

SECURING EMPLOYMENT EQUITY BY ENFORCING HUMAN RIGHTS LAWS

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Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it...

Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than altitudinal sources, governs whether or not the remedy is justified.¹

*Justice Rosalie Abella, Equality in Employment: A Royal Commission Report
October 1984*

INTRODUCTION

1. The Abella Report on Equality in Employment

Canada's 1984 Royal Commission on Equality in Employment Report by Justice Rosalie Abella was revolutionary in its recommendations and influence, providing leadership to governments, human rights institutions and civil society organizations world-wide. The picture Justice Abella drew of the widespread systemic discrimination faced by disadvantaged groups, particularly women, racialized groups, aboriginal persons, and persons with disabilities reflected patterns which continue world-wide to this day. The Report was very critical of the traditional complaint-based human rights approach which assumed discrimination was occasional and intentional rather than primarily systemic and deeply embedded in Canadian labour markets.

Resolving discrimination caused by malevolent intent on a case-by-case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest.²

Justice Abella argued that international and domestic human rights guarantees required the redesign of Canada's human rights system so that it could deliver protection from that discrimination. Nothing less was acceptable. Employment equity was the answer.

Justice Abella called for a pro-active law requiring all federally regulated employers to root out that discrimination by identifying and eliminating the barriers and implementing positive hiring and employment measures with mandatory reporting systems. This was a radically different approach to human rights enforcement.³ Employment equity requires employers working with trade unions if any to identify the particular ways in which such systemic discrimination may be operating in their workplaces' recruitment, employment and retention practices. The goal is to put all groups on a

¹ R. S. Abella: *Equality in Employment*, Report of the Royal Commission on Equality in Employment (Ottawa, Canada, Ministry of Supply and Services, 1984. (hereinafter the "Abella Report")

² The Abella Report, supra, at page 8

³ Ibid. See Recommendation #1 at page 255.

level employment playing field with advantaged groups. Once employment equity is achieved in any particular area, steps must be taken to ensure the level playing field is maintained. Employment equity planning therefore is the recognized systematic human rights remedy allowing workplace parties to identify and redress, within the spheres of their responsibility, systemic discrimination. Abella also called for pay equity - the right to equal pay for work of equal value - to be part of all employment equity programmes and for provinces and territories to enact equal pay for work of equal value legislation to comply with international obligations.⁴

Justice Abella's Report and the research it relied on informed international human rights thinking both at the International Labour Organization and the United Nations and the development of international standards.⁵ Specifically in Canada, it led to the passage of the federal *Employment Equity Act* in 1985⁶. Later the Federal Contractors Programme was developed requiring such contractors, even if provincially regulated, to comply with federal law.⁷ The Abella report also led to the passage of Ontario's 1995 *Employment Equity Act*. The thinking behind the Abella Report also profoundly influenced Supreme Court of Canada equality rights jurisprudence under both the *Canadian Charter of Rights and Freedoms* ("*Charter*") and Canadian human rights laws.

Yet twenty-five years after the Abella Report, employment equity in Canada has lost its way and is in urgent need of revitalization. The *Employment Equity Act* has not lived up to its potential and in any event, covers only a small percentage of Canadian workers. Many argue the *Act* is both weakly enforced by the Canadian Human Rights Commission and fundamentally flawed. The *Act* focusses on reporting statistics without effective sanctions for employers who fail take action when statistics reveal an unrepresentative workforce.⁸ While the federal law has survived to this date and was improved in 1995, Ontario's law was quickly repealed in 1995 by a conservative government claiming it was reverse discrimination. The Ontario law was a significant improvement on the federal law, with a strong role for unions in negotiating employment equity. Such stronger provisions likely contributed to its quick demise. While a number of provincial governments have employment equity policies including British Columbia's Public Service Act Directive on Employment Equity, no other province took up the gauntlet to legislate a province-wide specialized employment equity law.

⁴ The Abella Report, supra, Recommendations 32 and 33 at page 261.

⁵ See ILO Director-General. 2003. *Time for Equality at Work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference 91st Session 2003, Report I(b), Geneva, International Labour Office and ILO, Director General, Tackling the Challenges: Equality at Work, Geneva, 2007.

⁶ *Employment Equity Act* 1995, c. 44, Statutes of Canada.

⁷ See Canadian Human Rights Commission employment equity website for information on Employment Equity Act. http://www.chrc-ccdp.ca/employment_equity/default-en.asp

⁸ Lum, Janet The Federal Employment Equity Act: goals vs. implementation 2008 *Canadian Public Administration* 38:1, 45 - 76. Bakan, A. And Kobayashi, A.,2000, Employment Equity Policy in Canada: An Interprovincial Comparison, Ottawa: Status of Women Canada Research Papers.

2. Summary of Paper

This paper, focussing on Ontario, argues that the tools to revitalize employment equity enforcement are actually close at hand. The tools flow from the inter-connecting matrix of equity obligations found in provincial human rights laws and policies, labour relations and pay equity laws and collective agreements. A specific pro-active law is certainly helpful in gaining compliance yet significant progress can and must be made without it, by relying on the wide-ranging, pro-active human rights obligations which govern all Canadian employers and trade unions under the human rights law jurisprudence developed by the Supreme Court of Canada over the last 25 years. This jurisprudence calls on employers, working with trade unions to develop a culture of equality in workplaces by pro-actively designing workplace rules and practices to promote the equality of disadvantaged groups - not hinder it. Human rights laws contain within their wide-ranging requirements, pro-active planning and equality promoting obligations which need to be enforced. Courts and human rights tribunals have repeatedly affirmed that human rights legislation must be interpreted contextually to adapt to changing conditions and evolving conceptions of the remedies needed to ensure the promise of human rights guarantees.⁹

Yet, despite these strongly worded decisions, employers have not enacted such pro-active planning measures and they often exclude unions from any human rights planning they do. Many employers still delay taking any action, hoping no complaint will be filed and that human rights and pay equity commissions are too weak or under-resourced to catch them. This paper argues that such employers are violating provincial equity obligations when they fail to engage in such pro-active employment equity planning. Employers are required to pro-actively work, with unions, if any, to establish and maintain workplace employment equity (“EE”).

This paper is organized into four main parts: Part I places the achievement and maintenance of employment equity in the current context of the patterns of systemic discrimination operating in Canada’s globalized labour markets to disadvantaged groups, comparing that to the situation described in the Abella Report. Part II details the development in human rights and *Charter* law jurisprudence of employment equity measures and planning as human rights remedies. Part III outlines various Ontario equity obligations and policies that provide the legal foundation requiring employers, working with trade unions to pro-actively engage in employment equity planning and implementation. Part IV outlines the 1) employment equity planning process; 2) the responsibility of employers to work with unions and provide disclosure; 3) the union responsibility to work towards employment equity; 4) the relationship between employment equity, accommodation and collective bargaining; 5) the enforcement of employment equity obligations; and 6) the role of the Ontario Human Rights Commission. Annex A summarizes key international employment equity standards. Annex B lists selected references.

PART I SYSTEMIC DISCRIMINATION IN CANADA’S GLOBALIZED LABOUR MARKETS

1. Introduction

The Abella Report made the following statement which continues to describe the massive discrimination experienced by disadvantaged groups:

⁹ See detailed analysis in Faraday, F. Denike, M and Stephenson, K. *Making Equality Rights Real: Securing Substantive Equality under the Charter*. Toronto: Irwin Law, 2006, second edition forthcoming.

“Employment equity is a strategy designed to obliterate the effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded. It requires a “special blend of what is necessary, what is fair and what is workable”. ... We need equal opportunity to achieve fairness in the process, and we need employment equity to achieve justice in the outcome.”

“What is needed to achieve equality in employment is a massive policy response to systemic discrimination. This requires taking steps to bring each group to a point of fair competition. It means making the workplace respond by eliminating barriers that interfere unreasonably with employment options. It is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen” Equality in Employment: A Royal Commission Report - General Summary.1984.

