CANADIAN LABOUR CONGRESS
TRADE UNION GUIDE
TO THE
FEDERAL *EMPLOYMENT EQUITY ACT*

Prepared by
MARY CORNISH, KAREN SCHUCHER AND AMANDA PASK

CAVALLUZZO HAYES SHILTON McINTYRE & CORNISH
43 Madison Avenue
TORONTO, Ontario
M5R 2S2
Tel: (416) 964-1115
Fax: (416) 964-5895
E-mail: inquiry@chsmc.com

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Joint Project of the Canadian Labour Congress and Cavalluzzo Hayes Shilton McIntyre & Cornish

Abbreviations used in this Guide:

Act	Federal *Employment Equity Act*
CHRA	*Canadian Human Rights Act*
CHRC	Canadian Human Rights Commission
Code	*Canada Labour Code*
CLRB	Canada Labour Relations Board
CRO	Compliance Review Officers
ESR	Employment Systems Review
HRDC	Human Resources Development Canada
NOC	National Occupational Classification
Tribunal	Employment Equity Review Tribunal

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CHAPTER 1: INTRODUCTION

> The purpose of this *Act* is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences: *Act*, s.2.

THE FEDERAL *EMPLOYMENT EQUITY ACT*

The federal *Employment Equity Act*, ("the *Act*") became law on October 26, 1996 replacing the 1986 *Employment Equity Act*.[1] This law gives unions another tool to use in the struggle to end employment discrimination and bring equity and fairness to the workplace. It also alters the legal human rights framework within which unions operate in the federal sector.

While the *Act* gives employers the legal responsibility for achieving employment equity, this Guide suggests creative ways for trade unionists in the federal sector to use the *Act* to further the equality rights of their members both directly under the *Act* and through other tools such as collective bargaining, grievances and the anti-discrimination provisions of the *Canadian Human Rights Act ("CHRA")*. Unions working in provincial labour jurisdictions can also use the Guide for employers covered by the Federal Contractors Program,[2] as those employers must implement similar employment equity plans.

Specifically this Guide is designed to:

- inform unions and their members about employment equity rights, obligations and procedures in the federal sector;
- help unions to communicate with their staff, local union decision-makers and their members about employment equity;
- help unions to be aware of the impact of the *Act* on unions and their members, and of how unions can use the *Act* to advance their equity objectives;

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1 S.C. 1995, c.44.

2 Employers who employ 100 or more people with Federal Government contract valued at $200,000.00 or more. See *Appendix 3 - What Employers are Covered?*.

- be a working reference document to the *Act,* the *Regulations* and *Guidelines* for trade unionists active in implementing employment equity in their workplaces.

The 1996 *Employment Equity Act*:

→ Clarifies and strengthens employer obligations and gives the Canadian Human Rights Commission ("CHRC") the mandate to monitor, verify and enforce compliance.

→ Gives unions a right to be consulted by, and to collaborate with, employers on the implementation of employment equity, including the preparation, implementation and revision of the employment equity plan.

→ Enables unions to challenge employers on an ongoing basis to change workplace practices of every sort, including those employers argue are "management rights".

→ Provides unions with an important opportunity to identify and address their human rights responsibilities as co-signatory of collective agreements.

→ Continues the profound change to the process and content of collective bargaining resulting from the enforcement of human rights legislation in unionized workplaces.

→ Specifies that seniority rights are generally not barriers to employment equity unless found discriminatory under the *Canadian Human Rights Act ("CHRA").*

→ Amends the *CHRA* to limit the application of the *CHRA* where the *Act* applies.

UNIONS AND EMPLOYMENT EQUITY

Mandatory employment equity legislation has been widely supported by equality seeking groups and unions. Unions recognize that their attempts to remedy discrimination through collective bargaining, grievance arbitration and human rights complaints will not, alone, combat the systemic problem of discrimination.

Reasons Unions Support Employment Equity Legislation

- it provides minimum standards and protection for workers who do not have the power to bargain for employment equity provisions in their workplaces;
- employment equity provisions help to advance the principles which lie at the heart of the labour movement - principles of collective responsibility, fairness, equality, justice, workplace democracy and worker solidarity; and
- the process of implementing employment equity legislation is an opportunity for unions to require employers to review longstanding conditions of work which need to be changed - often in areas otherwise covered by management rights.

Unions and Designated Group Members Working Together

The labour movement and advocacy groups representing disadvantaged groups both within and outside unions have worked hard in the past to understand each other's concerns and to work together to force employers and governments to take action on the equity front. Unions have shown commitment to the principles of employment equity and in many workplaces will be the strongest and most well-equipped force for its achievement. But work still needs to be done to establish effective working relationships between designated group members and unions. The Canadian Labour Congress's Task Force on Racism, in its October 1997, Report recommended that unions should develop employment equity plans with the participation of Aboriginal Peoples and People of Colour[3]. Working to implement the new *Employment Equity Act* can serve to strengthen the labour movement's relationships with its designated group members and with advocacy groups in the wider community.

Knowledge about the *Act* will help Unions to:

- take advantage of the opportunities it presents to achieve equity objectives

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[3] Canadian Labour Congress "Framework for Action" Excerpt from *Challenging Racism: Going Beyond Recommendations, Report of the CLC National Anti-Racism Task Force*, October 1997

- understand the way that the changes in the legal framework affect their equity strategies and existing liabilities under human rights legislation
- meet their legal obligations under existing human rights legislation
- assess the legitimacy of employer and other challenges to the collective agreement originating in the employment equity process.

EMPLOYER RESPONSIBILITIES

Despite union lobbying for joint responsibility, the *Act* gives legal responsibility for achieving employment equity to employers alone, who must:

➜ conduct a workforce survey and analysis to identify underrepresentation of members of designated groups;

➜ review their employment systems, policies and practices to identify employment barriers;

➜ prepare an employment equity plan setting out:

- measures to be taken to remove employment barriers,
- positive policies and practices to be instituted,
- measures taken to ensure reasonable accommodations,
- short and long term numerical goals and timetables for hiring and promotion to correct underrepresentation.

Some employers have already realized that employment equity is part of a strategic approach to human resource management and recognize they must develop policies and practices that take advantage of Canada's increasingly diverse workforce if they wish to be successful. However, most employers will not work to achieve employment equity without a continuous struggle by their unions and/or employees to force them to abide by the law.

Both employers and unions continue to be bound by the *CHRA* although it has been amended to take into account employers' responsibilities and liabilities under the *Act*. For a discussion of these amendments see *Chpt. 4 Enforcing Employment Equity*.

WHO IS COVERED?

The *Act* covers all federal departments and all federally regulated employers (Crown and private) with 100 or more employees. The Canadian Forces and non-civilian members of the Royal Canadian Mounted Police may be covered upon order of the Governor in Council. Although the *Act* does not directly apply to federal contractors, employers that are covered by the Federal Contractors Program are required to conform to the *Act's* standards. See *Appendix 3 - What Employers are Covered?*

LEGISLATIVE HISTORY

Mandatory employment equity was first introduced to the federal sector by the 1986 *Employment Equity Act*. That *Act* required all federally regulated companies with 100 or more employees to prepare and file an annual report setting out the employment situation of the four "designated groups": women, aboriginal peoples, members of visible minorities and persons with disabilities.

In 1992, a Parliamentary Committee recommended that this *Act* be extended to cover the federal public service, the Canadian Armed Forces, the Royal Canadian Mounted Police and all federal agencies, boards and commissions. This recommendation, as well as the general perception that the *Act's* reporting requirements were not achieving any significant improvements, led to the 1996 introduction of the current *Employment Equity Act*[4]. The 1996 *Act* contains new obligations and enforcement mechanisms, and applies to the federal public service.

The Canadian Labour Congress, unions and other advocacy groups are continuing to lobby and pressure the Federal Government to strengthen the *Act* and ensure the *Act* is effectively enforced and implemented.

EXISTING EMPLOYMENT EQUITY RESPONSIBILITIES

Employment equity measures are not new to federal human rights law. Federal human rights decisions by Human Rights Tribunals under the *Canadian Human Rights Act* have ordered employers to establish numerical goals and targets for remedying systemic discrimination.

The two leading Tribunal decisions are *Action Travail des Femmes*[5], which was upheld in 1987 by the Supreme Court of Canada and the Tribunal's 1997 decision in *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* ("*NCARR*")[6]. These decisions show the employment equity or positive measures standards Courts have already set for employers and unions under existing human rights laws in the federal jurisdiction.

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[4] As described by the Canadian Human Rights Commission in its *1996 Annual Report*.

[5] *Canadian National Railway v. Action Travail des Femmes* (1987) 8 C.H.R.R. D/4210

[6] *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* (1997) 28 C.H.R.R. D/179

In the 1987 case of *Action Travail des Femmes*[7], the Supreme Court of Canada unanimously ruled that a Human Rights Tribunal could order an employment equity programme 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.

In the 1997 decision in *National Capital Alliance on Race Relations v. Canada (Health & Welfare)* the Human Rights Tribunal followed *Action Travail* to impose an extensive remedial employment equity program on Health Canada. The 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 Courts have also recognized employment equity obligations under the *Charter of Human Rights and Freedoms*. In the 1998 case *Perera v. Canada*[8], the Federal Court of Appeal upheld the right of the visible minority applicants to proceed with a civil claim against their former employer, the Canadian International Development Agency ("CIDA") claiming that CIDA engaged in systemic discrimination against them, including biased promotion procedures and assignment of work which violated their rights to equality under section 15 of the *Charter of Rights and Freedoms*.[9] The Court decided that the Trial Division has jurisdiction pursuant to section 24 of the *Charter* to "provide effective remedies for breaches of a citizen's constitutional rights to equality" and that where there is "systemic discrimination" and warranting circumstances, it is appropriate to order employment equity plan measures.[10]

For a detailed outline of the above decisions, see Appendix 1. For a more detailed discussion of employer and union responsibilities under the *CHRA*, see Chpt. 3.

Ontario enacted the *Employment Equity Act, 1993* which provided for wide-ranging employment equity measures carried out jointly by employers and unions. When the Ontario Tory Government came to power in 1995, they repealed the law. This repeal is now the subject of a challenge under the *Charter of Rights and Freedoms* and the decision of the Ontario Court of Appeal is still reserved.

NEED FOR EMPLOYMENT EQUITY LEGISLATION

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7 *Canadian National Railway v. Action Travail des Femmes* (1987) 8 C.H.R.R. D/4210

8 *Perera v. Canada* (1998), 158 D.L.R. (4th) 341

9 *Perera*, para. 2

10 *Perera*, paras. 29-30

Underrepresentation of women, aboriginal peoples, persons with disabilities and visible minorities continues to be a serious problem in the federal public and private sector. This is documented in both the *1996 Annual Report of the Canadian Human Rights Commission* and the *1997 Report on the Employment Equity Act*, which shows the very limited progress of each of these groups since the introduction of the 1986 *Act.*

The Canadian Labour Congress has also detailed this problem in many briefs to the federal government and most recently in its 1997 Task Force Report, *Challenging Racism: Going Beyond Recommendations.*

When dealing with a specific problem, it is important to review the specific wording in any applicable section of the *Act* or *Regulations* and to review the *Guidelines*. It is also important to keep handy the *Canadian Human Rights Act, Regulations* and Guidelines. For ease of reference this Guide refers to the applicable sections of the *Act* and the *Regulations* at the end of the sentence. For easy reference, the Table of Contents for each issued *Guideline* is set out in Appendix 14.

As some of the terms used in employment equity implementation may be unfamiliar, a Dictionary of Terms is included at the end of Chpt. 5.

Abbreviations used in this Guide:

Act	Federal *Employment Equity Act*
CHRA	*Canadian Human Rights Act*
CHRC	Canadian Human Rights Commission
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CHAPTER 2: OVERVIEW OF THE LEGISLATION

INTERACTION OF THE *ACT*, THE *REGULATIONS* AND *GUIDELINES*

It is helpful when working with the *Act,* the *Regulations* and the Guidelines to understand how they work together.

- The *Act* sets out the general principles and legislative requirements for achieving employment equity.
- The *Regulations* set out the day-to-day rules and procedures for how employment equity will be achieved.
- The *Guidelines* issued by Human Resources Development Canada ("HRDC") provide assistance with implementing the *Act* and *Regulations* but are non-binding.

