarily there must be some form of systemic discrimination. Justice Abella appears to come to the same conclusion in her study about equality in employment. She referred to statistical 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.[140]

---

[137] 480 U.S. 616 (1987).

[138] 480 U.S. 149 (1987). Constitutional cases had to meet the scrutiny test of the equal protection clause. That problem does not arise in Canada on account of the explicit exemption provided in s. 15(2) of the *Charter*.

[139] (Ottawa: Supply & Services Canada, 1982) at 60-61.

[140] *Supra*, note 23 at 2-3. This reasoning was incorporated into the seventh recommendation set out at 255-56.

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 also resisted 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 CN's workforce, and even fashioned a remedy on the basis of those statistics, nevertheless the Tribunal made its finding of discrimination on the basis of considerable evidence about discriminatory employment practices and attitudes at CN. Similarly, the under-representation of women in CN's workplace 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 CN may have signalled the presence of discrimination, as suggested by Justice Abella, and while such statistics served as a benchmark for the affirmative action remedy, the under-representation of women did not drive the Tribunal's factual finding that CN was engaging in discrimination.

The logic of the numbers approach lends a definite appeal to the implementation and imposition of affirmative action-type goals and quotas. Measures designed to increase the representation of minority groups promise tangible results in a short span of time. That appeals to the minority groups who voice concerns over discrimination, and it appeals to politicians who wish to allay those concerns. A government can legislate conduct to raise the representativeness of the minority groups; but it cannot legislate attitudes. Such measures are also appealing because they appear to create a discrimination-free workplace by erasing the most visible effect of discrimination in employment. Achieving a representative workforce 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. Moreover, it is easier to monitor compliance with such timetables and quotas through the comparison of statistics than it is to collect proof of discriminatory intent and practices.

Hence, 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, it is not surprising that the numbers approach has been incorporated into the *EEA*. In the *EEA*, statistical parity plays a 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 workforce, or
>
> (ii) in those segments of the workforce 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".[141] 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 representation of minorities, and gives 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 workforce. 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 *EEA* concerning the goal of subsection 4(a), namely, the elimination of discriminatory barriers.

The same is true of the *Employment Equity Annual Report* produced annually by the Department of Employment and Immigration. Those reports are 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 tenor is repeated in the Department of Employment and Immigration's *Employment Equity: Guide for Employers*. The *Guide* instructs employers to achieve a "representative labour force". That means a labour force which:

---

[141] *Supra*, note 139 at 102.

> reflects the demographic composition of the external workforce, 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 workforce, either by reason of their skills, qualifications, union membership, licenses, permits or other bona fide occupational requirement, or by their geographic accessibility to the employer.[142]

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 workforce.

Approaching employment equity as a matter of representativeness tends to foster the belief that there is a "correct proportion" for each designated group. The workplace should then be divided into "pieces of pie" which would 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 would have a standard by which to measure the progress and success of an employment equity plan.

Even though the Human Rights Tribunal in *Action Travail* did not adopt the logic of the numbers approach in its entirety, the affirmative action portion of the remedy ordered by the Tribunal reflects the type of result that would follow from relying on that type of reasoning. Since, at the time of the hearing before the Federal Tribunal, women held 13% of blue-collar jobs nation-wide, it was determined that women are entitled to that same proportion of blue-collar jobs at CN. 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 workforce generally?[143] 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 13% figure as a measuring standard for employment equity when that figure itself may be a reflection of discriminatory practices and attitudes nation-wide.

Attempting to determine the correct representation of the workplace raises a collateral problem. Why do only women, visible minorities, Aboriginal people, 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 other ethnic groups, short persons, or persons of particular religious denominations not be apportioned a share of the workplace? While it may be helpful to consider the degree of representation of the designated groups for the purpose of identifying problematic areas, it does not necessarily follow that the groups whose statistics assist in flagging discriminatory atti-

---

[142] (Ottawa: Supply & Services Canada, 1989) at 10.