While significant progress has been made with many important human rights precedents, systemic discrimination continues to flourish in Canada. While the 2009 patterns of discrimination in Canada’s globalized labour market share many similarities to those documented by Justice Abella in 1984, there are also marked differences in the structure and conditions of employment.¹⁰ Both these changes and entrenched patterns affect the nature and the degree of systemic discrimination faced by equality seeking groups and the design of the mechanisms to successfully tackle those violations. The Ontario Human Rights Commission in its many annual and special reports have documented this discrimination over the years.¹¹ The increasing inequalities and the increasing number of disadvantaged groups in the labour market mean that effective employment equity mechanisms are needed now more than ever to ensure equity and economic prosperity. The changes mean that such mechanisms must be tailored to meet the diverse forms of precarious work which characterize the work performed by disadvantaged groups. For many, finding an employer is their first problem.

2. Changing Demographics

Since the Abella Report, there are important changes in the demographics of Canada’s labour market.¹² Between 1981 and 2006, there has been a threefold increase in the Canada’s visible minority population. People of colour now constitute 13.4 per cent of the population. Of the recent immigrants who arrived to Canada between 1990 and 2000, 73 per cent are of visible minority backgrounds.¹³ However, visible minority Canadians have lower employment rates than non-visible

¹⁰ Human Resources Development Canada, Employment Equity Act Annual Reports, http://www.hrsdc.gc.ca/eng/lp/lo/lsw/we/ee_tools/reports/annual/index-we.shtml.

¹¹ See <http://www.ohrc.on.ca/en/resources/annualreports>; and <http://www.ohrc.on.ca/en/resources/factsheets>.

¹² See Abella Report labour force participation, the occupation distribution and the earnings of the designated groups at page 52.

¹³ Greese, Gillian, "Racializing Work /Reproducing White Privilege" in *Work in Tumultuous Times* (ed) Shalla, Vivian and Clement, W (Montreal: McGill Queens Press: 2007) at page 196.

minorities at an estimated less than 10 per cent of white counterparts. By 2006, more women participate in the labour force at an all-time high of 73.5 percent.¹⁴ With the aging population, it is not surprising that an estimated one out of every seven in the population reports having a disability in 2006. For the working-age population (15 to 64 years), the most common disability is pain and discomfort, affecting 74.4%.¹⁵ Aboriginal peoples now represent 3.1% of the national workforce.

3. Changing Structures and Conditions of Work

Along with the changing demographics of the Canadian labour market has come the rise of contingent and precarious employment relationships as documented by Leah Vosko and Judy Fudge.¹⁶ These employment forms include part-time, contract, temporary and own-account self-employment and have grown from 33% in 1989 to 37% in 2001.¹⁷ Today, disadvantaged groups dominate such employment. For example, women continue to be much more likely than their male counterparts to work part-time and make up increasing numbers of own-account self-employed workers. Contingent work presents significant challenges to equality mechanisms based on a narrow understanding of a single workplace rather than across sectors or supply chains.¹⁸

4. Persistent Occupational Segregation and Lower Pay

While labour force participation rates may be high for women, a persistent occupational segregation and unemployment continues to exist for all designated groups. Employment equity with its focus on redressing such segregation is of critical importance.

Men and women continue to do different work with men dominating higher-paid production, supervisory and management positions.¹⁹ In 2004, 67% of all employed women were working in teaching, nursing and related health occupations, clerical, sales and service occupations. Just 30% of men work in the service-based occupations. There has been virtually no change in the proportion of women employed in the traditional female-dominated occupations over the past decade. Women of all racialized groups are concentrated in traditional sectors of female employment which are low paid and precarious occupations.

Nearly 60% of Aboriginal workers are highly segregated into specific occupations, including semi-

¹⁴ Statistics Canada, *Women in Canada*, 2005.

¹⁵ Statistics Canada, *Physical Activity Limitation Survey*, 2006.
<http://www.statcan.gc.ca/pub/89-628-x/89-628-x2007002-eng.htm>

¹⁶ Vosko, Leah and Cynthia Cranford. 2006. *Precarious Employment*. Montreal: McGill-Queen's University Press.

¹⁷ The employment form or status was not reviewed in detail in the Abella Report, although the report does comment on the fact that women aged 25 accounted for over 61% of female part-time employment compared to male-part-time employment that was concentrated in the 15 to 24 age category. See page 77.

¹⁸ See Fudge F and Vosko, L "Gender Paradoxes and the Rise of Contingent work: Towards a Transformative Political Economy of the Labour Market in Changing Canada: Political Economy as Transformation Clement W and Vosko L (ed) Montreal: McGill-Queen's Press, 2003

¹⁹ Ibid

skilled manual workers, skilled crafts and trades and sales and service personnel. Only 6% are employed as managers, compared to 9% of the national workforce. High unemployment continues to exist particular for Aboriginal peoples. For example, Aboriginal women have the lowest levels of employment with 41 per cent over age 15 employed. 48% of Aboriginal men are employed.

Since the 2001 Census many more workers have reported a disability, indicating an increasing willingness to self-identify and an ageing workforce. Yet again such workers are concentrated in occupational groups such as sales and service and professions and there is significant unemployment.

Occupational segregation has a direct impact on pay. Disadvantaged groups in Canada are the face of poverty. Arguably, systemic discrimination is the key contributor to such poverty.²⁰ Racial minority women earn 36% less than men and Aboriginal women earn 54% less. Women with disabilities earn significantly less than women and men without disabilities. Women outnumber men in nine of the 10 lowest-paying occupations in Canada.

The pervasive occupational segregation, unemployment and more precarious employment corresponds with a value system in which the work of advantaged groups are still considered superior economically, socially and legally. Disadvantage groups experience discrimination in all aspects of the labour market experience including the ability to get work, the conditions of work, the retention of work and retirement conditions. Such discrimination also arises from workplace practices which are explicitly contained in collective agreements or result from its application or the representational actions of unions.

5. Seeking Equity in Difficult Economic Times

Employment equity is essential for a fully sustainable economic recovery for entire economy, in general, the designated groups, their families and their communities, specifically. Employment equity measures also maximize productivity and economic viability by making full use of the skills of Ontario's diverse workforce.

When the Abella Report was released, it was a time of economic turmoil. As noted in the Commission report, Canada's economy had been faltering for some time. The country's unemployment rate, at 11.2 per cent in August 1984 was expected to hover around that mark for the balance of the decade. The Commission identified that while full employment would bring an advantage to the furtherance of its objectives, fewer jobs as a result of the recession brought keener competition. However, the 1984 Commission provided clear guidance:

"The fact that the economy is anaemic does not justify a listless response to discrimination. The members of the four designated groups represent about 60 per cent of Canada's total population. They have a right, whatever the economic conditions, to compete equally for their fair share of employment opportunities. As it is, the recession has only intensified their long penalization in the form of under training,

²⁰ Ibid, at page 197. See also Wallis, M and Kwok, Sui-ming (ed) *Daily Struggles: The deepening racialization and feminisations of poverty in Canada*. Toronto: Canadian Scholars Press Inc, 2008. Go, Avvy, "Law as a Tool to Address the increasing Racialization of Poverty in Ontario, Paper for Law Commission of Ontario's Symposium Conversations about Law Reform, May 12, 2009.

*underemployment, underpayment and outright exclusion from the labour force.*²¹

In 2009, the Canadian economy is again in turmoil and the midst of a slow recovery from a world-wide recession. Disadvantaged groups are repeatedly faced with the argument that redressing equality is too expensive. However, the costs of inaction are simply too great. The economic argument that employment equity is simply too costly is pervasive, but specious. Employers have no "discretion" to violate the Ontario Human Rights Code because they think human rights enforcement is too `costly` or `difficult` as a direct result of difficult economic times. The argument also fails to acknowledge that the cost of achieving equality is reflective of the extent of the discrimination experienced. It effectively penalizes employment equity seeking groups doubly. The groups already suffer long-term discrimination which resulted in the equity gaps. The magnitude of an enterprise's delinquency – the size of the equity gaps – is then relied on to oppose redress. For every year of inaction the cost of redress is higher, the damage inflicted is deeper and the systemic equality benefits fail to materialize.

Before reviewing Ontario's legal framework for securing employment equity obligations, Part II describes the historical and human rights jurisprudential basis for such obligations.

