Legislating Employment Equity in Ontario

Juanita WESTMORELAND-TRAORÉ*[1]

[1] Employment Equity Commissioner, Province of Ontario, Toronto, Ontario.

I welcome the occasion to address the members of the Canadian Institute for the Administration of Justice at this Conference on "Work, Unemployment and Justice", and to speak about equity in employment.

This workshop is very timely. In Ontario, we are about to begin extensive consultation on the content of employment equity legislation. I would like to spend the next twenty minutes or so, providing a description for you of where things stand in Ontario on employment equity, and some of the principles and issues that we will be considering in the coming months.

In November 1990, the Ontario Government announced its intention to introduce employment equity legislation. I think it may be helpful to take a few minutes and provide some of the background which explains why the Government is committed to implementing employment equity legislation.

I. EMPLOYMENT EQUITY IS NOT NEW

Employment equity, or affirmative action as it is referred to in the United States, is not a new concept. Voluntary employment equity programs have existed for many years in Ontario. Indeed, the Ontario Public Service has had an employment equity program for women since 1974. Also, many private sector employers in Ontario began to implement voluntary employment equity programs in the 1980s.

At the Federal level, the Federal Government has also had this type of program since the 1970s. And in 1986, the *Employment Equity Act*[1] was passed which made it mandatory for federally-regulated employers, with 100 or more employees, to implement employment equity programs. The Federal Government has also instituted a contractors' compliance program. The experience with the contractors' program, particularly in the United States, is that it captures the attention of employers quite effectively.

Generally speaking, and apart from the *Employment Equity Act*,[2] governments in Canada have tried to encourage employers to adopt voluntary programs and have created a legal environment favourable to this. For example, the Ontario *Human Rights Code*[3] was revised in 1981 to include, among other provisions, a section which permits employers to institute employment equity programs for groups who are disadvantaged. And of course, section 15(2) of the Charter[4] permits the use of special programs by governments to ameliorate conditions of disadvantage.

I also believe it is important to emphasize that employment equity legislation is consistent with our obligations under international law. The *International Covenant on Economic, Social and Cultural Rights*;[5] the *International Covenant on the Elimination of all forms of Racial Discrimination*;[6] and the *Convention on the Elimination of all forms of Discrimination against Women*[7] all recognize the right to equality in employment.

Article 1(4) of the *International Covenant on the Elimination of all Forms of Racial Discrimination* provides that:

> *special measures taken for the sole purpose of securing advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.*[8]

While Article 4(1) of the *Convention on the Elimination of all Forms of Discrimination Against Women* states that:

> *adoption by State Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination.*[9]

In my opinion, employment equity legislation directs workplaces to develop and implement the type of special programs envisaged under these conventions.

II. NEW DEFINITIONS OF EQUALITY

The concern with equality in employment has been on the legislative agenda for over forty years in Canada, and Ontario has been at the forefront of seeking to promote equality in employment by prohibiting discrimination in employment.

Beginning in the 1950s, Ontario's human rights legislation has gradually evolved to prohibit discrimination on the grounds of race, sex, and disability, among other prohibited grounds of discrimination.

During this time, our concepts of equality and discrimination have also evolved. The Aristotelian principle of formal equality, referred to by Mr. Justice McIntyre in the *Andrews*[10] decision, that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness" has been found to be deficient.

Instead, we have accepted a broader and more substantive interpretation of equality, including equality in employment, one which recognizes the need to accommodate differences and to eliminate or reduce, as William Black and Lynn Smith have argued, the conditions of disadvantage that are experienced by certain groups in our society. An obvious example is the inclusion of the duty to accommodate persons with disabilities in the Ontario *Human Rights Code*.[11]

The evolution in our thinking about equality, has been reflected in the evolution in our understanding of discrimination in human rights legislation. As David Baker and Greg Sones have suggested in an article in the Journal of Law and Social Policy, the underpinnings of this evolution are directly related to the fundamental purpose of human rights legislation which is the promotion and protection of equal opportunity.

