The Employment Equity Act: From Policy to Implementation

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I. INTRODUCTION

We, as Canadians, have accepted the concept of equity as a value which we seek to uphold in our laws and throughout our society. Thoughtful Canadians have recognized that a truly just society may never be fully achieved but that this image provides us with a goal worth seeking. The Royal Commission Report, *Equality in Employment* (1984) presents today's challenge for Canada:

> *If in this ongoing process we are not always sure what "equality" means, most of us have a good understanding of what is "fair". And what is happening today in Canada to women, native people, disabled persons and visible minorities is not fair.*[1]

Each generation has faced challenges to live up to our sense of fairness, and at times we have failed miserably, as in our treatment of Canadians of Japanese origins or our rejection of Jewish people fleeing the Holocaust before and during World War II. However, we are aware of our failures and despite them, remain as a people committed to the principle of equity and are attempting to direct our educational and legislative efforts to achieve that principle. We seek a society wherein people will have the opportunity to develop their skills and talents to the best of their ability, free of discriminatory barriers.

The new equity initiatives of the federal government in the field of employment were a response to many studies, parliamentary reports and increasing pressures from groups and individuals. The Royal Commission Report, *Equality in Employment*, released in October 1984 was a culmination of all these efforts.

From studies and statistical analysis, we are increasingly aware that, as a society, we have not enabled women and minorities to fully participate in the work force in all occupations and levels including those which represent decision-making in business, government and labour. A quick review of some of the more significant findings from the 1986 Census reinforces this awareness.

The profile of women in the Canadian work force, derived from the 1986 Census, indicated that despite voluntary employment equity programs and equal pay legislation, women remained disadvantaged workers. Women represented 44% of the Canadian labour force in 1986, and accounted for 95% of the increase in the labour force between 1981 and 1986. Women also experienced relatively high unemployment rates. The unemployment rate for women was 11.2% versus 9.6% for men. Moreover, over one half (53.2%) of women in the labour force remained segregated in clerical, sales and service positions. Women held less than one fifth (17.4%) of upper management positions and less than one third of all middle management jobs. The average salary (1986) for women working full-time was $19,995.00, only 65.6% of the average full-time salary for men.

There were some problems in obtaining a complete set of data on the profile of aboriginal peoples in the Canadian labour force, due to the non-participation of 130 reserves

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1. Judge Rosalie Abella, *The Royal Commission Report* (1984) at 1.

(45,000) people in the 1986 Census. Even with this undercount, the 1986 Census still showed a 72% increase in the number of aboriginal peoples in the labour force since 1981. Despite this increase, aboriginal peoples only represented about 2.1% of the Canadian labour force in 1986. The unemployment rate for aboriginal peoples in 1986 was 22.7% — more than twice the national average. Aboriginal peoples also showed a high degree of occupational segregation. Nearly one half (47.9%) of this group were found in clerical, service or other manual positions. They were under-represented in upper management, middle management and professional positions. The average salary for aboriginal peoples was $23,265.00. This represented 86.9% of the average full-time salary for the Canadian labour force.

The 1986 census data on persons with disabilities was collected from a supplementary survey, the *Health and Activity Limitation Survey* (HALS). This survey was designed to gain more accurate information about persons with disabilities than had been previously collected. The information was broken down into two sub-groups: those who are limited at work and those who are not. As may be expected, persons with disabilities who are not limited at work had a profile which was quite similar to that of the Canadian labour force. Persons with disabilities who are limited at work, however, indicated many of the characteristics of a disadvantaged group. The unemployment rate of persons with disabilities who were limited at work in 1986 was 20%, more than twice the national average. Their average full-time salary (1986) was $22,415 — only 83.7% of the average full-time salary for the Canadian labour force. They were also under-represented in upper management, middle management and professional positions.

Between 1981 and 1986 the number of members of visible minorities in the labour force increased by 31.4% and the representation of the group increased to 6.3%. Members of visible minorities exhibited many of the characteristics of a disadvantaged group. Their unemployment rate in 1986 was 10.8%, more than two percentage points above the national average. Members of visible minorities had an average salary of $24,228 — 90.5% of the average full-time salary in the Canadian labour force. They were also under-represented in managerial positions. There is substantial internal diversity within this group. Some of the racial sub-groups have higher rates of unemployment and lower average salaries.