The *Act*

The *Act* sets out the core employment equity obligations of employers and is divided into four sections:

Part I — Sets out the obligations of employers to:

- consult and collaborate with employee representatives in the implementation of employment equity;
- identify employment barriers against certain groups;
- determine the degree of underrepresentation of certain groups in their workforce;
- prepare, implement, review and revise employment equity plans;
- make reports to the Minister concerning employment equity.

Part II — Sets out the mechanisms for enforcing employer obligations under the *Act.*

Part III — Provides for the assessment of monetary penalties.

Part IV — Establishes regulation-making authority and provides for other general matters.

The *Act* also

- makes related amendments to the *CHRA,* the *Financial Administration Act* and the *Public Service Employment Act*;
- gives the Governor in Council (Federal Government) authority to make regulations to clarify how employers are to carry out their obligations.

The *Regulations*

The Government created the *Employment Equity Regulations* to clarify the employment equity obligations of employers and to facilitate quick and efficient audits by the CHRC. Despite lobbying by the Canadian Labour Congress, the Government has not enacted any regulations to assist unions and employers with carrying out their collaboration and consultation responsibilities.

Areas Covered by the Regulations

The *Employment Equity Regulations* provide details concerning the following areas of the *Act*:

- collection of workforce information and workforce analysis;
- employment systems review;
- maintenance of employment equity records; and
- calculation of the number of employees.

A detailed list of the topics covered by these *Regulations* is also set out in Appendix 2.

Appendix 2 to this Guide sets out some further details concerning what types of regulations can be passed generally and also specifically in relation to the public sector, the Canadian Security Intelligence Service, the Canadian Forces and the Royal Canadian Mounted Police.

The *Regulations* also include references to "former Regulations that existed under the 1986 Act. These cover:

- private sector employers reporting requirements *Regs,* s.18; and
- definitions *Regs,* s. 41(1)(a).

A few technical amendments are included to modernize these former Regulations[11].

The Guidelines

To provide employers with direction about how to implement the new *Act*, HRDC has developed a series of ministerial guidelines in consultation with the CHRC. ***These guidelines are not legally binding***. Interpretations or approaches that differ from the guidelines, but which are consistent with the *Act* and its *Regulations* are also legitimate, because it is the *Act* and *Regulations* which govern.

HRDC has Announced Eleven Guidelines.

Guideline 1*	Getting Started
Guideline 2*	Communications
Guideline 3	Consultation and Collaboration
Guideline 4	Collection of Workforce Information
Guideline 5	Workforce Analysis
Guideline 6	Employment Systems Review
Guideline 7	Employment Equity Plan
Guideline 8*	Aboriginal Peoples
Guideline 9*	Monitoring, Review and Revision
Guideline 10	Record Keeping
Guideline 11	Employment Equity Reports

(Those marked with an asterisk have not been released as of September, 1998.)

Each Guideline consists of a Part A setting out the legal framework, a Part B addressing the practical application of the law and a Part C headed "Information Documents". The Guidelines are lengthy and detailed but contain important implementation information. They are directed primarily at employers, rather than at unions or employees. Appendix 14 provides the Table of Contents from each of the Guidelines released to date. HRDC also distributes two documents with its Guideline binder; an *Overview of Employment Equity* and one on *Compliance*. They also plan to distribute Reference Documents, the first of which is titled *The Status of the Designated Groups in the Labour Force*.

[11]The occupational classification is updated to allow employers to use Census of Canada information, which, starting in 1996 will be based on the new *National Occupational Classification*. The salary ranges are also updated to reflect the shift in salary distributions over the last ten years.

All of these Guidelines and documents can be downloaded from the HRDC WEEDIS web-site at http://info.load-otea.hrdc-drhc.gc.ca/~weedis (described below).

SUMMARY OF THE *ACT*

The *Act's* requirements are briefly summarized below. For more detailed information about particular sections of the *Act*, as well as commentary and tips directed at unions who are working on an issue, see the relevant Appendix.

WHAT EMPLOYERS ARE COVERED?

The *Act* covers all federal departments and all federally regulated employers (Crown and private) with 100 or more employees. The Canadian Forces and non-civilian members of the Royal Canadian Mounted Police may be covered upon order of the Governor in Council. Although the *Act* does not directly apply to federal contractors, employers that are covered by the Federal Contractors Program are required to conform to the *Act's* standards: *Act*, s.42.

See, *Appendix 3: What Employers Are Covered?*

The *Act* sets out in detail the government bodies that will carry out the responsibilities of an employer for employees in different parts of the public sector: *Act*, s.4.

See, *Appendix 4: Who is the Employer?*

EMPLOYERS REQUIRED TO IMPLEMENT EMPLOYMENT EQUITY

The *Act* imposes a *positive obligation* on employers to "implement employment equity" and sets out the steps which must be taken to fulfill this obligation. Employment barriers against persons in designated groups which result from the employer's employment systems, policies and practices must be *identified* and *eliminated*: *Act*, s.5(a).

In addition, employers are required to institute positive policies and practices to accelerate progress towards a representative workforce, and to make reasonable accommodations of differences to ensure that persons in designated groups achieve a level of representation in each occupational group in the employer's workforce that reflects their availability in the labour force: *Act*, s.5(b)

The *Act* distinguishes measures aimed at eliminating the employment barriers faced by members of the designated groups from positive policies and practices and reasonable

accommodations aimed at ensuring a representative workforce as set out below. The *Act* requires all three types of measures to be included in an employment equity plan.

Note: In other employment equity materials these terms may be used more loosely and interchangeably, with "positive policies" often being used to refer to any pro-active measure, including those necessary to the elimination of barriers.

What are Barriers?

A "barrier" is any employment policy or practice which directly or indirectly has a greater negative impact on members of a designated group than it has on others, and which is not vital to the performance of the job:

See "How to Identify a Barrier" in *Appendix 9: Employment Systems Review*

What are Positive Policies and Practices?

Positive policies and practices are measures that go beyond the elimination of barriers to promote the creation of a diverse workplace. These are measures aimed at overcoming the effect on workplace diversity of the many years in which barriers have been faced by designated group members.

See: "What are Positive Policies and Practices" in *Appendix 10: Employment Equity Plan*

What are Accommodations?

Accommodations are the steps that are taken to adapt the workplace and its rules to the particular needs or characteristics of a designated group or individual group members.

See: "What are Accommodations" in *Appendix 10: Employment Equity Plan*

WHAT EMPLOYMENT EQUITY DOES NOT REQUIRE

The obligation to implement employment equity does not require an employer to

- take measures that would cause undue hardship: *Act*, s.6(a).
- hire or promote unqualified persons: *Act*, s.6(b).
- hire or promote within the public sector on a basis other than merit where selection according to merit is required by the *Public Service Employment Act*: *Act*, s.6(c).
- create new positions: *Act*, s.6(d).

WHAT IS THE UNION'S ROLE UNDER THE *ACT*?

The *Act* gives to "employee representatives" the right to be integrally involved at every stage of the employment equity process, by requiring employers to engage in consultations and to collaborate with employee representatives.

Where there is a union, the *Act* defines "employee representatives" to mean "bargaining agent". For non-unionized employees "employee representatives" are defined as "those persons designated by employees as their representatives": *Act*, s.3.

Collaboration on Employment Equity Plan

The employer and all employee representatives "shall collaborate" in the preparation, implementation and revision of the employment equity plan: *Act*, s.15(3).

Consultation

Employers are also required to "consult" employee representatives about:

1) the assistance they could provide to facilitate:
   - the implementation of employment equity;
   - communication to employees of matters relating to employment equity: *Act*, s.15(1)(a);
2) the preparation, implementation and revision of the employment equity plan: *Act*, s.15(1))b).

The *Act* mandates that the union "shall participate in a consultation": *Act* s.15(2)

Seniority Rights

Where the employment systems review suggests that seniority rights may have an adverse impact on the employment opportunities of designated groups, employers and bargaining agents must also consult about measures that may be taken to minimize this adverse impact: *Act*, s.8(3). This consultation obligation does not apply to the priorities for appointment under the *Public Service Employment Act* or the workforce adjustment measures established by Treasury Board.

See: *Chapter 3: Unions and the Employment Equity Process*

COMPLIANCE AND OTHER DATES

Employers are given a short time frame to prepare their employment equity plans.

Treasury Board, PSC and other Federal Sector Employers One Year From October 23, 1996

The Treasury Board, the Public Service Commission and any employers to whom the old *Employment Equity Act*, 1986 applied have *one year from October 23, 1996* to comply with their obligations to:

- ✔ conduct a workforce analysis
- ✔ conduct an employment systems review
- ✔ prepare an employment equity plan. Act, s.45

The CHRC commenced auditing employers for compliance on October 23, 1997.

New Employers - Eighteen Months

Persons who become employers within the meaning of the *Act* after October 23, 1996 have eighteen months to comply with the obligations set out above: *Act*, s.16(1) .

No Compliance Audit for New Employers for Two Years

The CHRC may not conduct a compliance audit of newly covered employers until two years after the day on which the person became an employer: *Act*, s.16(2).

Continuing Duties: Implementation and Monitoring of Plan

Employers are required to ensure that their employment equity plan, if implemented, would constitute reasonable progress toward implementing employment equity: *Act*, s. 11.

Employers must

- ✔ make all reasonable efforts to implement their employment equity plan; and
- ✔ monitor implementation of their plan on a regular basis to assess whether reasonable progress toward implementing employment equity is being made: *Act*, s.12.

Unions and Compliance Deadlines

There are a number of ways in which unions can now become involved in the employment equity process. The compliance deadline for employers has now been reached. Unions who have not yet been aware of or involved in the employment equity process can:

- try to find out what steps, if any, the employer has already taken by making a request for full disclosure of all employment equity process information from the employer.

- if the employer claims to have developed an employment equity plan, review the preceding survey, analysis and plan to determine any deficiencies.

- if the employer has violated the *Act,* consider

  - requesting the CHRC to conduct a compliance audit
  - filing a grievance under the collective agreement's anti-discrimination provisions; or
  - a complaint under the *CHRA's* anti-discrimination provisions.

- take steps to become fully involved in the consultation and collaboration process, requiring the employer if necessary to start again with the Union's full participation.

INFORMING EMPLOYEES

Effective communication is vital to a successful employment equity programme. The employer has a positive obligation to:

- provide information to employees that explains the purpose of employment equity

- keep employees informed about measures undertaken or planned to implement employment equity and the progress the employer has made: *Act*, s.14.

Employers must consult unions about the assistance that unions can provide in communicating with employees: *Act*, s.15(1).

See *Appendix 6: Informing Employees*

SURVEY, ANALYSIS AND REVIEW STAGE

Before employers can create an employment equity plan they must analyze and review their workplace practices. This stage is divided into three parts:

- ➜ Workforce Survey
- ➜ Workforce Analysis
- ➜ Employment Systems Review

1. Conduct a Workforce Survey

A survey of the workforce must be carried out to gather information about the current representation of the designated groups in each occupational group in the workforce. The four designated groups are: women, aboriginal peoples, members of visible minorities and persons with disabilities: *Act*, s.3.

The *Act* is based on the principle of self-identification, which means that only those people who choose to self-identify as members of the designated groups can be counted as members for employment equity purposes. The responses of individual employees on the workforce survey are confidential and can be used only for the purpose of implementing the employer's obligations under this law: *Act* s.9(3)

See *Appendix 7: Workforce Survey*

Everyone who is employed by an employer for 12 weeks or more over a calendar year is covered by the *Act* and must be included in a workforce survey: *Reg*, s.1(2)(a).

See *Appendix 1: Who is an Employee*?

2. Analyze the Results of the Workforce Survey

The responses to the workforce survey must be analyzed to determine:

- the number of designated group members for each occupational group of the employer's workforce, and
- the degree of underrepresentation of designated group members. *Regs.*, s.6(1)

A group is underrepresented where the representation of group members in an occupational group in a particular workplace is low compared to its representation in whichever of the following groups is the most appropriate:

- the Canadian workforce as a whole, or
- those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography, and from which the employer may reasonably be expected to draw employees: *Regs.*, s.6(1)(b).