PART II THE DEVELOPMENT OF EMPLOYMENT EQUITY MEASURES AS HUMAN RIGHTS REMEDIES

1. Introduction

Securing workplace employment equity is a complex problem. Workers experience discrimination in many different workplace contexts and ways. As noted above, workers with multiple and intersecting disadvantages, such as women of colour, also experience greater and different disadvantage which requires special attention.²² Entrenched socio-economic and cultural factors sustain discrimination and are powerful constraints against progress. This is the reason why Justice Abella called for the entrenchment of equality promoting measures (referred to in the international human rights field as `mainstreaming`) into workplace governance through employment equity planning.

To redress these above-noted society-wide discriminatory practices and impacts, the Royal Commission called for an ongoing employment equity workplace planning process to identify whether and how such societal systemic discrimination was operating in any particular workplace so that remedial steps could be taken. Such a process includes:

- a. Starting with drawing a profile or "mapping" of the disadvantaged groups and their representation, or lack thereof and conditions of work at all levels of the workforce;
- b. Then identifying and eliminating barriers in an organization's employment

²¹ The Abella *Report*, supra, at page 6

²² *Canada (A.G.) v. Mossop* [1993] 1 S.C.R. 554, at 645-646; Ontario Human Rights Commission: "An Intersectional approach to discrimination: Addressing multiple grounds in human rights claims", Discussion paper, available at <http://www.ohrc.on.ca>; and *Kearney v. Bramalea Ltd.* (No. 2), (1998) 34 C.H.R.R. D/1 (Ont. Bd. of Inquiry).

procedures and policies which were contributing to any inequitable conditions and lack representation throughout all workplace occupations and levels.

- c. Developing positive policies and practices including reasonable accommodation to ensure the effects of systemic barriers are eliminated and equality of employment is promoted;
- d. Preparing plans which set out the actions required for steps b and c above and appropriate targets and goals to work towards equitable representation of disadvantaged group members throughout a workforce; and
- e. the monitoring, review and revision of those plans, as necessary.²³

2. Supreme Court of Canada Jurisprudence

a. Systemic Discrimination Requires Systemic Remedies

Following on the Royal Commission, the Supreme Court of Canada (SCC) over the last 25 years has issued decisions which call for increasingly wide-ranging and pro-active steps to be taken by employers, working with trade unions, to address the above-noted persistent systemic discrimination.²⁴ These decisions are all based on its finding that human rights laws such as Ontario's *Code* are quasi-constitutional laws which must be interpreted liberally to achieve their

²³ For a description of employment equity, see Human Resources and Development Canada website, <http://www.hrsdc.gc.ca/eng/lp/lo/lsw/ve/information/what.shtml>. For a history of employment equity see <http://www.hrsdc.gc.ca/eng/lp/lo/lsw/ve/information/history.shtml>.

²⁴ *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (S.C.C.), [1985] 2 S.C.R. 536; *Ontario (Human Rights Commission) v. Borough of Etobicoke*, 1982 CanLII 15 (S.C.C.), [1982] 1 S.C.R. 202; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, 1988 CanLII 7 (S.C.C.), [1988] 2 S.C.R. 279; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (S.C.C.), [1990] 2 S.C.R. 489; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, 1989 CanLII 18 (S.C.C.), [1989] 2 S.C.R. 1297; *Canada (Human Rights Commission) v. Toronto-Dominion Bank*, 1998 CanLII 8112 (F.C.A.), [1998] 4 F.C. 205; *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (S.C.C.), [1990] 3 S.C.R. 892; *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (S.C.C.), [1994] 2 S.C.R. 525; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.), [1999] 1 S.C.R. 497; *Canada (Attorney General) v. Levac*, reflex, [1992] 3 F.C. 463; *Grismer v. British Columbia (Attorney General)* (1994), 25 C.H.R.R. D/296; *Thwaites v. Canada (Armed Forces)* (1993), 19 C.H.R.R. D/259; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, ("Action Travail des Femmes") 1987 CanLII 109 (S.C.C.), ("Action Travail") [1987] 1 S.C.R. 1114; *Insurance Corp. of British Columbia v. Heerspink*, 1982 CanLII 27 (S.C.C.), [1982] 2 S.C.R. 145; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, 1992 CanLII 67 (S.C.C.), [1992] 2 S.C.R. 321; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (S.C.C.), [1987] 2 S.C.R. 84; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (S.C.C.), [1989] 1 S.C.R. 143; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (S.C.C.), [1997] 3 S.C.R. 624; *Bhinder v. Canadian National Railway Co.*, 1985 CanLII 19 (S.C.C.), [1985] 2 S.C.R. 561; *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (S.C.C.), [1992] 2 S.C.R. 970; *R. v. Cranston*, [1997] C.H.R.D. No. 1 (QL); *Perera v. Canada* (1998), 158 D.L.R. (4th) 341; *R. v. Kapp*, 2008 SCC 41; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.

fundamental objectives.²⁵ Initial SCC jurisprudence such as the 1987 decision in *Robichaud v. Canada (Treasury Board)* called for proactive employer measures. In *Robichaud*, the Court found that the Department of National Defence had a positive obligation to establish and to maintain a workplace free of sexual harassment.

Starting with the nature of discrimination itself, these cases recognized that discrimination is systemic and calls for systemic remedies. Earlier formal notions of equality which regarded discrimination as an exceptional and individual circumstance requiring intention, have given way to understanding that discrimination is often structural and embedded in economic and work practices and systems which are in turn rooted in prevalent cultural and social practices and prejudices. This has led to the concept of indirect discrimination where barriers which have a disproportionately negative effect on a group are just as discriminatory as those which directly give preference or exclude because of a person's group status.²⁶ Remedying and preventing discrimination requires a recognition that existing social and legal arrangements have benefitted dominant groups and disadvantaged others due to prejudice and stereotypes. This leads to the need for proactive employment equity measures which seek to restore the balance and transform institutional practices to accommodate disadvantaged groups' needs.²⁷

b. Employment Equity Decisions

Two SCC decisions specifically addressed the need for employment equity or affirmative action measures in order to redress systemic workplace discrimination. In the 1987 decision, *Action Travail des Femmes v. Canadian National Railway* (1987), 40 D.L.R. (4th) 193 (S.C.C.) the SCC unanimously ruled that the Canadian Human Rights Tribunal ("CHRT") could order an employment equity program under the *CHRA* if it was necessary to remedy workplace discriminatory practices. The Tribunal's Temporary Measures order required CN to hire one woman in every four new hires into certain jobs where the evidence showed that they had been improperly excluded for many years by systemic discriminatory employment practices.

An employment equity programme is thus designed to work in three ways: First, by countering the cumulative effects of systemic discrimination, such a programme renders future discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.

Secondly, by placing members of the group that had previously been excluded into the heart of the workplace and by allowing them to prove ability on the job, the employment equity scheme addresses the attitudinal problem of stereotyping. For example, if women are seen to be doing the job of "brakeman" or heavy cleaner or signaler at Canadian National, it is no longer possible to see women as capable of fulfilling only certain

²⁵ O'Malley, *supra*, at p. 547, per McIntyre J.; *Action Travail*, *supra*, at pp. 1134-36, per Dickson C.J.; *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (S.C.C.), [1987] 2 S.C.R. 84, at pp. 89-90, per La Forest J.

²⁶ *The Abella Report*, *supra* at page 2.

²⁷ See *CNR v. Canada (Human Rights Commission)* (1987) 1 S.C.R. 1114 ; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.

traditional occupational roles. It will become more and more difficult to ascribe characteristics to an individual by reference to the stereotypical characteristics ascribed to all women.

Thirdly, an employment equity programme helps to create what has been termed a "critical mass" of the previously excluded group in the workplace. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is not longer the case that one or two women, for example will be seen to "represent" all women... Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring (since once sufficient numbers of minorities\women are hired, the normal processes of the workplace will lead to those women referring their friends and relatives for employment.)

