

# Employment Equity and Pay Equity: A Cursory Review

---

Russell G. JURIAN SZ\*

<b>PART I: EMPLOYMENT EQUITY</b> .....	311
<b>I. INTRODUCTION</b> .....	311
<b>II. THE DEFINITION OF "EMPLOYMENT EQUITY"</b> .....	311
<b>III. EMPLOYMENT EQUITY ACT AND FEDERAL CONTRACTOR'S PROGRAM</b> .....	313
<b>IV. EMPLOYMENT EQUITY AND THE LAW</b> .....	315
<b>V. THE ROLE OF THE COURTS</b> .....	318
<b>VI. IDENTIFYING THE DISADVANTAGED</b> .....	322
<b>1. Individuals and Groups</b> .....	322
<b>2. Disabled</b> .....	323
<b>3. Visible Minorities</b> .....	324
a) Average Income .....	324
b) Social Mobility .....	326
c) Job Status .....	326
d) Job Security .....	327
e) Ethnic Occupational Concentration .....	327
<b>4. Women</b> .....	328
<b>VI. STATISTICAL DISCREPANCIES AND DISCRIMINATION</b> .....	331
<b>VII. CONCLUSION</b> .....	332

---

\* Of Blake, Cassels & Graydon, Toronto, Ontario.

**PART II: PAY EQUITY** ..... 333

## PART I: EMPLOYMENT EQUITY

### I. INTRODUCTION

Recently a glossy pamphlet came into my hands. On its cover was a stylized human figure. Half the figure white; the other half, a solid colour. On the cover was the prominently displayed title "Are You A Victim Of Reverse Discrimination?". I opened the pamphlet only to find it was published by a major life insurance company and sought to market a particular form of group disability insurance plan, on the basis that higher income employees subsidize lower income employees in an ordinary group plan.<sup>1</sup> The pamphlet illustrates that concern about special preference being given to certain groups is widespread and serious enough to be exploited in sales techniques.

### II. THE DEFINITION OF "EMPLOYMENT EQUITY"

The first legislation to require employers to implement "employment equity" by hiring and promoting according to statistics has been passed in Canada.<sup>2</sup> The importance of this subject cannot be exaggerated because it will fundamentally define the character of Canadian society and the place of individuals and groups in it for the future.

"Employment equity" is a Canadian term, coined by Judge Rosalie Abella in the Royal Commission Report on Equality in Employment. Judge Abella candidly explained, in 1984, that she wished to avoid the connotations of the term "affirmative action" and the controversy associated with it in the United States:

*The language that has collected around the issue of equality often produces overwhelmingly emotional responses....*

*Often the words themselves rather than the issues trigger intellectual resistance. Their use almost instantly produces a protective wall through which reason cannot easily penetrate....*

*People generally have a sense that "affirmative action" refers to interventionalist government policies, and that is enough to prompt a negative reaction from many ...*

*The Commission notes this in order to propose that a new term, "employment equity", be adopted to describe programs of positive remedy for discrimination in the Canadian workplace. No great principle is sacrificed in exchanging phrases of disputed definition for newer ones that may be more accurate and less destructive of reasoned debate.*

---

1. The Paul Revere Life Insurance Company, publication EP359 pr/85.

2. *Employment Equity Act*, S.C. 1984-85-86, c. 31.

Particularly, Judge Abella wished to avoid "affirmative action"'s connotation of hiring quotas:

*In devising their unique program, the Americans have called it affirmative action. In most people's minds, it has become associated with the imposition of quotas. In creating our own program in Canada, we may not wish to use quotas and we should therefore seriously consider calling it something else if we want to avoid some of the intellectual resistance and confusion.*"<sup>3</sup>

As the employment equity programs being implemented do require hiring according to statistics, the term "employment equity" quickly came to conjure the same polarized attitudes and connotations as did "affirmative action". Some people see employment equity as the social technique that will finally bring about a fair and equal distribution of society's benefits. Others consider it the negation of the fundamental values of equality which are central to a free society.

The term "employment equity" is vague and elastic. Some definitions suggest that employment equity is a systematic approach to identifying and eradicating barriers that discriminate. Understood in this way, employment equity as social policy does not differ from human rights legislation which prohibits unintentional and systemic discrimination. Employment equity measures are used to break a continuing and self-perpetuating system of pervasive discrimination. Chief Justice Dickson in the *ATF* case<sup>4</sup> stated that an employment equity program is designed to work in three ways:

1. By countering the cumulative effects of systemic discrimination, the program renders further discrimination pointless.
2. By placing members of the groups that had previously been excluded into the heart of the workplace the program allows them to prove their ability on the job thereby changing the attitude that they are unable to perform satisfactorily.
3. The program creates in the workplace a "critical mass" of the previously excluded group, thus eliminating the problems of "tokenism", ensuring that the individuals have peer support, reducing stigmatization and promoting self-correction of the system.

This approach presumes, as was the case in *ATF*, that discrimination against the group has been established, and is so pervasive that the group has been more or less totally excluded from the workplace.

Another definition is that "employment equity" is "a comprehensive planning process designed to bring about not only equality of opportunity but also equality of results".<sup>5</sup> Judith Keene, the author of one of the few texts on human rights legislation in Canada, states

---

3. *Royal Commission Report on Equality in Employment* (1984) at 6-7.

4. *C.N. v. Canada (Human Rights Commission) (Action Travail des Femmes)*, [1987] 1 S.C.R. 1114.

5. Rhys Phillips, *Abella Report On Employment Equity* (Ottawa, 1984) at 49.

that "the main aim of Affirmative Action is to change the existing distribution of employment. Changes can be tracked statistically, in the same way the original workforce was analysed. Goals and timetables are developed in short, intermediate and long term focus. Actual results are compared with the stated goals at appropriate times and, if necessary, adjustments to the plan are made to improve 'production'".<sup>6</sup>

The premise of the second approach is that any significant discrepancy between the qualified number of a group employed by a particular employer and in the workforce as a whole is indicative of a social problem requiring governmental intervention.

### III. EMPLOYMENT EQUITY ACT AND FEDERAL CONTRACTOR'S PROGRAM

The *Employment Equity Act*, the first statute to mandatorily require the implementation of employment equity in Canada, incorporates both the foregoing approaches. First, the *Act* requires an employer to identify and eliminate employment practices that result in employment barriers against persons in designated groups.<sup>7</sup> This is the classical approach to the problem of discrimination in society. Discrimination must be identified, and then action taken to eliminate it.

Secondly and independently, the *Act* requires an employer to ensure that persons in the designated groups are represented among its employees proportionately to their representation in the workforce or the qualified workforce. This obligation derives simply from the appropriate statistics.<sup>8</sup> The designated groups are women, aboriginal people, the disabled, and visible minorities.

On or before June 1 of every year, every employer must file with the Minister a report detailing:

1. The number of employees in the employer's workforce, and the number of employees who are members of the designated group, broken down by industrial sectors;
2. A description of the classes of occupational groupings of the employer and the degree of representation of persons in designated groups in each occupational group;
3. The salary ranges of employees and the degree of representation of persons in designated groups in each range and subdivision of each range;

---

6. Judith Keene, *Human Rights in Ontario* (Toronto: Carswell, 1983) at 152.

7. *Supra* note 2, s. 4(a).

8. *Ibid.* s. 4(b).