See Appendix 8: Workforce Analysis

3. Conduct an Employment Systems Review ("ESR")

A review of employment systems, policies and practices must be conducted to identify employment barriers against persons in designated groups: *Act*, s.9(1)(b).

Seniority Rights

The following seniority and related rights are deemed not to be barriers under the *Act*:

- seniority rights with respect to layoff or recall: *Act*, s.8(1).
- other seniority rights unless they are found to constitute a discriminatory practice under the *CHRA*, including those provided under workforce adjustment policies: *Act*, s.8(2).
- priorities for appointments under the *Public Service Employment Act* or regulations: *Act*, s.8(4)(a).
- workforce adjustment measures established by Treasury Board: *Act*, s.8(4)(b).

See *Appendix 9: Employment Systems Review*

Analysis and Review Where Valid Previous Data

The *Act* allows employers not to conduct a workforce survey, workforce analysis and employment systems review where:

- the results of a previous workforce survey are up to date and likely to be as accurate as a new survey;
- the results of a previous workforce analysis are up to date and would likely be the same as the results of a new analysis;

- the results of a previous employment systems review would likely be the same as the results of a new analysis.

Unions should be alert to ensure that the data relied upon in creating an employment equity plan provides an accurate and adequate foundation for employment equity planning. In most cases there will be an argument that workforce surveys, analyses and ESR's conducted without union involvement will not be as accurate or "likely the same" as if these processes were undertaken with the collaboration of a union.

See sections on use of previous data in: *Appendix 7: Workforce Survey; Appendix 8: Workforce Analysis and Appendix 9: ESR*

EMPLOYMENT EQUITY PLAN - PREPARATION

1. Preparation of Plan

An employment equity plan must be prepared which includes measures to be taken in the short term and in the longer term. The employer must ensure that its employment equity plan would, if implemented, constitute reasonable progress toward implementing employment equity: *Act*, s. 11. The short term is not less than one year and not more than three years; the longer term is more than three years: *Act*, s.10(3).

Short Term Measures

The plan must :

- specify the positive policies and practices that are to be instituted for hiring, training, promotion and retention of persons in designated groups and for making reasonable accommodation of persons in designated groups: *Act*, s.10(1)(a).
- specify the measures to be taken by the employer to eliminate employment barriers identified: *Act*, s.10(1)b).
- establish a timetable for implementing these matters: *Act*, s.10(1)(c).
- establish numerical goals for hiring and promotion and measures to be taken in each year to meet those goals: *Act*, s.10(1)(d).

Longer Term Measures

The plan must:

- set out the employer's goals for increasing representation of persons in designated groups in the workforce and the employer's strategy for achieving those goals: *Act*, s.10(1)(e).

ENFORCEMENT

CHRC and Employment Equity Review Tribunal

The CHRC has the sole responsibility for the direct enforcement of the *Act*. The *Act* provides for the following stages of enforcement against employers, all of which are to be carried out by designated members of the CHRC:

- compliance audits by CHRC compliance review officers ("CROs")
- "persuasion" and negotiated written undertakings by CROs
- compliance directions by CHRC
- review of CHRC compliance directions by the Employment Equity Review Tribunal ("Tribunal").

See: Chapter 4: Enforcing Employment Equity

Enforcement Against Unions

The *Act* does not contain any explicit provision making unions directly subject to orders by compliance review officers or the Tribunal. Indeed, the Guidelines appear to assume throughout that unions will not be made directly subject to such orders. However, unions should be aware that the Tribunal is given a broad-ranging power to "make any other order it considers appropriate and reasonable in the circumstances to remedy non-compliance": *Act*, s.30(1).

It is not yet clear whether the Tribunal will take the view that this power encompasses an ability to make orders which directly or indirectly impact on a union's collective bargaining rights. Given that many of the issues covered in an employment systems review and employment equity plan are covered in a collective agreement, the possibility of collective agreement impact is significant. If such Tribunal orders were possible, they could be imposed only where the union had been given notice and allowed to participate fully in the proceedings.

In general, the scheme of the *Act* appears to be that the co-operation of unions is secured through relying on unions' existing *CHRA* responsibilities. Under the *CHRA,* unions can be held liable with the employer for collective agreement provisions with a discriminatory impact on designated groups. *CHRA* Human Rights Tribunals can order amendments to a collective agreement and can order unions to pay damages to affected individuals. In this regard, the *Act*'s *Guidelines* advise employers that unions can be held jointly liable for discrimination flowing from a collective agreement and that unions have a duty to accommodate where a

collective agreement provision has a discriminatory impact: See *Guideline* 3 at 11; *Guideline* 6 at 30; *Guideline* 7 at 14.

See Chapter 3 re: Existing Equity Responsibilities of Unions

THE COLLECTIVE AGREEMENT AND THE EMPLOYMENT EQUITY PROCESS

The *Act* does not specifically provide that collective agreements can be overridden by the employment equity plan. Under the now repealed Ontario legislation, the employment equity plan was deemed to prevail over the collective agreement to the extent of any inconsistency, and the Tribunal had explicit power to order amendments to a collective agreement.[12] There are no similar provisions in the federal *Act.* It therefore appears that the agreement of the bargaining agent to amend a collective agreement under this *Act* should be sought. However, unions are obliged under the *CHRA* to give their agreement to amend or vary provisions in the collective agreement that are in fact discriminatory.

See discussion of the Supreme Court of Canada's decision in *Renaud* in Chpt. 3 of this Guide.

The Guidelines appear to acknowledge the necessity of at least seeking the union's agreement to changes to collective agreements which are necessary. The Guidelines advise that unions are under an obligation under the *CHRA* to facilitate reasonable accommodations, and specifically state (in the context of seniority provisions) that any changes to the collective agreement must be the subject of negotiations.

See *Guideline* 3 at 11; *Guideline* 6 at 30; *Guideline* 7 at 14.

If an employer believes it can prove that a collective agreement provision is discriminatory and needs to be amended and the union is resisting that amendment, the employer may try to go ahead without the union's agreement and include a provision in its plan which is inconsistent with the collective agreement and wait for the union to grieve the violation of the agreement. The issue would then be dealt with by a grievance arbitrator who might well uphold the employer's actions if the provision were proved to be discriminatory. Arbitrators now have the power under the *Canada Labour Code* ("*Code*") to interpret, apply and give relief under employment related statutes which include the *CHRA* and the *Act.*

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[12] *Employment Equity Act, 1993.* The Ontario Court of Appeal is currently reserved on an appeal of a dismissal of a challenge to the repeal of this law under the Charter of Rights and Freedoms *Ferrell v. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335 (Gen. Div.).

Bargaining agents must therefore deal very carefully with employer requests to amend or vary collective agreements for equity reasons. Unions must be vigilant to ensure that employers do not use employment equity to circumvent negotiated protections, while being equally alert to make changes which are genuinely necessary to the achievement of employment equity. They must also cooperate in full with individual accommodations that are legitimately required and which do not impose undue hardship on other workers.

See: *Chapter 4: Enforcing Employment Equity*
Chapter 3: Existing Equity Responsibilities of Unions

WHO WILL YOU BE DEALING WITH?

Minister of Human Resources

The *Act* gives the Minister of Human Resources a number of responsibilities. In practice, the responsibilities assigned to the Minister will be carried out by Human Resources Development Canada. See s.43 of the *Act* for the Minister's power to delegate duties.

General Ministerial Powers and Duties

- developing and conducting information programs to foster public understanding of the *Act* and public recognition of its purposes;
- undertaking research;
- promoting, by appropriate means the purpose of the *Act*;
- publishing and disseminating information, issuing guidelines and providing advice to private sector employers and employee representatives regarding the implementation of employment equity; and
- developing and conducting programs to recognize private sector employers for outstanding achievement in implementing employment equity: *Act*, s.42(1).

Federal Contractors Program

The Minister is responsible for the administration of the Federal Contractors Program for Employment Equity which requires employers with Federal contracts to comply with the *Act.* This requirement is an important tool for unions to use in expanding the coverage of the *Act* to provincially regulated employers who are otherwise not covered by employment equity legislation: *Act*, s.42(2).

Labour Market Information

The Minister must make available to employers any available relevant labour market information respecting designated groups in the Canadian workforce in order to assist employers in fulfilling their employment equity obligations: *Act*, s.42(3).

Human Resources Development Canada

Responsibilities

As noted above, HRDC carries out many of the Minister's responsibilities set out above. HRDC is also responsible for drafting the Guidelines under the *Act* and for the production of other educational and informational materials.

Regional Workplace Equity Consultants

HRDC employs these Consultants in each province to provide assistance concerning the *Act*'s application.

WEEDIS Web Site

HRDC has a web site which it plans to use to keep all interested parties up to date on matters relating to workplace equity. HRDC's home page is at http://www.hrdc-drhc.gc.ca. The Workplace Equity Electronic Dissemination Information System (WEEDIS) site can be found at http://info.load-otea.hrdc-drhc.gc.ca/~weedis. HRDC plans to make available all major publications relating to the implementation of workplace equity for downloading from this site. The site also contains a variety of useful background publications, as well as lists of advocacy and training organizations that may be of assistance.

Treasury Board And Public Service Commission

The Treasury Board and the Public Service Commission, acting under the *Financial Administration Act* and the *Public Service Employment Act*, are responsible for carrying out the obligations of an "employer" in relation to those parts of the public service that are set out in Part I of Schedule I to the *Public Service Staff Relations Act* (as well civilian employees of the RCMP): *Act*, s 4(4); See also "Who is the Employer?" at p 103 of this *Guide* and Appendix 3 for a copy of Schedule 1.[13]

[13]The Treasury Board and the Public Service Commission may authorize the chief executive officer or relevant deputy head to exercise any of its powers or duties as an employer. Such persons may then subdelegate these functions: *Act*, s. 4(7).

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[13]The Treasury Board and the Public Service Commission may authorize the chief executive officer or relevant deputy head to exercise any of its powers or duties as an employer. Such persons may then subdelegate these functions: *Act*, s. 4(7).

Responsibilities for Enforcement

The CHRC is responsible for enforcing the employers' obligations to implement employment equity under the *Act*'s sections 5, 9 to 15 and 17 through compliance, audits, undertakings and compliance directions: *Act*, s.22(1).

The CHRC's audit procedures and the compliance and audit criteria it will use to assess compliance are set out in its *Framework for Compliance Audits*. Enforcement procedures are discussed in detail in Chpt. 4 of this Guide.

Annual Report

The CHRC's annual report to Parliament required by s.61 of the *CHRA* must now include an assessment of its activities under the *Act* during the year and their effectiveness: *Act*, s.32. This will be an important report for unions to obtain and review each year.

Web Site

The CHRC web site at http:\\www.chrc.ca has some useful resources, including downloadable copies of the *Framework for Compliance Audits*, and a bulletin devoted to new publications and developments in employment equity. This site also promises that it will include copies of the Guidelines under the *Act*.

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CHAPTER 3:
UNIONS AND THE EMPLOYMENT EQUITY PROCESS

OVERVIEW OF UNIONS' ROLE UNDER THE *ACT*

Before the *Act* was passed, unions lobbied to be given equal responsibility with employers to achieve employment equity in unionized workplaces, as had been the case under Ontario's now repealed *Employment Equity Act, 1993*. This goal was not achieved. The *Act* makes employers exclusively responsible for meeting the *Act*'s requirements. At the same time, however, employers must "consult" and "collaborate" with employee representatives in carrying out their obligation to implement employment equity.

New Opportunities

The *Act* strengthens the ability of unions to pursue systemic discrimination in the workplace in the following ways:

→ *The Act gives unions a right to be consulted by, and to collaborate with, employers on the implementation of employment equity.*

These rights can enable unions to challenge employers on an on-going basis to change workplace practices in recruitment, hiring, retention, promotion and working conditions. These rights also mean that employers have lost the ability to rely on their "management rights" to fend off union challenges to their authority to run the workplace. It is hard to think of any workplace practice affecting a union's members which should not come under employment equity scrutiny.

→ *The Act gives unions another way to fight the employer's traditional strategy of "divide and conquer".*

Unions will be a better position to deal with employers who try to operate their workplaces so that the designated groups are ghettoized from the white able-bodied male workforce, and pitted against one another to the employer's advantage.