If increasing numbers of women apply for non-traditional jobs, the desire to work in blue collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications more seriously. In other words, once a "critical mass" of the previously excluded group has been created in the workforce, there is a significant chance for the continuing self-correction of the system. (1997) 28 C.H.R.R. D/179, p. D4230-31

In attempting to combat systemic discrimination, it is essential to look to past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. p. D4231

In the 1997 SCC decision in *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* (1997), 28 C.H.R.R. D/179, the CHRT followed *Action Travail* to impose an extensive remedial employment equity Program on Health Canada. Their order included permanent measures, such as management training in equity issues and bias-free interviewing techniques, as well as temporary or special measures that included five years of accelerated targets for the promotion of visible minorities into the senior positions from which they had been blocked by discriminatory practices.

The 1999 *British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union ("BCGEU")*²⁸ decision is a watershed one. It more explicitly provided the foundational basis for requiring employers, working with trade unions to engage in equality planning. The Court made it clear that employers must act to prevent and eradicate discrimination. They are not to wait for complaints, proven discrimination cases or requests for accommodation before taking action. They must ensure that workplace standards and rules are designed for equality from the outset.

"Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. **They must build conceptions of equality into workplace standards.** By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that **the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible.** ... The standard itself is required to provide for individual

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British Columbia (Public Service Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R. 3.

accommodation, if reasonably possible.” [emphasis in bold added]²⁹

In striking down an employee fitness test on the basis that it discriminated against women and was not a *bona fide* occupational requirement, the Court cited with approval the writing of Gwen Brodsky and Shelagh Day which stated the previous notion of accommodation:

*does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness.*³⁰

By clearly focussing on workplace standards and the need to ensure that these standards themselves are inclusive, the *BCGEU* decision emphasizes the importance of addressing discrimination at the systemic level. The decision expands the concept of accommodation by finding that a workplace standard is itself “discriminatory”, or not “neutral”, where it reflects only the needs, abilities and requirements of one group of workers -- most often male, white and able-bodied workers.

The above-noted SCC decisions calling for wide-ranging proactive actions by employers can only be satisfied by carrying out an employment equity planning process such as described by the Royal Commission. To eradicate and prevent discrimination and plan for equality, it is necessary to know what disadvantaged groups work in or are excluded from the workplace and in what positions and under what conditions they work. Once this picture is drawn, action must be taken. Disadvantaged group members are entitled to a workplace where employment equity planning and measures are being undertaken.

c. Charter Decisions

The *Charter* has also been interpreted by the Courts to require government employers to establish employment equity measures to redress systemic discrimination. The 1998 case of *Perera v. Canada* (1998), 158 D.L.R. (4th) 341, involved a civil claim by visible minority applicants against their former employer, the Canadian International Development Agency. They claimed a section 15(1) *Charter* violation as a result of CIDA engaging in systemic discrimination against them, including biased promotion procedures and work assignments. The Federal Court of Appeal decided that courts have jurisdiction pursuant to section 24 of the *Charter* to “provide effective remedies for breaches of a citizen’s constitutional rights to equality” and where there is “systemic discrimination” and warranting circumstances, it is appropriate to order employment equity plan measures (pp. 350-51).

The 2008 SCC decision in *R. v. Kapp*, 2008 SCC 41, found that the purpose of the equal treatment provisions in section 15(1) of the *Charter* are to prevent governments from making distinctions which perpetuate or impose disadvantage (para. 25) and the purpose of section 15(2) permitting

²⁹ Ibid at para. 68

³⁰ Ibid at para. 42

affirmative action is to ameliorate the conditions of disadvantaged groups, “enabling governments to pro-actively combat discrimination.” The Court found that these two sections are confirmatory of each other and “work together.” (para. 37) and that affirmative action measures are not “justified discrimination” or discrimination in any sense. The Court noted that the formal “like treatment” model may in fact produce inequality. “There must be accorded, as nearly as possible, an equality of benefit and protection and no more of the restrictions, penalties, or burdens imposed upon one than another. (p. 23) The Court cited its ruling in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171 that:

“The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”

3. Human Rights Tribunal Orders

Tribunals interpreting human rights laws have also made many orders requiring positive accommodation and equality promoting measures to make workplaces inclusive and to eradicate the negative discriminatory impacts which workers experience. In considering the type of systemic orders to make, the following factors have been identified to assess the deficiencies in the way an enterprise is handling discrimination complaints and to therefore target the necessary remedial measures: 1) the promptness of the institutional response to the complaint; 2) the seriousness with which the complaint was treated; 3) the procedures in place at the time to deal with discrimination and harassment; 4) the resources made available to deal with the complaint; 5) whether the institution took the complaint seriously, then provided a healthy work environment for the complainant; and 6) the degree to which action taken was communicated by the complainant.³¹

Canadian tribunals have ordered a wide range of systemic remedies including: 1) developing and implementing a comprehensive workplace harassment and discrimination policy, which includes a definition of harassing behaviours and an internal complaints process;³² 2) reviewing internal workplace standards or restrictions that adversely impact certain groups and bringing them into human rights compliance;³³ 3) implementing “special programmes” or plans to remedy past discrimination as well as prevent future discrimination;³⁴ 4) changing hiring and/or recruitment

³¹ *Wall v. Embro* (1995) 27 C.H.R.R. D/44 (Ont. Bd. of Inquiry).

³² *Curling v. Torimiro* (2000), 38 C.H.R.R. D/216, 4 C.C.E.L. (3d) 202 (Ont. Bd. Inq.); *Drummond v. Tempo Paint* (1999), 33 C.H.R.R. D/184 (Ont. Bd. of Inquiry) at D/190; *Moffatt v. Kinark Child and Family Services* (1999), 33 C.H.R.R. D/184 (Ont. Bd. of Inquiry) at D/360; *Miller v. Sam's Pizza House* [1995] NSHRBID No. 2, *Tahmourpour v RCMP* 2008 CHRT 10 at 253 (although recently overturned by the Federal Court on Oct. 6, 2009).

³³ *BCGEU*, op.cit.; *Morgoch v. Ottawa (City)* (No. 2) (1990), 11 C.H.R.R. D/80 (Ont. Bd. of Inquiry) at D/93; *A. v. Quality Inn* (1993), 20 C.H.R.R. D/230 (Ont. Bd. of Inquiry) - which included revisions to the harassment policy to clarify when discipline will result and what the discipline will be when the policy is not adhered to; *Gauthier v. Canada (Canadian Armed Forces)* [1989] C.H.R.D. No. 3 (CHRT); *Gohm v. Domtar* (1992), 89 D.L.R. (4th) 305 (Ont. Div. Ct.); *Canada (A.G.) v. Green* [2000] F.C.J. No. 778 (F.C.T.D.)

³⁴ *Canadian National Railway Co. v. Canada (Human Rights Comm.) and Action travail des femmes* (1987), 8 C.H.R.R. D/4210 (S.C.C.) [Eng./Fr. 24 pp.] S.C.C. Upholds Affirmative Action -- Order of a Tribunal which requires that a company hire one woman in every four new hires into unskilled blue-collar jobs.; *Canada (A.G.) v. Green*, op.cit., at 27; *Pitawanakwat v. Canada (Dept. of Secretary of State)* (1994), 21 C.H.R.R.

practices in order to achieve proportional representation in the organization;³⁵ 5) creating a workplace race relations committee (which may include external members) to set objectives and measures to improve workplace race relations;³⁶ 6) establishing an internal review committee to monitor the implementation of human rights orders or plans including periodic reports to senior management;³⁷ 7) appointing a person responsible with full powers to ensure implementation orders are carried out;³⁸ 8) requiring managers to attend a training programme to identify and address instances of harassment and inappropriate behaviour;³⁹ 9) training management to mentor a cross-culturally diverse workforce;⁴⁰ 10) requiring management to circulate to all employees information on available resources, complaint procedures and remedies for those with harassment concerns;⁴¹ 11) implementing annual performance assessments of managers which include evaluation of their compliance with human rights measures;⁴² 11) requiring attendance of all employees at human rights education programmes;⁴³ 12) requiring the employer to state in all staffing notices and job postings and advertisements that the enterprise is an “Equal Opportunity Employer”;⁴⁴ and 13) implementing individual career plans and training programs for visible minorities.⁵⁴

The above comprehensive legal orders directed at changing the workplace culture and practices with their short and long term measures recognize that change will take place over time and will require the pro-active and ongoing participation of all workplace parties.