As our understanding of the barriers that prevent equality in employment has increased, human rights legislation and its interpretation have changed. Whereas human rights legislation

was initially concerned with direct discrimination, the focus in the last decade has increasingly been on systemic discrimination.

In *Action Travail des Femmes* v. *Canadian National Railways,*[12] the Supreme Court of Canada agreed with the definition of systemic discrimination put forth by Judge Abella in her report on "Equality in Employment". She wrote:

> *Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics* [...][13]

> *It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.*

The focus on the systemic discrimination described by Judge Abella, and referred to by the Supreme Court in the *Action Travail des Femmes* case, has primarily arisen because it is recognized that barriers to equality in employment continued to persist despite the prohibition of direct discrimination. The response has been the inclusion in human rights legislation of sections which permit, on a voluntary basis, employment equity programs, as well as the type of remedy sanctioned by the Supreme Court in the *A.T.F.* case.

I would also like to suggest that how we approach equality has also undergone a significant evolution, beyond that of changes in our understanding of equality and discrimination. It is an evolution that has two parts to it. First, there has been an evolution in our thinking as to the activities and measures that must be undertaken in society if we are to promote or achieve equality. Secondly, there has been an evolution in how we measure or assess whether or not equality exists - in other words, we are moving toward evaluating the existence of equality by examining results. I will return to these themes later.

Despite these encouraging developments in human rights legislation, we continue to live in a society where discrimination is practised all too frequently; while many workers or groups experience discrimination daily, four groups in particular have borne the brunt of discrimination in employment: Aboriginal peoples, persons with disabilities, racial minorities and women.

As Judge Abella noted in her report, "Equality in Employment",[14] the consequence of this discrimination is "that these groups have restricted employment opportunities, limited access to decision-making processes that critically affect them, little public visibility as contributing Canadians, and a circumscribed range of options."

III. DESIGNATION OF FOUR DISADVANTAGED GROUPS

It is necessary to share with you some of the data on the socio-economic disadvantage that is experienced by members of these four groups in Ontario. Data which shows that members of these groups have restricted work opportunities, and higher unemployment or underemployment than white males. It is data which helps to explain why members of these groups believe that the justice system has served them poorly, and why they believe that new solutions are required to address the situation of disadvantage that they find themselves in.

Aboriginal peoples are more often unemployed, earn lower incomes and have less education than the non-Aboriginal population in Ontario. In 1986, Aboriginal peoples had an unemployment rate which was more than double that of the non-Aboriginal population. Statistics have shown that Aboriginal peoples earn two-thirds of the income of the general population. Generally speaking, most Aboriginal workers tend to be concentrated in a narrow range of occupations, where they tend to be found in low-paying seasonal or part-time jobs. However, it should be noted that increased Aboriginal control over their education is proving to be effective in furthering educational achievement. Between 1985 and 1990 there has been a 66% increase in enrolments by Aboriginal students in university and post-secondary institutions.

Much of the disadvantage that faces Aboriginal peoples is the direct result of both intentional and systemic discrimination in employment, education, and training. Workplaces may lack cultural accommodation or sensitivity, and the lack of opportunities for training and education on reserves or in rural areas contributes to the employment disadvantage faced by Aboriginal peoples.

For persons with disabilities, the situation is equally intolerable. Unemployment rates for persons with disabilities are more than double the general population. Data from the 1986 Statistics Canada *Health and Activity Limitation Survey*[15] showed that almost 30% of persons with disabilities responded that they have been refused employment because of their disability. The labour force participation rate of persons with disabilities is almost half that of the general population. The barriers to employment that face persons with disabilities include stereotypes about certain disabilities, the reluctance on the part of employers to provide job accommodation, and an education, training and social assistance system that has marginalized persons with disabilities by failing to recognize the contribution that persons with disabilities can, and want to make, to our community.