[143] At the time of the hearing, women represented 40.7% of the total Canadian labour force. Today, that figure has increased to 44%: *supra*, note 101 at 28.

tudes, practices, and policies are the only ones 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. When one considers that the numbers approach essentially substitutes the goal of a representative workforce 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 caution against rushing forward too quickly with any scheme that purports to solve employment discrimination by artificially creating a representative workplace through the implementation of numerical solutions.[144]

The danger in the numbers approach is that a representative workforce could be confused with or taken to be synonymous with the elimination of 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 workforce are not necessarily a remedy for employment discrimination. Indeed, most of those measures focus upon increasing the representation of minorities in the workplace instead of considering or dealing with the causes of employment discrimination.

It is conceivable that through the use of quotas an employer would be able to achieve the objective of subsection 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 this loophole in the logic of the numbers approach. An employer could defend its current employment practices against allegations of discrimination by showing that the practice adversely affected less than 20% of the designated group. Thus, according to this "bottom-line" defence, as long as an employer can achieve such approximate representativeness, it would not matter whether it engages in discriminatory conduct. In 1982, however, the United States Supreme Court put an end to the use of the "bottom-line" defence in *Connecticut* v. *Teal*.[145] That defence has not appeared in Canada because Canadian courts and human rights tribunals have not yet adopted numerical comparisons as the sole proof of the presence or absence of discrimination. Nevertheless, the numbers approach has tended to dominate the attention of the regulatory scheme under the *EEA*, and has all but eclipsed measures designed to eliminate the employment practices that caused the imbalance of representation in the first place.

---

[144] *See generally supra*, note 122 and *supra*, note 115. The *1989 Annual Report* notes at 37 that "employment equity planning must proceed as an integral part of human resources management; that it is not a numbers game". The *1990 Annual Report* notes at 43 that "[i]t 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".

[145] 457 U.S. 440 (1982).

Thus, even though the "bottom-line" defence does not play a role in Canadian courts or tribunals, the belief that discrimination in the workplace will be eliminated through the achievement of a representative workforce seems to endure.

ELIMINATION OF DISCRIMINATORY PRACTICES

Fortunately, the *EEA* does not ignore the need to address discriminatory employment practices. Subsection 4(a) of the *EEA* requires employers to identify and eliminate practices "that result in employment barriers against persons in designated groups". Indeed, in *Action Travail*, the Human Rights Tribunal paid particular attention to the employment practices at CN that restricted opportunities for women. The eight permanent measures in the Tribunal's order are often overlooked in the shadow of the temporary affirmative action measure that received the attention of the Supreme Court of Canada.[146] 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.

Little needs to be said about the role and effect of certain employment practices in creating discrimination in the workplace. That topic was canvassed earlier during the discussion about systemic discrimination. It was the discovery of detrimental effect of such practices that focused attention on the adverse impact doctrine and gave rise to provisions such as sections 7 and 10 of the *CHRA*. Those sections give the Canadian Human Rights Commission the mandate to force employers to eliminate discriminatory employment practices. Hence, a few words should be said about the Commission's efforts to fight against discriminatory practices.

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. The Canadian Human Rights Commission seeks to overcome some of the limitations of the complaints process by broadening the grounds for launching an investigation to include statistical under-representation of minorities. The Commission claims that the data in the annual employment equity reports can constitute reasonable grounds to believe that discriminatory employment practices may exist.[147] Section 10 of the *CHRA* does not

---

[146] *Supra*, note 83 at D/2414-5.
[147] *Supra*, note 96 at 2.

appear to fault an employer for maintaining a workforce that does not reflect the make-up of the federal labour market or for failing to fulfil any other obligations under the *EEA*. The Canadian Human Rights Commission must therefore find a policy, practice, or agreement which has the intent or effect of reducing employment opportunities.[148] Without reasonable grounds for launching an investigation, the Commission 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.