D/355; *Gauthier v. Canada (Canadian Armed Forces)*, op.cit.

³⁵ *Action Travail des Femmes*, op.cit.; *Pitawanakwat v. Canada (Department of Secretary of State)* op.cit.; *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

³⁶ *Dhillon v. F.W. Woolworth Ltd* , op.cit.; *Ahluwalia v. Metropolitan Toronto (Municipality) Commissioners of Police* (1983) 4 C.H.R.R. D/1757 (Ont. Bd. of Inquiry).

³⁷ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)* [1997] C.H.R.D. No. 3 (CHRT); and *McKinnon and Ontario Human Rights Commission v. Ontario (Ministry of Correctional Services) et al.*, op.cit.

³⁸ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

³⁹ *Curling v. Torimiro* (2000), 38 C.H.R.R. D/216, 4 C.C.E.L. (3d) 202 (Ont. Bd. Inq.) at p. 17; and *Chiswell v. Valdi Foods 1987 Inc.* (1995), 95 CLLC 230-004 (Ont. Bd. of Inq.)

⁴⁰ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

⁴¹ *Pitawanakwat v. Canada (Dept. of Secretary of State)*, op.cit.

⁴² *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

⁴³ *Canada (A.G.) v. Green*, op.cit.at 27;*Pitawanakwat v. Canada (Dept. of Secretary of State)*, op.cit.

⁴⁴ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

⁴⁵ *National Capital Alliance on Race Relations v. Canada (Health and Welfare)*, op.cit.

4. Expansion of Groups Covered By Employment Equity Obligations

While the federal *Employment Equity Act* limits the designated protected groups to women, persons with disabilities, Aboriginal peoples, and members of visible minorities, human rights laws cover more groups and therefore this expands the scope of employment equity protection. While any employment equity process will likely disclose very significant concerns with respect to the above-noted four groups, other groups such as those who experience systemic discrimination because of their age, ethnicity, sexual orientation or creed also need employment equity protection. As well, many groups are simultaneously members of various different groups and the intersectional discrimination they experience can be addressed under the general human rights obligations.

PART III ONTARIO EQUITY LAWS AND HUMAN RIGHTS COMMISSION POLICIES

Respect for human rights, human dignity, and equality, is a core value in Canadian society, and a cornerstone of public policy. For this reason, human rights legislation has been recognized by the courts as having a unique importance, and indeed has been accorded quasi-constitutional status. Every Ontarian has an interest in the creation of a society in which human rights are respected, and all have the opportunity to equally participate and contribute.

Moreover, respect for human rights is the law. Under the Code, employers, landlords and service providers are required to ensure that they are providing inclusive and non-discriminatory environments. Harassment and discrimination are a violation of the law, and organizations that fail to take adequate steps to prevent and address harassment and discrimination may be held liable.

Ontario Human Rights Commission, Guidelines on Developing Human Rights Policies and Procedures, 19 June 1996, Revised: January 30, 2008

1. Ontario Equity Laws and Obligations

In Ontario, employment equity obligations flow from a number of different specific laws: these include the *Human Rights Code*, (“Code”) the *Labour Relations Act* (`LRA`), the *Pay Equity Act* (`PEA`), anti-discrimination collective agreement provisions and the *Charter* for government workers. It is this intersecting combination of laws which sustains this paper’s argument that Ontario employers and unions are obliged to engage in employment equity planning and implementation.

a. Human Rights Code

Ontario’s *Human Rights Code*, similar to such laws in other provinces, guarantees to every Ontarian the right to equal treatment with respect to employment without discrimination or harassment because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. s.5(1) and (2). Every Ontarian also has the right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination. s.6. The *Code* also exempts from claims of reverse discrimination, special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the

infringement of the above-noted rights. s. 14 (1). The jurisprudence interpreting such statutory provisions to include employment equity obligations is set out in Part II above.

b. *Labour Relations Act*

Ontario's *Labour Relations Act* includes important protections which can be used by trade unions and disadvantaged groups in the course of securing employment equity. As a result of section 56 of the *LRA*, disadvantaged group members are bound by the provisions of collective agreements negotiated by employers and trade unions. Critically, section 54 provides that collective agreements "must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms."⁴⁶ The duty of the employer and bargaining agent to "bargain in good faith and make every reasonable effort to make a collective agreement", in section 17, has been interpreted to mean that such bargaining must not include unlawful or discriminatory proposals. Just as a proposal by an employer to pay less than the minimum wage required by the *Employment Standards Act* would be an illegal demand, so is a proposal for a collective agreement provision which would violate the *Code*.⁴⁷ Accordingly, employers, as well as unions, will violate the *LRA* if they enter into, renew or apply collective agreements in a way which causes discrimination. This includes where a provision has a disparate impact on a disadvantaged group. In light of the role of unions as an exclusive bargaining agent, they are required by section 74 not to discriminate in their representational or referral duties

Pursuant to section 96(4), the Ontario Labour Relations Board (OLRB) has a wide-ranging power to redress any violation of these provisions "despite the provisions of any collective agreement" and can order the employer and the trade union to cease doing or "rectify" the act complained of which would include amending the collective agreement or directing the parties to apply the collective agreement in a non-discriminatory manner.

c. *Pay Equity Act*

In Ontario, the *Pay Equity Act* specifically acknowledges that there is systemic discrimination in the compensation of female job classes - similar to the systemic discrimination recognition in the federal *Employment Equity Act*. The PEA sets out specific employer obligations to establish and maintain pay equity for female job classes with comparable male job classes. As well, section 7(2) obliges both the employer and the union to not bargain for or agree to compensation practices that would fail to achieve or maintain pay equity (See *St. Joseph's Villa* (19 August 1993) 0345-92 (PEHT) and *Ottawa Board of Education* (1995), 6 P.E.R. 45). Unions are prohibited from agreeing to a collective agreement which has gender-based pay discrimination. (See *York Region Board of Education* (CUPE) (1995), 6 P.E.R. 3). Employers and unions after agreeing to their original pay equity plan must monitor the workplace for any changes which would affect the validity of the original pay equity plan. In addition, there is *Code* jurisprudence which finds that the existence of the PEA does not remove the jurisdiction of the *Code* to address the issue of discriminatory pay.

⁴⁶ *Labour Relations Act*, 1995 S.O., c. 1, Schedule A.

⁴⁷ See, for example, *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)* [2003] 2 S.C.R. 157 where the Court stated that, at para 52, granting arbitrators the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes has the additional advantage of bolstering human rights protection.

d. Anti-Discrimination Collective Agreement Provisions

Most Ontario collective agreements have a provision which states that there will be no discrimination on the basis of prohibited grounds under the *Code*. Some even have explicit employment equity provisions. As outlined above, in interpreting the collective agreement, arbitrators have the power under the *LRA* to interpret and apply relevant legislation like the *Code*. Accordingly, arbitrators could order employment equity measures under these provisions.

2. Ontario Human Rights Commission Policies

The Ontario Human Rights Commission has issued 21 Policies most of which are employment-related and cover the various *Code* grounds. The employment-related policies explain the need for employers working with trade unions, if any, to engage in pro-active planning and to take pro-active measures to secure a discrimination-free workplace. These Policies, as a result of the 2006 Bill 107 reform, now have a formal status under sections 30 and 45.5 as providing guidance to the Human Rights Tribunal of Ontario (“HRTTO”) for the *Code*’s application.⁴⁸ Given the *Code*’s provisions are relevant now only to *Code* applications but also to the interpretation of the *LRA* and collective agreement provisions, these policies are a major source of support for this paper’s argument for pro-active employment equity obligations.

a. Guidelines on Developing Human Rights Policies and Procedures

The Commission’s *Guidelines on Developing Human Rights Policies and Procedures*, updated in January, 2008, provide specific advice about what employers and trade unions must do in order to address their pro-active human rights obligations and secure a discrimination-free environment. The following excerpts clearly show the Commission’s call for planning, remedial measures and monitoring by employers and unions and the involvement of the union as a “key partner”.

Under the *Code*, employers, service providers and housing providers have the ultimate responsibility for ensuring a healthy and inclusive environment, and preventing and addressing discrimination and harassment. They must ensure that their organizations are free from discriminatory or harassing behaviour.