Members of racial minorities continue to experience discrimination and disadvantage in employment, despite the fact that discrimination in employment on the grounds of race has been prohibited in Ontario for the last forty years. Statistics Canada data from 1986 shows that at each level of educational achievement, racial minorities earn less than whites. Ghettoization is also a significant employment disadvantage experienced by racial minorities. A 1985 study by Billingsley and Muszynski[16] noted that racial minorities tend to be concentrated in personal services, health and welfare organizations, and are significantly under-represented in education, administration, and professional occupational categories. In addition, relative to other immigrants, racial minority immigrants experience higher rates of unemployment and significant barriers continue to exist with respect to access to trades and professions.

Women also continue to experience disadvantage in employment. While some women have improved employment opportunities, the majority of working women are still in traditional occupations in manufacturing, sales and clerical. Eighty percent of women work in three occupational categories, whereas eighty percent of men work in twenty-seven occupational categories. In addition, barriers to promotion continue to persist. In August, the *Toronto Star* had a report on a recent U.S. Department of Labour study which clearly showed that a "glass ceiling" existed for women.

Women working full-time continue to earn less than men working full-time. In 1986 women earned 64.5% of what men earned. Over 70% of part-time workers are women, while the representation of women in apprenticeship programs was a dismal 4.5% in 1987-1988. The employment disadvantage experienced by women who are also members of more than one disadvantaged group is even more acute. For example, women with disabilities earn about 64% of what non-disabled women earn.

Studies such as the Abella Commission Report, as well as those undertaken for the Ontario Government, clearly show that members of these four groups experience severe employment disadvantage because of widespread employment discrimination. But the statistics do not tell the whole story. They do not speak of the humiliation and degradation, nor the frustration and fatalism, that are the products of discrimination in employment.

As for the members of these four groups, they are tired of waiting for change. They would argue, and I agree, that our current system for the protection of human rights, and elimination of discrimination in employment, has generally failed, but for a few exceptions, to have any significant impact on the disadvantage experienced by members of these groups. Human rights legislation, as presently applied, has not rectified the disadvantage that they face in employment. Nor have the voluntary programs that I referred to earlier, produced significant change.

I would like to spend a few moments talking about the failure of human rights legislation to respond to the disadvantages that I have outlined, despite the evolution of human rights legislation which I have already described. I think it will help clarify why members of these four groups are advocating a different approach to achieving equality in employment. An approach which represents a significant shift in our thinking, one away from the anti-discrimination model for the promotion and protection of equality, to one which focuses on the achievement of equality through a proactive approach and positive measures.

I would suggest that traditionally, human rights commissions have neither had the structure, nor the resources to respond to the widespread discrimination that is faced by members of these groups. I also think it is safe to say that generally human rights commissions have used their power to initiate investigations very sparingly, whether individual or systemic. Their work has been largely reactive and case-oriented.

Systemic problems require systemic solutions. To respond to the disadvantage and discrimination experienced by Aboriginal peoples, women, persons with disabilities and racial minorities, and recognizing the limitations and weaknesses of present human rights legislation, the Ontario Government has announced its intention to introduce employment equity legislation. Not only will the implementation of such legislation fulfil a long-standing commitment of the Ontario Government, but its introduction is an integral part of the Government's economic renewal strategy.

IV. DECISIONS WHICH HAVE ALREADY BEEN MADE

The Ontario Government has made four decisions concerning employment equity:

1) Employment equity will be legislated;

2) The legislation will designate four groups: Aboriginal peoples, persons with disabilities, racial minorities and women;

3) The legislation will cover the public, the broader public and the private sectors; and

4) Employment equity will be mandatory and an effective enforcement mechanism will be established to ensure compliance.

Over the coming months, I am going to be holding consultations across Ontario on employment equity. During these consultations, people will be asked for their views on questions of implementation and structure.

