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From outlawing discrimination to promoting equality: Canada's experience with anti-discrimination legislation

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Foreword

The following study has been elaborated under the auspices of the ILO's Migration for Employment Branch. The objectives of the Branch are to contribute to (i) the evaluation, formulation and application of international migration policies suited to the economic and social aims of governments, employers' and workers' organizations, (ii) the increase of equality of opportunity and treatment of migrants and the protection of their rights and dignity. Its means of action are research, technical advisory services and co-operation, meetings and work concerned with international labour standards. The Branch also collects, analyses and disseminates relevant information and acts as the information source for ILO constituents, ILO units and other interested parties.

The ILO has a constitutional obligation to protect the "interests of workers when employed in countries other than their own". This has traditionally been effected through the elaboration, adoption and supervision on international labour standards, in particular the Migration for Employment Convention (Revised), 1949 (No. 97); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); and the non-binding Recommendations supplementing them. International legal instruments of this kind aim to influence national laws and regulations in such countries as ratify the binding Conventions; and in this way they change not only legislation but the actual practices as well.

The key concern of ILO standards for migrant workers is non-discrimination or equality of opportunity and treatment. Many countries broadly adhere to this objective in the economic and social spheres. Some countries ratify ILO Conventions [1] and do their level best to fulfil the obligations deriving from them. One might expect, therefore, that discrimination would no longer be part of the legislation or practices of these countries. Unfortunately, there is a great deal of circumstantial evidence that this assumption does not hold in certain respects and especially not at the workplace in private or public enterprises; and such evidence also exists for countries not having ratified ILO Conventions.

Therefore, the ILO has launched a series of activities under the programmatic title of "Combating discrimination against (im)migrant workers and ethnic minorities in the world of work". [2] It aims to reduce discrimination against non-nationals and persons of distinct ethnic origins by informing

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[1] Forty in the case of Convention No. 97, one hundred and twelve in the case of Convention No. 111, and seventeen in the case of Convention No. 143.

[2] See: R. Zegers de Beijl: *Discrimination of migrant workers in western Europe* (Geneva, ILO, 1990); L. Foster, A. Marshall and L. Williams: *Discrimination against immigrant workers in Australia* (Geneva, ILO, 1991); R. Torrealba: *Discriminación del trabajador migrante en Venezuela* (Geneva, ILO, 1991); R. Zegers de Beijl: *Although equal before the law* (Geneva, ILO, 1992); S. Dex: *The costs of discriminating against migrant workers: an international review* (Geneva, ILO, 1992); R. Torrealba: *Discrimination against migrant workers in Venezuela* (Geneva, ILO, 1992); F. Bovenkerk: *Testing discrimination in natural experiments: A manual for international comparative research on discrimination on the grounds of "race" and ethnic origin* (ILO, Geneva, 1992); C. Raskin: *De facto discrimination, immigrant workers and ethnic minorities: A Canadian overview* (ILO, Geneva, 1993); J. Wrench and P. Taylor: *A research manual on the evaluation of anti-discrimination training activities* (ILO, Geneva, 1993); G. Rutherglen: *Protecting aliens, immigrants, and ethnic minorities from discrimination in employment: The experience in the United States* (ILO, Geneva, 1994); F. Bovenkerk, M.J.I. Gras, D. Ramsoedh with the assistance of M. Dankoor and A. Havelaar: *Discrimination against migrant workers and ethnic minorities in access to employment in the Netherlands* (ILO, Geneva, 1995).

policy makers, employers' and workers' organizations as well as trainers engaged in preventing or countering unlawful discrimination of how legislative measures and training activities can be rendered more effective, based on an international comparison of the impact of such measures and activities. These activities cover four main components: i) empirical verification of discrimination; ii) research to assess the scope and efficacy of legislative measures designed to combat discrimination; iii) research to document and to evaluate training and education in anti-discrimination or equal treatment; iv) international seminars to discuss the research findings.

In the present paper, Caterina Ventura assesses the scope and efficacy of legislative measures taken in Canada in protecting (im)migrants and minority groups from discrimination in employment. The Canadian experience clearly demonstrates the need for comprehensive civil legislation to combat employment-related discrimination. For such legislation to be effective, it should comprise obligations for employers to report on the ethnic composition of their workforce and to develop plans to rectify the eventual under-representation of specific groups. The paper's conclusion that anti-discrimination legislation can only be effective if it is accompanied by effective monitoring and enforcement mechanisms, provides useful guidance to legislators and policy makers in other countries.

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Introduction

This paper will assess the content, scope, administration, enforcement and efficacy of Canadian human rights legislation and related statutes in protecting migrants, immigrants and ethnic minorities in the world of work. In considering issues of discrimination regarding (im)migrant workers and ethnic minorities, the applicable legislative grounds of discrimination include race, colour, national or ethnic origin and citizenship. Im(migrant) workers and ethnic minorities are discriminated against on these grounds as Canada was colonized by the British and French resulting in the view that non-Europeans, particularly non-white workers, are regarded as foreigners and therefore subject to differential treatment based on their race, colour, origin and citizenship (see: Raskin, 1993).

As with other countries such as the United States, the inception of human rights statutes in Canada was based on prohibiting race discrimination. Although the main applicable ground of discrimination regarding (im)migrant workers and ethnic minorities is race, this paper will refer to the scope, content and efficacy of anti-discrimination statutes generally, as the comments remain relatively unchanged whether the discussion centres on race discrimination or the other grounds prohibited under these statutes. The prohibitions against discrimination are generally applicable to all enumerated grounds. The case law interpreting the statutes follows the same principle. For example, the decision of the Supreme Court of Canada regarding the liability of the employer in the case of sexual harassment as enunciated in the case of *Robichaud v. The Queen*, is applicable to all other forms of harassment including racial harassment.

The case law interpreting legislated anti-discrimination provisions will be relied on extensively to elucidate the scope of the protection. Reference will be made to race, colour, ethnic origin and citizenship cases where possible as illustrative of the application of the statute.

1.1. Immigration to Canada

The source countries for Canada's immigrant intake has changed over time. Immigration began with the early colonial settlement of French and English. The American revolution resulted in black slaves escaping up the east coast to Canada or being brought in by white loyalists. The first piece of legislation that one may say would constitute anti-discrimination legislation was introduced in Upper Canada in 1793 entitled *An act to prevent the further introduction of Slaves and to limit the terms of contracts for servitude within this Province*. A few decades later on the west coast of Canada, Chinese labourers were brought to Canada. The Asiatic were denied the right to vote, were subject to head taxes and segregated land ownership (Pentney, 1993, p.1-5).

Canada traditionally preferred European immigrants and welcomed them in the late 1800's and post World War II. Canadian historians have described Canada's immigration policy in the following terms:

> For most of its history Canada has had a restrictionist immigration policy and, from the outset, an immigration policy with unabashed ethnic and racial priorities ... As Canada proceeded through the first half of the twentieth century, Jews, Asians, and blacks were ever more often relegated by Canadian officials to the bottom of the list of those preferred.

> With the onset of the Great Depression, Canada's door to immigrants closed and, reflecting the now accepted principles of ethnic selection, Canada's door was shut most tightly to Jews (Abella and Troper, 1982, p.x).

It was not until the 1960's with the introduction of universal, non-discriminatory and objective selection criteria that non-European non-white immigration became extensive (White and Samuel, 1991, p.70). These new "visible minority immigrants", as these immigrants are referred to in Canada, settled primarily in Canada's major cities, Toronto, Vancouver and Montreal. Since 1951, the proportion of the national population made up of immigrants has remained relatively stable at 16 per cent. However, researchers have observed that this stability hides considerable change in terms of the composition of the group (Beaujot, Basavarajappa and Verma, 1988, p.3). The majority of Canada's immigrants now originates from Asia, Latin and Central America, the Caribbean and African countries (Badets, 1989, p. 3).

Incidents of intolerance and unease directed at visible and ethnic minorities were not uncommon following influxes of non-white immigrants. A 1977 report by the Ontario Human Rights Commission noted the prevalence in Toronto, Canada's most ethnically diverse city, of a climate of racial intolerance that included both violent and subtle forms of racial hostility, as well as a marked increase in substantial cases of discriminatory behaviour (Ontario Human Rights Commission, 1977).

By the end of the 1980's Canadians had become anxious over ethnic diversity. Three out of ten Canadians believe that when it comes to things that count the most, all races are not equal. Three-quarters of Canadians blamed the victims of racial prejudice, believing that "immigrants bring discrimination upon themselves" (Samuel and White, 1991, p. 82).

1.2. Legal status of (im)migrant workers and ethnic minorities

Individuals lawfully in Canada, migrants, permanent residents, immigrants in the process of obtaining Canadian citizenship or other, have most of the same rights as Canadian citizens. Citizenship in Canada. Canadian citizenship accords the additional rights of the right to vote, hold a Canadian passport and be given preference in some occupations. The *Public Service Employment Act* which governs employment in the Canadian public service (s. 16), as well as the *Royal Canadian Mounted Police Act*, which governs the federal police force, (s.9.1), are examples of statutes which permit the restriction of competitions for employment to Canadian citizens.

Until recently, asylum claimants were denied the right to work in Canada until their claim had been adjudicated. Due to a backlog in processing claims, many asylum claimants were required to rely on social assistance for an extended period. Effective January 24, 1994, asylum claimants are permitted to seek employment while awaiting determination of their claim.

1.3. Development of human rights statutes

Various statutes began emerging in the mid 1940's prohibiting discrimination. Some statutes criminally sanctioned discriminatory practices. However, this was found not to be a successful method of dealing with the issue as the criminal burden of proof is more difficult to establish than

the civil burden. Formal Canadian human rights legislation creating human rights commissions began emerging because of overwhelming evidence of racial and religious discrimination (Cornish, 1992, p. 45). The intent of the legislation was clearly articulated by a senior Ontario Human Rights Commission official :

> Modern day human rights legislation is predicated on the theory that the actions of prejudiced people and their attitudes can be changed and influenced by the process of re-education, discussion, and the presentation of dispassionate socio-scientific materials that are used to challenge popular myths and stereotypes about people...Human Rights legislation on this continent is the skilful blending of educational and legal techniques in the pursuit of social justice (Hill, 1965, p.4).

Although anti-discrimination provisions are found in many Canadian statutes, the main pieces of legislation that prohibit discrimination are the Canadian Charter of Rights and Freedoms, the federal and provincial human rights acts and employment equity acts. The Criminal Code also contains hate propaganda provisions. The following section attempts to put this legislation into perspective.

2. Overview

2.1. The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms*, referred to as the Charter, is part of the Canadian Constitution and therefore part of the supreme law of the land. There are three "equality rights" provisions in the Canadian Charter. There is a general equality rights section (s.15); a declaratory section that provides for Canada's multicultural heritage (s.27) as well as a declaratory section that deals with equality based on sex (s.28). Court challenges alleging an infringement of the right to equality are based on section 15 of the Charter which provides that everyone is equal before and under the law and has a right to equal protection and equal benefit of the law. The Charter only applies to government or state action, including the state as an employer, and not to private action. Discrimination by private action including employers is dealt with by anti-discrimination legislation or as they are referred to in Canada, human rights statutes.

2.2. Human rights legislation

Canada is a federation of ten provinces and two territories. There is a federal level of government, provincial or territorial level of government and the third level is that of local government. Powers are distributed between the provinces and the federal government pursuant to the Canadian Constitution. The provincial governments have authority to pass human rights legislation dealing with infringements that fall within matters delegated under the constitution as being provincial. These include matters relating to "property and civil rights", "matters of a merely local and private nature" or "local work or undertaking". Examples of provincially regulated employers would include manufacturers and the service industry.

Where the matter is bound up with a federal work or undertaking it will fall within the jurisdiction of the federal Parliament and therefore be covered by federal human rights legislation. Matters falling within federal jurisdiction include railways and banks. Employment with these industries

is thus dealt with under federal human rights legislation, whereas employment with the service industry and manufacturing is covered by provincial legislation.

Human rights legislation evolved over the past few decades, to its present state where all provinces and one of the territories have human rights acts. While there are differences between the provincial and federal legislation as to the nature and extent of the legislation, the majority of the provinces have legislation similar to the federal human rights act. This paper will often refer to the Canadian Human Rights Act, the federal legislation, as representative of the types of provisions found in anti-discrimination legislation in Canada. Reference will be made to provincial human rights legislation as required.

The various human rights acts in Canada provide that one may not deny access to or occupancy of certain services, facilities or accommodation because of certain stipulated grounds. Human rights commissions are mandated to enforce the statute as well as promote human rights through public education initiatives. Proscribed grounds of discrimination in Canada generally include race, colour, ethnic origin, religion, sex, age, marital status, family status, disability and conviction for which a pardon has been granted.

In the field of employment, practices such as refusal to employ or continue to employ or refer or recruit or train, promote or transfer any person on the basis of a proscribed ground of discrimination are prohibited. Harassment and indirect discrimination are also prohibited. Provision is made for affirmative action programmes. Exceptions to the general rule of non-discrimination are permitted if certain requirements are met. Trade unions must also comply with the legislation in their role as representing employees as well as in their role as employer.

2.3. Employment Equity Act (affirmative action)

The federal government introduced employment equity (affirmative action) legislation in 1986. The federal employment equity legislation only covers employers employing 100 or more workers within federal jurisdiction. There is a separate equity programme for federal public servants. The Province of Ontario passed its own employment equity legislation in 1994 which applies to employers situated in Ontario that fall within provincial jurisdiction. Therefore, at the present time in Canada, legislated employment equity applies only to federally regulated employers and employers in the province of Ontario. Employment equity requires organizations of a certain size to develop employment equity plans, goals and timetables so as to eliminate systemic barriers to disadvantaged groups (women, disabled, visible minorities and aboriginals) and thereby increase their representation in employment.

2.4. The Criminal Code, hate propaganda provision

The Criminal Code, section 319 makes it an offence for everyone who, by communicating a statement in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace. An identifiable group is defined as any section of the public distinguished by colour, race, religion or ethnic origin. As the Criminal Code provisions do not relate to employment, these provisions will not be discussed further.