An organization can be held responsible for discrimination where the discrimination is carried out indirectly. For example, an employer that authorizes an employment agency to discriminate on its behalf can be found liable for discrimination.

Organizations have an obligation to be aware of whether their policies, practices and programs are having an adverse impact or resulting in systemic discrimination based on a *Code* ground. Whether or not a formal complaint has been made, organizations must acknowledge and address potential human rights issues.

⁴⁸ Cornish, M, Faraday, F. And Pickel, J. *Enforcing Human Rights in Ontario*. Aurora : Canada Law Books 2009. See also *Human Rights at Work*, 2008, Ontario Human Rights Commission, <http://www.ohrc.on.ca/en/resources/Policies/atwork?page=atwork-Contents.html>. It is essential that workplace parties look to these policies for guidance as they may be found liable under the *Code* if they do not.

Organizations that fail to take steps to prevent or address discrimination or harassment may experience serious repercussions. Human rights decisions are full of findings of liability and assessments of damages that are based on, or aggravated by, an organization's failure to appropriately address discrimination and harassment. An important factor in the assessment of liability or damages is the presence or absence of appropriate policies and procedures for preventing and responding to discrimination and harassment.

An organization may respond to complaints about individual instances of discrimination or harassment, but it may still be found to have failed to respond appropriately if the underlying problem is not resolved.[4] There may be a poisoned environment, or an organizational culture that excludes or marginalizes persons based on a Code ground. In these cases, the organization should take further steps, such as training and education, or barrier review and removal, in order to address the problem.

Unions, professional organizations and vocational associations are responsible for ensuring that they are not engaging in harassing or discriminatory behaviour against their members or prospective members. They are also responsible for ensuring that they are not causing or contributing to discriminatory actions in the workplace. A union may be held jointly liable with an employer where it has contributed towards discriminatory workplace policies or actions – for example, by negotiating discriminatory terms in a collective agreement, or blocking an appropriate accommodation, or failing to take steps to address a harassing or poisoned workplace environment.

Under section 45 of the Code, a corporation, trade union or occupational association, unincorporated association, or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as vicarious liability. Simply put, an organization is responsible for discrimination that occurs through the acts of its employees or agents, whether or not it had any knowledge of, participation in, or control over these actions.

In a unionized workplace, the union should be a key partner in the development and implementation of any human rights strategies.

These *Guidelines* further state:

“A complete strategy to prevent and address human rights issues should include the following elements:

- a. A barrier prevention, review and removal plan;*
- b. Anti-harassment and anti-discrimination policies;*
- c. An internal complaints procedure;*
- d. An accommodation policy and procedure ;*
- e. An education and training program.”*

b. Policy and Guidelines on Disability and the Duty to Accommodate

The Commission *Policy and Guidelines on Disability and the Duty to Accommodate* is a good example of the way that employment equity planning and measures are central to the Commission's guidelines for workplace parties meeting their responsibilities under the *Code*.

“organizations are responsible for dealing effectively, quickly and fairly with situations involving harassment or discrimination” and “developing anti-discrimination policies and procedures to resolve complaints as part of a broad program to build a harassment free and discrimination-free environment”. Para. 5.1

Such actions are considered to be part of:

“any complete strategy to resolve human rights issues that arise in the workplace - anti-harassment and discrimination policy; disability accommodation policy; a complaint resolution procedure and ongoing education programs`.... and ...should be developed in co-operation with the union or other workplace or organizational partners.” para. 5.1

The Policy calls for developing disability accommodation policies and procedures, accessibility review plans, identifying potential barriers and implementing the necessary procedures to make facilities, procedures and services accessible. “Conducting the accessibility review will show to what extent an organization is accessible to persons with disabilities and what needs to be done.” Such planning and steps are said to help an organization meet their legal human rights duty to accommodate those protected by the *Code*. Para.5, 5.2

PART IV TAKING ACTION TO ACHIEVE AND MAINTAIN EMPLOYMENT EQUITY

Parts I–III above outlined the history and the general legal foundation requiring a pro-active employment equity process in Ontario. This Part describes that process in greater detail and also highlights a number of key issues which will need to be addressed in order to see any progress in enforcing such obligations.

1. The Employment Equity Planning Process

While the specifics of any employment equity planning processes will vary depending on the size and nature of the workplace and the scope of the issues which need to be addressed, it is still useful to review the process contained in sections 1-17 of the federal *Employment Equity Act*.⁴⁹ In summary, a full employment equity planning process means a) the employer and the union are required to identify and eliminate barriers which operate against protected groups arising from employers' policies, procedures and practices; b) to institute positive policies and practices to accelerate progress towards a representative workforce; and c) to making reasonable

⁴⁹ For an overview of these requirements, see the CHSMC Overview of Federal Employment Equity Act Requirements (available at www.cavalluzzo.com); the Canadian Human Rights Commission website on Employment Equity and the Trade Union Guide to the Employment Equity Act, by Mary Cornish and Amanda Pask (available at www.cavalluzzo.com).

accommodations of differences to ensure that persons in the designated groups achieve a level of representation in each occupational group in the employer's workforce that reflects their availability in the labour force. Depending on the nature, size and structure of the workplace, this usually involves the following steps, (although effective action in any of these areas will also constitute employment equity actions):

- a. conduct a self-identification survey of the workforce to collect information on the disadvantaged group members in the workforce;
- b. conduct a workforce analysis to ascertain the degree of under-representation of those groups in the various workplace occupational groups
- c. carry out an employment systems review of all employer policies, procedures and practices, including collective agreement provisions and their application;
- d. identify barriers and positive policies and practices which would make reasonable accommodation and promote equitable representation in the workplace;
- e. prepare and implement an employment equity plan which would eliminate the discriminatory barriers, institute positive policies and practices with respect to hiring, training, promotion and retention of members of designated groups to make reasonable progress towards a representative workforce.
- f. monitor the plan's implementation and revise as necessary.

Throughout the above-noted steps, it is important to provide information to employees to explain the employment equity process and for the employer to establish and maintain appropriate employment equity records which can be used to measure progress.

What the above-noted process accomplishes is that it determines based on a concrete analysis of workplace conditions whether and in what manner the societal systemic discrimination is operating in a workplace. This is similar to the process used under the *Pay Equity Act*. Where discriminatory barriers are identified, they would be required to be removed immediately by the *Code* or the *LRA*, if in the collective agreement. The timing and extent of occupational targets and goals would depend on the nature and extent of the discrimination which was identified in the employment equity process. However, like the federal *Act*, there needs to be reasonable progress made to a representative workforce.

2. Responsibility of Employer to Work with Unions and Provide Disclosure

In light of the above obligations and jurisprudence, unions, as the exclusive bargaining agent for disadvantaged group employees and as the negotiator for collective agreements governing their workplace conditions, have both the right to participate in and negotiate with the employer employment equity provisions. This includes assessing whether collective agreement terms have a discriminatory impact; whether employer policies or practices are discriminatory, whether positive steps need to be taken to alter the agreement, its application or employer standards, rules or practices which fall outside of the collective agreement.

While there are sound legal arguments that the employer should engage in joint decision-making

with the union concerning employment equity measures, the best way to ensure a clearly enforceable right is to include an express requirement in the collective agreement that the parties develop an employment equity plan which is then incorporated into the collective agreement.

Flowing from the obligation to work with the bargaining agent, unions can argue that they need access to all the information that is necessary for them to participate properly in consultation and collaboration and to participate in an on-going way. During the collective bargaining process, there is jurisprudence which supports the disclosure to the union of information necessary to allow them to participate responsibly in the process.

3. Union Responsibility To Work Towards Employment Equity

Given unions' exclusive responsibility to dealing with the employer concerning the terms and conditions of disadvantaged group employees and its own representational human rights responsibilities, unions have responsibility to engage in employment equity planning.