Finally, it is important to note that within each disadvantaged group, women experience a double disadvantage. For instance, in 1986, women with disabilities were paid only 87.3% of the full-time average salary for all women in the Canadian labour force; aboriginal women were paid 92.9% and women who are members of visible minorities were paid 94.4% of the full-time average salary for all women in the Canadian labour force.

The 1984 Royal Commission Report concluded that voluntary affirmative action programs in the public and private sectors had made little progress in improving the employment status of women and minorities.

> *The choice for government is between imposing and hoping for equality in employment, between ensuring the right to freedom from discrimination and its mere articulation. In a society committed to equality, the choice is self-evident.*[2]

2. *Ibid.* at 202.

Among the far-reaching recommendations to both federal and provincial governments was the recommendation that a law be passed which would require all federally regulated employers, government departments and agencies to adopt affirmative action-employment equity programs. As well, "employment equity" was recommended as a "made in Canada" term, free of American concerns about affirmative action programs, to designate programs which address systemic discrimination in the Canadian workplace.

II. GOVERNMENT RESPONSE

Although the possible models for administering mandatory employment programs suggested by the Royal Commission were not fully accepted, a major announcement was made in the House of Commons, March 8, 1985 (International Women's Day) by the Honourable Flora MacDonald, then Minister of Employment and Immigration. It included three major initiatives and affected the following:

(1) Crown corporations, which must begin implementing employment equity by September and begin reporting annually within a year;

(2) Federally regulated businesses with 100 or more employees which must develop plans and begin reporting within three years; and

(3) Companies tendering on government contracts for goods and services, which must certify their commitment to Employment Equity and show results.[3]

As well, in a press release and a joint press conference following Flora MacDonald's announcement in the House, the Honourable Robert de Cotret, Treasury Board president, announced an immediate review of the Public Service job classification system to identify and remove any remaining systemic barriers to the target groups; the presentation to Treasury Board by the end of March of departmental plans to improve the status of the four groups including numerical objectives; and the establishment of a Public Service joint union-management committee to prepare "a detailed implementation plan in the area of equal pay for work of equal value."[4]

This paper will focus on the *Employment Equity Act* by considering the key definitions essential to an understanding of the *Act*, the background to the *Act*, the passage and final substance of the *Act* and issues for consideration in the future.

The *Act* is reviewed from the perspective of a policy advisor who is responsible for the day-to-day implementation of the legislation.

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3. Press Release, 8 March 1985.

4. *Ibid.*

III. DEFINITIONS ESSENTIAL TO AN UNDERSTANDING OF THE *EMPLOYMENT EQUITY ACT*

Section 2 of the *Employment Equity Act*, the purpose clause, consolidates in one statement the hope that a legislated approach focusing on the status of groups affected by systemic discrimination will lead to the achievement of a more equitable workplace.

> *S. 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.*[5]

This statement of purpose, while not essential to the operation of the legislation, was included on the insistence of policy advisors. As the first such legislation in Canada, such a statement clearly establishes the intent of the government.

Although anti-discrimination legislation to protect the rights of individuals has been part of the movement toward equity since the end of World War II, by the 1970s it was recognized that overt deliberate discrimination against women and minorities, albeit perhaps the most vicious form of discrimination, was not the most all-pervasive.

The case by case approach which was adopted under human rights legislation does not adequately address the problems of "systemic discrimination", defined as the:

> *act of excluding members of certain groups through the application of employment policies or practices based on criteria that are not job-related nor required for the safe and efficient operation of the business.*[6]

Systemic remedies are required to address the impact of traditional employment systems built around a model of the most powerful group: white, non-disabled males, and based on stereotypes which erect barriers to individuals because of misconceptions of, and prejudice toward, the group to which such individuals belong. Thus an apparently neutral employment policy or practice may unintentionally adversely impact women and minorities, for example, unnecessary height and weight requirements, which tend to screen out many women and some minority groups.

Under Section 12 of the *Act,* the guidelines provided to employers implementing an employment equity program, define Employment Equity as follows:

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5. *Employment Equity Act*, S.C 1986, C-31, s.2.

6. Employment and Immigration Canada, *Employment Equity: A Guide for Employers*, Glossary at 8.

A comprehensive planning process adopted by an employer to:

(a) identify and eliminate discrimination in the organization's employment procedures and policies;

(b) remedy the effects of past discrimination;

(c) ensure appropriate representation of designated groups throughout an employer's workforce.[7]

Disadvantages in employment for the four groups designated under the *Act* include such employment patterns as higher than average unemployment, lower than average pay rates and a tendency to be concentrated in low status jobs.