2.5. The Immigration Act

The Immigration Act, section 3, sets out Canadian policy on the manner in which immigration to Canada is administered. Included as a cornerstone of Canadian immigration policy is the recognition of the need to ensure that any person who seeks admission to Canada is subject to standards of admission that do not discriminate in a manner inconsistent with the Canadian Charter of Rights and Freedoms. The Canadian Charter of Rights and Freedoms expressly prohibits discrimination, inter alia, on the basis of race, colour, national or ethnic origin and religion.

3. The scope, substance and efficacy of the Canadian Charter of Rights and Freedoms

As mentioned in the previous chapter, the Charter applies to government activities only. It is entrenched in the Constitution and can only be repealed by constitutional amendment. A court may strike down federal or provincial legislation or overrule government action that is found to be inconsistent with the Charter. The principal provision in the Charter that protects equality rights is section 15. It reads:

> (1) Every individual is equal before and under the law and has the rights to the equal protection and the 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.
>
> (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.

No Charter protection is absolute. The justification section of the Charter (s.1) guarantees that the rights and freedoms set out in the Charter are subject to limits. It reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

A brief discussion of the courts' interpretation of section 1 of the Charter is included in section 3.1. below.

Section 15 rights are subject to section 33 of the Charter which provides provincial legislatures with the power to override section 15 and other sections of the Charter by expressly stating the provincial statute operates notwithstanding the relevant provision of the Charter.

3.1. Substance

Section 15 of the Charter came into effect on April 17, 1985, three years after the Charter was proclaimed. This was to allow governments the opportunity to repeal legislation that contravened section 15 of the Charter. The equality provisions of the Charter are still relatively new but there have been cases that assist in the interpretation of the equality provision. The landmark case that provided guidance on the interpretation of section 15 was the Supreme Court of Canada decision in *Andrews v. Law Society of British Columbia*, [1989] 10 C.H.R.R. D/5719. Mr. Andrews, a British citizen, successfully challenged the citizenship requirement for entry into the legal

profession contained in the *Barristers and Solicitors Act* (British Columbia) on the grounds that it violated his right to equality.

The Supreme Court viewed equality as a comparative concept, which takes its meaning to some extent from the context in which it operates. The main concern must be the impact of the law on the individual or group concerned. Laws should not have an adverse effect on disadvantaged groups. The Court stated that the purpose of the equality guarantee in the Charter is the promotion of a society in which all are secure in the knowledge that they are recognized in law as deserving of concern, respect and consideration. It has a large remedial component. The promotion of equality has a more specific goal than the mere elimination of distinctions. This is evidenced by distinctions in the Charter designed to safeguard certain groups. The Court rejected the concept that similarly situated people must be similarly treated and differently situated people must be treated differently. It recognized that identical treatment may produce inequality and would justify results that today would not be acceptable such as the "separate but equal" doctrine which was relied on in the United States to justify segregation. The court's recognition that equality may well require differentiation in treatment is commonly referred to by human rights analysts as the substantive equality theory.

All individuals coming to Canada, including (im)migrant workers and ethnic minorities must be permanent residents for three years before becoming eligible for Canadian citizenship. They are therefore for a certain period, non-citizens. The Supreme Court recognized the powerlessness of non-citizens and described them as:

> a group of persons who are relatively powerless politically, and whose interests are likely to be compromised by legislative decisions....Discrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national and ethnic origin (page D/5728).

It would appear that the court has interpreted section 15 of the Charter to include protection against discrimination on the basis of nationality.

Equality law under the Charter has relied on established jurisprudence developed under human rights statutes, while taking into account the different reach and structure of each. While discrimination under s.15(1) is of the same nature and fits the concept of discrimination developed under the human rights acts, a further step is required in order to decide whether discriminatory laws can be justified under section 1. The onus is on the state to establish this. This is a distinct step under the Charter which is not found in most human rights acts, because in those acts justification for or defence to discrimination is generally found in specific exceptions to the substantive rights. The differences between the Charter and human rights acts may justify different conclusions depending on which statute is used in bringing a case.

The purpose of section 15 is to protect those groups who experience social, political and legal disadvantages. The Court has set a high threshold for governments to overcome in order to justify discrimination. The general approach to the interpretation of section 1 (exception provision) was established by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103. The section 1 inquiry requires a two step process to determine if the challenged legislation is justified. First is an examination of the impugned law to determine if it is of such importance to permit overriding a constitutionally protected right. The second step involves a proportionality test where a number of factors must be balanced. The nature of the right, the extent of its infringement, and the desirable goal embodied in the legislation must be examined. The broader social impact of the impugned law and its alternatives must also be considered.

Section 15(1) of the Charter must be read as a whole along with section 15(2) which addresses the need to overcome the disadvantage of historically oppressed groups (Day, 1990, p. 5).

3.1.2. Section 15(2) of the Charter

Section 15(2) is referred to as the affirmative action section. There has been no clear direction from the courts regarding the interpretation of s. 15(2). However, the judiciary has in some cases interpreted the section as an exception to the general provision of equality in section 15(1) rather than a complement to it.

There are many problems with this approach. Primarily, it derogates affirmative action programmes to a lower level of equality right which is interpreted in a narrow manner. This is based on the general principle in human rights law in Canada that human rights guarantees are to be given a large and liberal interpretation and any exceptions to those guarantees are to be interpreted narrowly. It also leads to the conclusion that one does not achieve equality by implementing an affirmative action programme but rather by permitting an exception to it. This is based on the assumption that the norm of equality is treating everyone alike (Day, 1990, p.1; Vizkelety, 1990, p. 299).

A large part of Canadian laws are aimed at remedying social disadvantage and could be subject to a Charter challenge. The Courts have not been consistent in their determination as to whether a government programme meets the requirements of section 15(2). In an early decision on this issue, regarding a programme that gave preference to people with native background in the issuing of licences to grow wild rice, the court considered it was not sufficient to prove a bona fide intent to ameliorate disadvantage to meet the requirements of a special programme under section 15(2) of the Charter. The Court also required that the programme be scrutinized to ensure it did not interfere with the rights of non-natives (*Manitoba Rice Farmers Association v. Manitoba Human Rights Commission,* 7 C.H.R.R. [1986] D/3315).

A more recent group of cases involving challenges by male prison inmates alleging that surveillance and routine frisk searches by female guards contravened their privacy and equality rights, as female prisoners were not subject to the same searches by male guards, interpreted the special programme provisions in a more liberal manner. The courts, including the Supreme Court of Canada, determined that the difference in treatment was reasonably necessary to the success of the affirmative action programme for women guards. The courts were not sympathetic to the male applicants as they are members of a group that has no historical pattern of group based discrimination (*Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R.812). The courts recognized that differences in treatment and special programmes may be required to achieve equality.

3.1.3. Access to the courts and remedies under the Charter

As government actions fall within the jurisdiction of the human rights statutes as well as the Charter, either may be able to provide a remedy. The Charter provides a very broad remedy. Anyone whose Charter rights have been infringed can apply to a court of competent jurisdiction for an appropriate and just remedy. The Charter also states that it is the supreme law of the land and any law that is inconsistent with it is of no force and effect. In some cases where a law has been determined to be unconstitutional the court has found it appropriate to suspend the declaration of invalidity of a statute to give a legislature time to amend its legislation so as to conform with the Charter. This remedial approach is justified where the striking down of a law would deprive deserving persons of benefits without benefitting the individual whose rights have been violated (*Schachter v. Canada,* [1992] 2 S.C.R. 679).

A Charter application through the courts avoids the requirement that the case has passed the scrutiny of the human rights commission before it can be referred for determination. However, a remedy cannot be obtained if one does not have the financial capacity to launch a Charter challenge. This is one of the major procedural differences between proceeding with a Charter application as opposed to a human rights complaint. Human rights commissions accept, process and determine complaints without the requirement that the complainant incur expenses for legal counsel. Charter applications proceed through the courts and the applicants incur often substantial expense to retain legal counsel.

The question of access to the courts to launch a Charter challenge has been discussed at length in Canada. In 1985, following the proclamation into force of the equality provisions of the Charter, the Canadian government announced funding through the Court Challenges Programme to support individuals and groups to challenge federal legislation, practices and policies in test cases based on section 15 of the Charter. The Court Challenges Programme was placed under the auspices of an independent body so as to ensure unbiased decisions about which court challenges were funded. Many important Charter equality cases reached the Supreme Court for determination, owing directly or indirectly to funding by the Court Challenges Programme.

On February 27, 1992, the federal government cancelled the Court Challenges Programme. The Parliamentary All-Party Standing Committee on Human Rights and the Status of Disabled Persons held public hearings regarding the cancellation of the Programme and in June 1992 issued a report entitled "Paying Too Dearly". The Committee recommended the existing form of the Court Challenges Programme should continue receiving government funds until a non-profit Court Challenges foundation financed by federal, provincial governments and the legal profession was established (Halliday, 1992). In August 1993, the government announced the reinstatement of the original Court Challenges Programme. Negotiations are presently under way between government departments and stakeholders to determine the administrative structure of the reinstated programme.

Although the Court Challenges Programme is unable to fund all Charter challenges, it has allowed some accessibility to the courts for individuals and groups to challenge discriminatory laws or practices. The Programme is important as studies have shown that the disadvantaged generally do not have the resources to launch costly court challenges against governments who have the financial resources, expertise and opportunity to develop a comprehensive strategy to defend the status quo in the courts (McCormick, 1993, p. 525).

3.2. Efficacy of the Charter

Have governments in fact been successful in defending the status quo or has the Charter guaranteed protection for (im)migrant and ethnic minority workers from discrimination? There can be no doubt that the concept of equality has been advanced due to the Charter. Non-citizen (im)migrant and ethnic minority workers can be seen as the beneficiaries of Charter litigation as they have been recognized as "a discrete and insular minority ... a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated" (*Andrews v. Law Society of British Columbia* [1984], 10 CHRR, D/5721).

The Supreme Court's interpretation of the equality protection as provided in section 15 of the Charter is pragmatic. It recognizes that differences in treatment are sometimes necessary to allow individuals to compete on an equal footing. The Court has stated that the purpose of the guarantee provided in the Charter, in this case the pursuit of equality, requires a generous rather than

legalistic interpretation. The equality right should be placed in context so that protection is afforded to members of traditionally disadvantaged groups. In other words, for equity programmes to be successful they must be seen as an aid to equality and not as an exception to it. Applications under the Charter by groups that have not been historically disadvantaged asking to strike down programmes that assist disadvantaged groups will most likely be rejected by the Court.

The Charter's existence requires legislative drafters to consider equality rights when drafting new legislation. At a minimum, this assists in reducing the number of challenges individuals or advocacy groups must bring regarding unconstitutional provisions in legislation.

It is suggested by academics and NGOs, commenting on the Supreme Court of Canada's decisions interpreting s.15 of the Charter, that the Charter has played a vital role in advancing substantive equality. However, it must be recognized that its accessibility is limited for the time being particularly to individuals and advocacy groups having financial resources required to proceed through the courts. However, the re-introduction of the Court Challenges Programme recognizes the need to make the Charter accessible to those whom it was intended to protect.

The Charter has had an impact on the administration and enforcement of human rights legislation. Federal and provincial human rights legislation must conform with the Charter (*Blainey v. Ontario Hockey Association* [1987], 9 C.H.R.R. D/4549).

4. The scope, substance and efficacy of anti-discrimination statutes

4.1. Scope of legislative provisions

In this chapter we will examine the scope of employment protection provided in human rights acts as well as the level of substantive protection. This will commence with a review of the relevant legislative provisions including a discussion of discrimination theories. Case law will be relied on to assist in the interpretation of the legislation. An examination of the administration and enforcement of human rights statutes will be followed by a discussion of the efficacy of the existing human rights system.

Legislative provisions
The protection from discrimination in employment provided in human rights acts includes all phases of the employment relationship from pre-employment to termination.

4.1.1. Pre-employment
Within the pre-employment context, inquiries relating to employment advertising, pre-employment inquiries and activities of employment agencies are regulated by human rights acts.

The Canadian Human Rights Act states:

> For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination (s.3).
>
> It is a discriminatory practice
>
> (a) to use or circulate any form of application for employment, or
>
> (b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry that expresses or implies any limitation, specification or preference based on a prohibited ground of discrimination (s.8).

Similar provisions exist in most provincial statutes. The prohibition covers application forms, interviews and job advertisements.

4.1.2. Employment agencies
Most human rights acts have provisions which specifically prohibit employment agencies from discriminating against persons seeking employment. Employment agencies primarily refer individuals to employers for temporary employment.

The Ontario Human Rights Code provision relating to employment agencies stipulates:

> The right under section 4 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer (s.23(4)).

The federal government department responsible for employment referrals through its national employment service is required through its enabling statute, the *Employment and Immigration Department and Commission Act*, to:

> ensure that in referring a worker seeking employment there will be no discrimination within the meaning of the Canadian Human Rights Act (s.120(2)(b)).

4.1.3. Employment

The general prohibition against discrimination in employment in the Canadian Human Rights Act reads:

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

Policies or practices that have discriminatory effects or an adverse impact are also prohibited by what is often referred to as the systemic discrimination provision. Systemic discrimination is unintentional discrimination which results from the imposition of a seemingly neutral requirement that disproportionately affects a particular group. The systemic discrimination provision in the Canadian Human Rights Act reads:

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

As a complement to provisions aimed at combating systemic discrimination, all human rights legislation contain provisions for affirmative action programmes, commonly referred to as special programmes, intended to redress the effect of any systemic employment barriers. These barriers take the form of policies or practices that are seemingly neutral but deprive individuals belonging to certain groups from employment opportunities. It should be noted that the special programmes authorized by the Human Rights Act are permissive, not mandatory. The Canadian Human Rights Act special programmes provision states:

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

Harassment constitutes another a form of unlawful discrimination. It is specifically prohibited in human rights legislation. The Canadian Human Rights Act provision regarding harassment in employment states:

> It is a discriminatory practice,
>
> (c) in matters related to employment, to harass an individual on a prohibited ground of discrimination (s. 14(1)).