→ *The Act provides unions with an important opportunity to identify and address their significant human rights responsibilities and liabilities as co-signatory of collective agreements.*

Proactive obligations lessen the burden on individual members to bring forward discrimination complaints or grievances. Similarly, unions have a positive structure within which to implement their human rights obligations.

→ *The Act continues the profound change to the process and content of collective bargaining resulting from the enforcement of human rights legislation in unionized workplaces.*

Unions and their members can no longer look upon the signed collective agreement as the "law of the land" which cannot be questioned until the next round of bargaining. Where collective agreements are found to contain barriers to employees, and to those not yet hired, who are women, aboriginal persons, persons with disabilities and members of visible minorities, the collective agreement may need to be changed or appropriate individual exceptions may need to be made to its application.

Potential New Exposure to Liability

Because unions are not given full joint responsibility under the *Act* for implementing employment equity, there may not be any direct new legal grounds for union liability under the *Act*. However, it is important to note that the *Act* may give rise to new occasions for legal complaints against unions.

An example would be where an employer complains against the union alleging that the union failed to agree to remove a barrier to employment equity by amending the collective agreement where the ESR has revealed that the agreement contained a discriminatory barrier. This complaint could be filed under the *CHRA* or under the anti-discrimination provision in a collective agreement. Also, as employees receive employment equity information from the employer and the union and as well from CHRC compliance officers, employees may come to their unions with complaints and concerns about the union's role in workplace practices which employees find discriminatory. Employees dissatisfied with the union's response may decide to file a complaint against the union under the *CHRA* or a duty of fair representation complaint under section 37 of the *Code* or possibly under the union's constitution.

Unions will need to be in a position to assess the legitimacy of such claims, so that they can respond appropriately and without violating their existing legal responsibilities.

EXISTING EQUITY RESPONSIBILITIES OF UNIONS AND EMPLOYERS

It is useful to place the union's *Employment Equity Act* role in the larger context of existing and significant equity *responsibilities and liabilities* under human rights legislation. The already-established principles of union responsibility in relation to human rights issues are important in defining and interpreting the union role under this *Act*.

Human rights legislation like the *CHRA* is treated by courts as "almost constitutional" in nature.[14] It is given a broad, result-oriented interpretation, designed to make sure it meets its intended aims.[15] This approach allows the protection of human rights statutes to be extended to a wide variety of situations, and means that creativity is the key to addressing equity issues.

Canadian Human Rights Act

The *CHRA* prohibits discrimination on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted: *CHRA, s.3(1)*. These grounds encompass the designated groups that are also covered by the *Act*. Human rights legislation aims to identify and eliminate discrimination rather than to determine fault or punish conduct[16]. The focus is on the discriminatory effects of practices or policies[17], rather than on intention to discriminate[18].

Discrimination takes two basic legal forms: direct discrimination and adverse impact discrimination. Direct discrimination occurs when a designated group is explicitly singled out for disadvantageous treatment. Insults based on race or disability are forms of direct discrimination. Employers are responsible to take the necessary steps to ensure that employees are not subjected to such conduct at work[19]. Another example of direct discrimination is a rule based on a prohibited ground, such as a rule that makes a benefit

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[14] *Brooks v. Canada Safeway* [1989] 1 S.C.R. 1219 at 1245

[15] *Action Travail Des Femmes* v. *Canadian National Railway Co.* (1987), 40 D.L.R. (4th) 193 (S.C.C.) at 206-9; *Re Ontario Human Rights Commission and Simpson-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.) at 328-9

[16] *Robichaud, (Treasury Board)* [1987] 2 S.C.R. 84

[17] *Robichaud v. Canada, above*

[18] *Ontario Human Rights Commission & Simpson Sears Ltd., above*

[19] The *CHRA* specifies that it is a discriminatory practice to harass an individual on a prohibited ground of discrimination, and clarifies that sexual harassment is harassment on a prohibited ground: s. 14, Unions should also be aware that the *Canada Labour Code* contains a definition of sexual harassment and provides that every employee is entitled to employment free of harassment. The *Code* requires employers to make every reasonable effort to ensure that no employee is subjected to sexual harassment and to issue a policy statement that includes terms set out in the *Code* (see s.247).

available during medical leaves but not during pregnancy-related leaves.[20] Direct discrimination is contrary to law unless it can be shown that it is essential to the job to make distinctions on the basis of a prohibited ground (a bona fide occupational requirement) and that there is no individual accommodation possible without undue hardship[21].

Adverse impact discrimination occurs when a practice or rule appears neutral but has a negative impact on designated group members. Classic examples are dress codes that cannot be met by people required to wear certain clothing as a matter of religious observance, or height requirements that disproportionately exclude women. An investigation may reveal that the rule has an adverse impact and is not genuinely necessary to the job. If so, it would be better to cure the discriminatory effect by removing the rule for everyone. Otherwise, it is necessary to look at an accommodation that will remove the negative impact on the members of a particular group. If an accommodation is possible it must be implemented, unless doing so would inflict "undue hardship"[22].

Prior to the 1998 *CHRA* amendments the duty of reasonable accommodation was implied by decision-makers into the statute and defined through case law. [23] The 1998 amendments codify this duty and provide the CHRC with the power to issue regulations defining "undue hardship". Reference should be made to these regulations if and when they become available.

CHRA Anti-Discrimination Provisions Relating to Employment

Employment

7. 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: 1976-77, c.33, s.7.

Employment applications, advertisements

8. 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 expressly or implies any limitation, specification or preference based on a prohibited ground of discrimination: 1976-77, c.33, s.8.

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[20] *Brooks,* above, note 14. Note: The Supreme Court of Canada has held that discrimination on the basis of pregnancy is a form of sex discrimination. This is codified in s.3 of the *CHRA*, which explicitly provides that discrimination on the ground of pregnancy or child-birth shall be deemed to be discrimination on the ground of sex.

[21] This approach to accommodation is codified in the 1998 amendments to the *CHRA* contained in Bill S-5, S.C. 1998, c.9.

[22] *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489; 12 C.H.R.R. D/417 at D/444

[23] The primary cases are *Alberta Dairy Pool*, above and *Renaud*, below.

has resulted in unions being ordered to pay damages to designated group members who have been discriminated against.

[1992] 2 S.C.R. 970

Renaud Decision

The far-ranging nature of unions' obligations under human rights legislation was clarified by the Supreme Court in the 1992 case of *Renaud v. Board of School Trustees, School District No. 23 (Central Okanagan) and the Canadian Union of Public Employees, Local 523.*[25] This decision addressed union and employer duties to accommodate in detail, particularly where a collective agreement provision is alleged to be a barrier to achieving the equality rights of a bargaining unit member.

The *Renaud* case decided that a union has a duty to accommodate where the union is a party to the discrimination. The Court said that union may become a party to discrimination in two ways:

- Where union has signed a collective agreement that is discriminatory, or
- Where a union blocks reasonable accommodation by the employer.

Decisions After *Renaud*

In decisions since *Renaud*, union efforts to negotiate a change to the agreement and/or to assist in accommodating the affected group or individual have sometimes been accepted as a defence against joint liability[26], or have been a factor in deciding that only the employer should be ordered to pay compensation[27]. In other instances, however, unions have been held liable for the discriminatory impact of collective agreement provisions despite such efforts. For example in *Parcels v. Red Deer*, the collective agreement contained a provision requiring employees on maternity leave to prepay premiums, while disabled employees were not required to do so. Despite vigorous efforts on behalf of the complainant, the union was still found to have been in breach of its human rights responsibilities (along with the employer) for having signed the collective agreement [28].

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[25] [1992] 2 S.C.R. 970

[26] *Thomson v. Fleetwood Ambulance Service* (1995) C.L.L.C. 230-007 (Ont. Bd. Inq.); *Drager v. IAMAW* (1994) 20 C.H.R.R. D/119 (B.C.H.R.C.); *MacEachern v. St. Francis Xavier University* (1994) 24 C.H.R.R. D/226 (N.S.H.R.C.)

[27] *Moore v. Canada (Treasury Board)* (1996) 96 C.L.L.C. 230-37; *Moore v. Canada (Treasury Board)* (1997) 97 C.L.L.C. 230-018 (Can. Trib.)

[28] *Parcels and Red Deer General & Auxiliary Hospital* (1992) 15 C.H.R.R. D/257 (Alta. Bd. Inq., aff'd 17 C.H.R.R. D/167 (Alta. Q.B.); *Goyette v. Voyageur Colonial Ltee* [1997] C.H.R.D. No. 8 (unreported)

Unions should also be aware that at least one human rights Board of Inquiry has voiced the opinion that union officers who express support in negotiations for including a discriminatory clause in the collective agreement may be found to be personally in breach of the statute[29].

As well, a recent 1998 decision of Muldoon J. in *Bell Canada v. CEP*[30] found that a union could not file a pay equity complaint under the *CHRA* where the union signed the collective agreement containing the discriminatory wages. This decision has been appealed. If upheld, this finding could expose unions to very significant liability.

Participation in the employment equity process is an obvious means by which unions might assess whether terms in their collective agreements have a discriminatory impact, including evaluating employer challenges to the collective agreement. This participation may also enable unions to seek to take steps on behalf of their designated group members to alter the agreement or its application.

UNION RIGHTS AND RESPONSIBILITIES UNDER THE *ACT*

The *Act* uses the term "representatives" to refer to the bargaining agent, where one exists, or to representatives designated by employees to represent them, where there is no bargaining agent: *Act*, s. 1.

Duties To Consult And Collaborate

Introduction

Where there are unionized and/or non-unionized employees in a workplace, the employer has a duty to *consult* and a duty to *collaborate* with both groups: *Act, s.15*. The employer's duties to consult and to collaborate with employee representatives covers all aspects and phases of the employment equity process, from preliminary communications, through the preparation of the plan, to its revision.

Employer Duty to Consult

The employer has a duty to consult with employees' representatives by "inviting" them to "provide their views" about:

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[29] *O'Sullivan & Amcon Management Ltd.* (1994) 19 C.H.R.R. D/417 (Ont. Bd. Inq.)

[30] [1998] F.C.J. No.312 (Court File No. T-1414-96, issued March 17, 1998. Appeal to Federal Court of Appeal - Court File No. A-222-98 (T-1414096) to be heard October 13, 1998.

- the assistance they can provide to facilitate the implementation of employment equity and communication to employees of matters relating to employment equity: *Act*, s. 15(1)(a), and

- the preparation, implementation and revision of the employment equity plan: *Act*, s. 15(1)(b).

Consultation

Employers and employee representatives must "consult" about:

- the assistance representatives could provide to the employer to facilitate the implementation of employment equity in its workplace;

- the assistance representatives could provide to the employer in communicating to employees about employment equity matters;

- the preparation of the employment equity plan

- the implementation of the plan: *Act*, s.15(1)

- the revision of the plan: *Act*, s.15(1).

- measures that may be taken to minimize any adverse impact that seniority provisions may have. This duty applies *only* where, after the workforce analysis and employment systems review, it appears that a seniority right may be working to the disadvantage of the designated groups: *Act* s.8(3). [Note: seniority rights are otherwise specifically protected by s.8, as set out earlier in Chapter 2 of this Guide.]

Unions must participate in consultations: *Act*, s.15(2).

The 1986 *Employment Equity Act* also imposed a consultation duty on the employer but no additional duty to collaborate. This duty required the employer to implement employment equity in its workforce in consultation with employees' representatives. The policy directives under the former statute required the employer to provide "sufficient information and sufficient opportunity to employee representatives or bargaining agents to enable them to ask questions and submit advice on the implementation of employment equity." Thus, "consultation" was

defined by implication as being a process in which employees are given sufficient information to ask questions and to submit advice on the implementation of employment equity.

In arbitration jurisprudence, collective agreement provisions requiring the employer to "consult" with a union before making a change, have been interpreted to allow the employer to make the change it desires provided that there has been consultation with the union before making the change. In other words, the requirement to consult did not affect the ultimate ability of the employer unilaterally to make the change. Depending on the contract language, an employer's duty to consult has included requirements to provide reasonable notice before taking any step; to meet to discuss the situation; to provide information to ensure the discussion is properly informed and to effectively consider the input before taking any action.