The employment equity remedy to such disadvantages involves a comprehensive planning process leading to a program which seeks to remedy the effects of past discrimination through identifying and eliminating discriminatory barriers in the employer's employment policies and procedures. An effective program must include special measures in hiring, training and promoting women and minorities to ensure a fair representation of these designated groups throughout the organization.

Special measures are short-term "catch-up" activities designed to address a lack of representation of a designated group or groups within the employer's workplace. In analyzing employers' executive summaries submitted voluntarily by forty percent of employers covered by the *Act*, the recruitment of designated group members, training on equity issues to all staff and the training and development of women and minorities were the three most common measures described in their first statistical annual reports required by June 1, 1988.

Such measures, as part of a comprehensive plan, are deemed acceptable under Section 15 of the *Canadian Human Rights Act* and Section 15(2) of the *Charter of Rights and Freedoms*.

The purpose clause of the *Act* refers to the "accommodation of differences". *The Royal Commission Report*, 1984, addresses this essential aspect of an effective employment equity program:

Ignoring differences and refusing to accommodate them is a denial of equal access and opportunity. It is discrimination.[8]

Thus, to make a reasonable accommodation by adjusting the workplace site to allow access to persons with disabilities, providing assistance with day care or accommodating to minority cultural or religious practices in a reasonable manner, can ensure that individuals have equal access to jobs.

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7. *Supra* note 5.

8. Judge Rosalie Abella, *supra* note 1 at 3.

The term "work force" in Section 4 of the *Act* was deliberately recommended by the policy advisors. To use the more familiar and clearly defined term "labour force" would have limited the range of persons within the designated groups who must be included in the employment equity statistics. Labour force, as utilized by Statistics Canada, refers to those individuals with a job or those who have been seeking a job for four weeks prior to the labour force survey. The specifications the Employment Equity Branch provided for Statistics Canada's collection of data for purposes of employment equity planning and monitoring, track job seekers for 18 months prior to the census. The intention is to collect data on workers who have become discouraged in the search for employment. In the case of disabled persons, data was collected from 1980 to 1986, rather than the 18 month period for the other three groups.

To assist employers in establishing goals and timetables and to assess the numerical results achieved, Employment and Immigration Canada has prepared sets of availability data based on Statistics Canada information. In the *Affirmative Action Technical Training Manual*, Employment and Immigration Canada, availability data is defined as follows:

> *Availability data consists of three elements, all of which must be considered in determining the availability of target groups members for any job or occupation. These are:*
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> *(1) the geographical recruitment areas from which an employer attracts new employees;*
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> *(2) the skills required for the job; and*
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> *(3) the sources of candidates in the internal work force as well as in the external recruitment area.*[9]

Finally, although the designated groups are defined in the Employment Equity Regulations, the decision on those to be included in the sub-groups does require a certain amount of practical or common sense. Fortunately, as the regulations were being prepared, it was agreed by policy advisors and legal advisors that women did not require a definition in the Regulations!

The Regulations indicate that aboriginal peoples include Indian, Inuit or Métis who, "for the purposes of Section 6 of the *Act*, identify themselves to an employer, or agree to be identified by an employer, as Indians, Inuit or Métis."[10] This definition has not caused significant interpretive difficulties.

Persons with disabilities are defined as those who:

> *(1) have any persistent physical, mental, psychiatric, sensory or learning impairment,*

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9. Employment and Immigration Canada, *Affirmative Action Technical Training Manual* at 66.

10. Employment and Immigration Canada, *Employment Equity Act and Reporting Requirements*, Regulations at 2.

> *(2) consider themselves to be, or believe that an employer or a potential employer would be likely to consider them to be, disadvantaged in employment by reason of an impairment referred to in sub-paragraph (1), and*
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> *(3) for the purposes of section 6 of the* Act*, identify themselves to an employer, or agree to be identified by an employer, as persons with disabilities.*[11]

Although technical papers disseminated to employers with the *Act* and Regulations attempt to provide a listing of such disabilities, at times, one must question the lack of common sense when it was suggested that such "disabilities" as wearing glasses be considered appropriate as a disability to be reported. As well, hidden disabilities such as epilepsy or diabetes may provide instances where self-identification may not be acceptable to an employee.