4.1.4. Exceptions

Human rights legislation includes provisions which provide exceptions to the general rule of non-discrimination. The main exceptions of relevance to this paper are the bona fide occupational qualification or requirement, the live-in domestic employment provisions and the citizenship preference. The Canadian Human Rights Act provision regarding the bona fide occupational requirement states:

> It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement (s. 15(a)).

Provincial human rights legislation excludes domestics employed in private homes from the general employment discrimination protection. Human rights protection for domestics is limited to allegations of sexual harassment. The Individual Rights Protection Act of the Province of Alberta reads:

> Sections 7 and 8 (general anti-discrimination provisions) apply with respect to
>
> (a) a domestic employed in a private home, but only insofar as they relate to sexual harassment.

Canadian citizenship is a lawful requirement, qualification or consideration, according to most provincial human rights statutes if it is imposed or authorized by law, related to cultural, educational, trade union or athletic activities or if it is a requirement for senior executive positions. For example, the Ontario Human Rights Code states:

> A right under Part 1 to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law (s. 16(1)).
>
> A right under Part 1 to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence (s. 16(2)).
>
> A right under Part 1 to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions (s. 16(3)).

4.1.5. Investigation, mediation and decision-making power

Human rights legislation empowers human rights commissions to investigate, mediate and determine human rights complaints. The Commissions assign investigators to investigate complaints and report their findings to the Commission who will then determine whether the complaint should be dismissed, referred to conciliation (attempted settlement) or referred to a tribunal (quasi-judicial body that determines if the legislation has been infringed). The relevant provisions of the Canadian Human Rights Act read as follows:

> The Commission may designate a person in this Part referred to as an "investigator", to investigate a complaint (s. 43(1)).

An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation (s. 44(1)).

If, on receipt of a report referred to in subsection (1), the Commission is satisfied:

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority (s.44(2)).

On receipt of a report referred to in subsection (1), the Commission

(a) may request the President of the Human Rights Tribunal Panel to appoint a Human Rights Tribunal in accordance with section 49 to inquire into the complaint to which the report relates if the Commission is satisfied,

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted (...),

(b) shall dismiss the complaint to which the report relates if it is satisfied,

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted (s. 44(3)).

Most human rights acts in Canada empower the Tribunals or Boards of Inquiry, as they are called in some provinces, to order the rectification of an act of discrimination which has been found to have occurred. The award powers of the Board or Tribunal are set out in the respective human rights act. These powers include a power to issue "cease and desist " orders; issue an order to make available the rights denied; provide special damages for compensation for lost wages and for expenses; provide for the granting of exemplary or general damages for pain, suffering and humiliation (there are limits on this award ranging from Can$ 2,000 in British Columbia to Can$ 10,000 in Ontario if the infringement was wilful and reckless); the Saskatchewan and the federal Act empower the Tribunal to order the adoption of a special programme for affirmative action - both these statutes also provide that a tribunal cannot require the removal of an individual from employment if the employment was obtained in good faith. In most jurisdictions the filing of a Tribunal order with the superior court makes it enforceable as a court order.

As human rights commissions and tribunals are administrative bodies, their decisions are subject to judicial review. Judicial review allows the courts to quash a decision, require action be taken, prohibit action or make a declaration. Judicial intervention is permissible when an administrative body acts beyond its powers, fails to discharge its public duty and departs from legally permissible conduct. But if the Board acts in good faith and its decision can be rationally supported by the legislation, the courts will not intervene.

In addition to the powers of judicial review, the human rights statutes in the provinces of Alberta, Manitoba, Newfoundland and Ontario provide for a right of appeal on a question of law or fact or both.

4.2. Substance

Case law and human rights settlements will be relied on in this section to elucidate how the legislative provisions outlined above are substantively applied.

4.2.1. Pre-employment inquiries

The prohibitions relating to employment advertisements and the hiring process represent government's attempt to prevent an employer from screening out an applicant, irrespective of merit, because of a prohibited ground of discrimination. There have been Boards of Inquiry that have required publishers to cease publishing discriminatory advertisements. In one case the publisher was also ordered to include in its classified advertisements section a notice that the human rights legislation prohibits discriminatory advertising (*Hope v. Gray-Grant Publishers* [1981], 2 C.H.R.R. D/256).

4.2.2. Employment agencies

While there have been no recent board of inquiry cases regarding the discriminatory practices of employment agencies, the provision in human rights legislation prohibiting discriminatory practices remains necessary. A survey conducted by the Canadian Civil Liberties Association (CCLA) in 1975 revealed that 11 out of 15 employment agencies undertook to co-operate with a caller's request to refer only white candidates (October 28, 1975, *Globe and Mail* Newspaper). Three other repeat surveys over the following fifteen years bore similar results (April 10, 1991 letter from CCLA to Ontario Minister of Labour).

The Ontario Human Rights Commission relied on the employment agency provision in a 1991 raid on numerous employment agencies who were believed to be screening out minority candidates. The complaints that were initiated by the Commission were settled in the course of investigation. In a very innovative settlement, the employment agencies agreed to:

> survey all employees and persons referred to corporate clients to determine the number of designated group members: women, racial minorities, native persons and persons with disabilities;
>
> implement an extensive employment equity programme to ensure that their own workplaces will be representative of the population;
>
> encourage their clients to hire designated group members;
>
> review the policies and practices in their workplaces that could act as barriers to the advancement of designated group members;
>
> provide all present and future staff with training in employment equity, human rights, race and ethnic relations;
>
> retain computer and written records of referrals;
>
> report discriminatory job requests to the Chief Executive Officer of the agency; and
>
> provide regular reports to the Commission on progress of all aspects of these settlements.

This settlement is an excellent example of redressing inequality through eliminating barriers to employment and taking proactive measures to strive for a representative workforce. The monitoring by the Commission ensures the continuity of the effort.

4.2.3. Employment

Employers have often tried to argue that their relationship with the complainant was one of contractor/contractee as opposed to employment in order to avoid application of the employment provisions in human rights legislation. Jurisprudence has developed criteria relating to the level of control of the employee's daily work by the employer to determine if an employment relationship exists.

4.2.3.1. Discrimination theories

As outlined above, all human rights acts in Canada prohibit direct and indirect discrimination and harassment. They also contain provisions regarding affirmative action or special programmes.

Direct discrimination occurs where an employer adopts a rule or practice that on its face discriminates on a prohibited ground. For example, an employer refuses to hire a qualified black job applicant because the employer believes blacks are slow. Until the mid 1970s, human rights jurisprudence required the element of intent to discriminate in order to establish a breach of human rights legislation. A series of boards of inquiry decisions in the mid 1970s focused on the *effect* of practices on certain groups rather than on the employer's intent. The decisions recognized, for example, that an employer's policy that all employees be clean shaven effectively denied employment to Sikhs (*Singh v. Security and Investigation Services Limited* [1977], unreported (Ontario Board of Inquiry)). Subsequently, the adverse effect discrimination theory was established to cover these types of behaviour.

Adverse effect (referred to as adverse impact in the United States) or indirect discrimination concerns a neutral rule or policy which has a discriminatory effect on a particular group. The concept was best defined by J. McIntyre of the Supreme Court of Canada in that Court's landmark decision in the first Ontario case dealing with adverse effect discrimination to go before the courts, *Ontario Human Rights Commission v. Simpson Sears Ltd.* [1985], 7 C.H.R.R. D/3102 at D/3106 (hereinafter referred to as the *Simpson Sears* decision). Adverse impact discrimination occurs when:

> ... an employer for genuine business reasons adopts a rule which on its face is neutral and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.

The Court went on to say that if an employer's neutral rule adversely impacts on an individual, the employer has a duty to accommodate the employee, short of undue hardship. The duty to accommodate short of undue hardship was subsequently interpreted by a Board of Inquiry Chairperson to impose a duty on employers to take substantial or meaningful steps to accommodate the requirements of the complainant. According to this interpretation, the term "undue hardship" indicates that there is some hardship that is "due" and it is only hardship that goes beyond this minimum that can be relied on as a defence (*Gohm v. Domtar Inc.*, [1990], 12 C.H.R.R. D/161).

In the *Simpson Sears* case, a Seventh Day Adventist part-time employee was adversely affected by the employer's neutral policy that all part-time employees must work Saturday. Saturday is the Sabbath for Seventh Day Adventists. The Supreme Court found unintentional discrimination on the part of the employer and ordered that the complainant be compensated for lost wages.

The same day the Supreme Court rendered the *Simpson Sears* decision it also rendered its decision in *Re Bhinder and Canadian National Railway Co.* [1985] 2 S.C.R. 561. The Bhinder case was similar to the *Simpson Sears* case as it dealt with a neutral rule, a requirement to wear a hard hat, that adversely effected the complainant, a Sikh whose religious tenets required he wear a turban. The difference between the *Simpson Sears* and *Bhinder* cases is that one was brought pursuant to the Ontario Human Rights Code and the other was filed under the Canadian Human Rights Act, railways coming under federal jurisdiction and the retail industry falling within provincial jurisdiction. The two statutes contained different provisions regarding the bona fide occupational qualification defence. A bona fide occupational qualification (b.f.o.q.) is a requirement imposed honestly and in good faith for the safe, efficient and reliable performance in employment. It establishes a defence to an allegation of discrimination.

As a result of the different wording in the provincial versus the federal human rights statute, the complaint filed provincially was successful while the complaint filed federally was not despite the similar facts. The Supreme Court in *Bhinder* placed significant limits on the concept of adverse effect discrimination by its liberal interpretation of the general bona fide occupational qualification defence contained in section 14(a) of the Canadian Human Rights Act. Although the Ontario Human Rights Code does contain a bona fide occupational qualification defence, it only applies to certain grounds (age, sex, record of offences or marital status) and therefore was not available as a defence to the respondents in the *Simpson Sears* case as the complaint was based on religion.

As the Tribunal that had initially heard the *Bhinder* case had found that the hard hat rule was a b.f.o.q., the Court concluded that the clear language of section 14(a) of the Canadian Human Rights Act eliminated the requirement that the employer accommodate the needs of the employee. The *Bhinder* decision resulted in a fundamental difference in human rights protection for employees, depending on whether their employer fell within provincial or federal jurisdiction.

Shortly after the *Bhinder* decision was rendered, the Canadian Human Rights Commission submitted a Special Report to Parliament describing the negative effect of the *Bhinder* decision on the Commission's work and requesting an amendment be introduced to overcome the *Bhinder* decision. This did not occur until the situation was redressed by the Supreme Court of Canada five years later in its decision in the case of *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489 (hereinafter referred to as Dairy Pool). In this case the Supreme Court overturned, in part, its earlier decision in *Bhinder*.

The *Dairy Pool* case, like *Bhinder* and *Simpson Sears*, dealt with the issue of a neutral policy, the requirement to work on peak business day, conflicting with the employee's religious requirements. The *Dairy Pool* case arose when the complainant had his employment relationship terminated for failing to report to work on a peak business day. The complainant had become a member of the World Wide Church of God and required adjustments to his work schedule to allow him to observe his Sabbath. The employer granted some of the adjustments but refused the complainant's request to be absent without pay on a Monday. The complainant alleged the employer had discriminated against him on the basis of religion. The case was appealed to the Supreme Court of Canada which upheld the claim and found that the employer had failed to make reasonable efforts to accommodate the employee's religious requirements. The *Dairy Pool* case was brought pursuant to Alberta's human rights statute, the *Individual Rights Protection Act*. That Act, like the *Canadian Human Rights Act* contains a general bona fide occupational qualification provision which applies to all prohibited grounds of discrimination. The *Dairy Pool* case was the Supreme Court of Canada's opportunity to revisit the *Bhinder* decision. Moreover, the *Dairy Pool* case clarified the law

regarding the defences available to an employer in a case of adverse effect discrimination and the elements of a bona fide occupational qualification defence.

Regarding the defences available to an employer in a case of adverse effect discrimination, the court overturned the *Bhinder* decision and ruled that a b.f.o.q. defence should not be applied in cases of adverse effect discrimination. It concluded that "where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship" (*Alberta Human Rights Commission v. Central Alberta Dairy Pool* [1990], 2 S.C.R., p. 517). This meant that the employer is required to establish that the rule is rationally connected to the performance of the job, and that it could not accommodate the employee's needs without incurring undue hardship. The threshold for the "rationally connected" rule has been a low one and most rules will meet the standard.
The Court, without definitively stating what constitutes undue hardship, sets out factors that can be taken into consideration in the determination of undue hardship. These include financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of workforce and facilities. The cost and administrative disruption must be measured in light of the overall size of the operation. Questions of safety must be assessed by examining the magnitude of the risk and who will bear it.

The Supreme Court elaborated on the issue of undue hardship in its 1992 decision in *Renaud v. Central Okanagan School District No. 23* [1992], 16 C.H.R.R. D/425. This case also dealt with religious discrimination. A school custodian was dismissed due to his inability to work Friday nights. The complainant was a Seventh Day Adventist. The employer was willing to accommodate the employee by rearranging the shift schedule, but the trade union which negotiated the collective agreement with the employer school board refused to consent to the shift change and threatened grievance proceedings if the school board attempted to institute a shift change.

In determining the extent of the duty to reasonably accommodate, the Supreme Court rejected the test adopted in the United States, enunciated in *Trans World Airlines v. Hardison*, 423 U.S. 63 [1977]. The *Hardison test* was developed in an entirely different legal context where the extent to which religious accommodation could be required was limited by the constitution. It therefore virtually removed the duty of the employer to accommodate as mere negligible effort was required to satisfy the duty to accommodate. In the Canadian context referring to the expression "undue hardship" implies that some hardship is acceptable. More than negligible efforts and expense are required. In the *Renaud* case, the Court addressed the issue of how the proposed shift change would impact on co-workers. The Court stated that minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society. The employer must establish actual substantial interference with the rights of other employees.

Regarding the bona fide occupational qualification which is still applicable to cases of direct discrimination, the Court made it clear that the employer will be expected to demonstrate that the rule takes account of the individual circumstances of employees or justify its failure to do so with reference to the nature of the rule itself. The b.f.o.q. defence now requires employers make efforts to accommodate the circumstances of the individual being negatively affected by the rule.