Joint Duty to Collaborate

The second obligation imposed by the *Act* is a duty on the employer and the employees' representatives to collaborate in the preparation, implementation and revision of the employment equity plan.

Collaboration

Employee representatives and employers must "collaborate" in:

- preparing the plan
- implementing the plan
- revising the employment equity plan

The *Guidelines* state that it is "advisable that there be involvement by employee representatives at each stage of the process. (*Guideline* 3: p.6)

"Collaboration" is not a term generally used in the labour relations or employment-related context. In its plain and ordinary meaning, the term collaboration means:

- to "work jointly"[31]
- to "work together"[32]
- "the act of working together in a joint project"[33].

[31] *The Concise Oxford English Dictionary*, 7th ed. (New York: Oxford University Press, 1982)

[32] *Gage Canadian Dictionary* (Toronto: Gage Publishing Limited), 1983)

[33] *Black's Law Dictionary*, 6th ed. (St. Paul, Minn: West Publishing Co., 1990)

The duty to "collaborate" should therefore be interpreted as requiring the parties to "work jointly" to prepare, implement and revise the employment equity plan. This duty should require the parties to endeavour seriously to reach agreement concerning every step of the employment equity process and the substantive decisions to be made in that process. The duty should include the right to equal representation on decision-making committees as well as the right to full disclosure as noted below.

A Framework for Meaningful Consultation and Collaboration

The *Act* sends a strong message that consultation and collaboration between all parties in the workplace is necessary to the achievement of employment equity. The CHRC has recognized this in its *Framework for Compliance Audits*, which states that a guiding principle of the audit process is the legislation's encouragement of consultation and cooperation between all parties. This *Framework* also states that compliance review officers should look at whether the employer has made all reasonable efforts to ensure that consultation is meaningful and appropriate in terms of the *Act*.

In light of the clear recognition of the importance of participation by employees' representatives in the employment equity process and of the companion duty to collaborate, the employer's duty to consult should be interpreted as a *duty to consult for the purpose of collaboration*.

The one limitation which the *Act* imposes on the consultation and collaboration duties is that they are not to be interpreted as "forms of co-management": *Act*, s.15(4). Employers alone under the *Act* bear legal responsibility for meeting the *Act*'s requirements. This limitation is difficult to reconcile with the union's joint responsibility and liability for the collective agreement which deals with many areas covered by an employment equity plan. However, the failure of an employer to consult and collaborate with the union may be a way of invalidating a defective employment equity plan. At the same time, the failure of a union to cooperate may violate a union's existing responsibility under the *CHRA*.

The emphasis on joint participation read together with the restriction on co-management should require the employer to endeavour in good faith to reach agreement with employees' representatives on both the process for arriving at decisions and at the decisions which will have to be made in order to implement employment equity.

Looked at in this way, the duty of collaboration under the *Act* can be characterized as indistinguishable from the now-repealed Ontario *Employment Equity Act, 1993*'s duty on employers and unions to "jointly carry out" the employment equity responsibilities. The difference between the two legislative schemes would not be in the processes required for working together towards agreement, but in the consequences of impasse.

Under the Ontario scheme, if an agreement could not be reached a plan could not be put in place unilaterally by the employer; the parties were required to have recourse to the tribunal to impose a course of action on them. Under the federal *Act*, where impasse is reached it would appear that an employer can choose to act unilaterally, subject to audit by the CHRC or a grievance or *CHRA* complaint by the union.

Unilateral employer action should not, however, be permitted in the absence of demonstrated good faith efforts to work jointly with unions and other employees' representatives and to seek reach agreement with them. Any unilateral action would still be then subject to audit by the CHRC or a complaint by the union under the *CHRA* or the collective agreement.

Consultation for the Purpose of Collaboration

This duty should appropriately be interpreted as requiring a process which provides a full and effective opportunity for employee representatives to work jointly with the employer at each step of the employment equity process including:

- initiating proposals for communicating with employees and facilitating employment equity, and for developing, implementing and revising an employment equity plan;
- reviewing and considering employer proposals for communicating with employees and facilitating employment equity, and for developing, implementing and revising an employment equity plan; and
- formulating an informed response to such proposals, provide alternate or additional proposals, and providing effective advice on any steps necessary to achieve employment equity.

The *Act* requires the reports of employers to include a description of the consultations between the employer and its employee's representatives concerning the implementation of employment equity: *Act*, ss. 18(6), s. 21(2)(c). In order to comply with its consultation and collaboration obligations, the employer should be required to record its reasons for not agreeing to the ideas, concerns and suggestions raised by the employees' representatives.

Enforcement Of Consultation And Collaboration Duties

Introduction

The *Act* makes the CHRC responsible for enforcing the obligations imposed on employers by sections 5, 9 to 15 and 17: *Act*, s. 22(1). The obligations imposed by employers under s. 15 include both the duty to consult and the duty to collaborate.

At the same time, the authority of compliance review officers to negotiate undertakings, which can subsequently lead to directions by the CHRC, makes express reference only to an employer's failure to consult: *Act*, s. 25(1)(g). In other words, the *Act* does not expressly authorize the compliance review officer to seek an undertaking in respect of an employer's failure to collaborate. There is also no express authorization for enforcing the duty to consult concerning seniority rights that may have an adverse impact.

Challenging *Guideline 3's* Enforcement Interpretation

Guideline 3 states that employers can be held to an obligation to do "whatever is in their power to facilitate the active involvement of employee representatives in the employment equity process". However, this *Guideline* also interprets the provisions of the *Act* to mean that the employer's duty to consult is the only enforceable duty. *Guideline 3* states that the reason the *Act* does not include enforcement powers against employers for the duty to collaborate with unions and the seniority consultation is that these are "mutual obligations" and employers cannot be held responsible for their failure in the absence of a power in the *Act* to make orders against unions and employee representatives. *Guideline 3* also states that this makes sense because it believes it not possible to "collaborate" alone.

There are good reasons to question and to challenge the approach taken by *Guideline 3*. The employer's duty to collaborate is a strong duty which is included among the duties which the CHRC has the responsibility to enforce. Enforcing the collaboration duty is essential to effectively implementing the right of employees' representatives' to participate in the employment equity process. There should be a presumption of enforceability for such a clear and important obligation placed on employers. It would be inappropriate to interpret the *Act* as enabling employers to develop employment equity plans which are not consistent with the collective agreement without enabling unions to enforce, through the CHRC, the employer's obligation to work jointly with them on the plan.

A further reason for interpreting the duty to collaborate as enforceable lies in the fact that this duty applies to all aspects of the employment equity process leading up to and including the preparation, implementation and revision of the employment equity plan. The *Act* clearly provides the CHRC with authority to enforce the employer's obligations in all of these areas, i.e. the employer's obligations to collect information, to conduct the required analyses, and to prepare, implement and revise the employment equity plan: *Act*, s 25(1)(a)-(f),(h).

Unions can argue that an employer's failure to collaborate with the employees' representative in carrying out these obligations is contrary to the *Act* because it constitutes a failure to carry out its obligations *in the manner required by the Act.* A failure by the employer to follow a full, joint, participative process is significant both as a matter of principle and because of the significant implications for unions of the ultimate authority resting with the employer.

With respect to *Guideline 3*'s argument that the duty is not enforceable against the union, the structure of the *Act* means that the duty does not need be enforced against unions. By giving employers the ultimate responsibility for implementing employment equity, the *Act* enables employers to act unilaterally where the employees' representative does not collaborate properly subject to a Commission audit.

What happens if there is a dispute?

Unions finding themselves blocked by employers from full participation in the design and implementation of employment equity should:

- seek assistance and enforcement from a compliance officer, who will determine whether the employer "has made all reasonable efforts to ensure that consultation is meaningful and appropriate in terms of the *Employment Equity Act*";
- try to file a complaint against the employer under the *CHRA* alleging that the employer's unwillingness to engage in meaningful discussions breached its equality obligations under the *CHRA*; or
- file a grievance under the anti-discrimination provisions of the collective agreement.

These enforcement avenues are discussed in further detail in Chapter 4.

***Bell Canada v. CEP* ("Muldoon") Decision**

Prior to the decision of Muldoon J. in the *Bell Canada v. CEP* pay equity decision[34], under the *CHRA* there was no doubt that unions could use equity legislation to challenge discriminatory provisions in a collective agreement, even though they had signed a collective agreement which contained the provision. The *Bell Canada* decision, which has been appealed, has clearly placed this assumption in jeopardy. The judge in that case held that the CEP

[34] [1998] F.C.J. No.312 (Court File No. T-1414-96, issued March 17, 1998. Appeal to Federal Court of Appeal - Court File No. A-222-98 (T-1414096) to be heard October 13, 1998.

should be prevented from bringing a *CHRA* complaint challenging discriminatory pay practices in the collective agreement to which it is a party.

Unless the *Bell Canada* decision is overturned on appeal, employers are likely to argue that the same rationale should prevent a union from using the *CHRA* to challenge a discriminatory collective agreement provision to which it is a party. Unions should give serious consideration to fighting this argument. The *Bell Canada* decision sets a very negative precedent and one which is not in keeping with the established jurisprudence on union challenges to discrimination.

Enforcement of the Union's Duties

The *Act*'s enforcement sections refer only to orders against employers: *Act*. s.25. It appears that the *Act* is not designed to make unions directly subject to orders under the *Act* enforcing their duties of consultation and collaboration. See discussion in Chpt 2 - Enforcement.

In general, as discussed above, it appears that the co-operation of unions with the *Act* is to be secured by means of their existing responsibilities under the *CHRA*. While it is not clear that a union's breach of its duty under the *Act* to consult and collaborate would amount independently to grounds for a *CHRA* complaint against a union, a breach of these duties may be found relevant to a union's liability in the context of a complaint concerning a discriminatory collective agreement provision.

Information Rights

Employers to Disclose Necessary Information

Guideline 3: *Consultation and Collaboration* recommends that employers provide employee representatives with:

> whatever information is reasonably necessary to allow them meaningful and effective participation in the consultation and collaboration processes, while ensuring that confidentiality requirements are met. (at p.10)

***Guideline* 3 recommends employers should provide information such as:**

- employer policies and practices regarding recruitment, retention, promotion, transfers, and terms and conditions of employment
- collective agreements in place

- wage and salary rates, benefit and classification systems
- the results of the workforce survey, workforce analysis and employment systems review.
- measures in the employment equity plan and timetables for their implementation [p.10].

Discussion: Information Rights

A right to information generally flows from the union's right and duty in the *Act* to participate in consultations and to collaborate in the equity process. Since these duties cover all aspects and phases of the process, unions will need more information than *Guideline 3* specifies. For example, obligations to consult and to collaborate cover the carrying out of the workforce survey, analysis and ESR, and the creation of an employment equity plan. A union that is involved in these processes would need to receive more than the "results" of each of these phases.

Unions Should Request the Following Additional Information:

- continuing and timely access to all the information necessary for their ongoing participation;
- all the information that the employer is reviewing in making its employment equity decisions, as well as any additional information that is necessary to formulate a position concerning equity - whether or not the employer is dealing with a particular issue at the time of the request
- information on the design of the processes for collecting information for employment equity purposes to facilitate union participation;
- information concerning all of an employer's workforce, not simply the bargaining unit which the union represents;
- information concerning practices and policies falling within traditional areas of management rights.

... Pay Equity Precedents ...

Unions can rely on precedents ordering disclosure to unions established under the Ontario's *Pay Equity Act* which similarly lacks any explicit requirement for employers to provide information to the bargaining agent. Ontario's Pay Equity Hearings Tribunal ruled that the joint duty of employers and unions to bargain pay equity in good faith required meaningful and informed discussions. The mutual obligation to consult and collaborate is similar to a duty to carry out responsibilities jointly in good faith and the pay equity jurisprudence should be helpful.