As noted above, unions, as the exclusive bargaining agent for employees, are required by the *Code* and the *LRA* to carry out their representational responsibilities in a manner which does not discriminate. The 1992 *Renaud* decision found that a union, as the exclusive bargaining agent for employees may become a party to discrimination and liable to pay damages in two ways: 1) where a union has signed a collective agreement that is discriminatory;⁵⁰ or 2) where a union blocks reasonable accommodation by the employer. As well, the Court in *BCGEU* specifically stated that the union is "obliged to assist in the search for possible accommodation."⁵¹

It is also clear that unions which take action to protect their members from discrimination are less likely to be found jointly liable for discriminatory collective agreement provisions. See *Thomson v. Fleetwood Ambulance Service 96 CLLC pra. 230-007* (Ont. Bd. Inq) where union was not held liable for discriminatory collective agreement provisions where the union had tried to remove the provision and had filed a grievance. See also *University of Ottawa and APUO 91999085 L.A.C. (4th) 214* (Ont. Arb. Bd. Adams) where the union was found not to be equivalent of co-conspirator. While the top up provision in the collective agreement was only for parental leave for adoptive and not birth parents, the union was not found liable as it had originally proposed a universal top up and had filed grievance over the issue.

4. Employment Equity, Accommodation and Collective Bargaining

It is important that the process of carrying out employment equity responsibilities is kept distinct from but related to the regular collective bargaining process. Ensuring enforcement of basic human rights standards is quite a different process from the give and take and compromising on issues which takes place in collective bargaining where the union is responsible for balancing the interests of its membership as a whole. The requirement to have a non-discriminatory collective agreement is a minimum standard like the minimum wage. It is not negotiable.

It is important to identify what issues and measures are employment equity actions and therefore

⁵⁰ *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (S.C.C.), [1992] 2 S.C.R. 970.

⁵¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3. at para. 65.

human rights remedies and lawfully required actions. The line is also not always clear and employers will likely argue unions are trying to label as employment equity measures, ordinary collective bargaining proposals which are restricted to the give and take of renewal bargaining sessions. Unions will want to argue that the failure to agree to the measure could lead to the union taking action in mid-collective agreement term to obtain the measure as a remedial order.

5. Enforcing Employment Equity Obligations

Given the various equity laws, there are a number of different ways to enforce employment equity planning obligations. The examples set out below relate to a unionized context.

If a union is of the view that a collective agreement provision does discriminate on its face or in its disparate adverse impact on a disadvantaged group and the employer refuses to change it, then the union could file an unfair labour practice complaint against the employer and request as relief that the Board order the rectification of the collective agreement provision. Unions can also bring a bargaining in bad faith complaint if an employer proposes or fails to take off the table a collective agreement provision which is discriminatory. As a corollary, the duty to bargain in good faith could be interpreted to include a duty not to resist union proposals which seek to implement human rights. For example, a union may put forward a bargaining proposal to remove or amend a collective agreement provision on the grounds that it is discriminatory and therefore illegal. If the employer will not agree to the proposal, or will agree to it only in exchange for something else, the union should consider bringing a bad faith bargaining complaint. Unions should not have to compromise on other issues in order to obtain agreement to proposals which seek to bring the collective agreement into compliance with *LRA* and *Code* obligations.

Through the process of a bad faith bargaining complaint, the labour board would have to determine whether or not the proposal at issue is one that is required by law or whether it is one of a number of possible legal alternatives. If a union's proposal were the only legal alternative, an employer's resistance to it should constitute bad faith bargaining. If the union proposal is not the only legal alternative, the employer would likely be able to resist it in favour of another method of responding to the collective agreement discrimination.

An application can also be filed under the *Code* with the HRTO under the new Bill 107 system. Employers may argue such application should be dealt with as a grievance under anti-discrimination provisions of the collective agreement. The HRTO may decide to initially defer to that process.⁵² Where a rectification of the collective agreement is required, a Tribunal application or Labour Board complaint may be preferable.

6. Role of the Ontario Human Rights Commission

As a result of the 2006 reforms to the *Code*, the Ontario Human Rights Commission has wide powers to promote a sustainable human rights culture in Ontario. In the employment context, that means employment equity. The *Code* allows the Commission to deploy a variety of human rights tools including policy development, investigation, engagement with community groups and institutions as well as litigation before the Human Rights Tribunal of Ontario. Given these diverse tools, the Commission can play a vital role in proactively enforcing employment equity obligations and eradicating systemic discrimination in employment opportunities. The Commission has

⁵² See Cornish, Faraday & Pickel, *Enforcing Human Rights in Ontario*, supra, April, 2009.

emphasized that it will focus on three key areas of work including connecting with communities in partnership and education; focussing on systems and sectors and, finally with monitoring, inquiring and intervention.

The Commission's new broad power to conduct inquiries is also critical for the enforcement of employment equity. Where community organizations or unions identify at the Tribunal employers who are failing to fulfill their employment equity functions, the Tribunal, pursuant to section 41, could appoint the Commission to inquire into the matter. The Commission may use this power in combination with the Commission power to make applications to the Tribunal or to intervene on specific cases. Indeed, the Commission's work on transit accessibility, its work with Asian Anglers and the investigation into the alleged systemic discrimination of the safe schools provisions of the Ontario *Education Act* are a few examples of how the Commission has relied upon its comprehensive enforcement tools.

These powers coupled with the Commission's explicitly power to make recommendations designed to prevent and eliminate discriminatory practices and to report directly to the public on the state of human rights provide key enforcement mechanisms to advance employment equity in Ontario workplaces.⁵³

CONCLUSION

Despite the 1995 repeal of Ontario's *Employment Equity Act*, this paper has shown that employers working with unions continue to have the duty in Ontario to pro-actively implement employment equity processes. Achieving and maintaining employment equity can be secured through effective human rights enforcement by employers and unions. In the current recession, employment equity rights and obligations are an important tool to further the equality and workplace interests of all equality seeking workers. Yet most employers are ignoring this obligation.

The Abella Report challenged the world in 1984 by stating that "law in a liberal democracy is the collective expression of the public will. Few matters deserve the attention of law more than the right of every individual to have access to the opportunity of demonstrating full potential."⁵⁴ Employment equity is the human rights remedy society has developed to carry out this democratic obligation. Twenty-five years later, the current human rights legal framework in Ontario sets out the obligation and the requirement to pro-actively achieve and maintain employment equity. Enforcing that framework is currently the most effective way to realize the Abella Report's vision for a more equitable and just society.

⁵³ For an in-depth discussion of the new powers of the Ontario Human Rights Commission, see Cornish, Faraday, Pickel *Enforcing Human Rights in Ontario* at page 65.

⁵⁴ The Abella Report, *supra*, at page 254.

Annex A – Employment Equity International Obligations

The following employment equity obligations flow from international human rights instruments.

Basic Principles and Obligations

The principle of employment equity must be guaranteed, requiring equality of opportunity and treatment in employment and occupation for all women, including those who are disadvantaged on the basis of race, colour, indigenous status, religion, disability, political opinion, national extraction or social origin. *International Covenant of Economic Social and Cultural Rights, (“ICESCR”), Articles 2, 7; International Covenant of Civil and Political Rights, (“ICCPR”), Article 26; Convention on the Elimination of Discrimination Against Women, (“CEDAW”), Article 11(1)(b); International Convention on the Elimination of all Forms of Racial Discrimination (CERD), Articles 4, 5(e)(i); Universal Declaration of Human Rights, Articles 2, 7, 23; ILO Discrimination (Employment and Occupation) Convention (No. 111) (ILO Convention No.111), Articles 1, 2, 3(b); ILO Employment Policy Convention (No. 122) (ILO Convention No. 122), Article 2(c); Durban Programme of Action on Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban Programme), Articles 48, 66; Beijing +5 Resolution, Paras. 74(b), 82(a), (e); Declaration on the Rights of Disabled Persons, Articles 6, 7; Declaration on the Rights of Mentally Retarded Persons, Articles 2,3; Declaration on Race and Racial Prejudice, Article 9; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Rule 8; World Programme of Action Concerning Disabled Persons, Paras. 116-118; Convention on the Rights of Persons with Disabilities. (CRPWD)*

The right to work must be guaranteed and protected from discrimination. *ICESCR, Article 6; CERD, Article 5(e)(i); CEDAW, Article 11(1)(a); CRPWD, Art.27*