4. The number of employees hired, promoted and terminated and the degree of representation in those numbers of persons in designated groups.<sup>9</sup>

An employer must, every year, prepare a plan setting out the goals that the employer intends to achieve in hiring persons from the designated groups, and the timetable for the implementation of those goals.<sup>10</sup> The Act prescribes a \$50,000 fine for failing to file the annual report.<sup>11</sup>

A copy of each employer's annual report is sent to the Canadian Human Rights Commission.<sup>12</sup> The Commission has the authority to initiate complaints under the *Canadian Human Rights Act*<sup>13</sup> and has done so on the basis of the data in the reports.

As well each report filed with the Minister is available for public inspection by any person<sup>14</sup> who might use the data in the report to file private complaints under the *Canadian Human Rights Act*.

The federal government's employment equity initiative has been extended to employers within provincial jurisdiction by use of the federal government's economic power as a major purchaser of goods and services. The Federal Contractor's Program applies to companies who employ 100 persons or more and who wish to bid on contracts of \$200,000.00 or more. Such companies are required, as a matter of contract, to commit themselves to "implement Employment Equity". One of the terms of the commitment is "... the establishment of goals for the hiring and promotion of designated group members".<sup>15</sup> The Canada Employment and Immigration Commission will review a representative sample of contractors periodically to ensure they are complying with their undertakings.<sup>16</sup> Failure to comply will lead to exclusion from bidding on federal government contracts.

The *Employment Equity Act* and Federal Contractor's Program require an employer to make employment decisions, whether hiring, promotional, or lay-off, that take into account an individual's personal characteristics in order to achieve a workplace with a demographic profile that reflects that of the workforce in society at large.

---

9. *Ibid.* s. 6(1).

10. *Ibid.* s. 5.

11. *Ibid.* s. 7.

12. *Ibid.* s. 8.

13. S.C. 1985, c. H-6.

14. *Ibid.* s. 10.

15. Canada Employment and Immigration Commission, *Employment Equity: A Guide For Employers* (Cat. No. WH-3-596).

16. Employment and Immigration Canada, *Employment Equity: The Federal Contractor's Program* (Cat. No. WH-3-590) at 2.

#### IV. EMPLOYMENT EQUITY AND THE LAW

In Canada, the Constitution prohibits governmental discrimination on enumerated and analogous grounds, and then goes on to expressly recognize special programs. Section 15 of the *Charter* provides:

##### *Equality Rights*

##### *Equality before and under law and equal protection and benefit of law*

*15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

##### *Affirmative action program*

*15(2) 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.*

##### *Droits à l'égalité*

##### *Égalité devant la loi, égalité de bénéfice et protection égale de la loi*

*15(1) La loi ne fait exception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.*

##### *Programmes de promotion sociale*

*15(1) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer les situations d'individus ou de groupes défavorisés notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.*

There are two competing approaches to the interpretation of Section 15(2). According to the first, Section 15(2) is an exception to the guarantee of equality in Section 15(1). A law program or activity may offend Section 15(1) but would nevertheless not be found to be unconstitutional because it was saved by Section 15(2).

An alternative view is that Section 15(2) is but an interpretative aid to Section 15(1). Section 15(2) indicates the notion of equality in Section 15(1) must be understood to encompass the preferential treatment accorded to disadvantaged individuals or groups in the appropriate circumstances. Therefore there would be no *prima facie* breach of Section 15(1).<sup>17</sup>

American courts have been forced to adopt the second approach because neither their *Civil Rights Act* nor the United States Constitution contain exceptions permitting affirmative action. This approach was also taken by the Supreme Court of Canada prior to the existence of the Canadian *Charter* in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*<sup>18</sup>

The few Courts which have considered the matter since the adoption of the *Charter* are choosing the first approach. In *Apsit v. Manitoba Human Rights Commission*, Simonsen J. reviewed both arguments and said that Section 15(2) did not have " ... the shallow quality of an interpretive aid for its preceding provision".<sup>19</sup>

Section 15(2) of the *Charter* is not unique. Twelve of the thirteen jurisdictions in Canada (including the territories), but not Alberta, have legislative provisions which expressly allow affirmative action programs.<sup>20</sup>

The role of human rights commissions in relation to affirmative action varies from province to province. Quebec is the only jurisdiction which requires the Commission to approve programs prior to their implementation. In British Columbia, Newfoundland, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan and the Northwest Territories, the Commission may approve a program, but such approval is not required in order to rely on the exception as a defence to a complaint. In the *Canadian Human Rights Act*, *Manitoba Human Rights Code* and the *Yukon Human Rights Code*, the Commission cannot approve programs. These jurisdictions simply contain sections which create a defence for affirmative action programs.

Alberta's *Individual Rights Protection Act* permits the Lieutenant Governor to exempt, by regulation, any person from the application of the *Act* though it does not seem to have been intended that this discretion be used for affirmative action programs.

---

17. M. Eberts, "Sex-Based Discrimination and the Charter" at 216, and M. David, "Equality Rights and the Physically Handicapped" at 353, in Anne F. Bayefsky & Mary Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt, Ont.: Carswell, 1985).

18. [1981] 1 S.C.R. 699.

19. [1988] 1 W.W.R. 629 (Q.B.) at 641; see also *Manitoba Rice Farmers Association v. Human Rights Commission* (1985), 27 Man. R. 50 (Q.B.) at 55, *Shewchuk v. Ricard* (1986), 24 C.R.R. 45 (B.C.C.A.) at 63.

20. *British Columbia Human Rights Act*, S.B.C. 1984, c. 22, s. 11; *Manitoba Human Rights Code*, C.C.S.M., c. H175, s. 11, s. 43(2); *Newfoundland Human Rights Code*, S.N. 1988, c. 62, s. 20(1); *New Brunswick Human Rights Code*, R.S.N.B. 1973, c. H-11, s. 12; *Northwest Territories Human Rights Code*, R.S.N.W.T. 1974, c. F2, s. 14; *Nova Scotia Human Rights Code*, S.N.S. 1969, c. 11, s. 19; *Ontario Human Rights Code*, S.O. 1981, c. 53, s. 13(1).



A consideration of affirmative action or employment equity programs must encompass the legislative exceptions, because Section 15(2) of the *Charter* does not authorize affirmative action in Canada, in the sense of requiring that it be legal. Section 15(2) merely provides that affirmative action will not be subject to attack under Section 15(1) of the *Charter*. It is still possible that a mere statute could prohibit affirmative action, or treat it differently from the Constitution.

The legislative provisions are important because the *Charter's* guarantee of equality without discrimination applies only to government. Therefore the validity of voluntarily undertaken private affirmative action will be determined under the Human Rights Codes and not under the Constitution, unless, as will be discussed, the legislative saving provision itself is being attacked.

The legislative provisions must also be considered in regard to governmental affirmative action because the Human Rights Codes apply to government action as well as to private action. In fact, the Supreme Court of Canada has found that the Human Rights Codes are "quasi-constitutional" and have primacy over other conflicting legislation.<sup>21</sup> The Human Rights Codes of Yukon, Ontario, Manitoba, Prince Edward Island, Quebec and Saskatchewan have express clauses that provide that they have primacy over other conflicting legislation.<sup>22</sup> Therefore, the legality as well as the constitutionality of governmental or government imposed affirmative action must be considered.