Disclosure Principles Developed under Ontario's *Pay Equity Act*:

- there must be disclosure of relevant information;
- disclosure is required to foster rational and informed discussions on the items required by the applicable statute
- the parties must have sufficient information
  - to intelligently appraise the other's proposals;
  - to formulate their own positions; and
  - to fairly represent their members.
- the information requested must be *necessary* to fulfil statutory requirements;
- the information must be *rationally related* to an issue or issues required by the *Act* to be addressed;
- the information may be necessary to test the quality or impact of a decision in the process;
- disclosure must be made when parties cannot agree on an issue without the information requested;
- disclosure is also necessary where the parties must have the information in order to identify and agree upon a matter statutorily required by the *Act*.[35]

Tips for Obtaining Information in the Audit and Enforcement Process

Where an audit is being conducted, unions should:

➜ request the employer to provide "all information that is reasonably necessary to allow them meaningful and effective participation in the consultation and collaboration processes, while ensuring that confidentiality requirements are met" (language from *Guideline* 3: p.10)

➜ ensure that the Compliance Review Officer is aware that this request has been made

➜ ask the Compliance Review Officer to obtain written consent from the employer to release to the union all information obtained in the course of the investigation that, in the officer's view, is "reasonably necessary" to the union's participation under the *Act*

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35 *OPSEU and Cybermedix Health Services Ltd.* (1989), 1 P.E.R. 43 at para.22 and 24

- ➜ take the position with both the employer and the CHRC's officers that providing this consent is one of the employer's duties under the *Act*
- ➜ alternatively, ask the Compliance Review Officer to commence negotiation of an employer undertaking to provide this information directly to the union.
- ➜ consider whether a grievance could be filed under the collective agreement or a complaint under the *CHRA.*

CONFIDENTIALITY REQUIREMENTS

Workforce Survey

Information gathered through a workforce survey is confidential and can be used only for the purpose of implementing the employer's obligations under the *Act*: *Act,* s.9(3)

Although the employer must be able to identify the person who returns each survey, each employee's self-identification on the questionnaire is confidential. It is not necessary for those working on the implementation of employment equity to have access to information which would allow them to identify which worker gave which response. Employment equity is based on the statistical representation of designated groups in the workforce and on the principle of self-identification, which means that only those people who self-identify as members of the designated groups can be counted as members for employment equity purposes.

As a result, unions should not seek information that identifies individuals, and employers should not make this information generally available even to those managers who are dealing with employment equity.

However, it appears that the *results* or summary data of the workforce survey are not confidential as the results are to be included in the employers' annual reports under the *Act*, which are public documents.

Other Confidentiality Issues

Employers may also be concerned about the confidentiality of information for reasons of business competitiveness in the case of the private sector, or for security reasons in a government context. Unions will have to deal with such objections as they are raised. It may be possible to negotiate terms for the release and use of such information. In many cases unions will already be familiar with these issues from their collective agreement negotiations with the employer.

Where the CHRC wishes to obtain confidential information, its compliance officers and other personnel are required to satisfy any security requirements that apply to persons who normally have access to and use of that information: *Act*, s.24.

Confidentiality Of Information Obtained By The CHRC

Information Deemed Privileged

Information obtained by the CHRC under the *Act* is treated as "privileged" and such information must not knowingly be disclosed or made available without the written consent of the person from whom it was obtained: *Act*, s.34(1).

Use of Information in Administration\Enforcement of the *Act*

Privileged information cannot be the subject of evidence or a statement in connection with any legal proceedings: *Act*, s.34(2) except:

- for the purposes of legal proceedings relating to the administration or enforcement of the *Act*: *Act*, s.34(2)(4))
- to a federal Minister Crown or to an officer or employee of the federal government for any purpose relating to the administration or enforcement of the *Act*, on any terms and conditions the CHRC considers appropriate: *Act*, s.34(3).

Information obtained by the CHRC or the Tribunal under the *Act* may not be used in any proceedings under any other Act without the consent of the employer concerned: *Act,* s.34(5).

Security Requirements

Where confidential information is involved, compliance officers and other CHRC employees must satisfy any security requirements taken by persons who normally have access to and use of that information: *Act*, s.24.

Union Access to CHRC Information

- In order to be able to participate meaningfully in the employment equity implementation process, unions will likely need access to information gathered by the CHRC.
- Where information is needed in connection with efforts to ensure compliance with the *Act*, a union can argue that the privileged information can be disclosed because it will be used in connection with legal proceedings relating to the administration or enforcement of the *Act*.
- The *Act* does not define the term "legal proceedings". In the absence of a restrictive definition, unions can try to argue that a legal proceeding under the *Act* includes any action taken in pursuit of compliance, from negotiating undertakings to hearings.

Procedures And Structures For Consultation And Collaboration

Joint Labour Management Committees

The *Act* and *Regulations* provide no guidance on how employers and employee representatives should carry out their responsibilities and how these responsibilities relate to their collective bargaining duties. It is therefore essential for employers and unions to work out an effective process which recognizes the various legal obligations of the parties.

In order for unions to have a genuine opportunity to integrate employment equity with collective bargaining and contract administration, it will typically be necessary to have at least one forum in which the employer can meet separately with each bargaining agent to discuss employment equity. Usually, the most effective way to jointly carry out employment equity responsibilities is to operate primarily through employer-union Joint Employment Equity Committees and to use a Co-ordinating Committee as a forum for resolving matters identified by the individual Joint Committees as requiring co-ordination between bargaining units. This was the structure provided for in Ontario's now repealed *Employment Equity Act, 1993*.

This structure offers several advantages:

- the creation of an effective employment equity plan will require considerable co-ordination with traditional collective bargaining. Joint Committees will assist in achieving this as well as ensuring respect for the traditional bi-partite relationship between unions and employers.

- the Joint Committee structure will facilitate effective decision-making and avoid unnecessary conflict between bargaining agents. Unions should also consider carefully whether they wish to engage in a process with management and unrepresented employees.

Where possible, unions should try to participate at the earliest stages of the employment equity process. A union that has not participated in the workforce analysis and employment systems review will be less able to ensure that the plan meets its aims and may face difficulties assessing the legitimacy of employer requests for alterations to the collective agreement.

***Guideline* 3 Suggestions for Consultation and Collaboration Procedures**:

- Joint labour-management committees (or one such committee) should be struck.
- All major decisions related to the implementation of employment equity should have the full support of employers and employee representatives (subject to the fact that the ultimate responsibility for compliance with the *Act* lies solely with the employer, and lack of agreement will be no defence). (p.15)
- Clear and accurate Committee records should be maintained in order to assist in meeting the employer's obligation to report on the consultation with employee representatives (p. 15)

Designated Group Members And Advocacy Groups

The union's responsibility to "consult" and "collaborate" with the employer to implement employment equity can be carried out most effectively where the union and its designated group members have a good working relationship.

Recognition of Expertise of Designated Group Members and Advocacy Groups

- Trade unionists must recognize the expertise and experience of designated group members and their advocacy groups as well as the deficiencies in the current collective bargaining system.
- It will be essential for unions to encourage the participation of their designated group members in the employment equity process and to listen to and rely on their expertise.
- Designated group advocacy organizations will also have much of the information unions need to participate in carrying out the workforce survey, conducting the review of employment policies and practices and developing the employment equity plan.

Recognition of Vital Role and Expertise of Unions

- At the same time, it is important for designated group advocates to recognize the vital role that unions have played and will play in implementing employment equity and to respect their role and their expertise in dealing with recalcitrant employers.
- Unions have been at the forefront of bringing justice on equity issues to the workplace through their advocacy for workers in workplaces; through negotiating strong protections in collective agreement language and through lobbying for progressive legislation in the areas of human rights, pay equity and employment equity.
- It is still true that the quickest and most effective way for designated group members to achieve greater equality in the workplace is to unionize their workplace. With a union, they can join together with co-workers to fight for a collective agreement with better working conditions, access to jobs and better pay and benefits.
- Just as the extra rights given to unionized workers under provincial pay equity legislation prompted unionization of many workplaces, non-organized workers seeking employment equity may look to unionization so that their union can take on responsibility along with the employer for developing and implementing an employment equity plan.

Guideline 3 - Model Joint Committee

... Introduction ...

The Model Joint Committee suggested by *Guideline* 3 accords in large part with the recommendations made in the Canadian Labour Congress' 1985 position paper on employment equity and in its submissions to the CHRC. It is not yet clear to what extent the CHRC will regard the refusal of an employer to operate in accordance with this model as a breach of its duties under the *Act*. A source of concern is that the *Guideline* 3 includes other samples of "joint labour-management initiatives"; for example a letter of intent that sets up just one annual meeting for the union to "present its views" on the preparation, implementation and review of the employment equity plan. A union could argue that an employer prepared to offer only this level of participation to its unions would be in breach of its duties under the *Act* or the *CHRA*.

***Guideline* 3 Recommendations for a Model Joint Committee:**

Co-ordinating Committee

- In larger unionized workplaces there could be a committee for each union and for non-unionized employees, plus a co-ordinating committee with representatives from each sub-committee.

Committee Composition

- Committees should have a minimum of four members
- At least half the members should be employee representatives
- Consideration should be given to having the committee co-chaired by the union and management
- Committee selection criteria should include familiarity with equity issues, the organizational structure and membership in the designated groups (p.17)
- Where a union exists the union will designate its representative (p.18). Employee representatives must not be selected by the employer (the *Act* itself requires designation of employee representatives by employees). *Guideline* 3 suggests three options for facilitating the designation of representatives by non-unionized employees. (p.18)

Consultation with designated group members

- Employee representatives should consult with the members of the designated groups they represent (p.18)

Rights of Employee Representatives

- Committee meetings should take place during working hours (p.20)
- Employee representatives should receive normal pay for committee meetings and must be allowed work time with pay to perform their duties as a member of the committee, including preparation for meetings (such as the development of proposals)
- Employee representatives and designated group members should be granted reasonable time off with pay for the purpose of consulting with one another.

... Payment of Employee Time ...

The lack of any specific requirement in the *Act* or *Regulations* for time off with pay for employees engaged in the employment equity process is cause for serious concern, despite *Guideline* 3's statement that such arrangements are necessary to the proper functioning of a joint labour-management committee.

Achieving employment equity is time consuming and ensuring proper payment will be a very important issue, particularly for smaller bargaining units. Unions should take the position that the duties to consult and collaborate cannot be carried out effectively without ensuring employee participation through payment of time. Preparation for union-employer meetings includes attending employment equity training courses, internal union committee meetings, meetings with designated group members and advocacy organizations, as well as the review of employment equity materials.

Guideline Recommendations/Basic Principles for Joint Committees

... Introduction ...

Guideline 3 sets out a useful series of recommendations and "basic principles" concerning the effective functioning of the joint committee.

... Recommendations ...

- Committee members should receive appropriate training
- Terms of reference should be developed for the committee
- A general action plan outlining key activities and deadlines should be developed.

... Basic Principles ...

The "basic principles" expressed in *Guideline* 3 are:

- There should be good faith and good will on both sides. The process should not be subverted for other issues. Most importantly, the process must not be simply a technical exercise to fulfil the requirements of the law;
- Committee members should be provided with a full opportunity to:
    - identify and understand the issues;
    - review and consider proposals before the committee

- formulate an informed response to proposals before the committee; and

- present alternative or additional proposals to the committee for consideration.

- The employer should give effective consideration to all proposals, advice, suggestions and other comments provided by employee representatives during the consultation and collaboration process.

- The employer should advise employee representatives of any intention not to address their concerns, give reasons for not doing so and provide a further opportunity for a response to these reasons. (at p.19)

Employer's Duty To Report On Consultation And Collaboration

Employers must include in their annual reports a narrative description of their consultations with employee representatives: *Act*, s.18(6)(b); s.21(2)(c). There is no requirement in the *Act* or *Regulations* for employee representatives to sign off on this description. However, *Guideline* 3 states that employee representatives should be given an opportunity to review this description, prior to filing, so that they may provide input and recommend changes. Where this has occurred the employer can add this fact into its description to assist in demonstrating that it has met its responsibilities under the *Act*.

If a union believes that the description is inaccurate or misleading, the assistance of a compliance officer should be sought and/or the union should write its own addendum to the Report and forward it to the Minister or the Legislature (as appropriate) to be read with the report.