The authority of the Commission to prosecute an employment equity complaint on the basis of statistical information is currently being challenged by several employers in the Federal Court. These employers argue that the Commission has exceeded its jurisdiction by using section 10 of the *CHRA* to monitor compliance with the *EEA*.[149] Those employers also charge that the complaints lack particulars regarding the identity of the victims, the location of the discrimination, and the specific practices which discriminate.[150] While the Human Rights Commission claims that statistical data fulfil 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.[151]

The Commission is sensitive to criticism of its activities and has admitted that some feel it goes about its task too zealously.[152]

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 inves-

---

[148] Section 10 reads:
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.

[149] *Supra*, note 96 at 6.

[150] *Ibid.*

[151] *Supra*, note 98 at 55.

[152] *Ibid.* at 12.

tigations on their own initiative.[153] These investigations could target the activities of a particular person or industry with or without an allegation of discrimination.[154] In practice, these formal investigations came under considerable attack from both the judiciary and the private sector. Like the CBC 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 they perceive 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 is viewed as 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 Canadian Human Rights Commission to achieve a considerable degree of exposure and publicity. This is precisely the strategy used by the EEOC in the United States where the threat of litigation "persuaded" many employers to pursue affirmative action voluntarily. 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 in the shadow 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 for special approaches and remedies to deal with it. Canadian courts are more likely to be comfortable with the Commission conducting formal investigations, because the use of tribunals for the imposition of sanctions approximates the various safeguards associated with court adjudication.

While granting the Canadian Human Rights Commission the mandate to conduct formal investigations would enhance its ability to pursue employers who engage in systemic discrimination, that power would not overcome other short-comings of a complaint-based process. Dealing with discrimination by bringing the employment practices of every employer before a tribunal for scrutiny constitutes a slow progress towards a discrimination-free workplace. 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 *it is* the present standard of conduct.

The Commission is doing the best it can to address discriminatory employment practices. However, the effective removal of discrimination from the workplace depends upon enlisting the cooperation of employers

---

[153] *Sex Discrimination Act 1974*, (U.K.), c. 65; *Race Relations Act 1976*, (U.K.), c. 74.

[154] G. Appleby & E. Ellis, *Formal Investigations: The Commission for Racial Equality and Equal Opportunities Commission as Law Enforcement Agencies* (1984) PUBLIC LAW 236 at 262.

themselves. 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. The first step in enlisting the assistance of employers is to make visible the latent barriers. Providing them with specific guidance on how to eliminate restrictive practices would go a long way to changing the environment in the workplace. 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 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.[155] The *Guide* addresses several areas where discriminatory barriers may arise, including recruitment, selection process, 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.

The acquisition of job qualifications is also an important factor in the broadening of employment opportunities. The employment equity scheme, however, does not currently address the barriers faced by minorities in acquiring those job qualifications. Paragraph 4(b)(ii) of the *EEA* obliges employers to attain a proportional representation only with respect to the qualified pool of candidates in the workforce. Thus, under the current scheme of the *EEA*, it is not a problem if a designated group has been or continues to be excluded or discouraged from the special training programs needed to enter the 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 workforce, without inquiring into the reasons why that proportion was far below the proportion of women in the workforce generally.

Women face the same discriminatory entry barriers to training programs as to the workplace. There are reports of women being turned away from training programs because it involved a "man's trade".[156] Women often get routed into "dead-end" clerical positions without the

---

[155] *Employment Systems Review Guide: Technical Training Manual on Employment Equity, Module 3* (Ottawa: Supply & Services Canada, 1989).

[156] *See generally* E. Kracow, "Whistles While You Work" *Montreal Mirror* (4 October 1990) 5.

time or opportunity 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.[157]

On-the-job retraining programs could facilitate a woman's promotion into a better paying job in those cases. Job training programs should be scrutinized for restrictive practices against members of minority groups even though the barriers that arise as a result of the lack of effective job training and retraining may not be exclusively within the domain of employers.