While Human Rights Codes can restrict the scope of what would be permissible affirmative action under the *Charter*, they cannot broaden it. The Codes as law must comply with the standards of the Constitution, and in particular Section 15's guarantee of equality without discrimination. Human Rights Codes have been found to offend Section 15 of the *Charter*, at least on a *prima facie* basis. For example, in *Blainey*, the Ontario Court of Appeal found the blanket exception in the Ontario Code that permitted sex-segregated athletic facilities contravened the *Charter*.<sup>23</sup>

If a Human Rights Code were to provide a broader exception for affirmative action than that recognized by Section 15(2) of the *Charter*, it would infringe Section 15(1) of the *Charter*. For example, a Code that permitted a special program for a group without the requirement that the group be disadvantaged would likely offend the *Charter*. Interestingly, it seems that the special program provisions of several jurisdictions are overly broad. The Codes in New Brunswick, Nova Scotia, Prince Edward Island and the Northwest Territories permit special programs designed to promote the welfare of any class of individuals. They contain no reference to disadvantage nor even to prohibited grounds of discrimination. The

---

21. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.

22. S.Y. 1987, c. 3, s. 36; S.O. 1981, c. 53, s. 46(2); S.M. 1987-8, c. 45, Preamble; R.S.P.E.I. 1975, c. 72, s. 1(2); R.S.Q. 1988, c. 12, s. 52; S.S. 1979, c. s-24-1, s. 44.

23. *Blainey v. Ont. Hockey Assn.* (1986), 14 O.A.C. 194 (Ont. C.A.); see also *McKinney v. University of Guelph* (1988), 63 O.R. (2d) 1 (C.A.); *Connell v. U.B.C.*, [1988] 2 W.W.R. 688 (C.A.); *Stoffman v. Vancouver General Hospital*, [1988] 2 W.W.R. 708 (C.A.); *Sniders v. A.G. Nova Scotia* (1989), 14 C.R.D. 350, 10-04 (N.S.C.A.).

use of these legislative provisions to promote the welfare of a privileged class would be unconstitutional.

Thus, a constitutional attack, under Section 15 of the *Charter* on *private* affirmative action is possible indirectly, by focusing the attack on the legislative provision that permits it. If the legislative provision is rendered null and void, or restricted, then a private program may become illegal.

The argument that overly broad special program provisions of Human Rights Codes and governmental affirmative action, while not qualifying for Section 15(2) protection, may nevertheless be constitutional under section 1 will likely be resisted by the Courts. Simonsen J., in the *Apsit* case, upon finding that the program was not saved by Section 15(2) of the *Charter* did go on to rule that it was not a reasonable limit under Section 1 of the *Charter*. However, he expressed great difficulty with the notion that Section 1 might apply, when the invocation of Section 15(2) has failed.<sup>24</sup>

## V. THE ROLE OF THE COURTS

Section 15(2) makes clear that certain facts must exist before a program may be put in place. The individuals or groups who may be beneficiaries of a Section 15(2) program must be "disadvantaged". The objective existence of the "conditions of disadvantage" would have to be established before Section 15(2) could be invoked.

As well, the pointed use in Section 15(2) of "because of [the grounds]", as opposed to the "based on" in Section 15(1) must be significant. The French version uses "du fait de" in Section 15(2) and "fondée sur" in Section 15(1). "Based on" does not imply causality but merely supportive association. A base is that which supports, or upon which something rests. "Because of" implies that the disadvantages are caused by the grounds listed. These words would support the Court's requiring evidence that the "conditions of disadvantage" are *because of* the enumerated grounds. Such a requirement would greatly restrict not only government affirmative action but private affirmative action as well because the legislative exceptions without this requirement would be overly broad.

The phrase "that has as its object" in Section 15(2) of the *Charter* may indicate that Courts, having determined whether the facts exist that are required to trigger the application of Section 15(2), should not review the structure of the special program. The law, program or activity may be improperly designed and may, in fact, not assist disadvantaged groups as intended, but if its "object" was the amelioration of conditions of disadvantaged individuals or groups, then according to a literal interpretation, it would be within the application of Section 15(2).

The recently legislated affirmative action programs expressly state their "object". For example, Section 2 of the federal *Employment Equity Act* states that the purpose of the legislation is:

---

24. *Supra* note 19 at 646.

*... 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 the same way but also requires special measures and the accommodation of differences.*

The preamble to Ontario's *Pay Equity Act*<sup>25</sup> states:

*Whereas it is desirable that affirmative action be taken to redress gender discrimination in the compensation of employees employed in female job classes;*

and Subsection 4(1) of the *Act* states:

*the purpose of this Act is to redress systemic gender discrimination in compensation for work performed by employees in female job classes.*

Simonsen J. in the *Apsit* case<sup>26</sup> emphasized that such expressions should not be sufficient to preempt review by Courts. He said:

*I adopt the position that it is not sufficient compliance with s. 15(2) merely to present a government declaration that a program is an affirmative action program designed to assist a particular target group and foster growth in an industry.*

*A bald declaration by government that it has adopted a program which has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race does not ipso facto meet the requirements to sanctify the program under s. 15(2) of the Charter. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory. If the approach argued by the intervenor [Attorney General of Manitoba] were permitted, the equality guarantees in s. 15(1) would become a hollow shell.*

Simonsen J. adopted a liberal and purposive approach to Section 15(2) by looking at its general intent rather than embarking on a textual analysis of its individual words and terms. He said:

*In order to justify a program under section 15(2), I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation. It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed towards the cause of the disadvantage. There must be a unity or*

---

25. S.O. 1987, c. 34.

26. *Supra* note 19 at 642.

*interrelationship among the elements of the program which will prompt the Court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.*

*If one hopes to give the term "disadvantage" a meaning which is consistent with the idea of equality, then there must be a reasonable relationship between the cause of the disadvantage and the form of ameliorative action".<sup>27</sup>*

The British Columbia Court of Appeal in *Shewchuk*, while observing that "section 15(2) excuses discrimination under section 15(1) if the object of the discrimination is the amelioration of conditions of disadvantaged individuals or groups",<sup>28</sup> proceeded to determine the matter on the basis that objectively viewed the program did not in fact ameliorate conditions of disadvantage.

Chief Justice Nemetz, in a minority judgment suggested that affirmative action programs:

*... must be carefully scrutinized to ascertain ... whether the law or program is in fact an ameliorative one for disadvantaged individuals or groups including those set out in section 15(2) ... ".<sup>29</sup>*

It seems then, in spite of its wording, that the Courts will subject Section 15(2) programs to a substantive review. The *Apsit* case concerned a government policy to grant licenses to grow wild rice only to persons of native background. Simonsen J. accepted that the target group was disadvantaged, and could be identified by race. He went on to rule that a reasonable relationship between the cause of the disadvantage and the form of the ameliorative action was an essential ingredient that had not been proven.<sup>30</sup> He then articulated what may become the most important consideration in a substantive review of Section 15(2) programs. He stated that "as a matter of principle, a special law or program which is put forward under Section 15(2) cannot be justified if it unnecessarily denied the existing rights of others."<sup>31</sup>

In *Shewchuk v. Ricart*,<sup>32</sup> Nemetz C.J.B.C. stipulated that affirmative action programs must be carefully scrutinized to determine " ... whether the effect of the law or program is so unreasonable that it is grossly unfair to other individuals or groups".

Only two human rights statutes have words, similar to the *Charter's*, that refer to the program's object. Section 19(2) of the *British Columbia Human Rights Act* provides that "the Council may approve any program or activity that has as its object ...". Article 86.1 of

---

27. *Ibid.* at 642.

28. *Shewchuk*, *Supra* note 19 at 63.

29. *Ibid.* at 52.

30. *Supra* note 19 at 643.

31. *Ibid.* at 644.

32. *Supra* note 19 at 52.

the *Quebec Charter* refers to "The object of an affirmative action program". In the remaining jurisdictions, except Alberta, the special program provisions of the human rights statute allows a special program that is "designed" to promote the welfare of a group, or to correct disadvantage.