The definition of visible minorities in the Regulations has also raised some questions. They are defined as:

> *persons, other than aboriginal peoples, who are, because of their race or colour, in a visible minority in Canada, are considered to be persons who are non-Caucasian in race or non-white in colour and who, for the purposes of Section 6 of the Act, identify themselves to an employer, or agree to be identified by an employer, as non-Caucasian in race or non-white in colour.*[12]

Technical Reference Paper No. 2 provides self-identification categories and a listing of examples of visible minority sub-groups. The development of these categories required considerable research and may be the subject of interest and differences of opinion for some time to come. Practically speaking, policy advisors, in considering the constituency of the group, kept as a basis for decisions the difficulties humans have in accepting those who look different from the majority of the people of one's town, city or country. This basis for possible discriminatory attitudes and practices helped to guide the thinking of those recommending appropriate categories and examples.

IV. AMERICAN/CANADIAN DEVELOPMENTS

Although the term Employment Equity recommended by the Abella Commission is a Canadian concept without the past history of controversy surrounding the American "Affirmative Action", much of the terminology and certainly the intentions are similar in the two countries. However, it is interesting to note that the impetus for action was quite different in the two countries.

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11. *Ibid.* at 2.

12. *Ibid.* at 3.

In the United States, the civil rights movement to achieve recognition of the rights and dignity of black people led the way towards positive programs for women, Hispanics and others. In Canada, pressures for change came from the women's movement which provided leadership and led to the inclusion of equality for women in *The Constitution Act 1982*. Although this right must be tested, it enshrines the concept of equality between men and women, a constitutional amendment that has so far eluded women in the United States.

The voluntary programs promoted by governments in Canada began with the Affirmative Action Program of the government of Ontario in 1975 targeted to women. In 1977, the federal government mandated the Canada Employment and Immigration Commission to work with employers to establish programs to improve the employment status, not only for women, but Native people and persons with disabilities. Following the Royal Commission Report in 1984, the new group, visible minorities, was targeted in recognition of the changing demographics of Canadian society. (It should be noted however that under the Employment and Immigration voluntary program, begun in 1977, Blacks in Nova Scotia were designated). Visible minorities were also designated for special measures in the training and development programs under the Canadian Jobs Strategy of Employment and Immigration.

As in the United States, systemic discrimination, not necessarily involving the intent to discriminate has, since the 1970s, become accepted by human rights tribunals and Court rulings.

The American cases, *Griggs* v. *Duke Power Company* 401 US 424 (1971) and *United Steelworkers of America* v. *Weber* (1974) established that "...good intent does not redeem employment procedures ... that operate as build-in headwinds for minority groups (or women)... "[13]

In the *Weber* case, it was affirmed that a race-conscious "catch-up" affirmative action plan designed to break down historical patterns of discrimination was permissible under Title VII of the Civil Rights Act.

Canadian cases such as *Ishor Singh* v. *Security and Investigations* (1977) and *K.S. Bhinder and the Canadian Human Rights Commission* v. *The Canadian National Railway Company* confirm that the intent to discriminate does not have to be proven for there to be a violation of legislation prohibiting discrimination in employment. An apparently neutral policy can have an adverse impact on members of certain groups thereby demonstrating the discriminatory nature of certain employment policies and procedures.

Thus the ordering of affirmative action programs to prevent further disadvantages in employment has now been accepted in tribunal decisions under human rights law in canada. However, the most far-reaching decision in applying a systemic remedy for systemic discrimination is the Supreme Court decision in *Action Travail des Femmes* v. *Canadian National*.

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13. *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971).

In this case, the women's organization alleged that recruitment procedures, non-job related testing and derogatory and unequal treatment of female applicants were preventing a fair representation of women in the St. Lawrence region of the company.

The Human Rights Tribunal ordered a comprehensive affirmative action/employment equity program, including advertising campaigns to encourage women to consider non-traditional jobs, policies to prevent sexual harassment and special measures to ensure that one out of four new hires were women until the percentage of women in non-traditional positions reached 13%, the national rate for women in non-traditional occupations. Although a majority of the Federal Court of Appeal approved much of the decision, it overturned the application of numerical quotas. However, in a landmark decision, the Supreme Court reversed this decision and unanimously held that a Tribunal under the *Canadian Human Rights Act* can impose an employment equity program designed to address systemic discrimination and upheld the 13% representation quota set by the Tribunal. Chief Justice Dickson noted:

> *To render future discrimination pointless, to destroy discrimination stereotyping and to create the required "critical mass" of target group participation in the work force, it is essential to combat the effects of past systemic discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for the previously excluded group. The dominant purpose of employment equity programs is always to improve the situation of the target group in the future."*[14]

V. THE LEGISLATIVE PROCESS

The March 1985 announcement introducing employment equity legislation was followed by a series of consultations with representatives of business, labour and designated groups. In an address to one such consultative session, April 30, 1985, then Minister of Employment and Immigration, the Honourable Flora MacDonald, indicated the link between equity in the workplace and sound economic development.