Rules concerning trade union liability for failure to accommodate were articulated by the Court. There are two ways a trade union may become a party to a discrimination complaint. First, it may cause or contribute to the formulation of the rule that has a discriminatory effect, particularly if the rule is part of a collective agreement. Second, where the rule is not part of a collective agreement,

the union may impede the reasonable efforts of the employer to accommodate. The second situation only comes into play if the union's involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably be found.

Human rights analysts are of the view that the *Renaud* decision is a reasonable and practical approach which makes clear that respect for equality and diversity may require hardship up to the point that it is undue. It also balances individual equality rights and the collective interests of the union membership (Pentney, 1993, p. 4-56.17).

4.2.3.2. Harassment

(Im)migrant workers and ethnic minorities often leave employment because they suffer racial or religious harassment. Harassment provisions exist in all human rights acts in Canada. These provisions were included because racial slurs, name-calling and other offensive behaviour created a hostile working environment. Such a hostile or poisoned working environment constitutes a term or condition of employment imposed on disadvantaged groups that is different from other employee's terms and conditions of employment. Analysts in the human rights field have come to recognize that harassment is a major systemic barrier to the retention and promotion of disadvantaged groups (Cornish, 1992, p. 110). It is for this reason that in examining systemic barriers to employment for disadvantaged groups, it should be determined whether employers have an effective harassment policy, one that employees are aware of and have confidence in.

Harassment is defined in the Ontario Human Rights Code as a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome. The case law regarding harassment has progressed and become more sensitive over the years. Earlier tribunals were of the view that more than one event is required to establish harassment. Human rights commissions however have stated in their harassment policies that one event is sufficient to establish harassment.

A Board of Inquiry found an employer liable for harassment when racial slurs directed at others were a major reason for the complainant leaving her employment (*Lee v. T.J. Applebee's Food Conglomeration* [1987], 9 C.H.R.R. D/4781). Racial harassment was recognized as simply one manifestation of a generally aggressive behaviour. Regarding a respondent employee who picked fights with white as well as non-white employees, an Ontario Human Rights Board of Inquiry Chairperson found that the use of racial epithets and name calling as a means of belittling and humiliating the opposition when the opponent was a visible minority constituted racial harassment (*Persaud v. Consumers Distributing* [1991], 14 C.H.R.R D/23). Also included in the sorts of behaviour that can be considered harassment are false and embarrassing accusations of misbehaviour as well as discriminatory treatment with respect to posting, transfers, hours of work, or other working conditions (*Wei Fu v. Ontario Government Protective Service* [1985], 6 C.H.R.R. D/2797).

The most recent development in harassment law regards the determination of whether comments are offensive. Should this determination be based on the *reasonable victim's* view of whether the comments are offensive or the view of what is referred to in law as the *reasonable person*? Those in favour of the reasonable victim standard argue that the reasonable person represents the view of the dominant or privileged white males and would not be sensitized to personal and cultural differences. A recent Canadian Human Rights Tribunal adopted the reasonable victim perspective in determining whether questions asked of the complainant in an interview constituted harassment (*Stadnyk v. Canada Employment and Immigration Commission*, unreported decision rendered

July 17, 1993). The adoption of the "reasonable victim" standard can be interpreted as the elimination of a systemic barrier in the human rights adjudication process, as complainants will no longer be subject to the views of the dominant group concerning the types of comments the victim should consider offensive.

4.2.4. Special programmes (affirmative action)

Affirmative action provisions exist in all Canadian human rights statutes. They are often referred to as special programmes. There have been a small number of cases interpreting these provisions. The trend in human rights tribunal decisions interpreting special programme provisions has been to accept a broad definition of special programmes.

In Canada, the first case to reach the Supreme Court of Canada that resulted in a special programme was brought pursuant to the systemic discrimination provision, section 10 of the Canadian Human Rights Act. In *Action Travail des Femmes v. Canadian National Railway Co.*,[1987] 1 S.C.R. 1114, the Court approved a quota ordered by a human rights tribunal that one of every four new employees hired be a woman until thirteen percent of the blue collar (labourer) jobs at the railway were filled by women. The Supreme Court in elucidating on how employment equity is designed to break a continuing cycle of systemic discrimination stated:

> The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forbears (p. 1143).

The Court formulated two general principles as guidelines for the interpretation of the law respecting affirmative action programmes. First, it held that provisions regarding affirmative action programmes are of a "special nature" and must be given a large and liberal interpretation (p. 1133). Second, it held that affirmative action remedies are consistent with the principle of non-discrimination and not a violation of it (p. 1139).

A case that has recently been decided by the Ontario Court of Appeals has raised the issue of how to deal with special programmes that are under-inclusive in that benefits are restricted to certain groups or restricted within groups - *Roberts v. Ontario Ministry of Health* ([1989], 10 C.H.R.R. D/6353 Ont. Bd. Of Inquiry; affirmed 1990, 14 C.H.R.R D/1 Ont. Div. Ct.; Ontario Court of Appeal decision rendered August 16, 1994, unreported). Mr. Roberts, a seventy-three year old visually impaired man, filed a human rights complaint alleging that the Ontario Ministry of Health's Assistive Devices Program that subsidized the cost of devices for individuals under the age of 23 discriminated on the basis of age. The Board Chairperson found that although the programme did in fact discriminate on the basis of age, the programme was saved by the special programme provision of the Ontario Human Rights Code. The Chairperson took an expansive view of the provision. The Board envisioned only two grounds for challenging a special programme. The grounds are that the beneficiaries of the programme are not disadvantaged or there is a concern as to the bona fides of the respondent in establishing the programme. According to the Chairperson, factors such as the under-inclusiveness, the actual effects or the rational connection between the means and the object of the programme are not matters to be determined by a Board of Inquiry.

The Chairperson expressed concern that employers would not institute special programmes if they feared the programmes would be struck down unless they were perfectly drawn to eliminate all forms of discrimination at once. The Chairperson opined that one of the purposes of the affirmative action provisions in human rights statutes was to avoid costly and time-consuming litigation about

the legality of the programmes. In a very brief judgment affirming the Board's decision, the Ontario Divisional Court stated, "Generally speaking, courts should not lightly second guess clear legislative judgments, particularly when dealing with programmes designed to proceed to greater equality of opportunity for disadvantaged persons".

The Ontario Human Rights Commission appealed the Ontario Divisional Court decision to the Ontario Court of Appeal. The Court of Appeal found that the lower courts had erred in law in interpreting the special programmes provision of the Ontario Human Rights Code as having as its only purpose the exemption of special programmes from the application of the Code. The special programmes provision, according to the Court of Appeal, was to be interpreted also as an interpretive aid aimed at promoting substantive equality - the idea that decision makers should assess the end results of policies designed to promote equality.

The Court of Appeal was of the view that the Board of Inquiry should have considered (1) whether a particular provision or limitation of a special programme resulted in discrimination against a person or group with the disadvantage the programme was designed to benefit, and (2) whether the provision or limitation was reasonably related to the scheme of the special programme. The Court determined that the complainant had been discriminated against and such discrimination was not reasonably related to the scheme of the special programme. Although discriminatory restrictions might be justified in some cases this was not the case here. In the *Roberts* case, the Court was of the view that the government failed to show that removing the age restriction would harm the programme as the evidence before the Court demonstrated that young people were less likely to be visually disadvantaged and had better access to other government programmes than older people.

As mentioned earlier there are very few cases dealing with the affirmative action provisions of human rights legislation. This is, in part, due to the effective screening out of "reverse discrimination" complaints by human rights commissions. Reverse discrimination complaints are those filed by individuals who are not members of historically disadvantaged groups alleging that special programmes which exclude them are discriminatory. As affirmative action is endorsed as necessary for achieving equality and is legislatively protected, human rights commissions have refused to proceed on "reverse discrimination" complaints.

Human rights commissions have legislatively been assigned a significant role regarding special programmes. Many of the human right statutes contain provisions whereby the human rights commission's approval of a special programme exempts it from the application of the relevant human rights Act. For this reason, along with the need for the Commissions to adhere to criteria in determining whether to proceed on "reverse discrimination" complaints, many human rights commissions have developed guidelines for special programmes (Sheppard, 1993, p.47).

Guidelines issued by the Ontario Human Rights Commission, for example, require that a special programme be designed to assist disadvantaged persons or groups; define the designated persons or group that it purports to assist; be based on clearly articulated reasons why the group is considered disadvantaged and how the proposed measures will relieve this hardship or disadvantage.

The Canadian Human Rights Commission policy on special programmes focuses on a three step process for the creation of a special programme: conducting a workforce analysis to determine representation, review of employment systems/barriers, development of remedial measures. A common feature of the guidelines is the requirement that the programme be based on a prepared

plan, outlining its terms, conditions, and duration. It should include monitoring and evaluation mechanisms, and it should be developed in consultation with all individuals or groups concerned.

Canadian governments have been concerned enough with the need for affirmative action that along with providing constitutional protection for affirmative action programmes they have commissioned various studies to report on the issue. The first major study, "Report of the Royal Commission on Equality in Employment", October 1984 prepared by Justice Rosalie Abella, hereinafter referred to as the Abella report, resulted in the 1986 federal Employment Equity Act. The Ontario Law Reform Commission also recently commissioned a study on the issue. The resulting paper recognizes that the problem with formal equality is that it fails to acknowledge the built-in bias in apparently neutral standards applied to all (Sheppard, 1993).

The Ontario report notes that neutral standards are based on the experiences of the socially privileged group. While groups remain excluded from social and economic benefits, that exclusion results in additional inequality. The argument that preferential hiring is an affront to the merit principle is viewed as spurious as the "historically privileged" have developed the criteria to determine merit which would then be skewed to represent characteristics which that group finds meritorious. As the system suits the needs of the advantaged and fails to recognize the needs of the disadvantaged, some manifestations of direct discrimination, such as harassment, can constitute systemic discrimination as they are not acknowledged as a problem and can be endemic to the organization concerned. Therefore, equity or special programmes are considered to be proactive, planned programmes designed to remedy group based problems of systemic discrimination. Substantive equality acknowledges one's group differences which are accommodated in laws, social and institutional policies and practices (Sheppard, op.cit., pp. 10, 13).

The report also provides policy guidance on how equity programmes should be implemented. It explains that equity programmes commence with a confirmation stage where a statistical analysis is undertaken of the under-representation of the disadvantaged group concerned. Efforts should also be made to ascertain from group members their experience of how groups are excluded from power. An examination of policies relating to human rights issues, their implementation and awareness by employees provide a framework for determining if the employer organization is receptive to disadvantaged groups. An examination of all policies should be undertaken to determine inherent bias and barriers to the entry and promotion of disadvantaged groups. Education and awareness sessions regarding diversity can assist in overcoming stereotypical views and reduce the level of alienation of disadvantaged groups. Also it is recommended that the support mechanisms provided to the historically privileged should be extended to the historically disadvantaged (Sheppard, op.cit., pp. 11-12).

This last point was acknowledged by former Supreme Court of Canada Justice Bertha Wilson in her capacity as Chairperson of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession. Ms. Wilson refers to the very subtle differentiation, such as mentoring and the assigning of high profile work to the historically privileged members and the routine, time consuming and unrecognized tasks with no mentoring to the disadvantaged groups as insurmountable barriers to advancement (Wilson, 1993, p.87).

In short, affirmative action programmes must not concentrate only on preferential hiring without modifying the workplace to make it more welcoming to disadvantaged groups. If there is no accommodation, the only members of the disadvantaged groups that will survive are those individuals who imitate the privileged.

4.2.5. Exceptions
The main exception to the general rule of non-discrimination are the bona fide occupational qualification (b.f.o.q.), the domestic employment and citizenship exceptions.

4.2.5.1. Bona fide occupational requirement
Earlier, during the discussion of adverse effect and direct discrimination, the issue of the bona fide occupational qualification was discussed in terms of when it could be relied on to justify discriminatory requirements. This section will briefly describe the criteria that must be established to meet the Supreme Court of Canada test of what constitutes a b.f.o.q.. All Canadian human rights acts contain a b.f.o.q. provision.

There are two tests that must be met to establish a bona fide occupational qualification. The *subjective test*, requires that the b.f.o.q. must be imposed honestly, in good faith and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy. The *objective test* requires that the bona fide occupational requirement is reasonably necessary to assure the effective and economical performance of the job without endangering the employee, other employees or the general public.

If a Tribunal determines that these tests have been met, a discriminatory requirement constitutes a b.f.o.q. and is therefore justified.

4.2.5.2. Foreign domestics
Individuals who are employed in domestic employment are exempted by many provincial human rights acts from the general employment prohibition against discrimination. These individuals, however, are covered under the harassment provisions in most acts. In Canada, a fair number of domestic helpers are migrant workers who enter Canada pursuant to the live-in caregivers programme. The level of abuse of this group has been said to be quite high. The Ontario Human Rights Code which formerly contained this exemption restricted it to individuals attending to personal or medical needs of the ill. This means that in the province of Ontario, the majority of domestic workers now enjoy the same level of protection against discrimination as other workers.

4.2.5.3. Citizenship
As discussed earlier, the Supreme Court of Canada ruled in the *Andrews* case that the citizenship requirement in the British Columbia Barristers and Solicitors Act was contrary to section 15 of the Charter and could not be saved by section 1 of the Charter. Various provincial human rights acts contain provisions which permit the giving of preference to job applicants who are Canadian citizens. These provisions also exist in public service statutes, including the federal Public Service Employment Act. A Charter challenge of the provisions in the federal Public Service Employment Act is currently before the courts.

The Ontario Human Rights Code citizenship exception provision, cited earlier (supra p. 12), is extremely broad, contrary to the general principle that exceptions to human rights acts should be narrow. Despite this broad exception provision there have been cases where attempts by organizations to restrict employment to Canadian citizens have been found to be discriminatory. For example, an employer who believed that certain qualities of character could be assured by a restriction by citizenship was found by a Board of Inquiry to have engaged in a discriminatory practice (*Barnard v. Canadian Corps of Commissionaires* [1985] 6 C.H.R.R. D/2659).