Restrictive employment practices in general deserve generous attention in the employment equity scheme because they have directly restricted the opportunities for minorities. It is through such restrictions that restrictive practices have led to the under-representation of minorities in the workplace. Removing those barriers will enable minorities to take up any employment opportunity.

Elimination of Discriminatory Attitudes

In addition to restrictive practices, employment discrimination is caused by attitudes held by employers, employees, and members of minority groups. 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 CN 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.[158]

He went on in his judgment to implicate attitudes directly as the problem of discrimination:

> [S]ystemic 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

---

[157] *Supra*, note 48 at 63.
[158] *Supra*, note 40 at 1119.

> create a climate in which both negative practices and negative attitudes can be challenged and discouraged.[159]

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. For example, the CN employment practices that were implicated in *Action Travail* had a tendency to keep the number of women employees low. The absence of women from the workplace, in turn, engendered and reinforced the traditional stereotypes of women that maintain they cannot perform physically demanding labour-intensive work in sectors of heavy industry. That stereotype then gave rise to practices that discouraged women from seeking employment at CN.

In some instances, those attitudes are associated with paternalism as opposed to hatred or bigotry.[160] 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 CN:

> [I]f 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.[161]

The numerical remedies used to increase the representation of women at CN were expected to create a "critical mass" that would eventually break down the paternalistic attitudes and interrupt the "continuing cycle of systemic discrimination".[162]

It is not certain that an increase in the representativeness of women will by itself unsaddle traditional gender stereotypes. 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 a majority group.[163] Also, those with stereotyped visions of identifiable groups will tend to remember evidence which confirms the stereotypes and forget evidence to the contrary.[164] Once a discriminatory practice is in place, it will tend to

---

[159] *Ibid.* at 1139. The Chief Justice repeated that point at 1143.

[160] *See generally supra*, note 48 at 60-67.

[161] *Supra*, note 40 at 1143-44.

[162] *Ibid.* at 1143.

[163] *See generally* B.L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks* (1976) 34 J. OF PERS. & SOC. PSYCHOLOGY 590; H.A. Sagar & J.W. Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Agressive Acts* (1980) 39 J. OF PERS. & SOC. PSYCHOLOGY 590.

[164] *See generally* M. Rothbart, M. Evans & S. Fulero, *Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes* (1979) 15 J. OF EXPERIMENTAL & SOC. PSYCHOLOGY 343; W.G. Stephan & D. Rosenfield, *Racial and Ethnic Stereotypes*, in A.G. Miller, ed., IN THE EYE OF THE BEHOLDER (New York: Praeger, 1982) at 92.

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.[165]

Moreover, increasing the representation of women fails completely to deal with malicious attitudes. The *Boyle/Kirkman Report* provided a list of comments which exemplified those attitudes.[166] Numerical quotas may also polarize the workplace between those employees who welcome the idea of employment equity, and those who are either firmly convinced of the traditional stereotypes or are simply prejudiced against the designated minorities. Even those employees who are not particularly prejudiced may nevertheless resent any affirmative action-type program for its apparent preferential treatment of minority employees. Unless steps are taken to educate employees about employment discrimination, they may feel threatened by affirmative action and may succumb to arguments that portray affirmative action as a form of reverse discrimination. In addition, those who stand to benefit from numerical targets and quotas resent the implication that they needed them to advance, while those who do not advance blame their fate on the targets and goals.[167] Hence, attempts to artificially change the representation of minorities without effective measures of addressing current attitudes are unlikely to eliminate discrimination from the workplace.

Chief Justice Dickson 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 unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.[168]

Unfortunately, a foreman's battle is *not* lost. He and other male employees can continue to make life difficult for the women who get jobs at CN. 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

---

[165] J.G. MacIntosh, *Employment Discrimination: An Economic Perspective* (1987) 19 OTTAWA L. REV. 275 at 286.