Again, the important question is, to what type of review should boards of inquiry and Courts subject special programs under these sections? Should they confine themselves to determining that the jurisdictional prerequisites exist, or scrutinize substantively the "design" of the program as well.

A recent Ontario Board of Inquiry<sup>33</sup> provided an extensive discussion of this question. The Ontario Ministry of Health had an Assistive Devices Program which covered up to 75% of the cost of devices used by individuals with long term disabilities. Only those 22 years of age or younger were eligible for funding under the program. Mr. Roberts applied for financial support to purchase a visual aid and was refused. He then filed a human rights complaint that he had been refused because of age discrimination.

Ontario's special program exception begins: "A right under Part I is not infringed by the implementation of a special program designed to ... ". The Board found that the verb "design" is defined by the concise Oxford English Dictionary as "contrived, planned; purpose, intent". The Board said, "The focus here is on intention, rather than the actual achieving of a result. The test required is a subjective one, and the focus is to separate bona fide motivations from colourable intentions".

The Board went on to observe that it was not its " ... function to supervise and evaluate the efficacy of affirmative action measures. In all practicality this type of review would stultify the development of affirmative action. Organizations would become fearful of designing affirmative action programs out of apprehension that if they were not perfectly drawn to eliminate all forms of discrimination at once they would be struck down".<sup>34</sup>

The Board would not however, completely shield affirmative action from attack. "This is not to suggest that there is no room for challenge to respondents who seek to shelter a program under section 13. The beneficiaries must be individuals who suffer hardship, economic disadvantage, or disadvantage generally. The respondents must show that their bona fide intent in designing the program is to relieve such hardship or disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity".<sup>35</sup>

While the policy reasons why the Board wished to avoid a substantive review of the program are clear, it is not certain that the approach of the Board is required by the language of the section. The work "designed" is defined by the Oxford English Dictionary as a participial adjective meaning "a) marked out, appointed ...; b) planned, purposed, intended; c) drawn, outlined; formed, fashioned, or framed according to design". While the second

---

33. *Roberts v. The Ministry of Health* (Ontario Human Rights Bd. Inquiry) (April 14, 1989), Professor Constance B. Backhouse.

34. *Ibid.* at 71.

35. *Ibid.* at 72.

meaning accords with the Board's subjective test, the other meanings would support a scrutiny of the "design" or structure of the program.

There are reasons for preferring an objective interpretation. The main feature, and some would say triumph, of jurisprudence under human rights legislation in the last decade has been the shift of judicial attention from the intent of the actor to the effect of his or her actions. Theoretical consistency requires that special programs too must be scrutinized in terms of their actual effect in operation rather than on the basis of the good intentions of those who implement them. As well the word "designed" does not refer to the person implementing the special program, whose intent might be at issue, but to the program itself.

Whether special programs will be substantively reviewed under the *Charter*, and under the legislative exceptions cannot be taken to have been finally decided as yet. In any event the reviewing Board or Court will be called upon to determine whether the conditions of disadvantage have been established to exist objectively.

## VI. IDENTIFYING THE DISADVANTAGED

### 1. Individuals and Groups

Section 15(2) of the *Charter* allows special programs for disadvantaged individuals and for disadvantaged groups. The *Employment Equity Act* and Federal Contractor's Program are drafted and designed as if there is no distinction between the individual and groups.

Group rights are usually thought of as pertaining to matters that are susceptible of enjoyment by the group, such as education, culture, and language. Legal guarantees in relation to such matters create group rights. A job, on the other hand, is enjoyed by the individual. The *Employment Equity Act* seems to create a new group right — the right of the designated groups to a proportional share of the job market.

The *Act* assumes that benefitting an individual identified by certain personal characteristics somehow benefits and relates to other individuals with the same characteristics and therefore benefits the "group". The "group" in fact is an artifice. While the people who fall within the definitions may in some instances share community interests, in most cases they do not.

The assumption that all individuals within the definitions somehow represent each other and may be dealt with according to generalized observations about such persons is exceedingly troubling. It has much in common with the attitudes that human rights legislation seeks to eradicate.

### 2. Disabled

Persons who suffer disabilities may be identified as "disadvantaged" for the purposes of Section 15(2) of the *Charter*. However, the *Employment Equity Act's* definition of disability may well make the *Act* vulnerable to challenge. The definition poses an irresolvable problem with the reliability of data used to implement "Employment Equity". Parliamentarians were unwilling to require that employees and job applicants identify their disabilities to employers. The *Act* counts persons as disabled only if they voluntarily identify themselves to the employer, or agree to be identified as such by the employer. (Under the *Act* identification of members of all the designated groups depends on voluntary identification). Such voluntary identification certainly results in lower than actual utilization rates.

The second defect in the *Act's* definition is that disabled persons must "consider themselves to be, or believe an employer or a potential employer would be likely to consider them to be disadvantaged in employment ..." by reason of a persistent impairment.<sup>36</sup> The problem is that disabled persons quite rightly believe that their disability in no way impairs the satisfactory performance of their jobs. Disabled persons who have just obtained a job or who are successfully employed are likely not to feel disadvantaged in employment. On the other hand, a person who fears discrimination is not likely to identify his or her disability to the employer. The definition results in "utilization data" not of the number of disabled persons in an employer's workforce but of those that are mismatched for their jobs, or who require reasonable accommodation.

By contrast, external data is based on a complex "limitations" survey associated with the 1986 Census that measures an individual's "... ability to perform an activity in the manner or within the range considered normal for a human being".<sup>37</sup> On the basis of data generated by this defective definition, the Canadian Human Rights Commission is investigating systemic discrimination complaints against several large employers.

---

36. S. 3(b), *Employment Equity Regulations*.

37. *Health and Activity Limitation Survey* (Statistics Canada, 1988).

### 3. Visible Minorities

In the United States the philosophical problem with the use of race as a factor in determining the distribution of employment benefits has been recognized. However, the use of race is rationalized to be a convenient administrative tool for the identification of individual sociological disadvantage.

*One approach to the foregoing philosophical objections to reverse discrimination is to point out that when so-called reverse discrimination occurs, and blacks are given preferential treatment, the relevant basis for the discrimination is not race, which is arguably an arbitrary characteristic. Rather, it is the wrongs and losses blacks have suffered and the special needs they now have, which form the relevant characteristics upon which the discrimination is based. In other words, the reason for preferring blacks is because they have been victimized by a history of slavery and discrimination. We are preferring people with history of suffering that makes them different from others, and different in a manner relevant to the preference they are now receiving. Therefore the discrimination is not arbitrary.*

*Race, when explicitly used as a classification, is being used for administrative convenience. Because there is a high correlation between being black and being a victim of invidious discrimination, it is a valid administrative tool for discerning who has suffered a history of slavery and discrimination.<sup>38</sup>*

With the exception of aboriginal peoples and a few local communities of blacks in the Halifax and Windsor areas, this reasoning is generally inapplicable to visible minorities in Canada. While visible minorities have been present in Canada for a long time, most individuals who belong to visible minorities have arrived in Canada since 1972. While Canada does share a world history of colonialism, Canadian society of today is not stratified by a legacy of slavery and 70 years of constitutional approval of the "separate but equal" doctrine. The use of skin colour in Canada as an administratively convenient cipher for "disadvantage" must be established on some other basis.

#### a) Average Income

National averages of income cannot be used as sufficient evidence of disadvantage without sophisticated statistical analysis. The demographics of ethnic groups differ in age, region in Canada, educational level, degree of urbanization and proportion of foreign born to Canadian born. These factors have overriding effects on average income when computed nationally.