4.3. Administration and enforcement of human rights legislation

Following a review of the substantive protection against discrimination provided in human rights acts, the manner in which those rights are administered and enforced merits discussion. A brief discussion will follow on the influence of human rights commissions in the promotion of human rights.

4.3.1. Complaints

Complaints alleging contravention of human rights legislation can be made to human rights commissions by the victim, in some provinces by third parties, or the human rights commissions themselves can initiate complaints. Complaints must be brought, depending on the province, within six months to two years of the alleged violation. Extension of the time period is allowed when the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. However, Courts will not tolerate excessive delays in processing complaints. The Courts have prohibited the federal Human Rights Commission from investigating complaints where the delay was found to be unreasonable (*Motorways Direct Transport Ltd. v. Canadian Human Rights Commission*, unreported, April 22, 1991, Federal Court Trial Division).

Complaints are filed with human rights commissions in prescribed forms, usually drafted by Commission staff to ensure legal requirements are met. Following the receipt of the complaint, the human rights commission is charged with investigation and attempted settlement. In some provinces these functions are separated and performed by different staff, investigators and conciliators, while in other provinces officials carry out both functions. Federally, the functions are separated by statute. The formal conciliation process commences only after the investigation is completed and the Commission has decided that the matter warrants conciliation (Canadian Human Rights Act, s. 47). Analysts state that from the point of view of the effectiveness of the Commission's work, it is important that the functions be separated. This is because the investigation process tends to arouse hostility from the respondent which is not a favourable setting for settlement (Pentney, 1985, p. 15-9).

Commissions are provided limited discretion regarding their duty to investigate complaints. They may decide to not proceed with a complaint if the matter is not within their jurisdiction; could be more appropriately be dealt with under another act; grievance or other review procedures have not been exhausted; is trivial, frivolous, vexatious or made in bad faith. Under the federal act, a complaint cannot be taken unless the victim of the practice was lawfully present in Canada (Canadian Human Rights Act, s. 40 (5)).

4.3.2. Investigation

At the federal level, once a complaint is accepted by the Commission, it is assigned to an investigator. Generally the investigator has the power (in some cases based on a warrant) to enter premises at any reasonable time, to carry out such inquiries as are reasonably necessary, and to require production of documents relevant to the investigation (Canadian Human Rights Act, s. 43). Most human rights acts provide that no person may hinder or obstruct an investigation. As well, prohibitions against reprisals taken against complainants or witnesses exist in all human rights acts.

Upon completion of the investigation, a report is prepared summarizing the evidence and providing an analysis of investigation findings. The report is provided to the parties who can make a submission to the Commission for its consideration in determining whether the complaint should be dismissed, referred to conciliation (in jurisdictions where the investigation and conciliation

functions are separate) or referred to a Tribunal or Board which holds a public hearing to determine if the relevant human rights act has been infringed.

4.3.3. Conciliation or settlement

Effort at conciliation is mandatory in most provincial human rights acts, except in Manitoba, Newfoundland and in the federal Human Rights Act where it is discretionary.

4.3.4. The hearing

Once a decision is made by the federal human rights commission (composed of one full time and up to seven part-time members, politically appointed, who meet on a monthly basis to determine complaints) to proceed with a complaint to hearing, the matter is referred to an administrative tribunal often referred to as a human rights tribunal or board of inquiry. These boards have exclusive authority to hear substantive matters arising from alleged infringement of human rights acts. The human rights commission is a party to and has carriage of the complaint at tribunal. The Commission often represents the complainant before the tribunal.

Administrative tribunals are not bound by the ordinary rules of evidence required at trials, this flexibility usually goes to the admissibility of evidence, not to weight. In addition to the rules of natural justice which require boards to decide without bias and to give parties an opportunity to be heard, it is also recognized that boards cannot base their decisions on an absence of evidence, on completely irrelevant evidence or other illegal evidence such as hearsay. Administrative tribunals must balance the desirability of an informal approach on the one hand and the duty to ensure all parties are treated fairly on the other.

The standard of proof required of the parties when making out their case is consistent with that which would be applied by the civil courts. The test in human rights cases is the civil burden of proof, that is a case must be established on the balance of probabilities rather than beyond a reasonable doubt which is the criminal burden of proof. The advantage of administrative tribunals is they have specialized knowledge which analysts have stated has contributed to the development of anti-discrimination law in Canada (Vizkelety, 1987, p. 11).

4.3.5. Remedies

The human rights acts of all the jurisdictions in Canada outline what type of remedy a human rights tribunal can order. The permitted remedies vary from province to province. For example, the Saskatchewan and federal human rights acts provide that a third party should not be adversely affected when trying to compensate the victim of discrimination. This provision does not exist in the Ontario Human Rights Code. In an unusual Ontario Board of Inquiry order, the employer was ordered to appoint a complainant to a supervisory position in place of the incumbent. The order was upheld on appeal (*L.C.B.O. v. Karumanchiri, Ng and Yan* [1987], 8 C.H.R.R. D/4076). The three complainants in this case alleged that they had been denied promotions within the respondent's laboratory on the basis of their race, colour, ancestry, place of origin and ethnic origin. The complaints related to two promotions received by another L.C.B.O. employee, in preference to the complainants. Two of the complainants also alleged they had been subject to reprisals by the incumbent because of the complaints of discrimination. The Board of Inquiry ordered in favour of the complainants, and in particular the Board found that one of the complainants, Mr. Karumanchiri should have received the two promotions rather than the incumbent. The following explanation was provided by the Board:

> This order is not entered as punishment. Rather, it is entered to vindicate the very real interests that have been infringed. Clearly, such an order will have a harsh effect upon Mr....(the incumbent), who in many ways was an innocent party insofar as his promotion to Assistant Chief Chemist and Director are concerned.

> It is not the pursuit of an affirmative action programme that impels the order. Rather, Mr. Karumanchiri was the person who should have been designated both Assistant Chief Chemist and Director of Laboratory Services...A money award will not fully respond to the wrongs that have been done. The hard fact is that there is only one director, and Mr. Karumanchiri should be that Director.

The issue of the award power in the Canadian Human Rights Act was extensively considered by the Supreme Court of Canada in its decision in *Action Travail des Femmes v. Canadian National Railway Company* discussed earlier in relation to special programmes. The Tribunal under the federal human rights act had found widespread discriminatory employment practices by the respondent and made a detailed order. Along with requiring the respondent to develop a temporary recruitment campaign aimed at women, until a level of 13 per cent of women in non-traditional positions was achieved, the Tribunal order also stipulated numerous modifications to the manner in which the respondent tested for entry level positions, to job requirements, and to the dissemination of employment information and hiring practices. The Tribunal order had been appealed to the Federal Court of Appeal. The Federal Court found the quota scheme was not directed to identifiable victims of the discriminatory practice as required by the legislation and was therefore inappropriate.

The Canadian Human Rights Commission appealed the Federal Court decision to the Supreme Court of Canada. The Supreme Court upheld the Tribunal order and pointed out that the purpose of human rights legislation as a whole is to prevent discrimination, and that the rights enunciated therein should be given their full recognition and effect. The Court went on to say that the provisions setting out the awards tribunals may make should be interpreted to allow for a remedial order such as the one the Tribunal had made. There must be an association between prevention and the remedy.

Other non-monetary awards that have been ordered by human rights boards of inquiry or tribunals include the following directions to respondents:

> to make a written apology to the complainant,
>
> to offer the complainant the opportunity to apply for the next job/vacancy,
>
> to reinstate the complainant in employment,
>
> to place advertisements for employment with minority group organizations,
>
> to notify the Commission every time an employee of the same group as the complainant leaves the respondent's employment so that the Commission can monitor the respondent and determine the reason for the employee's departure,
>
> to constitute a management-employee Race Relations Committee with human rights Commission staff to establish effective communications on inter-race relations and measures to remove verbal racial harassment from the workplace. If the Commission representative would be of the view that the respondent is not implementing reasonable measures, the Commission may request the Board to reconvene (*Dhillon v. F.W. Woolworth Company* [1982], 3 C.H.R.R. D/743).

The question has arisen whether human rights boards of inquiry or tribunals may apply the Charter and determine constitutional questions and remedies when such issues are presented before them.

Analysts are of the view that although most human rights laws do not confer express statutory authority to determine questions of law, this jurisdiction may be implied in view of the nature of the function performed by these bodies, and by virtue of their remedial authority. Boards of inquiry have been treated as quasi-judicial decision making bodies, and their expertise in human rights matters combined with their adjudicative structure and statutory remedial powers suggest that boards of inquiry would be found to possess the authority to construe statutes so as to conform with the Charter (Pentney, 1993, p.15-81).

A recent decision of the Federal Court of Appeal however found that neither the Canadian Human Rights Commission nor the Tribunal appointed by it had the power to consider and give effect to the contention that a provision of the Canadian Human Rights Act was unconstitutional and should be disregarded (*Bell v. Canadian Human Rights Commission*, unreported decision of the Federal Court of Appeal, February, 28, 1994). This issue has not yet been determined by the Supreme Court of Canada and therefore will probably be the subject of further litigation.

4.3.6. The appeal process

As human rights commissions and tribunals are administrative bodies, their decisions are subject to judicial review. Judicial review allows the courts to quash a decision, require action be taken, prohibit action or make a declaration. Judicial intervention is permissible when an administrative body acts beyond its powers, fails to discharge its public duty and departs from legally permissible conduct. But if the Board acts in good faith and its decision can be rationally supported by the legislation, the Courts will not intervene. In addition to the powers of judicial review, the human rights statutes in Alberta, Manitoba, Newfoundland and Ontario provide for a right of appeal on a question of law or fact or both (Pentney, 1993, p. 15-26.3)

4.3.7. Influence of Human Rights Commissions in promoting non-discrimination

Before leaving the subject of human rights commissions enforcement mechanisms, a discussion of the influence of these mechanisms is warranted.

Human rights commissions influence discrimination laws and policies through the issuance of policy statements outlining the Commission's view on how the provisions in the human rights Act it enforces should be interpreted. Human rights commissions determine which cases will proceed to a Tribunal. Commission lawyers have carriage of the case at Tribunal. Commissions are able to strategize and present new approaches with the possible result of extending human rights protection through judicial pronouncements.

The Chief Commissioner of the Canadian Human Rights Commission, for example, is often called upon to provide his views to various parliamentary committees debating proposed legislation so as to ensure that the human rights implications of the draft legislation are considered. Human rights commissions also produce annual reports which are sometimes viewed as the barometer of the state of human rights in Canada over the period under review. Media attention surrounding the annual reports draws attention to the issues which the Commission views as requiring redress. For example, in its 1993 Annual Report, the Canadian Human Rights Commission expressed concern with some Canadians' reluctance to accept Royal Canadian Mounted Police Sikh officers who were permitted by the police force to wear turbans in place of the Mounties' stetson (Canadian Human Rights Commission, 1993, p. 41).

4.4. Effectiveness of the present model

At least three provinces have conducted reviews of the effectiveness of the current human rights system. Alberta and Saskatchewan had not at the time of writing issued their reports on their human rights review. The province of Ontario had established a Human Rights Code Review Task Force which provided the Government in 1992 with a report entitled Achieving Equality: A Report on Human Rights Reform (Cornish, 1992). Much emphasis will be placed on the report in this section of the paper as it, at a minimum, outlines the concerns raised by all stakeholders in the human rights process - employers, advocacy groups and the Ontario Human Rights Commission itself - regarding the effectiveness of the current process.

4.4.1. Overview

Society has changed considerably over the past thirty years since the existing human rights enforcement system was first introduced. One of the major criticisms of the existing system is its concentration on discrimination as an individual problem rather than as a systemic problem. The Ontario task force set out what it believes is necessary for a system to substantially reduce discrimination. It must:

> empower and support those who experience discrimination in order that they may direct the methods used in achieving equality;
>
> promote a compliance culture throughout all institutions by adoption of proactive measures and policies;
>
> establish an accessible, effective and expert Tribunal to assist in resolution of human rights claims either through mediation or adjudication (Cornish, 1992, p.2).

The report also cited the following major criticisms of the existing human rights enforcement model.

4.4.2. Backlog

The Ontario Human Rights Commission had been the subject of concern for the past few years as its backlog of cases grew and confidence in it diminished. The Commission is viewed by many as so ineffective that there is no point in making a claim. To try to resolve the backlog, the Commission introduced an "early settlement initiative" by which it quickly tries to settle cases without investigation. This initiative resulted in 55 per cent of cases being settled at the early stage. Many individuals felt pressured to accept unsatisfactory or unfair settlements as otherwise they would have to wait a considerable time for the complaint to be investigated and later referred to the Commission for decision (Cornish, 1992, p. 17). Other human rights commissions have complained about the backlog of cases that have resulted from increased complaints and limited resources (British Columbia Council on Human Rights, 1992).

4.4.3. Independence

Independence from government is a major issue for human rights commissions. The Ontario Task Force believes that the appointment process for human rights bodies should be protected from political influence. At present, provincial or federal Commission members of most Human Rights Commissions are appointed by the government. Criticism has been expressed at different times that governments have appointed people to Human Rights Commissions who lacked qualifications (Cornish, 1992, p. 40). In Ontario, the government is the biggest employer in the province and the biggest respondent before the Commission. The Report states that governments are subject to pressure from powerful groups in society who prefer a less effective Commission. Governments, therefore, undergo a conflict of interest when they appoint members of a Commission who are then

supposed to be watchdogs over the Government. An independent Appointments Committee comprised of individuals committed to the human rights field was suggested.

The Canadian Human Rights Commission has also on numerous occasions stated its concerns regarding lack of independence from government. This concern has been primarily related to the Commission's reporting relationship. At the present time, the Commission reports to Parliament through the Minister of Justice. Factually speaking, the majority of complaints before Tribunals are against the federal government, represented by the federal Department of Justice lawyers. In fact the Commission ends up taking its employer to court. Although the Commission has clearly stated that to date there has been no interference, it wants the situation to be rectified. The Commission must also request its funds from the Treasury Board, a government department, which is responsible for funding government departments and agencies. This in reality means that the Commission must go to the Treasury Board to request funds for litigation where the Treasury Board may be the respondent. The credibility of the Commission is weakened by its lack of independence from government and it has therefore requested that it report directly to Parliament (Canadian Human Rights Commission, 1990, p.1).