> *This brings to mind how far we have come in recognizing the concerns both of targeted groups and of business and labour in achieving equity and efficiency. What may come as a surprise to you here is the degree to which the issue of employment equity is seen by this government as being central to the whole question of creating economic growth and prosperity in Canada in the future."*[15]

The Employment Equity Act (1986) represents the first efforts in Canada to legislate a group approach to systemic discrimination in employment. It has been considered by some to be experimental legislation and as such has a built-in procedure.

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14. (1987) 3:7 *Women's Employment Law* at 3.

15. *Employment Equity Consultations - Remarks*, 30 April 1985.

June 27, 1985, *Bill C-62, An Act Respecting Employment Equity* was tabled for first reading in the House of Commons by the Honourable Flora MacDonald. At the same time, *Employment Equity, A Working Paper*, was distributed to interested parties. It provided information about the legislation and sought responses to regulatory options. Responses were submitted to the Employment Equity Branch of Employment and Immigration Canada to ensure that policy advisors were aware of the possible impact of the options presented.

The second reading of the bill in the House of Commons began on October 3rd. It was passed and referred to a legislative committee November 21st, following an acrimonious debate with a division in the House of 94 Yeas and 25 Nays.

The legislative committee convened on December 4th and heard from many witnesses representing employers, unions and designated groups. Following several sessions of strong and often conflicting testimony, the Honourable Flora MacDonald made a second appearance before the committee on January 16, 1986. She reiterated the two major principles underlying the legislation, that is, a focus on employer results and the public disclosure of those results. Indicating that the government wished to strike a balance between the conflicting requests of employers concerned about excessive reporting requirements and that of groups wishing to legislate more stringent requirements, she proposed several amendments. With those changes and a few changes drafted during clause-by-clause consideration of the bill, three new sections and four new sub-sections were approved.

The legislation covered Crown corporations and federally regulated businesses having 100 or more employees which are required to provide detailed annual reports on the status of designated groups in their organizations.

The employer must report by June 1 of each year, beginning in 1988, on the industrial sector(s) and numbers of all employees and the number of designated group employees. Where the employer has 100 or more employees, at national, provincial or major city levels (Census Metropolitan Areas; Halifax, Montreal, Toronto, Winnipeg, Regina, Calgary, Edmonton and Vancouver), a separate report is required on the following:

(1) The occupational groups of the employer based on 12 categories, used by the Royal Commission 1984 in their study of Crown corporations, and four salary ranges within these groups.

(2) Salary ranges of employees and the representation of designated groups within these ranges.

(3) The representation of designated groups in all hirings, promotions and terminations (flow data).

By regulation, the minority groups were to be reported on by the representation of male and female employees in each reporting category.

The individual employer reports must be printed and made available for public inspection under Section 10. This was accomplished by enlisting the support of approximately

300 libraries across Canada, of which 60 maintain hard copy sets of reports and approximately 240 maintain microfiche copies.

As well, Section 9 requires a consolidated report providing an analysis of the status of designated groups within the federally regulated labour force. The report must be tabled in Parliament by the Minister of Employment and Immigration prior to the end of the calendar year during which employers have filed their individual reports.

Section 4 of the *Act* prescribes the employer's duty to implement a program to move toward a more representative 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*
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> *(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*
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> *(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."*[16]

The key focus of employment equity planning is encompassed by this section: the elimination of systemic employment barriers, the adoption of positive action and a reasonable accommodation of differences. It also covers the concept that the representation of designated groups must be at least proportional to their occupational availability in the work force.

Section 4 (b)(i) "in the work force" establishes that the population referred to are those who are in the labour force, as earlier defined and those who would be if they were not excluded by barriers to employment (see p. 10).

Section 4 (b)(ii) by inference, destroys the myth that employment equity programs promote the hiring and promotion of unqualified people. In this sub-section, the reference is to those *qualified* for the work, those eligible (by reason of the necessary union membership, permit licence, etc.) and those within the appropriate recruitment or promotion area).

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16. *Supra* note 5, s.4.