---

38. Nancy K. Kubasek & Andrea M. Giampetro, "Affirmative Action Plans: Legal Hurdles Have Been Removed; Do Philosophical Hurdles Still Remain?" 17:2 *Lincoln L. Rev.* 233.



For example, according to the 1981 census the percentage of Canadians falling within the high income age group 45-64 was 19%. This statistic for ethnic groups varied from a high of 24% for Scandinavian down to 13% for Black and for Filipino. The percentage of all Canadians having some university education is 16%, compared to 60% for Filipinos down to 5% for Portuguese.<sup>39</sup>

Still, if one used the gross national figures, 1971 and 1981 census data indicate that the inclusion of visible minorities as a disadvantaged group in the *Employment Equity Act* cannot be justified on this basis.

In 1981 average Canadian income was \$16,900.00. Average income of Indo-Pakistanis was &17,600.00 and of Japanese was \$18,700.00.<sup>40</sup> In 1981 only the Blacks and the Indo-Chinese placed in the fourth quartile. At the time however, 70% of the Indo-Chinese had immigrated to Canada within the previous three years,<sup>41</sup> many as refugees. White groups such as the Portuguese and Greek had the same or less income than the Blacks. Blacks have greater educational qualifications and should be expected to earn a higher income. Average female income for blacks is higher than the average Canadian female income. Interestingly, those of British ancestry earn only 4% more than the national average. In fact in English-speaking provinces, the British group earn less than the national average income.<sup>42</sup> Thus both white and visible minority groups are distributed throughout the range of national average income, making it too rough a measure of disadvantage.

Weinfeld, after allowing for age, educational, and immigrant adjustment concludes that the Japanese and Indo-Pakistanis "are doing very well", but the Blacks and Chinese "remain substantially victimized". Yet he points out that the disparities have decreased between 1971 and 1981. In 1971, Chinese incomes and Black incomes were 17% and some 20% below the Canadian average, but by 1981 the discrepancies were only 9% and 11% respectively.<sup>43</sup> A study of average income in Toronto ranked Chinese income with majority Canadian income.<sup>44</sup>

What the data makes clear is that average income is not an acceptable basis for the designation of all "visible minorities" as *per se* disadvantaged under the *Employment Equity Act* and the Federal Contractor's Program.

---

39. M. Weinfeld, "Ethnic and Race Relations" in J. Curtis & L. Temperman, eds, *Understanding Canadian Society* (Toronto: McGraw-Hill, 1988).

40. *Ibid.* Table 1.

41. *Ibid.* Table 1.

42. C. Winn, "Affirmative Action and Visible Minorities: Eight Premises in Quest of Evidence" (1985) 10 Can. Pub. Pol'y 684.

43. *Supra* note 39 at 603, 604.

44. J.G. Reitz, L. Calzavara & D. Dasko, *Ethnic Inequality and Segregation in Jobs* (Toronto: University of Toronto, 1981).

## b) Social Mobility

More telling is Professor Winn's analysis of the social mobility of ethnic groups. In passing the *Employment Equity Act* Parliament seems to have presumed that Canadian society is stratified and individuals are unable to improve their standing because of discrimination. Professor Winn has devised a social mobility measure. The mobility score of a particular group equals its income rank among the foreign born minus its income rank among the Canadian born. A plus score indicates the group's mean income position has improved from the foreign born generations to the Canadian born generation when compared with other groups. Professor Winn recognizes the rough and imperfect nature of this measure. It is based on only two census years, 1971 and 1981. It does not take into consideration the particular skills brought to Canada by different first generations of the ethnic groups. For example, recent Chinese immigrants are well educated whereas the original Chinese immigrants entered Canada as uneducated labourers.

Nevertheless, Professor Winn concludes there is an extremely high degree of social mobility within Canada. Of the five groups in the study which displayed upward mobility according to 1981 data, four were non-white. Six of the seven downwardly mobile groups were white. Blacks and Chinese experienced no change in rank and Indo-Pakistanis were downwardly mobile. Professor Winn suggests that the downward mobility score of the Indo-Pakistanis reflects the group's relatively recent immigration to Canada. A great number in the first generation are older and in the high earning age group. Since the Canadian born generation has not as yet reached high income earning years, its average income does not compare favourably with the preceding generation's, as yet. According to the 1981 Census, 95% of Indo-Pakistanis over 15 years old were born outside Canada.<sup>45</sup>

Again both white and visible minority groups are found throughout the range. The data shows that Canadian society is not sedimented.

## c) Job Status

Job status is another matter that might be put forward as an indicator of disadvantage. The Reitz study concluded that in Toronto, mainly the Italians, Portuguese and West Indians have lower scores on the Blisshen Job Status Scale than do other ethnic groups studied. Besides the West Indians, the only other visible minority group in the study, the Chinese, had a score close to that of the majority of Canadians, and which exceeded slightly that of Jewish men. The study notes that nationally the Jewish group has a mean job status higher than the majority group, whereas in Toronto it did not. The authors concluded that this reflected the degree of urbanization of the Jewish group.<sup>46</sup>

---

45. Secretary of State, *Socio-economic Profiles of Selected Ethnic/Visible Minority Groups* (March 1986) at 82.

46. *Supra* note 44.

The Reitz study also concluded there was little relation between job status and job income. Italian men, for example, had a very low mean job status but higher incomes than the majority Canadian group. Chinese had high job status as well as high income, whereas West Indians had low job status and low income.

#### d) Job Security

Job security may also be measured and the Reitz study indicates it is not allocated equally among ethnic groups. The study concluded that job qualifications account for much of the differential allocation of job security among ethnic groups, with West Indian men being an example. Low job security for West Indian women was seen to be due to poor job qualification. While Chinese men had high job security, Chinese women had low job security which was not explained by poor qualifications.

#### e) Ethnic Occupational Concentration

In a country that has elevated multi-culturalism to a Constitutional principle<sup>47</sup> it is to be expected that the distribution of ethnic groups in the workforce will reflect cultural choices and the particular tastes and characteristics of the immigrating groups. There is indeed ethnic occupational concentration in Canada as detailed in the Secretary of State's publication.<sup>48</sup> The Report details how visible minorities more often than not are overrepresented in occupational groupings. In fact the labour force participation of the various groups differ. At the time of the 1981 Census the national unemployment rate was 7.4%. For the major visible minority groups the rates were: Blacks — 7.8%, Chinese — 4.7%, Japanese — 3.9%, and Indo-Pakistani — 6.8%.<sup>49</sup>

While ethnic concentration may well be due to discrimination, it is more likely related to the particular group's immigration history and the particular skills of the immigrant generation. The immigrant generation of Italians did not become construction labourers because they faced discrimination in obtaining jobs as accountants. The result, though, is that today the construction industry in Toronto is highly ethnically concentrated. Ethnically concentrated industries may also provide landing pads for immigrants, and vehicles for upward mobility.

The Reitz study concluded that ethnic segregation by no means occurs only in low status or poorly paid jobs.

*The stereotype of minority ethnic groups as segregated in occupations and work settings in which they have low status and low income applies only to the*

---

47. *Charter of Rights and Freedoms*, s. 27.

48. *Supra* note 45.