Governments must enact employment equity legislation to ensure the right is guaranteed. *CEDAW, Articles 2(b), 2(f); ILO Convention No. 111, Article 3(b); ILO Maternity Protection Convention (Revised) (No. 183) (ILO Convention No. 183), Article 12, CRPWD, Art.27*

Employment equity is a fundamental labour standard. *ILO Declaration on Fundamental Principles and Rights at Work, Preamble, Article 1(b); Beijing Platform, Para. 41; CRPWD, Art.27*

Achieving employment equity is a required action for achieving the full implementation of human rights. *Beijing Declaration, Paras. 9, 21; CERD, Article 2; ILO Convention No. 111, Preamble; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Preamble, Rules 7(1), 15(2)*

In preventing employment discrimination, the multiple and intersecting forms of discrimination experienced by individuals must be taken into account. *Beijing Platform, Para. 178(f), (j), (p); Beijing +5 Resolution, Para. 83(d); Durban Programme, Articles 49, 51, 104(c); Draft Declaration on the Rights of Indigenous Peoples, Article 18*

Governments must signal that they have made a strong commitment to achieving employment equity, particularly through legislation, that they have dedicated themselves unreservedly to achieving employment equity, and that they have mobilized adequate resources. *ICESCR, Article 2(1); Beijing Platform, Para. 5*

Scope of Employment Equity Obligation

Employment equity must be proactively achieved in both the public sector and the private sector. *CEDAW*, Article 2(d), (e); *Beijing Platform*, Paras. 165(b), (o), 178(b), (h); *Beijing +5 Resolution*, Para. 82(m); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rules 5, 8; *Durban Programme*, Article 215

Employment equity must be achieved for part-time as well as full-time workers. *ILO Part-Time Work Convention (No. 175)* (*ILO Convention No. 175*), Article 4(c)

I. Women

The principle of gender equality must be constitutionalized. *CEDAW*, Article 2

Women's right to free choice of employment, the right to promotion, job security, equal benefits and conditions of service, and the right to receive vocational training and retaining must be ensured. *CEDAW*, Article 11(1)(c)

Women's right to social security and the right to paid leave in cases of retirement, unemployment, sickness, invalidity, old age, and other incapacity to work must be ensured. *CEDAW*, Article 11(1)(e)

Governments must coordinate with regional and international institutions and actors to ensure employment equity for women living in poverty. *Beijing +5 Resolution*, Para.101(d)

Government policies must include gender equality training and gender-awareness campaigns. *Beijing +5 Resolution*, Paras. 82(j), (k)

Homeworkers' protection against discrimination in employment and occupation must be ensured. *ILO Home Work Convention (No. 177)* (*ILO Convention No. 177*), Article 4(2)(b)

Unions must be afforded an active role in promoting employment equity. *ILO Convention No. 111*, Articles 1(b), 3(a); *Beijing Platform*, Paras. 178(d), 180(a); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rules 6, 9; *World Programme of Action Concerning Disabled Persons*, Para. 131; *Durban Programme*, Article 215; *ILO Workers with Family Responsibilities Convention (No. 156)* (*ILO Convention No. 156*), Article 11; *ILO Convention No. 183*, Articles 4(4), 11; *ILO Convention No. 122*, Article 3

Occupational segregation should be eliminated through measures such as counseling, placement, and the diversification of occupational choices. Equal participation in highly-skilled jobs and senior management positions should be promoted. *Beijing Platform*, Para. 178(g), *CRPWD*, Art.27

Employment equity must be facilitated by increasing access to risk capital, credit schemes, microcredit, and facilitating microenterprises and small and medium-sized enterprises. *Beijing +5 Resolution*, Paras. 74(b), 82(g)

Working mothers must be free from discrimination. ILO *Convention No. 183*, Articles 6, 8, 9, 10; *ICESCR*, Article 10; *CEDAW*, Article 11(2)

Governments must promote programmes and policies that enable women and men to reconcile their work and family responsibilities. *Beijing +5 Resolution*, Paras. 82(b), (c), (d); *CEDAW*, Article 10; ILO *Convention No. 156*, Article 3(1)

Workers with family responsibilities must be able to integrate into the labour force, as well as re-enter it after absences due to family responsibilities. ILO *Convention No. 156*, Article 7

Family support services and flexible working arrangements should be provided by the employer. *Beijing Platform*, Para. 180(b)

ii. Persons with Disabilities

Governments must support personal assistance programmes and interpretation services to increase the level of participation of persons with disabilities in everyday life at work. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 4

Negative attitudes and prejudices concerning disabled workers must be overcome, by means of state-initiated campaigns. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 7(4)

Employment equity for disabled persons must be achieved in both rural and urban areas. *World Programme of Action Concerning Disabled Persons*, Para. 128; *CRPWD*, Art.27

Employment equity for disabled persons should be achieved through various measures, including incentive-oriented quota schemes, designated employment, loans or grants for small businesses, contract compliance, and tax concessions. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 7(2); *World Programme of Action Concerning Disabled Persons*, Para. 129; *CRPWD*, Art.27

Technical aids for persons with disabilities and access to them must be supported by governments to achieve employment equity. *World Programme of Action Concerning Disabled Persons*, Para. 129

iii. Aboriginal Peoples

Governments must ensure employment equity for indigenous peoples. *Durban Programme*, Article 16; ILO *Indigenous and Tribal Peoples in Independent Countries Convention (No. 169)* (ILO *Convention No. 169*), Article 20; *Draft Declaration on the Rights of Indigenous Peoples*, Articles 18, 22

Governments must enact and supervise legislation and other measures for employment equity for indigenous and tribal peoples. ILO *Convention No. 169*, Article 33; *Draft Declaration on the Rights of Indigenous Peoples*, Article 37

Social security and other occupational benefits must be ensured without discrimination for indigenous and tribal peoples. ILO *Convention No. 169*, Articles 20(1)(c), 24

Vocational training must be tailored to suit the special needs of indigenous and tribal peoples. ILO *Convention No. 169*, Article 21

Handicrafts, rural and community-based industries, and a subsistence economy and traditional activities shall be recognized as important factors in the maintenance of cultures and in economic self-reliance and development of indigenous and tribal peoples. ILO *Convention No. 169*, Article 23

iv. *Workers Disadvantaged by Racism, Racial Discrimination, Xenophobia and Related Intolerance*

Methods for achieving employment equity for victims of racism, racial discrimination, xenophobia and related intolerance include civil rights enforcement and public education and communication within the workplace. *Durban Programme*, Article 104(a)

Enterprises organized and operated by women who are victims of racism, racial discrimination, xenophobia and related intolerance should be supported by promoting equal access to credit and training programmes. *Durban Programme*, Article 103

The public and the private sectors should improve the prospects of targeted groups, particularly those subject to multiple discrimination, facing the greatest obstacles in finding, keeping or regaining work. *Durban Programme*, Article 104(c)

Governments should promote and observe international instruments and norms on workers' rights to avoid the negative effects of discriminatory practices, racism and xenophobia in employment and occupation. *Durban Programme*, Article 106

Both the private and the public sector should foster the growth of businesses dedicated to improving economic and educational conditions in underserved and disadvantaged areas. *Durban Programme*, Article 104(b)

Enforcement of Employment Equity Rights

A national coordinating committee for employment equity should be permanent and based on legal and administrative regulation, composed of pluralistic forces, and guaranteed autonomy and resources. *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 17; *Durban Programme*, Articles 90, 91; *National Institutions for the Promotion and Protection of Human Rights (Paris Principles)*

Employment equity must be enforceable before a competent and expert tribunal, and the remedies must be effective and enforced when granted. *ICCPR*, Article 3; *CERD*, Article 6; *Durban Programme*, Articles 108, 165; *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 15(4); *CEDAW*, Article 2, *CRPWD*, Art.27

Meaningful sanctions must be imposed for the failure to comply with employment equity obligations. *CEDAW*, Article 2(b); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Rule 15(2)

Progress in employment equity must be reported annually. *ILO Convention No. 111* Article 3(f)

Legislation implementing employment equity must be reviewed and monitored. *Beijing Platform*, Para. 178(c); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, Preamble, Part IV

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