An interesting amendment to Section 4 was proposed by the Minister and accepted during the meetings of the Parliamentary Committee. It requires employers to consult with their unions or where there are no unions with employee representatives. In the guidelines issued following proclamation of the *Act*, such consultation is defined as follows:

> *In this context, consultation means that the employer must supply sufficient information and sufficient opportunity to employee representatives or bargaining agents to enable them to ask questions and submit advice on the implementation of Employment Equity.*[17]

This amendment continues to concern both employers and unions. In particular, those employers with "hiring halls" believe that unions should be required under the *Act* to cooperate in the development of employment equity planning. Although some unions may agree with this position, there was some reluctance during debates in the Legislative Committee to promote a stronger requirement.

The present *Act* contains a new Section 5 not in the original bill. Since establishing realistic numerical goals and a timetable for their achievement is an integral part of an effective employment equity plan, or indeed any effective business plan, Section 5(1) requires the employer to prepare a plan setting out the goals to be achieved during the year or following years and a timetable for implementation. Section 5(2) requires that a copy of the plan be retained by the employer for a period of at least three years "after the last year in respect of which the plan is prepared."[18]

This amendment relates to the role envisioned for the Canadian Human Rights Commission, as does another Sub-section 6(3) added following second reading of the bill which requires that all records forming the basis of the employers' annual report be maintained for a similar period of three years. Should the Canadian Human Rights Commission investigate a federally regulated company, records would be available to facilitate the investigation. A new Section 8 was also introduced by the Minister on January 16 before the Legislative Committee. Section 8 simply states that "The Minister shall, on the receipt of a report filed under section 6, send a copy thereof of the Canadian Human Rights Commission."[19] Since all individual employer reports are made available to the public, one might question the need for Section 8. However, this section was included to indicate that given the information on designated groups provided by employer reports, the Canadian Human Rights Commission can assess the numerical results and use such information to determine whether there has been a breach of the *Canadian Human Rights Act*. Section 10 of the *Canadian Human Rights Act* prohibits policies and practices which tend to deprive individuals or classes of individuals of employment opportunities on a prohibited ground of discrimination and Section 32(3) of the *Canadian Human Rights Act* provides that the

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17. *Supra* note 6 at 17.

18. *Supra* note 5, s.5(2) at 3.

19. *Ibid*. s.8.

Commission may initiate a complaint where it "has reasonable grounds for believing that a person is engaging or has been engaged in a discriminatory practice."[20]

The *Employment Equity Act* does not give any further powers to the Canadian Human Rights Commission but provides detailed information on the status of women and minorities within individual federally regulated firms which has not been previously available. The new sections of the *Employment Equity Act* which require that an employment equity plan and all records prepared in order to develop the plan be maintained by the employer for three years can therefore assist the Canadian Human Rights Commission should it decide sufficient grounds exist to initiate an investigation of individual employers' employment practices. Section 32 of the *Canadian Human Rights Act* also provides for complaint procedures. Given the nature of public scrutiny of results underlying the development of the *Act*, it was assumed that designated groups or representatives of the four groups would also file complaints under the *Canadian Human Rights Act*.

The final addition to the original bill was Section 13, which requires a review of the operation of the *Act*.

> *13 (1) Five years after the coming into force of this Act, and at the end of every three year period thereafter, a comprehensive review of the provisions and operation of this Act including the effect of such provisions shall be undertaken by such committee of the House of Commons as may be designated or established by the House for that purpose.*
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> *(2) Within six months after the completion of the review referred to in subsection (1), the committee so designated or established for that purpose shall submit a report on the review to Parliament including a statement of any changes the committee would recommend."*[21]

This addition provided some assurance to those concerned about the lack of an enforcement mechanism for Sections 4 and 5 in the *Act* since the only enforceable section under the *Employment Equity Act* itself is the requirement to report under Section 7.

> *7. An employer who fails to comply with section 6 is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars.*[22]

Thus Section 7 does not cover compliance with Sections 4 and 5 which address the employer's duty to develop "positive policies and practices" to ensure a representative workplace.

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20. *Canadian Human Rights Act*, S.C. 1976-77, s.2, as amended by S.C. 1980-81-82-83, C.143, s.1 & S.C. 1980-81-82, Sch. IV, s.1, s.32(3).

21. *Supra* note 5, s.13 at 5.

22. *Ibid.* s.7.

The parliamentary reviews required under the *Employment Equity Act* will assess the implementation of the *Act* and recommend any changes to improve its effectiveness.