Despite the Supreme Court's often stated view that human rights remedies must be effective and consistent with the almost constitutional nature of the rights protected, the Ontario task force found that human rights laws are being weakly and inadequately implemented. This is evidenced by the unconscionable delays in handling claims, the denial of a hearing to all but a small number of claimants and the disempowerment of those who try to claim their rights under the human rights code (Cornish, 1992, p. 46).

4.4.4. Accessibility

Individuals who need to rely on the human rights system require that it be accessible. As discussed earlier, most Commissions provide staff, referred to as intake officers (normally junior officers) who advise complainants of the legislation and draft the formal complaint on the complainant's behalf. The task force report suggests that what is needed is advocacy services to assist complainants throughout the process. The key concern is that the individuals dealing with complainants at the beginning of the process should be properly trained and able to spend the required time with the complainants so that complainants do not feel disempowered (Cornish, 1992, pp. 50-51).

Accessibility also means that equality groups need not seek out a particular complainant to have a case proceed but rather are able to file complaints regarding discriminatory practices. This option is not available presently under the Ontario Human Rights Code. However, the Canadian Human Rights Commission has accepted group complaints alleging systemic discrimination in hiring and promotion, referred to as employment equity complaints.

The issue of accessibility extends to accessibility to a hearing. The Cornish report stated that the single, strongest point made to the Task Force was that claimants should have access to a hearing, if necessary. People criticized what was viewed as the arbitrary, decision making power of the Commission whether or not to recommend a hearing (Cornish, 1992, p. 88).

There have been a number of decisions dealing with the question of fairness relating to Commission decisions which are based on investigation reports rather than a hearing. The Courts have stated that hearings are not required. Regarding the balance to be achieved, one of Canada's foremost human rights experts stated:

> With the crushing case loads facing Commissions, and with the increasing complexity of the legal and factual issues involved in many of the complaints, it would be an administrative nightmare to hold a full oral hearing before dismissing any complaint which the investigation has indicated is unfounded. On the other hand, Commissions should not be assessing credibility in making these decisions, and they must be conscious of the simple fact that the dismissal of most complaints cuts off all avenues of legal redress for the harm which the person alleges (Pentney, 1993, p. 15-21).

Tables 1 and 2 provide a detailed overview of employment related complaints received by the federal Canadian Human Rights Commission and the provincial Ontario Human Rights Commission, respectively. Employment related complaints are an important part of the overall number of complaints received, representing approximately three quarters of total complaints. These data reveal that race complaints make up roughly one fifth of all employment related complaints. "Race" together with "disability" and "sex" are the grounds most commonly relied on to lodge complaints. Yet "race"-based complaints have a slightly higher-than-average chance of being dismissed. Consequently, a below-average proportion of "race"-based complaints result in settlement. Interestingly though, federally "race"-based complaints are referred to tribunal as often as other types of complaints.

Race complaints that are based on adverse effect discrimination may have a higher success rate at tribunal than cases based on direct discrimination. This is due to the fact that direct race discrimination complaints, i.e. an employer refuses to hire blacks because he dislikes what he believes are foreigners, may be more difficult to prove. Employers are aware of human rights legislation and will rarely admit to the discriminatory practice. Therefore the discrimination must be proven by other means, including establishing that there could be no other plausible explanation for the refusal but discrimination, whereas adverse effect discrimination complaints are normally based on a policy that is acknowledged by the employer. The issue for determination at the tribunal level is whether the policy had a discriminatory effect on the complainant and if so, what steps have been taken towards reasonable accommodation.

The tables only reflect the number of complaints the commissions processed. This is definitely not a reflection of the level of discrimination in Canada. As mentioned earlier many individuals do not bother to lodge complaints with commissions. The complaints data only reveals the tip of the iceberg. Labour force data on the representation of visible minorities in the Canadian workforce shows income, employment and occupational segregation outcomes for certain visible minority groups that are lower than the Canadian norm. Recent surveys demonstrate that there are latent discriminatory attitudes present in certain strata of the Canadian population against visible minority Canadians (Raskin, 1993, p. 74). Employment-related discrimination against (im)migrant workers is a problem. The problem is not being resolved, amongst other reasons, because the existing human rights enforcement system is not sufficiently resourced resulting in delays and lack of confidence. The existing process is unable to deal effectively with systemic discrimination. Complaint remedies are, more often than not, individual-based remedies rather than a systemic resolution of the problem. Such individual-based remedies provide relief only to the complainant without resolving the discriminatory practice that resulted in the complaint.

Table 1. Employment complaints closed by disposition and ground Canada - 1993/94

Outcome	Sex	Age	Race (%)	Disability	Status	Religion	Pardon	Total (%)

Settled	117	16	42 (19)	126	13	2	2	318 (23)
Dismissed/ not pursued	201	119	172 (78)	345	171	8	5	1021 (74)
Tribunal	10	1	7 (3)	17	3	2	0	40 (3)
Total	328	136	221*	488	187	12	7	1379

* Race complaints comprise 16% of total complaints.
Source: Canadian Human Rights Commission

Table 2. Employment complaints closed by disposition and ground Ontario - 1991/92*

Outcome	Sex	Age	Race (%)	Disability	Status	Religion	Pardon	Total (%)
Settled	258	98	235 (55)	525	56	37	5	1214 (57)
Dismissed/ not pursued	131	78	184 (43)	414	22	21	2	852 (40)
Tribunal	21	7	9 (2)	25	8	8	0	78 (3)
Total	410	183	428**	964	86	66	7	2144

* More recent statistics were not available at the time of printing.
** Race complaints comprise 20% of total complaints.
Source: Ontario Human Rights Commission Annual Report, 1991-1992.

4.4.5. Reprisal

Most human rights statutes contain provisions prohibiting retaliation and intimidation resulting from the filing of a human rights complaint. The Ontario Task Force reported that it is a telling commentary on the inadequacy of protection that many persons who file complaints have left their job by the time the case gets settled or heard by a board of inquiry. In most decisions on sexual harassment, even if the complainant is successful at the Board, the remedy may include lost wages but rarely that the complainant be reinstated in her/his job in a work environment freed by the employer of sexual harassment. One can assume this is also the case with racial harassment (Cornish, 1992, p. 92).

The Task Force relied on labour legislation for a precedent on how the right to freedom from retaliation may be more effectively protected. In labour legislation, once a unionization campaign has been commenced, the employer has the burden of proving that any negative action against the employees was not in violation of the Labour Relations Act. The Task Force recommends that where a person alleges that he or she has suffered any negative action contrary to the anti-reprisal section of the Ontario Human Rights Code, the burden of proof that any respondent did not act contrary to the Ontario Human Rights Code should be put on the respondent (Cornish, 1992, p,92).

4.4.6. Human rights tribunals

As discussed earlier, human rights complaints in Canada must be handled through the human rights system as provided in the enabling statute, that is through human rights commissions and tribunals.

Some have argued that claimants should have direct access to the courts as courts are more prestigious than human rights tribunals and monetary awards are higher. A former Justice of the Courts, who prepared a report for the Task Force, stresses that the courts are not expert in the subject matter of human rights and should not hear human rights cases. He stated:

> Judges as a group have traditionally been drawn from social classes unsympathetic to social change. This has been perceived as clouding their judgment by inclining them to decide against the change the legislation seeks to achieve. Judges have been perceived as unsympathetic to the problems of the common-man (The Honourable Robert Reid Q.C.; Submission to the Ontario Human Rights Code Review Task Force, Cornish, 1992, p. 9).

Enforcing human rights law through the criminal system is also not viewed as a viable option. The burden of proof is higher in criminal actions and intent must be established, which is not an element of human rights law. The criminal process focuses on penalties rather than remedies. Flagrant acts of overt racism such as hate propaganda are already criminally sanctioned.

The Courts have often said that they are hesitant to set aside the decision of human rights tribunals as the tribunals have the advantage of specialization. However, in most jurisdictions in Canada, Board of Inquiry members are appointed on a part-time and short-term basis. This causes problems in scheduling hearings, as well as difficulty in building consistency, expertise and training. Therefore, the Ontario Task Force called for a permanent expert Tribunal (Cornish, 1992, p. 109). The Canadian Human Rights Commission made a similar recommendation. In its statement recommending changes to the Canadian Human Rights Act, *Human Rights in Transition: legislative Change for the 1990's*, the Commission stated that there should be changes to the tribunal system to ensure that members are available on a permanent basis, have sufficient knowledge of human rights law and practice, and can deal more expeditiously with cases referred to Tribunal (Canadian Human Rights Commission, 1990, p. 5).

4.4.7. Remedies

In Canada, human rights settlements are often viewed as a payment of a token amount of money. Boards' awards do not truly compensate the victim. Emphasis is placed on payment of lost wages, not on reinstating the worker. It is the author's view that guidance for the fashioning of human rights remedies should be taken from the Supreme Court of Canada's statement in *Robichaud v. The Queen*, 40 D.L.R. (4th) 577, that the remedies "strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment". Therefore, compensation for mental anguish should not be limited to cases where infringement has been engaged in wilfully or recklessly, as is the case in Ontario, nor should there be a monetary limit on damages for mental distress. In order to effectively overcome discrimination, remedies should not be limited to providing restitution to the complainant but also include the undertaking of measures to eliminate the discriminatory practices/environment that resulted in the complaint. Requiring employment equity measures and monitoring their implementation may prevent further complaints (See also: Cornish, 1992, p.144).

Failure to comply with terms of settlement or obstructing a tribunal is punishable by payment of a fine, in Ontario up to Can$ 25,000 and federally up to Can$ 50,000. The Ontario Task Force has recommended that the fine provisions are increased to a level similar to those under environmental legislation (Can$ 250,000). The Canadian Human Rights Commission has recommended that its fine provision be modified to make it more effective and improve the enforcement of settlements (Canadian Human Rights Commission, 1990, p, 5).

4.4.8. Absence of a systemic discrimination approach

There has been significant criticism of the existing individual complaints based system. This approach is viewed as time-consuming and costly financially and emotionally. Although some argue that an individual complainant's success usually changes the circumstances of that individual only, it should be noted that complaints that have proceeded through the courts have set precedents which have advanced human rights law and have therefore ameliorated conditions for others. It is true, however, that these changes have often been at extreme emotional and personal cost for the complainant. There has been recognition by many commissions that a systemic approach to human rights - an approach that is both broad-based and relieves the burden on individual members of disadvantaged groups of bringing forward complaints - is needed. This system should ideally provide systemic remedies. However, it should continue to provide for a mechanism for the filing of complaints by individuals who have suffered discrimination.

4.4.9. The role of government

The Ontario Task Force stated that a commitment to achieving equality must come from the top. Governments, federally and provincially, must take the leadership role and be accountable. This would include ensuring that public monies are not wasted on litigating legitimate human rights complaints but rather spent on focusing on whether there is a need for improvement to achieve equality rights.

At the federal level in Canada, an all-party Standing Committee on Human Rights holds hearings and makes recommendations to Parliament. It monitors human rights issues and has had an influence in bringing about reform. For example, the Standing Committee recommended the reinstatement of the Court Challenges Programme (cf. p. 8).

The Ontario Government was provided with the Task Force report in 1992. It has not formally responded to the recommendations but rather the Ontario Human Rights Commission announced its restructuring in August, 1993. The change in the structure involved a reduction of seven administrative units to four branches. The Commission stated this change will result in the consolidation and strengthening of all enforcement functions into a single operational group. Ontario Government officials state they are still considering the Task Force report to determine which recommendations can practically be implemented.

4.4.10. Influence of Human Rights Commissions

Human rights commissions influence discrimination laws and policies through the issuance of policy statements outlining the Commission's view on how provisions in the human rights Act it enforces should be interpreted. Human rights commissions determine which cases will proceed to tribunal. Commission lawyers have carriage of the case. Commissions are able to strategize and present new approaches with the possible result of extending human rights protection through judicial pronouncements.

The Chief Commissioner of the Canadian Human Rights Commission, for example, is often called upon to provide his views to various parliamentary committees debating proposed legislation so as to ensure that the human rights implications of the draft legislation are considered. Human rights commissions also produce annual reports which are sometimes viewed as the barometer of the state of human rights in Canada over the period under review. Media attention surrounding the annual reports draw attention to the issues which the Commission views as requiring redress.

5. The scope, substance and efficacy of employment equity legislation

This chapter will first examine the scope, substance and efficacy of the 1986 Employment Equity Act, followed by a brief analysis of the 1994 Ontario Employment Equity Act. Subsequently, Canada's affirmative action provisions will be compared with similar provisions in the United States and the United Kingdom.

The 1986 Employment Equity Act originated from the work of the 1984 Royal Commission on Employment. The Royal Commission Report argued that despite existing anti-discrimination legislation and voluntary affirmative action measures on the part of employers, systemic employment barriers continued to exist for women, aboriginal peoples, visible minorities and persons with disabilities. It was found that these individuals generally experienced restricted employment opportunities, limited access to decision-making processes that critically affected them, and little recognition as contributing Canadians.

The Royal Commission concluded that systemic remedies were required. The Commission advocated a new approach to the traditional meaning of defining equality, that treats everyone the same and approaches discrimination from the perspective of the single perpetrator and single victim. The Commission, instead, advanced a results-oriented approach to accommodate differences that have nothing to do with ability, but that may exclude certain individuals from full participation in employment. Legislation was called for to identify and eliminate systemic barriers in employment and the adoption of special measures to meet the needs of the four designated groups mentioned above (Abella, 1984).

5.1. Scope of the Employment Equity Act (1986)

The Employment Equity Act requires employers to identify and eliminate work place barriers that prevent the employment of persons in the four designated groups (women, aboriginals, visible minorities and persons with disabilities). Employers must take proactive measures to ensure that the particular circumstances of designated group members are reasonably accommodated in the work place. Employers must develop a plan setting out the goals to be achieved during the current and subsequent years and a timeframe for their implementation.