V. CONSIDERATIONS FOR EMPLOYMENT EQUITY LEGISLATION

I would like to spend my remaining time discussing four issues with you. In discussing these issues, I hope to show that employment equity legislation is consistent with the approach to equality that I outlined earlier and which underlies human rights legislation. In my opinion section 2 of the Federal *Employment Equity Act*[17] reflects this. It reads:

> *The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in 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 that treating persons in the same way but also requires special measures and the accommodation of differences.*

The four issues that I referred to are:

a) Employment equity is a systemic response to systemic barriers;

b) Proof of discrimination will not be a prerequisite for requiring an employer to develop an employment equity program;

c) Employment equity plans should include both anti-discrimination measures and positive measures; and

d) Compliance and enforcement of employment equity legislation must be effective.

A. Employment equity as a systemic response to systemic barriers

I think it is important to understand employment equity as good human resources planning designed to eliminate systemic barriers to employment, and to achieve equitable representation of designated groups in a particular workplace. The purpose of the planning is to break, what Mr. Chief Justice Dickson has referred to as "the continuing cycle of systemic discrimination", thereby creating an environment for equality.

Employment equity does this in three ways. First, it challenges existing employment policies and practices. In the jargon that is familiar to employment equity practitioners, but often unintelligible to anyone else, this is referred to as an employment systems review or audit. The purpose of this review is to evaluate policies and practices to determine what impact they have on women, racial minorities, persons with disabilities, and Aboriginal peoples. In particular, do the policies or practices have, intentionally or inadvertently, an exclusionary impact on members of these groups?

In addition, the employment systems review helps to identify those policies and practices that are missing from the workplace, and that through their absence contribute to the exclusion of members of these groups. For example, the absence of policies on work and family issues, job accommodation for persons with disabilities, or sexual or racial harassment can result in a climate which is not supportive of the participation or inclusion of members of these groups.

Secondly, it directly challenges discriminatory stereotypes. It can achieve this through a variety of methods. One method is to require that employees receive training on human rights and

cultural diversity. Another way, referred to by the Supreme Court in the *Action Travail des Femmes*[18] case, is by placing members of the group that previously had been excluded into the workplace. Working with members of the designated groups is the best, and most successful way, of challenging attitudinal barriers.

Thirdly, employment equity creates a critical mass of designated group representation in the workplace. Many commentators have written that as the participation of an excluded group increases in the workplace, a point is reached where many of the barriers that did exist begin to be removed. The employment system evolves and responds to their presence. Of course, "glass ceilings" can continue to exist unless corrective action is taken in those occupational groups where under-representation persists.

I think these three activities represent the systemic response and contribute to breaking the cycle of systemic barriers.

B. Proof of discrimination not a prerequisite

This leads me to the second issue that I would like to raise, the requirement of prior proof of discrimination. While human rights tribunals can order employment equity programs, generally there must first be a finding of discrimination.

The problem with this approach to the promotion of equality is that it is based on the assumption that equality exists unless proven otherwise. I, on the other hand, believe that the history of disadvantage and discrimination experienced by women, racial minorities, persons with disabilities and Aboriginal peoples, clearly shows that discriminatory practices were, and continue to be, embedded in our social structure. I have difficulty in accepting that a complaints driven model for the enforcement of equality, and which requires the proof of discrimination in each case, is the most effective way in the 1990s for achieving equality in employment.

It would seem to me to be more cost-effective and efficient to spend our energies positively, focusing on creating an environment which fosters equality, rather than trying to prove whether discrimination exists or not in a particular workplace. While human rights legislation is not considered penal legislation, except for the occasional penal clause, some employers might perceive the imposition of an employment equity program, by a tribunal after the finding of discrimination, as a punishment. Some positive advantages of employment equity may be lost in the psychological reaction to being punished.

What are some of these advantages? First, employment equity will ameliorate the conditions of disadvantage that exist for the four groups. Over the long-term, as members of these groups become more fully integrated into the workplace, the economic benefits of their participation should become substantial.

I also believe that it is becoming recognized by employers that the process of instituting an employment equity program makes good business sense. With the changing demographics in our society, and increased international competitiveness, it is important that employers examine their human resources policies.

I believe employment equity will require employers to engage in the type of human resources planning and evaluation which will inevitably result in a more productive use of human resources. The benefits of employment equity will not be limited to members of the four groups, but everyone should benefit. Policies which create a more supportive work environment, such as those dealing with flexible working arrangements, or work and family issues, benefit all workers.