Bill C-62 was passed by the House of Commons on April 23, 1986 and sent to the Senate for ratification. The Senate Committee raised two major issues with government officials and other witnesses prior to returning the bill to the Senate for third reading. The committee expressed concern regarding the validity of occupational data available on the four designated groups and, in particular, the three minority groups. This was recognized as a legitimate concern. However, assurances were provided that the 1986 census would provide better data which would gradually be refined and improved each year. As well, the Senate Committee was concerned that there was no effective enforcement mechanism as part of the legislation and suggested that the *Act* should be named "The Employment Equity Reporting Act", since it only provided enforcement of Section 6, the requirement that employers file a detailed report annually.

The Chief Commissioner of the Canadian Human Rights Commission, Gordon Fairweather, indicated that there would be sufficient information provided so that the Canadian Human Rights Commission could assess results and stated that Bill C-62 was required.

> *The Commission has explained that we will enforce employment equity by enforcing the* Canadian Human Rights Act. *The* Canadian Human Rights Act *gives the Commission the authority to initiate complaints when there are reasonable grounds for believing that an organization is engaging in discriminatory practices. The data reported by virtue of Bill C-62, where it documents an under-representation of a target group, will give the Commission these reasonable grounds.*[23]

The Senate ratified the bill and it received royal assent June 27, 1986, the day it was announced that the Honourable Flora MacDonald would be moving to another portfolio. As the Minister of the Crown spearheading this new and controversial legislation, she was able to oversee the original development of policy and the bill's passage through both Houses.

The *Act* and Regulations were proclaimed on August 13, 1986, and guidelines were issued to assist employers in the implementation of Sections 4 and 5.

The first review of the *Act* will occur in 1991. In its simplest form the question to be answered is: "Does the *Act* work?"

The Employment Equity Branch of Employment and Immigration Canada is in the process of developing a framework for the parliamentary review which will provide for a consultative process prior to the review, analysis of results to that date and other information relevant to the committee's needs.

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23. R. G. L. Fairweather, Canadian Human Rights Commission, *The Standing Committee on Legal and Constitutional Rights* (29 May 1986) at 6.

VI. THE FIRST YEAR

Three hundred and seventy-three employer reports were received in the spring and summer of 1988 for the 1987 reporting year. Some were received after the due date of June 1st, but in this first reporting year, in which the employers were required to file, only one failed to do so. That company was charged under Section 7 of the *Act* and the case is before the Court.

Many employers had difficulty establishing the systems necessary to identify and track the four groups and provide the data for each annual report. There were many corrections required from employers to ensure that their reports were accurate and consistent. In the fall of 1988, sets of individual employer reports were made publicly available in libraries across the country.

The analysis of the data and the voluntarily filed executive summaries was completed by Employment and Immigration Canada and the first consolidated report was tabled in Parliament by the Minister of State for Employment and Immigration, the Honourable Monique Vézina.

The results of the first year reports provide benchmark data for the first time in the federally regulated sector. However, the overall results were not impressive. As an example, disabled persons represented only 1.6% of full-time workers in this sector compared with 5.4% in the overall labour market and aboriginal peoples represented 0.7% of employees as compared with 2.1% in the Canadian labour force. Employers will be making efforts to improve these statistics prior to the annual review in 1991.

Employment equity consultants in each regional office worked with affected employers to assist them in the development of employment equity plans and their implementation. Sessions were held with employers to provide technical assistance on the reporting requirements as indicated in the Regulations. This assistance will continue as employers address the complex issues which may arise as employment equity initiatives influence the human resource planning of the firms. Ongoing consultation has also been organized with labour and designated group organizations.

There is no question that the *Act* and the non-legislated contract compliance program, the Federal Contractors Program, have generated considerable interest and positive employer action. Although the Canadian Human Rights Commission has not initiated an investigation following receipt of the individual employer reports, a complaint was filed with the Commission against nine major corporations; Canada Post, Canadian Broadcasting Corporation, Bell Canada, Canadian National Railway, Bank of Montreal, Bank of Nova Scotia, Royal Bank of Canada, Toronto Dominion Bank and the Canadian Imperial Bank of Commerce. This complaint was filed by a coalition of persons with disabilities. The Canadian Human Rights Commission is also undertaking joint reviews of the policies and practices of 19 corporations.

The availability data to assist employers in establishing goals and timetables for hiring members of the designated groups have been developed and disseminated to employers and other jurisdictions over the past few years. A post censal survey, the *Health and Activity*

Limitations Survey, has provided better information about persons with disabilities who are or are not limited at work, and the Employment Equity Steering Committee on Data, chaired by the Director General of the Employment Equity Branch of Employment and Immigration, is working to increase the amount and improve the quality of the data. Treasury board, Statistics Canada and the Canadian Human Rights Commission also sit on that committee to ensure consistency of information.