The Employment Equity Act requires employers to report to the responsible Minister, referred to as the Administering Department, each year on the representation of the four designated groups in their workforces. Representation is compared to the availability data on the designated groups provided by Statistics Canada. The Employment Equity Act applies to federally-regulated employers and Crown corporations that have 100 or more employees. These employers operate primarily in the banking, transportation and communication industries. The Act covers approximately 5 per cent of the Canadian work force. It is administered by the former Department of Employment and Immigration, now the Department of Human Resources (hereinafter referred to as the Administering Department).

The Administering Department also is responsible for the Federal Contractor's Programme, which is established as a government policy rather than through legislation. The programme applies to suppliers of goods and services to the federal government that have at least 100 employees and that want to bid on government contracts of Can$ 200,000 or more. As a prerequisite to tendering, a company must sign a certificate stating a commitment to implementing certain employment equity

measures such as the setting of goals and targets to increase representation of designated group members. At present, approximately 1,300 companies have signed certificates. Companies that receive contracts are subject to on-site compliance reviews by officials of the Employment Equity Branch of the Administering Department. Companies that do not comply with their commitment may face exclusion from future government business.

The Employment Equity Act requires "a comprehensive review of the provisions and operation of this Act including the effect of those provisions" to be undertaken five years after the Act came into force and at the end of every three-year period thereafter.

The following analysis will outline the concerns raised during the review of the existing Act by the all party Parliamentary Review Committee in 1991/1992 in its report entitled "A matter of fairness", which made 31 recommendations for improvement (see: Redway, 1992).

5.1.1. Employers covered by the Act

The Federal Public Service is not subject to the Employment Equity Act. Rather the Federal Public Service is subject to the Treasury Board Affirmative Action Policy. The Treasury Board Policy requires the identification and removal of barriers in employment systems, policies, procedures, practices, organizational attitudes and established behaviour patterns that hinder the employment or career progression of designated group members.

The Review Committee believes the federal government should be a leader in achieving employment equity and that the scope of the Act should be broadened to cover the public service and other federal employers not currently covered. The Act which presently applies to employers with 100 or more employees should be broadened in scope so as to apply to employers with 75 or more employees. Employers with less than 75 employees would be invited to develop voluntarily employment equity plans and submit them to the Administering Department for recognition as an Employment Equity Employer.

The Review Committee also believed that unions have a role to play in employment equity and recommended that federally certified unions be required to sign, as employers, a certificate of compliance with the principle of employment equity.

5.1.2. Self-identification

Voluntary self-identification by employees has been and is recommended to continue to be the manner in which an employer determines the representation of the designated groups among his/her workforce . The committee recommended, in response to employer's concerns that employees were not self-identifying, that education programmes should be carried out in conjunction with workplace surveys to make employees feel at ease with the identification process and to reassure them that the information is important and will be treated confidentially.

5.2. Substance

The current legislation fails to identify the type and extent of changes expected of employers. This could account for the fact that most employers covered by the Act have made very little progress toward employment equity in the five years since its inception. A need for qualitative measures to overcome barriers to employment and promotion was recognized by the Review Committee. This could include education and communication programmes as well as effective racial harassment policies. The Review Committee concluded that some employers believe that as long

as they are making some effort to redress longstanding discriminatory practices within the workplace, they are fulfilling all their legal obligations in a satisfactory manner (Redway, 1992, p. 12).

Research has indicated that the most effective employment equity programmes are those that contain formalized plans, goals and timetables that focus on all facets of the employment process, that have demonstrated management commitment, that contain a regular monitoring system and that are communicated throughout the organization. The Committee therefore recommended that requirements and standards must be set out in the legislation (Redway, 1992, p. 13).

5.2.1. Definitions

The Employment Equity Act requires the employer to consult with the employees, or where they are organized with the bargaining agent, on the implementation of employment equity. Consultation is specified in the guidelines to employers issued under the Act as supplying "sufficient information and sufficient opportunity to employee representatives to enable them to ask questions and submit advice on the implementation of employment equity". This provision was found not to be as encompassing as required. The Committee has suggested that the implementation of the employment equity plan should occur through negotiation with the employee representatives. This may provide the employees with some input in decisions that affect them.

Also, standardization of survey forms for employees to self-identify must be based on uniform definitions. To date, this has not been the case leaving the question whether the employer-developed definitions relied on for the self-identification surveys may be shown to be unreliable (Redway, 1992, p. 8).

5.2.2. Seniority

The Committee expressed concern about the extent to which seniority clauses in collective agreements may impose barriers to employment equity. In situations where an employer is reducing staff, the most recently hired employees, commonly designated group members, are the first to be terminated. It therefore recommended that the agency responsible for enforcement of the Employment Equity Act have authority to make an order to modify or remove seniority clauses where they represent a barrier to employment (Redway, 1992, p.17).

5.2.3. Enforcement and monitoring

The Employment Equity Act currently contains only one enforcement provision. An employer who fails to comply with the requirement to file an annual report with the Administering Department is guilty of an offence and liable on summary conviction to a fine not exceeding Can$ 50,000 (s. 7).

The Administering Department provides technical advice to employers and advises them of their statutory obligations. The Administering Department is required under the Employment Equity Act to provide the Canadian Human Rights Commission (CHRC) with copies of employers' annual reports (s. 8). The CHRC believes that this provision indicates that the government intends the Commission to play a role in the enforcement of the Employment Equity Act.

In the absence of an express monitoring or enforcement mechanism under the legislation, the CHRC has attempted to enforce the principles of employment equity by investigating complaints from third parties based on an employer's work force data. The Commission has also invited employers with poor representation figures to undertake a joint review of their employment systems. The Commission has also initiated its own complaints. However, the Commission's authority to

monitor and enforce compliance with the Employment Equity Act has been subject to a number of legal challenges (Redway, 1992, p. 25).

The Employment Equity Act does not clearly indicate the agency responsible for its implementation, monitoring and enforcement. The current jurisdictional ambiguity between the Administering Department and the CHRC should be resolved. Groups appearing before the Committee reviewing the Act agreed that any body given responsibility should have sufficient resources. The Review Committee concluded that the monitoring agency should have a consultative, problem-solving remedial role. The Administering Department currently performs these functions and should continue to do so (Redway, 1992, p. 26).

The Committee was also of the view that a separate enforcement agency is required when consultation and cooperation is unsuccessful. The Canadian Human Rights Commission already has an enforcement structure and is arms length from government and has therefore been recommended as the agency to enforce Employment Equity. The CHRC has expressed concern that the Committee recommendation is likely to perpetuate duplication and confusion. The Commission believes that the integrity of the compliance monitoring process can only be maintained if a clearly independent agency rather than a government department is assigned the mandate (CHRC presentation to the Special Committee on the Review of the Employment Equity Act, February 5, 1992).

The new Liberal government which came into power in November 1993, has stated it will give the CHRC the clear legislative authority to initiate investigations of employment equity issues.

5.3. Efficacy of the Employment Equity Act, 1986

The Employment Equity Act enabled researchers to obtain facts and figures on the share of employment obtained by different designated groups. Through the publicity received for not having a fair number of members of target groups in the work force, it embarrassed certain Crown corporations and private firms under the federal jurisdiction to take action in the area of employment equity (Samuel and White, 1991, p.44).

The Canadian Human Rights Commission Employment Equity 1993 Annual Review found that the representation of members of visible minorities increased in all industrial sectors for Employment Equity Act companies. Although they meet the overall availability rate, this was attributed to the large concentration of visible minorities in the banking sector. This does not, however, imply an equal representation *within* companies. Visible minority employees were concentrated in blue-collar and clerical work more often than other employees and remain under-represented in managerial jobs. Yet, the overall representation of members of visible minorities in federal departments and agencies, not covered by the Employment Equity Act, was less than half of that of employers subject to the Employment Equity Act. As such, although lacking in clear monitoring and enforcement mechanisms, the Act appeared to have had some impact.

The five year experience with the Employment Equity Act provided the opportunity to start off with a legislative concept and allow hands-on experience to iron out the problems. The experience and more importantly the five year review exercise has provided valuable information regarding changes necessary to improve the scope of the Act, the establishment of legislated standards for employers identifying the type and extent of changes expected and the need for proper monitoring and enforcement. Although the federal government has yet to implement changes to the Employment

Equity Act in response to the recommendations of the 1992 Redway report, it would appear that the report was taken into consideration by the Ontario government in drafting its employment equity legislation.

5.4. Scope of the Employment Equity Act (Ontario) 1994

The only other jurisdiction in Canada that has Employment Equity legislation is the province of Ontario. That province's Employment Equity Act became law on January 1, 1994. [3]

The Ontario Act is governed by the following principles:

> members of designated groups (women, aboriginals, members of racial minorities and people with disabilities) have the right to be considered for employment, hired, retained, treated and promoted for jobs in a way that is free from discrimination and barriers;
>
> every employer's workforce, at each level and in each job category, should reflect the composition of the community;
>
> every employer must make sure that workers are treated in a way that is free of systemic and deliberate barriers;
>
> every employer will put in place positive and supportive measures that will help recruit, employ, retain and promote members of the designated groups, and benefit the workplace as a whole (s. 2).

5.4.1. Employers covered by the Act

All employers in Ontario, including the provincial government and its agencies are covered by the Act, with these exceptions:

> employers in the broader public sector (such as municipalities, and school boards) with fewer than 10 employees;
>
> employers in the private sector with fewer than 50 employees;
>
> police forces covered by the Police Services Act (which has its own regulation requiring police forces to develop and implement employment equity plans).

The legislation contains a specific provision regarding government contracts:

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[3] The New Democrat Government of Ontario, responsible for introducing and passing Bill 79 - The Employment Equity Act, was defeated in the June 8, 1995 provincial elections in which the Conservative Party won a majority of the electoral seats. The new Conservative Party Premier, Mr. Mike Harris, announced on July 19, 1995 that Bill 79 will be repealed during the fall 1995 sitting of the province's legislature. Business organizations such as the Canadian Manufacturers Association and the Chambers of Commerce stated that they were pleased with the announcement, arguing that legislating employment equity creates bureaucracy and cost. However, other employers including municipalities, hospitals, universities and a major grocery chain advised that they plan to continue their employment equity initiatives even if they would be no longer under a legal obligation to do so. Organized labour, represented by the Canadian Labour Congress, explained that the Employment Equity Act was designed to build an equal opportunity playing field. The organization described the announced repeal of the Act as constituting a form of employment apartheid.

Anyone who has a contract with the Province of Ontario or a provincial government agency will meet its obligations under the Employment Equity Act;

Subcontractors must also follow the Employment Equity Act, as must organizations that receive grants, contributions, loans or loan guarantees from the Government or its agencies;

Non-compliance will result in cancellation of any contract or loan and the Province may refuse to make any further contracts or loans with the offending party.

5.4.2. Self-identification
Employees may decide whether or not they wish to answer questions in the workforce survey which all employers must conduct.

5.5. Substance

The requirements for the employer's employment equity plan are outlined in the legislation and further elaborated in the accompanying regulations. The plan naturally flows from the workforce survey and the employment systems review which identifies barriers to designated groups. The plan must show how barriers will be removed; what positive and supportive measures will be put in place to overcome the effect of the barriers on designated groups; what accommodation measures will be used; goals and timetables for the measures planned; and goals and timetables for the composition of the work force to reflect better the community. Employers must file a certificate with the Commission after preparing an employment equity plan.

5.5.1. Definitions
The Regulations define what constitutes a workforce survey questionnaire (s. 2) and how an occupational or salary group is to be determined (s. 4). These regulations allow for greater standardization.

5.5.2. Seniority
The Ontario Act makes it clear that seniority rights for layoffs or a recall to work after a layoff are not to be considered barriers under the Act. Other seniority rights are not to be considered barriers unless an Ontario Human Rights Board of Inquiry decides that a particular seniority right discriminates against members of a designated group.

5.5.3. Consultation
Employee representatives assist their employer in developing an employment equity plan for their workplace. Employee representatives participate in conducting a work force survey; reviewing employment policies and practices; preparing an employment equity plan; and revising an employment equity plan. The joint responsibilities of the employer and employee representatives must be carried out in good faith and separate from the normal collective bargaining process.

5.5.4. Enforcement
The Employment Equity Act is statutorily monitored and enforced by two bodies: the Employment Equity Commission and the Employment Equity Tribunal.

The Commission monitors compliance with the Act and employers' progress towards achieving employment equity. The Commission also serves as an information and advice source on employment equity.

The Tribunal acts as mediator and adjudicator. It reviews and enforces orders of the Commission. It adjudicates disputes about joint responsibility and responds to complaints that an employer has not lived up to its employment obligations. An employer may be prosecuted in the courts and face a fine of up to Can$ 50,000 if it fails to comply with an order of the Tribunal.

The Commission can conduct audits of employers to determine if they are complying. Officers have powers to enter a workplace and inspect documents. An employer who has not met the obligations under the Act regarding the work force survey, employment systems review, employment equity plan, consultation and record keeping may be ordered to do so by the Commission. The employer can appeal the order to the Tribunal which can confirm, change or cancel the order.

A Tribunal officer will attempt to mediate a settlement of all applications to the Tribunal. The Tribunal may also decide not to proceed on complaints that are not within its jurisdiction or that are "trivial, frivolous vexatious or made in bad faith". If the Tribunal finds the complaint is justified, it may order that i) an employment equity plan be established; ii) a plan be amended; iii) an employer create a fund for employment equity purposes; iv) an employer pay the cost of an administrator to develop and implement the employer's employment equity plan; v) a collective agreement be amended.

The Act included fines of up to Can$ 50,000 for any person who knowingly provides false information on a certificate filed with the Commission; hinders or obstructs an employee of the Commission who is carrying out an audit or executing a warrant; intimidates, coerces, penalizes or discriminates against another person who is exercising a right under the Act.