[166] *Supra*, note 40 at 1120. The following is a sampling of some of the examples: "Women are generally disruptive to the workforce", "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".

[167] *Supra*, note 48 at 128.

[168] *Supra*, note 40 at 1143.

continued problems and barriers they faced while on the job.[169] This is not a phenomenon unique to CN. 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.[170] The pressure to outperform 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.[171] Yet, in outperforming 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.[172] Those types of pressures 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*, the Supreme Court of Canada recognized the effect of sexist attitudes and conduct on the employment of women.[173] 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".[174]

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.[175] A scheme that focuses only upon increasing the representation of minorities in the workplace may allow major attitudinal barriers to persist unabated.

---

[169] *Ibid.* at 1123.

[170] *See generally* L. Greene, *Equal Employment Opportunity Law Twenty Years After the Civil Rights Act of 1964: Prospects for the Realization of Equality in Employment* (1984) 18 SUFFOLK U. L. REV. 593.

[171] *See generally supra*, note 165 at 288.

[172] *See generally* S. Law, *Girls Can't Be Plumbers — Affirmative Action for Women in Construction: Beyond Goals and Quotas*; Kracow, *supra*, note 156; S.M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion* (1990) 64 TULANE L. REV. 1625. On 8 March 1990, the CBC program IDEAS ran a story on women trying to make it in non-traditional jobs: *Journey of Women*, by Kate Braid.

[173] *Supra*, note 30.

[174] *Ibid.* at 1290.

[175] *Supra*, note 48 at 53.

The attitudes that play a role in restricting employment opportunities for minority groups are not unique to the workplace. In fact, these attitudes permeate the society as a whole, and they have an effect on minorities that are not designated under the *EEA*. The elimination of those attitudinal barriers would benefit any person who suffers as a result of systemic discrimination regardless of the group to which that person belongs. In contrast to numerical remedies, measures aimed at general societal attitudes do not require one to determine the proper representations of chosen groups. In the ensuing freedom to pursue employment, the composition of the workplace would adjust itself to reflect the preferences and inclinations of the workforce.

However, eliminating discriminatory attitudes in society generally cannot possibly be the goal of an employment equity scheme. Discriminatory attitudes arise from the perpetuation of stereotypes in the media, educational curricula, childhood experiences, and cultural conditioning. These areas lie outside the employment context. Since the *CHRA* and all other provincial human rights legislation have the elimination of discriminatory attitudes in society as one of their principal purposes, it would be redundant for the *EEA* to be concerned with societal attitudes, even though they are the root cause of employment discrimination. Rather, the *EEA* could be expected to deal specifically with the creation and perpetuation of discriminatory attitudes in the workplace.

The most important target group for the re-education of attitudes is management and the employees involved in personnel departments. They have the most direct control over the employment practices that restrict opportunities of minority groups and foster discriminatory attitudes among other employees. Educating and motivating employers to eliminate discriminatory barriers that are latent in their practices and policies is an alternative to pursuing employers through the complaints process. Such an educational approach answers Abella J.'s call for changing the standard of conduct across the board, rather than treating discriminatory practices as exceptions to a standard of conduct. It is to be expected that the desire to eliminate discriminatory practices will follow as employers realize and acknowledge the value of employment equity alongside the traditional values of productivity and profit.