49. *Ibid.*

*Portuguese, West Indians and Italians, and not to any of the other groups in the study. Moreover, the stereotype of minority ethnic groups as segregated only in such settings does not apply to the West Indian or Italian men ... To some extent, West Indian men are also segregated in occupations (but not work settings) in which they have high status (but not high incomes).*<sup>50</sup>

I am not aware of a study about whether ethnic groups differ in the extent they choose business opportunities rather than employment. If so this would be another factor that must be considered. An eleven nation study concluded that the proportion of immigrants among small entrepreneurs in Canada (16.1%) was double the industrialized countries' average.<sup>51</sup>

#### 4. Women

It is unnecessary to document the different and unequal sharing of the benefits of employment by men and women.<sup>52</sup> The data indicates that women's average annual income is significantly less than men's average income, and that women are significantly occupationally segregated and under-represented in senior positions. Should Section 15(2) programs be subjected to substantive review, it may be argued that requirements that there be statistical parity in pay and occupational performance between men and women are not appropriate or proportional ameliorative action.

The data detailing the disadvantage of women correlates strongly with their special reproductive role. The statistical differences are primarily between married or once married women on the one hand and all other persons on the other hand. Women shoulder heavy and drastically unequal responsibilities in child rearing, and of course full responsibility for child bearing. Women, not men, must interrupt their careers to bear children. While statistics prove there is occupational segregation of women they do not determine whether the segregation is due to choice of a life-cycle plan, or due to imposed constraints.<sup>53</sup>

Early socialization clearly plays a role in the educational and occupational segregation of women. Women who are mothers engage in far less promotion seeking behaviour than do men. For example, mobility is extremely important to employment with the large national employers subject to the *Employment Equity Act*. Not only is willingness to transfer determinative of promotions among white collar workers, but blue collar workers are affected by bidding and bumping rights based on seniority.<sup>54</sup>

---

50. *Supra* note 44 at 64.

51. "Characteristics of the Small Business Entrepreneur in Canada" (1987) 4:3 J. Small Bus. & Ent.

52. See, for example, *Women in the Labour Force* (Statistics Canada, March 1985) (Cat. No. 89-503 E).

53. M. Nakamura, "The Family Environment of Canadian Working Women in Managerial and Other Operations and Related Policy Issues" (Faculty of Business, University of Alberta, July 1989).

54. K. Hoffman & J. Reed, "When is Imbalance not Discrimination?", in G.S. Becker *et al.*, eds, *Discrimination, Affirmative Action and Equal Opportunity* (Vancouver: The Fraser Institute, 1982).

In a test case, glaring statistical discrepancies in male and female average pay and occupational representation have been explained by evidence of different interests and aspirations.<sup>55</sup> As long as significant numbers of individual women must choose to stay at home with young children, or must choose to accept occupational roles most compatible with their unequal share of child rearing responsibilities, statistical income and occupational parity between men and women simply cannot be attained.

The income gap does not provide a satisfactory rationale for statistical hiring of women. Just as clear as the fact that a general sex based income gap exists, is the fact that the general statistic comparing annual female income to annual male income is not very meaningful. A meaningful comparison must take other factors into account. The proportion of women in the workforce has increased dramatically while the proportion of men has remained stable, resulting in women being more junior in the workforce than men. Men have greater qualifications, and work more hours. It is more appropriate to speak of the "unexplained wage gap". The Pay Equity Commission of Ontario estimates that 1/4 to 1/3 of the unexplained wage gap is due to undervaluation of the work done by women.<sup>56</sup>

Occupational segregation is generally believed to be a more important contribution to the wage gap than wage discrimination.<sup>57</sup>

In any event, the division of human beings into the two groups, men and women, without regard to individual circumstances for the purpose of identifying disadvantage and allocating benefits is artificial. It assumes that one woman's disadvantage is shared by all other women, but not by men, and an advantage bestowed on one woman benefits all women, but not men, as if men and women were distinct groups in competition with each other. Yet on the personal and individual level the interests and experiences of both men and women are most closely shared with members of both sexes in the family. A young female, from an upper middle class family just entering the workforce may not have suffered any disadvantage. A young male entering the workforce may have been raised by a single mother and in fact may have suffered great disadvantages because of discrimination against his mother.

Giving young females preferences over young males in hiring decisions also raises issues of generational responsibility. It makes the young generation of males bear the burden for discrimination perpetrated by a previous generation simply because they are male.

The theory that benefits of employment equity for women will be passed on to the next generation is not unquestioned. Only with procreation are values and opportunities transmitted from one generation to the next. Canada's birthrate is far below what is necessary to replenish the population. Homemakers have more children than working mothers.<sup>58</sup> Professor Wynn observes that the family, not the individual, is the bearer of social class.

---

55. *E.E.O.C. v. Sears, Roebuck & Co.* (1986), 39 F.E.P. 1672.

56. *Questions and Answers: Pay Equity in the Workplace* (The Pay Equity Commission) at 2.

57. Anderson and Robb, "Comparable Worth in Canada" (1987).

58. C. Winn, "Affirmative Action for Women: More than a Case of Simple Justice" (1985) 28 Can. Pub. Adm. 24.

Family members suffer disadvantage or enjoy advantage together, and early socialization occurs within the family.

Studies show people generally marry within their own class. There is a great difference in work force participation according to social class. Female participation in the workforce ranges from 71% for university graduates to 34% for those with grade 11 or less.<sup>59</sup> Working class women with young children cannot generate sufficient income to make day care, nannies, or babysitters an alternative to staying home themselves. The beneficiaries of statistical hiring in favour of women will be upper status women and their families. The working class female's family income will suffer as her husband faces unequal competition in the workforce from higher status women. This statement should not be misinterpreted. It does not suggest that "breadwinners" occupy a special place in the workforce. In concrete terms, a male may be unsuccessful in gaining a promotion that might have been awarded to him on merit and greater experience, because a statistical hiring program dictated it be awarded to a qualified woman.

Professor Winn suggests that "the affirmative action programs and quota hiring intended to benefit all women have the effect of benefiting upper status women and their upper status husbands at the expense of lower status males and the women who depend on them as sole family provider".<sup>60</sup> Professor Winn notes that working class women are far less supportive of equal opportunity and "compensatory discrimination" than are those with a university education. He surmises that working class women sense that their own economic interests are not served by such policies. Middle class women who choose to be full time mothers also will experience constrained family income when their family's need for income is the greatest.

Professor Winn concludes that employment equity will exacerbate "income disparities between rich and poor families and therefore between rich and poor women. Although affirmative action is advocated in the name of average and low income [earners], these women do not benefit from quota hiring and may experience diminished family income as a result".<sup>61</sup> Professor Winn argues that statistical hiring for women will "rigidify the class structure and increase income disparities among families".<sup>62</sup>

Professor Winn suggests that income transfer to homemakers is better social policy than employment equity. He concludes that "affirmative action for women is an example of a welfare state measure that is advocated in the name of the poor but does not serve their interest".<sup>63</sup>

---

59. *Ibid.* at 40.

60. *Ibid.* at 41.

61. *Ibid.* at 44.

62. *Ibid.* at 40.

63. *Ibid.* at 46.

## VI. STATISTICAL DISCREPANCIES AND DISCRIMINATION

In Canada, the Supreme Court in the *ATF*<sup>64</sup> case has approved the use of statistical evidence of a gross discrepancy between the reported proportion of a group in a particular employer's workforce and their proportion in the workforce as a whole only in conjunction with direct evidence. In that case some fifty witnesses offered direct evidence of the discrimination suffered by women in applying for and working in blue collar positions in the St. Lawrence region of C.N.. In addition to the intentional discrimination of male supervisors, C.N. used a mechanical aptitude test in its selection process that excluded a disproportionate number of women. Female candidates were made to undergo physical tests not required of male candidates. Statistical evidence was led that while women held 13% of blue collar jobs in Canada, they held only 0.7% of blue collar jobs in C.N.'s St. Lawrence region. The Tribunal concluded that discriminatory practices were pervasive and deeply rooted in C.N.'s hiring process. As a remedy the Tribunal ordered that C.N. achieve a workforce in which 13% of its blue collar positions were held by women, and ordered C.N. to hire one woman for every four positions filled until the 13% was reached. The Tribunal's Order that one in four new blue collar employees be women until 13% of these jobs were held by women was upheld by the Supreme Court of Canada.