Union Assistance in Communicating Employment Equity

Guideline 3 includes a section discussing the assistance that employee representatives may provide in facilitating the communication and implementation of employment equity (pp. 6-8) which is further discussed in *Appendix 5: Informing Employees*. *Guideline* 3 also has a section on the consultation regarding adverse impact of seniority provisions in collective agreements (p.11). For this Guide's discussion of this issue, see Chpt. 2 - "The Collective Agreement and Employment Equity Process".

Seniority Rights And Employment Barriers

Employee Seniority Rights On Layoff or Recall

Employee layoff or recall seniority rights under a collective agreement or pursuant to the established practices of an employer are deemed not to be employment barriers for this *Act's* purposes: *Act*, s.8(1).

In other words, it appears employees will be entitled to rely on their established seniority rights to avoid layoff, to bump into other jobs or to have the right of recall from layoff unless the union and employer agree otherwise (see s.8(3)). Employers may not take the position that they are obliged under the *Act* to make changes to these kinds of provisions and practices.

Other seniority rights

Unless they are found to constitute a discriminatory practice under the *CHRA*, employee seniority rights (other than on layoff or recall, including rights acquired under workforce adjustment policies implemented when an employer is downsizing or restructuring, under a collective agreement or pursuant to an established practice), are deemed not to be employment barriers: *Act,* s.8(2). Until such a finding has been made, it appears such seniority rights cannot be considered to be a barrier under the *Act* and an employer cannot argue that they are entitled to unilaterally change such rights.

Consultation where a seniority provision has an adverse impact

Despite the provisions deeming seniority rights not to be barriers discussed above, where the employment systems review makes it appear that a collective agreement seniority right might have an adverse impact on the employment opportunities of persons in designated groups, the employer and its employees' representatives "shall consult with each other concerning measures that may be taken to minimize the adverse impact": *Act*, s.8(3).

There is no express authorization within the *Act* for enforcing the consultation concerning seniority provisions with an adverse impact. Thus, neither employers nor unions seem to be subject to orders made specifically to enforce this obligation.

However, both unions and employers continue to bear their existing responsibilities under the *CHRA* to ensure the collective agreement does not violate human rights principles. Where the ESR reveals that a seniority provision may have an adverse impact on the employment opportunities of designated groups, the requirement that the parties "consult... concerning measures that may be taken to minimize the adverse impact", appears to be intended to provide a forum for both parties to identify whether a human rights liability under the *CHRA* exists and to take pro-active steps to meet those responsibilities. Failing to take those proactive steps could lead to union and employer liability under the *CHRA*, employer liability under the *Act*, and possibly liability of both parties under a collective agreement.

There are very few decisions on seniority rights. However, in one recent case a requirement for departmental seniority that systematically excluded female telephone operators from advancement into preferred positions was found to be discriminatory under the *CHRA*[36].

Public Sector Practices Deemed Not a Barrier

In the public sector the following are deemed not to be employment barriers within the meaning of the *Act*, namely,

(a) priorities for appointment under the Public Service Employment Act or regulations made by the Public Service Commission; and

(b) workforce adjustment measures established by the Treasury Board, including measures set out in the Workforce Adjustment Directive, or by the Public Service Commission or any other portion of the public sector referred to in paras 4(1)(c) and (d): *Act*, s.8(4).

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[36] *Goyette v. Voyageur Colonial Ltee* [1997] C.H.R.D. No. 8, unreported decision of the Canadian Human Rights Tribunal, dated October 1997

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CHAPTER 4: ENFORCING EMPLOYMENT EQUITY

INTRODUCTION: THE *EMPLOYMENT EQUITY ACT* IN CONTEXT

Proactive Regime

The *Employment Equity Act* establishes a "pro-active" regime for addressing certain aspects of systemic discrimination in the workplace. Such a pro-active regime mandates positive obligations with a time table for compliance. It is an extension of the "complaints-based" equality measures already contained in the *CHRA*. In such "complaints-based" regimes, rights are largely enforced and protected only if a complaint is made that the statute has been violated.

Under the *Employment Equity Act,* proactive measures are required without waiting for a complaint because of the general assumption that there is systemic discrimination in many workplaces. The *Act* requires first that there be an analysis of the workplace to assess the degree of underrepresentation of designated group members and to identify the barriers operating in that specific workplace to create systemic discrimination.

Where discrimination is found, the next obligation is to develop remedial measures to eliminate the discrimination and to introduce positive policies and practices to correct any underrepresentation. These measures are set out in an employment equity plan which is then implemented and enforced. The *Act* gives the CHRC the responsibility to make sure that these steps are taken.

The *Act*'s pro-active obligations lessen the burden on individual members to bring forward discrimination complaints or grievances. Similarly, unions are provided with a positive structure within which to implement their human rights obligations and to work to see equity achieved. On the other hand, because there is no formal complaint mechanism, the *Act* contains no specific means by which unions or individuals can require the CHRC or Employment Equity Review Tribunal to investigate and rule on an allegation that an employer is in breach of its obligations. They must rely on the CHRC's enforcement discretion.

Union Access to Enforcement

When a pro-active regime works properly, it usually brings equity protection to more workers, by avoiding the piece-meal effects of a complaint-based regime. However, given the importance of the role of unions and designated group members in ensuring employer accountability, as well as the CHRC's limited resources, unions and designated group members are legitimately concerned that they have no direct enforcement role under the *Act*.

This concern is all the more valid because the *Act* introduced changes to the complaint-based *CHRA* human rights regime which restrict its application to matters which are intended to now be covered by the *Act*.

For this reason, in addition to setting out the *Act's* enforcement procedures, this chapter discusses the interaction of the *Act* with other legal regimes, including the *CHRA* and the collective bargaining relationship. Legal strategies in all these forums may be available to unions to achieve employment equity in the event that the CHRC enforcement process proves inadequate.

In particular, unions may seek to gain greater involvement in the employment equity process by enforcing the *Act*'s obligations through collective agreement negotiations and grievance arbitration. It is also possible that effective and successful use of alternative strategies may result in pressure being placed on the CHRC to strengthen the exercise of its enforcement powers and to involve unions in its enforcement processes.

FIVE-YEAR REVIEW OF *ACT*

By House of Commons Committee

The Act came into effect on October 23, 1996. Five years after the coming into force of this Act, and at the end of every five year period thereafter, a comprehensive review of the provisions and operation of the *Act* including the effect of its provisions, must be undertaken by a designated House of Commons Committee: *Act*, s.44(1).

Tabling of House Committee Report

Within six months after the five-year review is completed, the Committee must submit a report to the House of Commons including a statement of any changes the committee would recommend: *Act*, s.44(2).

Unions Need to Document Experiences with the *Act*

Unions should record their experiences and concerns with enforcement of the *Act* over the next two to three years. When the five-year review of the *Act* is conducted in 2001, there may be an opportunity to achieve legislative amendments strengthening the enforcement provisions if there is evidence that the current scheme is not adequate to fulfill the purpose of the *Act*.

PART I: DIRECT ENFORCEMENT UNDER THE *ACT*

CHRC RESPONSIBILITY FOR ENFORCEMENT

Direct enforcement has been placed in the hands of the CHRC which is *responsible* for enforcement of the *obligations imposed upon employers* by sections *5, 9-15 and 17* : *Act*, s. 22(1).

Obligations Enforced by CHRC

Employer Obligations Enforced by the CHRC:

- identifying and eliminating barriers, instituting positive policies and practices, and making reasonable accommodations: *Act*, s. 5
- conducting workforce analysis and employment systems review: *Act*, s.9(1)
- preparing and implementing an employment equity plan; ensuring that the employment equity plan would constitute reasonable progress; implementing the plan; monitoring its implementation, reviewing and revising the plan : *Act*, ss.10, 11, 12, 13
- providing information to employees: *Act*, s.14
- consulting and collaborating with bargaining agents: *Act*, s.15
- establishing and maintaining records: *Act*, s.17

THE COMPLIANCE AUDIT PROCESS

Audit Is the Initial Step to Enforcement

The "compliance audit" is the first step in the process of CHRC enforcement. The authority to conduct compliance audits is *discretionary*, not mandatory. A compliance officer "may"

conduct a compliance audit for purposes of ensuring compliance with the enforceable obligations: *Act*, s. 23(1). On its face, there does not appear to be any mandatory requirement for compliance audits to be conducted. The *Act* also does not impose any specific requirements on the compliance audit process. For example, there are no requirements governing when and how often compliance audits should be conducted.

The CHRC's document *Framework for Compliance Audits* outlines the audit process and sets out the factors that the CHRC will consider in assessing whether the employer has complied with the *Act*. This document is available from the *CHRA*'s web-site at *http://www.chrc.ca/equity*.

Compliance Review Officers

Conduct Audits

The CHRC carries out its enforcement responsibilities through Compliance Review Officers (CRO's), who are given the authority to carry out audits of employers to ensure that they are in compliance with the *Act*.

The CHRC may designate any person or category of persons as employment equity compliance review officers for the purposes of conducting compliance audits: *Act*, s.22(3). Compliance officers carry certificates to identify them as compliance officers and, on request, must show the certificate to the person in charge of a place that the officer is seeking to enter to conduct an audit: *Act*, s.23(3).

Human Rights Investigator May Not Conduct an Audit

The CHRC is required to keep separate its role as auditor under this *Act* from its role in investigating *CHRA* human rights complaints. A person who has been designated as an investigator in a *CHRA* complaint cannot conduct a compliance audit of that employer during the human rights investigation: *Act*, s.22(4).

Enforcing of Consultation/Collaboration Obligations

This issue is discussed fully in Chapter 3 under heading "Enforcement of Consultation and Collaboration Duties".

Powers of Compliance Officers

Compliance officers have extensive investigatory powers under which they may:

- enter places where they have reasonable grounds to believe there is any thing relevant to enforcement; and

- require production, for examination or copying, of records, books of account or other document they have reasonable grounds to believe contains information that is relevant to enforcement: *Act*, s.23(1).

- reproduce any record from a data processing system in the form of a print-out or other intelligible output and remove the print-out or other output for examination and copying; and

- use copying equipment to make copies of any record, book of account or other document: *Act*, s.23(2).

Obligation to Assist Compliance Officers

The person in charge and every person in a place being audited is required to give the compliance review officer all reasonable assistance to exercise their powers and to provide any information relevant to enforcement that the officer may reasonably require: *Act*, s.23(4). This section is broad enough to require the employer, employees and on-site union representatives to provide assistance and information if asked by the compliance review officer.

Compliance Undertakings And Directions

Guiding Policy Of Persuasion And Negotiation

The CHRC is required to be guided by the policy that, "wherever possible", cases of non-compliance should be resolved through "persuasion" and the negotiation of written undertakings: *Act*, s. 22(2)

Compliance reviews officers can negotiate undertakings with employers, and the CHRC may only issue directions to employers and make applications for orders confirming those directions "as a last resort": *Act*, s. 22(2).

Negotiating Written Employer Undertakings

Where a compliance officer is of the opinion that an employer has failed to meet an obligation, the officer must inform the employer and must attempt to negotiate a written undertaking from the employer to comply: *Act*, s. 25(1).

The requirement to attempt to negotiate an undertaking is triggered where an officer is of the opinion that the employer has failed to meet the following obligations:

- → has not collected information or conducted a workforce analysis or an employment systems review: *Act*, s. 25(1)(a)

- has not prepared an employment equity plan, has prepared an employment equity plan that does not meet the requirements of ss. 10 and 11, has not made all reasonable efforts to implement its employment equity plan, has failed to review and revise its employment equity plan: *Act*, ss. 25(1)(b)-(e)

- has failed to provide information to its employees: *Act*, s. 25(1)(f)

- has failed to consult with its employees' representatives: *Act*, s. 25(1)(g).

- has failed to establish and maintain employment equity records: *Act*, s. 25(1)(h).

Union Role in CHRC Process

- Unions may well want to ensure they are part of the CHRC's audit process
  - as a CRO undertaking or CHRC Directions might have a direct or indirect impact on collective agreement rights;
  - to push the CHRC to take effective enforcement steps;
- The *Act* does not set out a process for negotiating compliance undertakings or issuing Directions. It flows logically from the union's consultative and collaborative role in the employment equity process that unions should also be involved in these processes.
- The CHRC should be receptive to unions who wish to participate in the negotiations process. Its *Framework for Compliance Audits* recognizes as a guiding principle the importance of collaborative efforts and cooperation among all parties, including unions.
- Union participation in the negotiations process may be hindered if it does not have access to information obtained by the CHRC. Unions should make a request and seek to obtain all necessary information from the CHRC. For discussion of the status of information obtained by the CHRC, see Chpt. 3, "Information Rights".