The reporting requirements of the *EEA* play a crucial role in addressing employer attitudes. Going through the exercise of collecting and reporting the data on the composition of the workforce, employers will become more conscious about trends and discrepancies. Analyzing the problem areas and designing a plan of action further heightens the employer's consciousness about its hiring and promotion policies. The participation and cooperation of the Department of Employment and Immigration in a review process further assists in changing employer attitudes and assumptions about minority groups that have remained unchallenged. Employer workshops and seminars, such as those instituted in 1990 by the Canadian Human Rights Commission, to explain what kind of analysis is necessary for meaningful change, specifically

target the boardroom and executive officers.[176] The curricula of studies in business administration have been augmented to provide students who may go on to take management positions with an appreciation of the values of employment equity.[177]

The effective education of employers will reduce the apprehension and resistance that has been associated with mandatory affirmative action programs in the United States. That in turn will result in a stronger and more lasting degree of compliance to a non-discriminatory standard of conduct on behalf of employers.[178] 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 workplace to eliminate discriminatory barriers and give minority groups fairer access to employment opportunities. Representativeness once achieved is in danger of receding unless a true change in attitudes is actively pursued.

RECOMMENDATIONS OF THE SPECIAL PARLIAMENTARY COMMITTEE

On 7 May 1992, Parliament's Special Committee on the Review of the Employment Equity Act tabled its report and recommendations after receiving submissions from a broad perspective of views.[179] In its report, the Special Committee dealt with all aspects of the *EEA*. Several of their findings and recommendations are worthy of comment in light of what has been said in this article.

The Committee felt strongly that employment equity would most effectively be achieved through plans, goals, and timetables that employers develop.[180] While the Committee considered that employers needed flexibility to devise the most effective measures, it was felt that some employers were slow to respond in taking action. In order to expedite the process and to lend a greater imperative to the design and implementation of effective measures, the Committee recommended that Regulations to the *EEA* outline acceptable requirements and standards.[181] Such regulations would clearly identify the type and extent of changes expected of employers. The Special Committee also recommended that all interested parties participate in the development of the employment equity plan, including the employer, unions, employees' representatives, and designated group members.[182] It is pointed out that such participation

---

[176] *Supra*, note 115 at 48.

[177] 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 48 at 133.

[178] R.A. Macdonald, *Understanding Regulation by Regulations*, in I. Bernier & A. Lajoie, eds., REGULATIONS, CROWN CORPORATIONS AND ADMINISTRATIVE TRIBUNALS (Toronto: University of Toronto Press, 1985) 81 at 106*ff*.

[179] *Supra*, note 5.

[180] *Ibid.* at 12.

[181] *Ibid.* at 13 (Recommendation 2.1).

[182] *Ibid.* at 16 (Recommendation 2.4).

would not only perform an educational function, it would also enhance the acceptability of employment equity measures to all parties.

These recommendations show that the Special Committee does not wish employment equity in Canada to import from the United States experience with affirmative action the difficulties associated with the mandatory imposition of numerical quotas. The imposition of quotas is 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.[183] 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. Of course, there are arguments on both sides of this issue. Regardless of the validity of those arguments, it is certain that the imposition of mandatory quotas would have the undesirable effect of alienating employers from the cause of employment equity.

As a result, compliance could only be achieved through the intervention of the Canadian Human Rights Commission and Human Rights Tribunals. The enforcement of numerical quotas in this manner presents all the hurdles that the Canadian Human Rights Commission is presently dealing with in trying to fulfil its prosecutorial mandate. Litigation is time-consuming and expensive given the nature of Tribunal proceedings and inevitable appeals to higher courts. Even if the Commission is successful in the end, there is no assurance that the employer who has been beaten into submission will be effective in eliminating restrictive practices and other latent employment barriers. Nevertheless, the theory maintains that the effective prosecution of some employers will scare other employers into compliance. But employers who implement employment equity out of fear of prosecution will invariably perform a much poorer job than those who undertake employment equity out of an understanding of the objectives and a desire to achieve them. Besides, unwilling employers are likely to find ways of limiting the practical effect of tougher and more expansive regulations.[184] The Task Force on Barriers to Women in the Public Service was told by one manager that employers can find their way around numerical quotas:

> 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.[185]

---

[183] *See generally supra*, note 10.
[184] *Supra*, note 48 at 61.
[185] *Ibid.* at 129.