5.5.5. Review

A committee of the Legislative Assembly will undertake a comprehensive review of the Act within five years of proclamation.

5.6. A Comparison of the federal and the Ontario Employment Equity Acts

As suggested earlier, the Ontario employment equity legislation incorporated many of the recommendations of the 1992 Redway report. The Ontario Act can therefore be viewed as an improvement on the federal employment equity legislation. In particular, the Ontario legislation covers most employers in the province, including the provincial government and government contractors. The federal Act excludes the federal government. Federal contractors are only covered by government policy rather than by legislation.

The Ontario legislation defines the workplace survey questionnaire which ensures the reliability and standardization of the representation data resulting from the survey. In contrast, the federal Act does not define the workplace survey questionnaire which results in questionable data. Also, a formalized monitoring and enforcement system has been created by the Ontario employment equity legislation which is absent from the federal legislation.

5.7. A Comparison of affirmative action in Canada with the United States and the United Kingdom

Affirmative action in Canada is protected in at least three types of statutes. The supreme law of Canada, the Charter of Rights and Freedoms, protects affirmative action programmes in section 15.

All jurisdictions in Canada have special programme or affirmative action provisions in their anti-discrimination (human rights) statutes which protect the programmes from a claim of discrimination. Moreover, as discussed above, the implementation of affirmative action programmes is required by the federal and Ontario employment equity statutes.

5.7.1. Comparison with the United States

Canada's formal experience with affirmative action is recent compared with the development of the issue in the United States. However, a comparison of the manner in which employment equity/affirmative action has been interpreted in Canada with that in the United States exhibits major differences in how each country approaches the concept.

An obvious difference lies in the fact that Title VII of the Civil Rights Act, the model anti-discrimination statute in the United States, disclaims any intent to require affirmative action in any form (para 703 (j), 43 U.S.C. para 200e-2j). The requirement to report and keep records on the composition of the workforce is not in Title VII itself but rather in regulations issued by the Equal Employment Opportunities Commission, the agency charged with enforcing the statute.

American jurisprudence on affirmative action is based in the decisions of the United States Supreme Court in *Regents of the University of California v. Bakke,* 98 S.C. 2733 [1978], hereinafter referred to as the *Bakke* case and the *United Steelworkers of America v. Weber*, (99 S.Ct. 2721 [1979]) hereinafter referred to as the *Weber* case. The *Bakke* case concerned a challenge to the admission scheme of Davis medical school in California by a white male whose application had been rejected in two consecutive years. Mr. Bakke requested that the University be compelled to admit him to the Medical School. The Medical school had two admission programmes. The regular admissions programme and the special admissions programme for disadvantaged candidates.

In the Supreme Court of the United States, four of the judges, referred to as the Stevens group, found the special admissions programme to be invalid as a violation of the *Civil Rights Act* and ordered Bakke be admitted to the School. Four other judges, referred to as the Brennan group, concluded that although racial classifications call for "strict judicial scrutiny" under the Equal Protection Clause of the California Constitution, nevertheless the purpose of overcoming the effects of past discrimination by society as a whole, resulting in substantial, chronic minority under-representation in the medical profession, was sufficiently important to justify the University's remedial use of race as an admissions factor. The ninth judge, Justice Powell agreed with the Stevens group to hold that Bakke should be admitted, but at the same time joined the Brennan group in holding that race could be a valid criterion for university admissions. The special admissions programme that foreclosed consideration of persons like Bakke was found not to be essential to the achieving of the goal of obtaining a diverse student body.

The *Weber* case challenged the legality of an affirmative action programme that reserved 50 per cent of the openings in a plant craft-training programme for blacks until the percentage of black craft workers in the plant was commensurate with the percentage of blacks in the local labour force. The majority of the Supreme Court found that Title VII of the *Civil Rights Act* does not prohibit race-conscious affirmative action programmes. The programme was permissible because it was structured to open employment opportunities for blacks in occupations which had been traditionally closed to them without unnecessarily trammelling the interests of white workers. It did not require their discharge and replacement with black workers nor did it create an absolute bar to the advancement of white employees. The plan was temporary until the manifest racial imbalance was eliminated.

In one of the first cases to reach the Supreme Court of Canada challenging a special programme, that Court distinguished the *Bakke* and *Weber* cases. In *Re Athabasca Tribal Council and Amoco Canada Petroleum Company Ltd. et al.*, [1980], 112 D.L.R. (3d) 200, the Supreme Court found that a special programme to improve the lot of native people was not a breach of the Alberta human rights legislation. It is noteworthy that the anti-discrimination statute did not contain a special programme provision at the time the complaint was initiated. The Court found the *Bakke* and *Weber* decisions of no assistance as they dealt with a situation fundamentally different from that facing the Athabaskan Indians. The Court could not see how a programme that is designed to enable Indians to compete on equal terms with other members of the community, i.e. to obtain employment without regard to the handicaps which their race has inherited, could be construed as discriminating against other inhabitants.

The Supreme Court of Canada decisions in *Athabasca Tribal Council* and *Action Travail des Femmes v. Canadian National*, supra, are revealing examples of the divergence between the Canadian approach and American approach on affirmative action. The Canadian Supreme Court clearly took a purposive approach to human rights law and recognized affirmative action as a remedy to overcome systemic discrimination.

In Canada, both the Charter and the human rights acts lead to the observation that where, intentionally or not, the effect of employment practices has been to the disadvantage of a group of people based on an unchangeable characteristic, assisting the disadvantaged to achieve relative equality cannot be considered discrimination against individuals who do not possess that characteristic (Pentney, 1993, p.4-82).

Neither the *Bakke* nor the *Weber* case deals with the broad spectrum of measures that can be taken in pursuance of an "affirmative action" programme, but merely focus on the use of race alone as the basis for admission to a certain "quota". What becomes obvious from the American decisions regarding affirmative action is the context in which they are considered. The main concern is not achieving equality by examination and elimination of barriers to disadvantaged groups, but rather, once faced with evidence of under-representation, permitting an affirmative action programme that will not affect white workers. Affirmative action is interpreted as an exception to the general principle of non-discrimination rather than a required element to achieving equality.

Canada's history has involved accommodation to and recognition of group rights. This is evidenced in the *British North America Act*, the founding constitution of Canada, which makes provision for group religious and language rights. Although the right to non-discrimination is generally an individual right, the Canadian constitution includes rights one has a member of a group. By contrast, the American constitution is more focused on individual rights.

Executive Order 11246 promulgated by President Jonson in 1965 prohibits discrimination and requires affirmative action by federal contractors in the United States. The authority for Executive Order 11246 rests mainly on statutes authorizing the President to manage the purchase of goods and services for the federal government. It was not authorized by any of the civil rights acts. The Executive Order is enforced by administrative proceedings (Rutherglen, 1993, p.10). The American Office of Federal Contract Compliance Programs (OFCCP) may intervene directly in cases where deficiencies are found during a compliance review and force an affirmative action plan on the contractor. In Canada, where evidence of failure to meet the Federal Contractors programme criteria is found, the review officer may negotiate with company officials regarding additional on-site inspections until programme criteria are met.

The Executive Order is broader in application than its Canadian federal counterpart which covers contracts over Can$ 200,000 and contractors with more than 100 employees, as the American programme covers all federal contractors except those with contracts of US$ 10,000 or less (41 C.F.R. para 60 - 1.5 [1992]; Rutherglen, 1993, p.23). The process for both the Canadian and American enforcement of contract compliance is largely informal.
Although American legislation is focused on individual rights, resulting in a hesitant approach to affirmative action, its practices regarding contract compliance are further developed than Canada's.

5.7.2. Comparison with the United Kingdom

The Race Relations Act, 1976, applies to the whole of Great Britain with the exception of Northern Ireland. The Act does not permit "reverse discrimination": it is unlawful to discriminate in favour of a person of a particular racial group in recruitment or promotion. The Act does, however, permit certain forms of positive action to enable members of a particular racial group, who are at a disadvantage in employment, to compete on equal terms with others. Section 38 of the Act allows employers to take steps to encourage members of a particular racial group to be trained for a particular form of work or to give preference to employees from that group in allocating training places, provided it can be shown that no members of that racial group have been engaged in such work in the last 12 months or that the proportion of the racial group doing such work is small in comparison either with the workforce employed at the establishment or with the population of the area from which the employer normally recruits (Zegers de Beijl, 1991, p. 6).

The Race Relations Act also allows local authorities to pursue a policy of contract compliance. There is no statutory requirement for central government contractors although federal contracts contain a provision requiring contractors to conform with the employment provisions of the Race Relations Act. This in effect requires compliance with the principle of no discrimination but there is no positive obligation to reduce the barriers to employment of protected groups.

The United Kingdom has not recognized the need for mandated affirmative action and has permitted rather than required employers to establish limited affirmative action programmes. These programmes are clearly seen as an exception to equality rather than necessary for its achievement as the Race Relations Act still speaks in terms of "reverse discrimination". The United Kingdom is thus well behind both Canada the United States in recognizing the need for properly implemented and enforced mandatory affirmative action programmes.

Canada is well advanced of both the United Kingdom and the United States regarding the concept of affirmative action. This is primarily due to the findings of the 1984 Abella report that mandatory affirmative action is necessary to overcome systemic barriers to equality in employment. As well, Canada had adopted the concept of substantive equality which recognizes that accommodation for disadvantaged groups is necessary to achieve equality. Canada's affirmative action legislation is developing as seen in the wider scope of the recent provincial affirmative action legislation and the recommendations for change to the federal affirmative action legislation.

6. Conclusions and recommendations

The Canadian experience regarding anti-discrimination statutes illustrates that equality is not a static concept and therefore methods to achieve it are also not static. Whatever system that is established to deal with discrimination must include a cyclical re-examination or review.

Canada has been fortunate to have a pragmatic Supreme Court of Canada bench that has interpreted equality provisions in a generous rather than legalistic manner so as to achieve the purpose of the equality guarantee. Recognition that differences in treatment are sometimes necessary to ensure that all individuals can compete on an equal footing provides the basis for the implementation of affirmative action programmes as a complement to the attainment of equality rather than an exception to it.

The concept of equality has been advanced due to the inception of the Canadian Charter of Rights and Freedoms. Non-citizen (im)migrant or ethnic minority workers have particularly benefitted from the Supreme Court's interpretation of the equality provisions of the Charter. The Court has recognized that non-citizens are a "discrete and insular" group that warrant protection within the equality provisions of the Charter. However, the Charter can only be of assistance if the groups which require its protection are able to access it through the courts. Therefore, programmes must be in place to fund individuals and advocacy groups so that they may rely on the guarantees provided to them by the Charter and challenge infringements of those guarantees through the Courts.

Human rights commissions have the greatest experience enforcing non-discrimination in Canada. They have been responsible for setting the framework. Through pursuing complaints to the Supreme Court of Canada, human rights commissions have played an important role in the development of human rights law. As human rights commissions are government funded, there is no financial barrier for complainants to access the courts through these commissions. However, some individuals, including im(migrant) and ethnic minority workers, do not bother filing complainants with human rights commissions because they do not have confidence in the system. This lack of confidence can be attributed to delays in processing complaints, as well as the above average dismissal rate for race complaints. Therefore, data produced by human rights commissions on the number of complaints received, represent only the tip of the proverbial iceberg.

Human rights legislation in Canada has developed over the last few decades. Lessons have been learned from each stage of development which has resulted in a broader conceptualization of how equality is best achieved. The major lesson learned from this experience is that the individual complaints based model of combating discrimination will not resolve the systemic discrimination that is embedded in the Canadian workplace. Human rights commissions are aware of the need to focus on systemic barriers to discrimination and have strongly expressed the need to government for amendments to the legislation so they can take proactive measures so as to identify and eliminate barriers to the employment and advancement of disadvantaged groups. Human rights commissions require changes to their enabling statute to ensure their effectiveness.

Commissions and tribunals must be truly autonomous from government to maintain their integrity and credibility. Individuals who seek redress through human rights commissions should be more adequately protected from reprisal. Also, in order to be truly effective, human rights commissions and tribunals should become more accessible to the constituency which they serve. They should be adequately funded so that the crushing caseload with limited staff does not result in delays, resulting, in turn, in lack of confidence in the system of legal protection against discrimination. As human rights commissions can only be as effective as permitted by the enabling statute and the resources provided them to perform their mandate, both of these should be improved.

The federal Employment Equity Act provided a starting point for determining how to identify and eliminate systemic barriers in employment systems. The Act was viewed as deficient in areas such as employers covered, legislated standards for employers and enforcement. However, the reporting requirement provided a reference point to determine the level or representation of disadvantaged

groups in a particular establishment. It provided information as to the share of employment held by designated groups and embarrassed employers with poor employment equity records to take measures on a voluntary basis to improve the representation of the workforce. It should be stressed that reporting is only truly effective if it is accompanied by effective monitoring and enforcement mechanisms. In this sphere there is considerable room for improvement. Some of these weaknesses were picked up on in the 1994 Ontario Employment Equity Act.

The Canadian experience has shown that various levels of legal protection are required to combat discrimination against (im)migrant and ethnic minority workers. It is necessary to first understand this group's level of representation in the workplace. This requires formalized detailed monitoring and reporting, including reporting of representation according to job group. Where reporting indicates under-representation, the employer should be required to develop a plan to increase representation. This includes an examination of employment systems and policies. To be truly effective, the plan should be effectively monitored and enforced by an independent agency and be backed up by statutory sanctions in case of non-compliance. Although a systemic approach is designed to eliminate barriers to employment, it is not designed to assist the individual victim. A separate level of legislated protection is still required for individuals to file complaints of discrimination so as to provide individual victims with accessible avenues/possibilities of obtaining redress.

The Canadian experience covers both protection of individual victims of discrimination as well as action aimed at eliminating systemic barriers. Both approaches have their deficiencies. Yet, they are examples of the two-tiered approach, both of which require specialized and statutorily anchored enforcement mechanisms, to combat discrimination at the level of individual victims as well as at the societal level. As such, the Canadian experience merits serious scrutiny by other (im)migrant receiving countries faced with the growing problem of de facto discrimination in employment and all other walks of life.

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