The statistic regarding the discrepancy between women employed by C.N. and the women in the workforce generally was a minor part of the evidence of discrimination in the case. Chief Justice Dickson carefully reviewed the extensive direct evidence of discrimination. The use of the gross statistic by itself to found a case of discrimination has not yet been considered by the Courts.

It must be recognized, however, that the gross statistic was the fundamental evidence upon which the hiring remedy in *ATF* was based. It was accepted as the indicator of the extent of the discrimination. The use of gross aggregated statistics for even this limited purpose requires careful scrutiny.

The statistic compared the proportion of women employed in the St. Lawrence region of C.N. with the proportion of women in blue collar positions nationally. There may well have been significant regional differences in the profile of the national workforce. Also, it is certain that the national figure for blue collar workers was based on a much wider range of occupations than existed in C.N.'s workforce. If other industries, possibly the garment industry, had high concentrations of female blue collar workers in jobs that do not exist in the railroad industry, the gross national average would be less probative.

Importantly, the positions at C.N. involved both shift work and travel away from home. The national figure used by the Tribunal was the average of all blue collar positions. The national average of women in blue collar positions that involved both shift work and travel would certainly have been a different figure.

The *ATF* decision should not be read too widely. It is not authority that a mandatory order of statistical hiring is appropriate even in those cases where the discrepancy may have

---

64. *Supra* note 4.

been established to be due to systemic discrimination. Chief Justice Dickson carefully identified three features of the particular case that made a mandatory hiring quota permissible. The first was the clear and pervasive systemic discrimination that existed against women and which had been established by extensive direct evidence. Second, the Tribunal had found as a fact that the small number of women in non-traditional jobs tended to perpetuate the exclusion. Third, C.N. knew that its policies and practices, although perhaps not discriminatory in intent, were discriminatory in effect, yet had done nothing substantial to rectify the situation.

The *ATF* case makes clear the Chief Justice's approach to employment equity. It is necessary to break the continuing cycle of systemic discrimination.<sup>65</sup> This approach presupposes that there is systemic discrimination as was clearly established in the *ATF* case. The problem with the *Employment Equity Act* and the Federal Contractor's Program is that the existence of discrimination is assumed from the statistical disparities without any of the type of evidence that was led in the C.N. case.

## VII. CONCLUSION

No challenge of the *Employment Equity Act* or the Federal Contractor's Program has been brought. It might have been predicted that no preemptive challenge would be made. Canada is an open and caring society. Large Canadian employers subscribe to the fundamental values of human rights legislation and find discrimination odious. For both idealistic and business reasons they wish to utilize all the talent available in the workforce. Yet, as employers are subjected to aggressive prosecution based on Employment Equity data, defensive challenges to the legislation may be expected. A challenge under Section 15 of the *Charter* would establish a *prima facie* case. Section 15(2) may not be available as a defence for the inclusion of the designated group "visible minorities" because it may not be possible to prove that this broad category is "disadvantaged". If a substantive review is available under Section 15(2) then voluntary identification and the definition of disability may be difficult to justify. The *Act's* requirement of parity in the representation of men and women in all occupational groups, and all levels will lead to a spirited debate.

A challenge may also be brought under the *Canadian Human Rights Act*. If these employment equity programs, as presently devised, cannot satisfy the requirements of the special program provision of the *Canadian Human Rights Act*, then hiring preferences to achieve proportionality may be discriminatory. In fact the very collection of the data may breach Section 8 of the *Canadian Human Rights Act* which prohibits the making of an inquiry that classifies and specifies employees and applicants according to a prohibited ground.

Finally, the *Canadian Bill of Rights* should not be forgotten. It guarantees equality before the law and has been found to supercede conflicting federal legislation.<sup>66</sup> It contains

---

65. *Ibid.* at 1143.

66. *Singh v. M.E.I.*, [1985] 1 S.C.R. 177; *McBain v. Lederman*, [1985] 1 F.C. 856 (F.C.A.).



no provision allowing a defence for affirmative action. The ultimate failure of these challenges to the *Employment Equity Act* and Federal Contractor's Program may be too easily assumed.

## PART II: PAY EQUITY

Legislation to protect women from pay discrimination has traditionally required that male and female employees be paid the same wage for doing identical work. Thus a waiter and a waitress must be paid the same wage. Such legislation exists in every province.

This principle was extended to apply to situations where male employees and female employees perform substantially similar work. Job titles and job duties may differ somewhat, but they are substantially the same. This type of legislation also exists in every province and has been commonly applied to compare nurses' aides to orderlies and male janitors to female cleaners.

The concept of equal pay for work of equal value differs radically from the two preceding ones, in that it does not compare "work", but the "value" of work. Value is determined by job evaluation techniques and comparisons are made between dissimilar jobs. An example is the Canadian Human Rights Commission comparison of the relative value of the seven sub-groups of the 12,100 member General Services Category of the federal public service. The seven sub-groups were all paid at different rates. The lowest paid — food, laundry and miscellaneous personal services — were predominately female, while the remaining four — messenger, custodial, building and store services — were predominantly male. The case was settled for back-pay of some \$17 million. The annual continuing wage adjustments would be in the same order.

It is often said that the "equal value" concept involves comparing apples and oranges. It is impossible to compare an apple and an orange in terms of consumer taste and preference. These factors would largely affect the fruits' market value. However, an apple and an orange can be compared in terms of cost of production, storage, delivery, and nutritional value. "Equal value" laws reflect the political decision that workers' wages will not be determined wholly by market forces.

The prices of apples and oranges in the job marketplace must be determined by job evaluation systems, rather than by market forces alone. Job evaluation is not an objective science that can discover the *a priori* value of jobs. It requires that value judgments be made. Jobs which are determined to be of equal value by one system, may not be by another. However, once adopted, a system must be applied consistently across sex segregated occupations, thus assuring that the same standards have been applied to both sexes. Furthermore, job evaluation requires a precise articulation of the criteria according to which "value" will be determined. Such articulation allows scrutiny whether the criteria are sex biased.

Section 11 of the *Canadian Human Rights Act* came into effect on March 1, 1978 and makes it a discriminatory practice for an employer to "establish or maintain differences

in wages between male and female employees employed in the same establishment who are performing work of equal value". The *Act* applies to all employers within the legislative authority of the Parliament of Canada which includes the federal public service, federal Crown corporations, and federally regulated private industries such as banks, airlines, inter-provincial trucking companies, broadcasting, telecommunications and other industries whose labour relations are or would be governed by the *Canada Labour Code*. Section 11 applies to all employers regardless of size or number of employees.

Subsection 11(2) provides that the value of work shall be assessed in terms of the "composite of the skill, effort and responsibility required in the performance of the work, and the conditions under which the work is performed". The legislation does not specify the weight that each of these factors should bear. The terms are further clarified in guidelines published by the Canadian Human Rights Commission.

Section 11 is implemented in exactly the same way as any other discriminatory practice under the *Canadian Human Rights Act*, i.e. by a complaint process. Any individual has the right to file a complaint with the Canadian Human Rights Commission which investigates the matter, attempts to conciliate a settlement, and may decide whether the complaint should be heard by a Human Rights Tribunal. If so, the Commission prosecutes the case before the Tribunal.