No degree of prosecution by the Canadian Human Rights Commission can make up for losing the willingness of employers to work as partners in 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 prosecution of a limited number of complaints. In considering the question of enforcement mechanisms, the Committee specifically referred to these issues:

> The Committee strongly feels that the best approach is a remedial, as opposed to a punitive, method of enforcing the principles of employment equity under the Act. Coercing employers into complying with the legislation would only serve to build resentment and reinforce discriminatory attitudes. The Committee believes that creating positive attitudes is just as important to the process as eliminating institutional barriers.[186]

Employers who are persuaded to take the initiative in employment equity in their own interest and in the interest of fair play, develop measures that are more effective and better suited to the particular circumstances of their workplace. In addition to the inertia created by their commitment to employment equity, employers will feel more comfortable about an action plan and goals which they helped to develop. Accordingly, the Special Committee recommends that the Employment Equity Branch at the Department of Employment and Immigration continue to assist employers to devise and implement measures, and to monitor their progress. The recommendation stresses that this role be clearly expressed in the legislation. The recommendation that all interested parties work jointly on employment equity further strengthens the grass roots approach. Such cooperative and multi-party ventures would be invaluable to penetrating long-standing stereotypes and attitudes. In addition, it would strengthen the implementation of employment equity by reducing resistance that arises from a misapprehension of the motives and purposes of those measures.

It is true that some employers may need some additional coaxing before they take effective steps. Given the current legal challenges to the jurisdiction of the Canadian Human Rights Commission to proceed with investigations concerning employment equity, there is little threat of consequences for employers who are simply not willing to comply with the *EEA*. To remedy this deficiency, the Committee has recommended that the Canadian Human Rights Commission be formally recognized as an enforcement agency, and that its role and mandate be clearly defined under the *EEA* and *CHRA*. Moreover, the Committee recommends that a financial penalty be applied to all violations of the *EEA*, including the failure to consult with employee representatives, or to develop, implement, and comply with an employment equity program.[187] Such a provision should ensure that employers make reason-

---

[186] *Supra*, note 5 at 27.
[187] *Ibid.* at 29 (Recommendation 4.5).

able efforts to comply with the requirements of the *EEA*, and that no employers act in bad faith.

It is noteworthy that the Committee does not address the goal of attaining a representative workforce. That goal is captured in subsection 4(b) of the *EEA* which stipulates that the composition of employees should reflect the composition of the workforce available. In its report, the Committee stated that representatives of designated groups feared that numerical results could be distorted or manipulated.[188] The report also relayed the concerns of employers' organizations that it is difficult to assess real achievements on the basis of numbers alone. On several occasions, the Committee noted that more attention should be devoted to qualitative measures that appeared to have been overshadowed by quantitative considerations.[189] On the whole it can be said that the Committee resisted the temptation of focusing on the numbers approach and playing with numerical quotas.

In particular, the Committee resisted changing subsection 4(b) of the *EEA* to require that employers "catch up" with the representation of minorities in the workforce at large. Currently, employers are required to match the composition of their workplace with the composition of the workforce available in qualified applicant pools. Requiring employers to match the workforce at large in those instances where there is a difference between that workforce and the qualified workforce would compel employers to take drastic affirmative action measures. For example, a university with a faculty where women are under-represented would have to hire female professors at a greater rate than their proportion in the pool of qualified applicants. Indeed, a university might even have to ignore all male applicants and hire exclusively women in order to achieve an overall 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 women in the past, and it would penalize current male applicants for an advantage given to men in the past. By not calling for such measures, the Committee recognizes that as a systemic, proactive, and forward-looking remedy, employment equity is not intended or designed to provide compensation to the designated minorities for wrongs visited upon other members of those minorities in the past.

The Committee focused upon the proactive approach in its concluding remarks, where it recommended that the government set up a task force to develop a National Employment Equity Strategy. This recommendation recognizes that employment discrimination cannot be remedied by quick-fix measures to increase the representation of minority groups. Rather, the root causes of employment inequity must be addressed through broad initiatives:

---

[188] *Ibid.* at 12.
[189] *Ibid.* at 12 & 24.