In addition, employment equity is likely to result in a renewed focus on education and skills development in Ontario, which will be critical if we are to compete in the international marketplace. As I indicated earlier, the Ontario Government is committed to employment equity, not only because of social justice considerations, but because it is seen as an initiative which is critical to the success of our economic renewal.

I am convinced that the requirement that all employers implement employment equity, without the prior proof of discrimination being a prerequisite for the implementation of employment equity, is a significant development which will be welcomed by employers and members of the designated groups. Knowing the rules of the game, and avoiding lengthy hearings and court cases will be regarded as an improvement.

To respond to the pervasiveness of the barriers to employment for the four groups in virtually all workplaces in Ontario, it seems to me to make more sense that employment equity be mandatory.

C. Employment equity plans

This leads me to my third issue. The content and development of the employment equity plan. My comments on this subject are my own and do not necessarily reflect the views of the Ontario Government. As I have indicated, I am beginning the process of consultation on the form and content of the proposed employment equity legislation. As such, I would just like to raise some issues that I anticipate will receive considerable attention during the consultation process.

It is highly probable that the proposed legislation will require employers to develop an employment equity plan. Employment equity plans usually contain employment equity goals and the strategy for achieving them. One of the key issues that needs to be discussed during the consultation will be which components of the plan should be legislated?

Precedence for the content of an employment equity plan already exists in Ontario. In 1990, the *Police Services Act*[19] was proclaimed. This Act requires every police service to develop an employment equity plan containing goals for the removal of barriers; goals for the implementation of positive measures to increase the representation in police services of the designated groups; and goals for the composition of the police service.

An employment equity plan usually includes numerical goals and timetables for the hiring, promotion and increased participation of members of the four groups in the workplace. It also usually includes goals for the implementation of barrier elimination and job accommodation measures, supportive work environment initiatives and positive measures.

As an aside, I would just like to provide a brief description to explain what is meant by positive measures. Positive measures include activities such as special recruitment strategies which target members of the four groups, for example through advertising in media that serves specific racial minority groups. They can also include activities such as career development opportunities for members of the groups, reserved positions in apprenticeship programs, or even restricted competitions, so that only members from one or more of the groups are eligible to be hired. Positive measures are designed by employers to respond to the particular needs or situation of designated group members in an employer's workplace. These should be tailored to the requirements of the situation and must take into account the rights of other workers.

How the goals I mentioned are set and measured will have to be determined. However, considerable debate has already occurred in Ontario as to whether numerical goals are just quotas by another name.

I would like to address this issue for a minute. I believe numerical goals are distinct from quotas. Numerical goals are flexible because they are determined according to several criteria inclding opportunities for hiring and promotion in the workplace. Also, the failure to achieve a goal does not automatically result in a penalty. Quotas, by contrast, usually are a fixed number, externally imposed, with an automatic penalty if the quota is not met. Quotas are usually seen as a maximum.

For employment equity to work, existing partnerships in the workplace need to be strengthened. Without cooperation it is difficult to imagine employment equity succeeding.

In unionized workplaces, unions should participate in the development and implementation of plans. The protection of seniority is a fundamental principle for organized labour, particularly as it relates to lay-off and recall. For employment equity purposes, constructive forms of seniority have evolved, and continue to evolve, to permit entry and movement at all levels. In some workplaces, employment equity clauses have been bargained.

Many of the details relating to the role of workers in employment equity planning will require extensive study and consultation. For example, how can unorganized workers be involved? Will new structures for consultation in the workplace have to be developed? And what about the role of designated group workers in employment equity planning?

The role of workers in employment equity planning is also likely to generate considerable debate, but I believe that their participation must be ensured. Without the cooperation of workers in the workplace, it will be hard to achieve a general acceptance of employment equity, and obstacles against it could easily develop. More importantly, their inclusion is consistent with what employment equity is about, which is the opportunity to participate. However, I am also realistic. In many workplaces workers, like employers, will be resistant to employment equity. They may perceive it as unfair, or as reverse discrimination.