VII. ISSUES FOR THE FUTURE

A number of issues may be raised by interested parties during the 1991 review. Employers may seek the further commitment of bargaining agents under the legislation. They may also request the fine-tuning and a streamlining of regulations and some further assistance with the problem of encouraging designated group employees to self-identify.

It is also expected that the proliferation of programs in Canada, particularly in major cities, requiring a variety of conflicting reporting requirements, will be raised by employers who operate across two or more regions of Canada. Occupational Groups dissimilar to the grouping required under the *Act* and additional reporting required for sub-groups tend to deflect the efforts of employers from the development and implementation of effective programs to the development of a variety of reporting systems.

An early concern regarding possible violations of the privacy of individual employees appears to have lessened considerably following the dissemination of individual reports across the country.

In general, however, the employers appear to have adapted their business systems to comply with the legislation and information available at this time indicates that many employers are taking their responsibilities seriously and establishing programs which may indicate some numerical improvement by 1991. There is concern, however, that developing and implementing an effective program which will begin to demonstrate positive numerical changes in the representation of designated groups will take much effort and some considerable time. Will these efforts be acceptable to the parliamentary review committee or will the representatives of designated groups wanting more rapid change provide sufficient pressure to gain substantive changes to the legislation?

Labour may address the lack of enforcement for Sections 4 and 5 of the *Act* and may also seek a regulation to strengthen the definition of "consultation" in Section 4.

Designated group organizations have begun preparation for providing their concerns and recommendations to the consultations prior to the parliamentary review and to the parliamentary committee in 1991.

Since January of this year, the Employment Equity Branch, in cooperation with regional Employment Equity Consultants, have held information sessions in eight major centres with representatives of the four designated groups. At these sessions, the status of the two mandatory programs was updated and the technical tools and analytical capacity to review individual employer reports were provided. During 1990, the representatives of designated group organizations will make a useful contribution to government policy in preparation for the parliamentary review.

The development of standards against which employers programs and results can be assessed is one of the issues which not only concerns designated group organizations but employers as well. How does one measure acceptable or unacceptable results? Given the multitude of factors which could be considered, could standards be legislated under the *Act*? Designated group representatives may also recommend the establishment of guidelines which

would include a formula for employers to utilize in setting goals and timetables as part of the employment equity planning process.

There may also be requests for a stronger and perhaps more clearly defined enforcement mechanism. Should Sections 4 and 5 be made enforceable under the *Act*? How could this be done effectively?

Only brief reference has been made to the Federal Contractors Program designed to ensure that organizations, not covered by the legislation and wishing to bid on goods and services contracts with the federal government, implement an employment equity program. Although the goal is the same under this program, the enforcement process is quite different since it involves on-site compliance reviews of employers' policies and programs. The ultimate sanction against those employers receiving a negative review, is the withdrawal of their right to bid on future contracts until they comply with negotiated actions and timetables. Two employers have had this right withdrawn since commencement of the program. Assessment of this program may also be a factor in the deliberations of the parliamentary committee.

An issue which could arise in a future human rights case may reflect back on the Supreme Court decision in *Action travail des femmes* v. *Canadian National*. The ordering of one in four hires for women until 13% of non-traditional jobs in the St. Lawrence Region may not be accepted as easily in future cases. The Court accepted the 13% figure which was the percentage of jobs held by women nationally in Canadian National but which was applied to only one region of the country. The increasingly sophisticated statistical data available on the work force may in future provide employers defending the representation of designated group employees in their firms with a more refined tool for their defence. We may well observe complex arguments developing between human rights commissions and employers as to the accuracy of the statistical data and its appropriate applicability in geographical areas. The battle between opposing statisticians may well challenge the skill and understanding of Canadian courts.

Whatever the results of the first parliamentary review, from my perspective, the change of climate regarding the question of equality in employment is noteworthy. Many employers are working together to share strategies designed to improve the effectiveness of their programs. They are also beginning to talk to organizations representative of the four groups and Employment and Immigration Canada hopes to facilitate more joint discussions of this nature. One of the major responsibilities of government throughout the long and sometimes painful process of achieving equity is to maintain the focus on the goal that has so far eluded not only Canada but all other countries: the achievement of a workplace that is truly representative of all groups in our society.