> Employment equity is a key policy instrument in achieving well-being for all and in shaping a new labour market. Lasting solutions to the employment problems of disadvantaged groups will come only from attacking the root causes of employment inequity.[190]

The mainstay of the National Employment Equity Strategy would be the establishment of a mechanism to systematically foster partnerships among employers and various other parties interested in employment equity. Further, the Strategy would include undertaking a public education campaign, granting assistance to employers who seek to employ members of the designated groups, and creating job training programs that provide for the full participation of minorities. Finally, the Committee expects the task force to review federal legislation, regulations, and programs in order to eliminate any barriers to employment equity.[191]

These recommendations represent an emphasis on a cooperative, broad, and proactive approach to solving employment discrimination, as distinct from the imposition of numerical quotas that is associated with the numbers approach. This "soft" approach has been criticized as operating too slowly for a problem that is causing immediate harm. Members of designated groups may express frustration with the soft approach because it does not directly increase their representation in the workplace. Indeed, in terms of representativeness, the results of educating employers and eliminating restrictive barriers may not be measured in the span of a given number of years.

In setting expectations by which to evaluate the success of the employment equity regime, however, one should consider what causes employment discrimination, and what solutions would provide the most effective and long-lasting remedy to the problem. Those who are impatient with the soft approach should remember that "quick-fix" measures, such as the imposition of numerical quotas, are only temporary in nature and can only attempt to soothe the symptoms of employment discrimination. In fact, such measures could complicate and even exacerbate the problem of employment discrimination by reinforcing old attitudes and stereotypes and alienating employers. That would only serve to prolong the time that it would take to treat the actual root cause of discrimination. Hence it makes sense not to rush to increase the representation of minorities in the short-term, and thus jeopardize the long-term and long-lasting solutions.

There are already signs that times are changing, and that the next generation is shedding some of the traditional stereotypes and 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 and other minorities in such visible positions as public transit drivers or police officers also contributes to the reduction of traditional stereotypes. While

---

[190] *Ibid.* at 32.

[191] *Ibid.* at 35 (Recommendation 5.1).

these steps forward cannot be attributed to the *EEA*, they nevertheless provide reassurance that the potential for genuine change in attitudes does exist. Measures to address discriminatory attitudes and restrictive employment practices through a cooperative approach and a National Employment Equity Strategy can take advantage of that potential.

CONCLUSION

When Justice 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; it has nevertheless incorporated them into a uniquely Canadian regime by combining a proactive tenor with a hands-off approach.

The *EEA* promotes the achievement of a representative workforce and the elimination of restrictive employment practices. The *EEA* avoids any heavy-handed imposition of quotas or goals, however, preferring to rely upon the initiative and good sense of employers. At first glance, one is tempted to label that approach as a middle-of-the-road solution that seeks to appease both the designated minorities and employers. On a second look, however, it becomes apparent that, whether or not it was so intended, the approach taken in the *EEA* is an ingenious way of reducing employment discrimination without attracting apprehension or resistance from employers that for the most part react instinctively against any infringement upon their freedom to conduct business. While the *EEA* obliges employers to eliminate employment barriers to minorities and thereby increase their participation in the workplace, it leaves the details of devising a plan of action up to the employers. Hence, the implementation of employment equity programs occurs in a non-threatening context.

If the success of the *EEA* is to be measured in terms of the reduction of employment barriers, then the *EEA* 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 workplace of some employers. Voluntary measures taken by employers with an understanding of the problem of discrimination have a stronger foundation upon which to survive than measures taken in avoidance of litigation and sanctions.

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 *EEA*. It is hoped that the government will realize 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. The political decision of whether or not to augment the *EEA*, however, will not be taken under the false expectation that the achievement of a representative workforce will constitute a solution to employment discrimination.