Section 38.1 of the *Canada Labour Code* provides that a Labour Canada Inspector may notify the Canadian Human Rights Commission or file a complaint with the Commission whenever the Inspector believes that Section 11 is being contravened. In 1986 Labour Canada established an Equal Pay Division and an Equal Pay Program which seeks to ensure that every employer under federal jurisdiction is in compliance with Section 11. Labour Canada Inspectors contact employers to ensure that they understand their obligations, and provide detailed advice and guidance as to how they may best comply with them. Labour Inspectors may determine through on-site inspections whether wage inequity exists, and after providing the employer with the opportunity to correct the situation, will either notify the Canadian Human Rights Commission or file a complaint with the Commission.

A pay equity system adopts the "equal pay for equal value" principle but does not rely solely on complaints to trigger enforcement of the legislation's general prohibition. A complaint system of enforcement is usually based on the assumption that violations are the exception, not the rule. The investigation of individual complaints is only feasible if breaches of the legislation are exceptional. However, if one assumes that the existence of wage discrimination is systemic and pervasive throughout the economy, then obviously a complaint system of enforcement would be inadequate. As well, if it is assumed wage disparities are due not to intentional discrimination but to the inherent structure of the market, then government intervention to correct wage disparities is not so much a guarantee of non-discrimination as it is regulation of financial affairs.

Probably the main reason for abandoning the complaint-based model is that the quasi-judicial mechanisms of anti-discrimination law are not suited to the enforcement of "equal value" legislation. Such legislation requires the use of compensation techniques for its proper administration. The relative worth of jobs must be measured according to some job evaluation plan. Compensation practitioners are guided by "commonly accepted principles and methods", which have been developed within the profession over time.

However, the addition of sex as a factor to be considered in compensation practice has meant that new techniques and methods have had to be developed. For example, in a large organization, a particular job is seldom staffed exclusively by men or women. There are male bank tellers, male nurses and female engineers. How does one identify a mixed group of workers as male or female for the purposes of meaningful comparison? Also, in a large organization there may be several different "male" jobs, each performing work of equal value to a particular "female" job. Does one identify a single comparison as being the most appropriate or does one calculate the average? If the latter, how does one select among the various averaging techniques? What adjustments does one make? The new pay equity legislation prescribes technical standards to decide such questions.

The first example of such legislation in Canada was Manitoba's *Pay Equity Act*.<sup>67</sup> The *Act* applies only to the civil service (since 1 October 1985)<sup>68</sup> and to certain Crown entities and external agencies as specified (since 1 October 1986).<sup>69</sup> The external agencies are government hospitals and universities. The *Act* obliges the Civil Service Commission and the bargaining agents of the employees to identify the female and male dominated groups of employees, to apply a single bias-free job evaluation plan to these classes and to implement the necessary wage adjustments. The *Act* imposes a ceiling of one per cent of the total payroll of the employer per year, and a maximum of four such adjustments in four consecutive years.<sup>70</sup>

A pay equity bureau oversees the process and provides for arbitration where no agreement is reached.<sup>71</sup> The arbitrator has the authority to issue an order determining the job evaluation system to be applied, to prescribe conditions under which the job evaluation shall be carried out and to decide to which classes the plan shall be applied.<sup>72</sup> Finally, the arbitrator may fix the quantum and allocation of wage adjustments and provide for the "orderly implementation of those adjustments".<sup>73</sup>

Pay equity legislation applicable to public sector employers has been passed by Prince Edward Island<sup>74</sup> and by Nova Scotia<sup>75</sup>.

On June 15, 1987, the Province of Ontario took the matter much further by passing a *Pay Equity Act*<sup>76</sup> that applies to the private sector as well. A new regulatory agency, the Pay

---

67. S.M. 1985-86, c. 21, C.C.S.M. P 13.

68. *Ibid.* s. 8(1).

69. *Ibid.* s. 13(1), Schedule A.

70. *Ibid.* s. 7(3).

71. *Ibid.* s. 5(1).

72. *Ibid.* s. 10(7).

73. *Ibid.* s. 9(1).

74. *Pay Equity Act*, S.P.E.I., c. 16.

75. *Pay Equity Act*, S.N.S. 1988, c. 16.

76. *Supra* note 25.

Equity Commission, was created to oversee the process. The new scheme does not rely only on the filing of complaints for its enforcement. Rather, positive obligations are placed on employers with more than 100 employees in Ontario to undertake a series of steps to scrutinize their pay practices and to ensure that they meet the requirements of the legislation. Such employers must:

1. analyze their work forces to identify female and male job classes (i.e. those that are 60% female or 70% male respectively or any other class so designated by the employer, the employer and union, or the Pay Equity Commission);
2. compare the value of work performed by male and female job classes by applying an acceptable job evaluation plan;
3. increase the wages of each female job class to equal the wages of the employer's lowest paid male job class performing work of the same value in the establishment, and if possible within the same collective bargaining unit. If there is no such male job class, then the required increase is to the wages of the highest paid male job class that is performing work of lesser value.

The wage adjustments required by the *Act* will be limited to one per cent of an employer's total annual payroll in Ontario for each of seven consecutive years, after which the legislation will be reviewed.

Comparisons need only be made within each "establishment" of the employer, which has a geographic and not a functional meaning. An "establishment" would include all employees of an employer within a county, territorial district or regional municipality. The Municipality of Metropolitan Toronto is one "establishment". A wider definition of the establishment can be adopted by the employer, or imposed by the Pay Equity Commission.

Employers must devise and post in their workplaces "Pay Equity Plans" which describe in detail their programs for complying with the legislation. The agreement of the bargaining representatives of unionized employees must be secured for the content of a pay equity plan. Where employer and union cannot agree, the matter will be decided by the Pay Equity Commission. Where no union is involved, the employer can act unilaterally but any employee can file objections with the Pay Equity Commission, which will then decide the matter. The Pay Equity Commission is granted extensive powers to investigate and adjudicate objections and complaints.

The *Pay Equity Act* was proclaimed in force on January 1, 1988 but its application will be phased in. Employers in the public service and the broader public sector will have two years to post their pay equity plans and to begin making wage adjustments. Employers with at least 500 employees in Ontario also will have two years to post their plans, but will have three years to start making adjustments. Employers with 100 to 499 employees in Ontario have three years to post their pay equity plans, and four years to begin making wage adjustments.

Employers with less than 100 employee need not post pay equity plans, or make wage adjustments on their own initiative. However if they do not they will be vulnerable to having complaints filed against them. If they choose to voluntarily comply with the positive

obligations imposed by the statute, such employers have longer periods in which to do so. The legislation does not apply to employers with less than ten employees.

As noted in Part I of this paper the wage gap is generally believed to be more attributable to occupational and industry segregation of women. The Pay Equity Commission of Ontario estimates that 550,000 women in Ontario or 26% of the female labour force will have no recourse to the *Pay Equity Act* because they work in industries where there are no male comparators.<sup>77</sup> Women have tended to work in industries which pay the lowest wages.

It must be concluded that even an ambitious initiative such as the *Pay Equity Act* of Ontario will not eliminate the wage gap between men as a class and women as a class. Compliance with the *Act* will be enormously expensive for employers and for the monitoring agency. I am not referring here to the cost of wage adjustments but to the administrative costs of implementation of the system. Government efforts to ensure equality for women simply must recognize women's role as mothers. One may be excused for wondering whether a requirement that large employers provide daycare on the premises might be more successful in the long term.

---

77. *The Pay Equity Office Progress Report to the Minister on Predominantly Female Sectors* (June 1989).