We must take care not to dismiss the legitimate fears and concerns that these workers have. But we also must not give legitimacy to reactions which just mask discriminatory attitudes or ideas. Instead we must strive to ensure that the elements of the employment equity plan, and the measures that are used, are fully explained in the education and communication material that is distributed in the workplace, so that workers can understand the objectives of employment equity and why it is needed. Illustrations of situations where identical treatment is unfair treatment will be important.

D. Ensuring compliance with the legislation

Finally, ensuring compliance with the legislation is a critical issue that must be fully explored during the consultation process. The number of employers to be covered by the legislation has yet to be determined, but regardless of the number, the method by which compliance with the legislation is monitored and enforced must be effective and workable. One key difference between voluntary programs and the legislated programs will be the extent to which there is an effective and efficient monitoring system in place. The lack of accountability and monitoring has been found to be a major factor in the disappointing results of voluntary programs.

One possibility would be to require an Employment Equity Commission to conduct random audits or selective audits, based on the size of the employer or geographic location. There may be a role for individual or group complaints.

I also believe that the legislation should acknowledge the role of incentives in trying to promote compliance with the Act. This could include awards, technical assistance or the publicity of positive performances by employers.

However, as in other legislation, penalties could apply in situations where employers refuse to comply with the Act, or fail without sufficient reason to achieve the goals that are set out in the employment equity plan. Sanctions could include negative reports, fines, restricted access to government contracts, and administrative orders including the imposition of quotas.

Again, I believe that the mechanisms for compliance and enforcement will generate considerable debate during the consultation process. But if our emphasis is to be on results, we must ensure that we have a system which is fair, effective and expeditious. We must have clear criteria which specify when and why sanctions will be imposed if employers fail to achieve the results that are desired.

We must also avoid structural mechanisms for compliance and enforcement that are more likely to generate backlogs of complaints or audits. The experience of other boards and tribunals will be instructive in this regard.

The Government of Ontario recognizes that the aspirations of members of the four groups must be met. The economic and social cost of their exclusion from the workplace, as well as their underemployment, can no longer be accepted.

Over the coming months, I will be holding consultations with all the stakeholders. I hope to foster dialogue and consensus, where possible, on the issues that will be raised - including those that I have raised with you today. This may not always be possible - but I hope to encourage consensus wherever possible.

The endeavour to create a society where social justice and equality are generally respected is an important one. While many challenges lie ahead, I am confident that we will be successful.

FOOTNOTES

1. *Employment Equity Act*, R.S.C. 1985, (2d Supp.) c. 23.

2. *Ibid.*

3. *Human Rights Code*, R.S.O. 1990, c. H.19.

4. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5. *International Covenant on Economic, Social and Cultural Rights*, 3 January 1976, 993 U.N.T.S. 3.

6. *International Covenant on the Elimination of all forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195.

7. *Convention on the Elimination of all forms of Racial Discrimination against Women*, 18 December 1979, G.A. Res. 34/180, U.N. Doc. A/34/36 (1980).

8. *Ibid.*

9. *Ibid.*

10. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143.

11. *Supra* note 3.

12. *Action Travail des Femmes* v. *Canadian National Railways* (1987), 1 S.C.R. 1114 [hereinafter *A.T.F.* or *Action Travail des Femmes*.

13. Ontario, Commission on Equality in Employment, "Report of the Commission on Equality in Employment" by Judge R.S. Abella (Ottawa: Supply and Services Canada, 1984).

14. *Ibid.*

15. Statistics Canada *The Health and Activity Limitation Survey* (Ottawa: Statistics Canada, 1988).

16. B. Billingsley & L. Muszynski, *No Discrimination Here? Toronto Employers and the Multi-racial Workforce* (Toronto: Social Planning Council of Metropolitan Toronto, 1985).

17. *Supra* note 1.

18. *Supra* note 12.

19. *Police Services Act*, R.S.O. 1990, c. P.15.