Where Employer Asserts Failure of Group Members to Self-Identify

The *Act* depends on the principle of voluntary self-identification by designated group members. As a result, situations can arise where an employer believes there is a significant discrepancy between the actual numbers of designated group members in the workplace and the numbers of employees that have identified themselves as such in the workforce survey.

Where a CRO's non-compliance finding is based in part on an apparent underrepresentation of designated group members in a workplace, the employer may take the position that the discrepancy is due to a failure by members of the workforce to self-identify: *Act*, s.25(1.1). If the compliance officer agrees, this factor will be taken into account in the negotiation of undertakings and issuance of directions: *Act*, s.25(1.2). It is important to note that in satisfying a compliance officer of such a discrepancy, an employer cannot identify individual employees in its work force whom it believes did not self-identify: *Act*, s.25(1.3).

Directions/Orders

CHRC May Issue Directions

Directions to employers are issued by the CHRC itself rather than by compliance officers. The CHRC's power to issue directions is discretionary not mandatory: *Act*, ss. 25, 26.

Compliance officers must notify the CHRC of the circumstances which can give rise to an order for directions. Upon receiving such notification, the CHRC may issue a direction to the employer which is to be sent by registered mail: *Act*, ss. 25(2),(3), 26(1).

Circumstances in Which CHRC Directions Can be Made

Directions can be issued in the following circumstances:

- → where a compliance officer cannot obtain a written undertaking sufficient to remedy the non-compliance: *Act*, s.25(2)
- → where compliance officer is of the opinion that the employer has breached an undertaking: *Act*, s.25(3).
- → where a compliance officer is of the opinion that an employer has failed to give reasonable assistance or to provide information as required: *Act*, s.26(1).

The CHRC direction will:

- → set out the facts on which the officer's finding of non-compliance is based (not required for breach of undertaking direction), and

→ require the employer to take the actions as set out in the direction to remedy the non-compliance: *Act*, ss.25(2), 26(3), 26(1).

Role for Union in Issuance of CHRC Direction

- Under the *Act*, seeking the assistance of the compliance officer is the first step to getting the CHRC to issue an direction.
- There is no direct route in the *Act* for a union to make a request for a direction for compliance.
- Unions can play a useful role in this context by seeking to monitor the employer's compliance with an undertaking and bringing any concerns about non-compliance to the attention of the CRO.

Amendment of Direction

The CHRC may rescind or amend a direction where new facts are presented and it is satisfied that the direction was issued without knowledge of a material fact or was based on a mistake about a material fact: *Act*, ss.25(4), 26(2).

Limitations on Contents of Directions and Orders

The CHRC cannot give a direction which would: :

→ cause undue hardship on an employer: *Act*, s. 33(1)(a)

→ require an employer to hire or promote unqualified persons and, with respect to the public sector, require an employer to hire or promote persons without regard for merit as required by the *Public Service Employment Act or* impose on the Public Service Commission an obligation to exercise its discretion regarding exclusion orders or regulations: *Act*, s. 33(1)(b),(c)

→ require an employer to create new positions in its workforce: *Act*, s. 33(1)(d)

→ impose a quota on an employer - "quota" in this context is defined as "a requirement to hire or promote a fixed and arbitrary number of persons during a given period": *Act*, s. 33(1)(d), (2)*

→ in the case of a direction or order respecting the establishment of short term numerical goals, fail to take into account the factors set out in s.10(2): *Act*, s.33(1).

* Note: quotas which are not "arbitrary" are permitted.

Public Sector Direction or Order

In making a direction or order to a public sector employer, the CHRC must take into account the roles and responsibilities of that portion of the sector, as set out in other statutes such as the *Public Service Employment Act* and the *Financial Administration Act*: *Act*, s.33(3).

Enforcing the Compliance Audit and Direction Power

What Unions Can do to Obtain Effective Compliance Audits Directions

- ➜ Unions and other labour organizations can make requests and suggestions to the CHRC concerning the exercise of its compliance audit power and authority to issue directions. For example, concerns about the process for selecting employers for audit, and the timetable for audits, can be raised directly with the CHRC.

- ➜ If the CHRC is not responsive to concerns, one possible route to consider is to make an application to the Federal Court Trial Division asking for an order directing the CHRC to exercise its responsibility to enforce the *Act*. Since the CHRC's enforcement responsibility is discretionary rather than mandatory, it would be necessary to show that the CHRC has refused to exercise its discretion to audit or issue Directions for reasons which are improper or inconsistent with the purposes of the *CHRA*.

- ➜ If the CHRC failure to act served to undermine or frustrate the purposes of the *Act*, the Court could intervene to direct the CHRC to exercise its discretion properly. Other possible avenues by which unions can seek to enforce either the *Act* and/or its obligations are discussed below.

MONETARY PENALTIES AVAILABLE AGAINST PRIVATE SECTOR EMPLOYERS FOR REPORTING VIOLATIONS

Monetary penalties are ordered by the Minister not by the CHRC and only against private sector employers.

The Minister has the power to order a monetary penalty where a private sector employer commits one or more of following filing *reporting* violations:

- failure to file an employment equity report: *Act*, s. 35(1)(a)
- failure to include the required information in a report: *Act*, s. 35(1)(b)
- knowingly filing false or misleading information: *Act*, s.35(1)(c).

There is a maximum penalty of $10,000.00 for a single violation, with a cap of $50,000.00 for repeated or continuing violations. A new violation occurs on each day that an employer fails to meet the requirement: *Act*, ss. 35, 36.

An assessment of a monetary penalty can be issued to an employer within two years of the Minister becoming aware of the violation: *Act*, s. 36(1). An employer has thirty days either to pay or to appeal the notice of violation: *Act*, s. 38(1).

EMPLOYMENT EQUITY REVIEW TRIBUNALS' RESPONSIBILITIES

Introduction

Employment Equity Review Tribunals are established by the President of the Human Rights Tribunal Panel under the *CHRA* to decide certain matters relating to the *Act's* enforcement.

Tribunal Composition and Qualifications

Tribunal members are selected from among the membership of the Human Rights Tribunal constituted under the *CHRA*. Human Rights Tribunals decide issues relating to enforcement of the *CHRA*.

Tribunal hearings will normally be conducted before a one member panel. The Panel President has the discretion to appoint a three person Tribunal if s/he considers that the complexity of the case warrants it. Where there is a three-member panel, one member will be designated to preside over the hearing: *Act*, s. 28(1),(2),(4).

The Panel President must consider knowledge and experience in employment equity matters in making Tribunal appointments: *Act*, s. 28(3).

Requests for Review

An employer can dispute a CHRC a direction by asking the Panel President for a review of the direction: *Act*, s. 27(1). There is no provision for a union disputing a CHRC direction or the failure to issue a direction.

Time Limits

Where the direction concerns non-compliance with the *Act* or breach of an undertaking, the employer must request a review within sixty days of when the direction was issued: *Act*, s. 27(1)(a). Where the direction concerns failure to give assistance to a compliance officer, the request must be made within thirty days: *Act*, s.27(1)(b).

The CHRC may apply to the President of the Panel for an order confirming a direction where it believes that an employer has failed to comply: *Act*, s.27(2). The CHRC cannot apply for an order where the employer has requested a review: *Act*, s.27(3). Again, there is no provision for a union requesting such a review where there is employer non-compliance.

Proceedings Before the Tribunal

A Tribunal must conduct matters before it as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit: *Act*, s.29(2). The Panel President may retain persons having technical or special knowledge to assist or advise a Tribunal in any matter: *Act*, s.28(7). The Panel President may also make rules governing the Tribunal's practice and procedure: *Act,* s.27(9).

Review Tribunals have the power to:

- → summon and enforce the attendance of witnesses, and compel production of documents and other things: *Act*, s. 29(1)(a)
- → administer oaths: *Act*, s. 29(1)(b)
- → receive and accept such evidence as they see fit, whether or not admissible in a court of law: *Act*, s. 29(1)(c).

Tribunal hearings are public unless an employer establishes that the circumstances of the case require it to be held in private (*in camera*): *Act*, s. 29(3),(4).

Tribunal Decisions and Orders

Tribunal Powers

A Tribunal has the power to:

- → confirm, vary or rescind the CHRC's direction: *Act*, s. 30(1)(a), and
- → make any other order it considers appropriate and reasonable in the circumstances to remedy the non-compliance: *Act*, s.30(1)(b).

Note: Tribunal orders are subject to the same limitations on their content as CHRC directions: *Act*, s.33(1), see "Limitations on Contents of Directions and Orders", above

A Tribunal may vary or rescind any order it has made: *Act*, s.30(2). There is no appeal from a Tribunal order. Orders can only be challenged by way of the more limited route of judicial review in the Federal Court: *Act*, s.30(3). A Tribunal must:

- → provide the parties with written reasons for its decision: *Act*, s.29(5)
- → on request by any person, provide the person with a copy of any of its decisions, including a decision to hold a hearing *in camera*, together with the written reasons for the decision: *Act*, s.29(6).

Court Enforcement of Tribunal Orders

Any order of a Tribunal may be made an order of the Federal Court for purposes of enforcement: *Act*, s.31(1). There is no similar provision for enforcement of a CHRC Direction.

Role of Unions in Tribunal Proceedings

Unions may wish to participate in Tribunal proceedings to ensure the Tribunal's decision fairly enforces the *Act* as it affects their members and\or does not inappropriately affect the collective agreement. The *Act* does not specify who can participate in Tribunal proceedings but appears to contemplate that the parties will only be the CHRC and the employer.

Given a union's equity responsibilities and the concern that a Tribunal's order may directly or indirectly impact on the collective agreement, unions should be entitled to participate if they choose to. The Tribunal's general procedural powers would include the power to allow unions to participate as intervenors where appropriate. Intervention can take two forms: as a "friend of the Tribunal" or as a party intervenor.

- A union seeking to intervene as a "friend of the Tribunal" would have to show that it represented some general public interest not represented by the parties, *or* could provide the Tribunal with some expertise in an area of fact, law or policy which could assist the Tribunal in deciding the issues before it. The extent of participation is at the discretion of the Tribunal.
- A party intervenor has full rights of participation, but to intervene in this role it is necessary to show that the decision may impact on the intervenor's legal rights: see Ont. Pay Equity Hearings Tribunal decision of *ONA v. Haldimand-Norfolk (No. 5)*[37].

Unions could, depending on the facts, seek to intervene on either ground. If the union believes the Tribunal's decision could impact on its collective agreement rights, then this is a good argument for seeking full party intervenor status. Unions can also seek status on the basis that their expertise and experience with respect to the workplace and the impact on employees is vital to the Tribunal's understanding of the issues before it.

[37] [1990] 1 P.E.R. 77

PART II: ACHIEVING EMPLOYMENT EQUITY: INTERACTION OF THE *ACT* WITH OTHER LEGAL REGIMES

THE *ACT* AND THE *CANADIAN HUMAN RIGHTS ACT*

Introduction

The *Act* amended the *CHRA* to limit its role in relation to employment equity. These amendments restrict or prohibit *CHRA* complaints in certain circumstances and limit the Tribunal's authority to order certain measures aimed at correcting underrepresentation. These amendments to the *CHRA* signal that there is to be some interaction between the *CHRA* and the *Act*. In fact, the same body, the CHRC, has enforcement responsibility for both statutes.

Can the *Act*'s Obligations be Enforced by a *CHRA* Complaint?

The *CHRA* amendments were likely intended to protect employers from "double liability" by preventing the same issue from giving rise to proceedings under two separate statutes. However, the amendments must be carefully reviewed because individuals and unions have to date been able to directly enforce the *CHRA* by filing complaints against employers whereas enforcement of the *Act* is the exclusive responsibility of the CHRC[38].

Since the *Act* does not provide for its direct enforcement by unions, it is important to consider whether unions can seek access to its enforcement indirectly by way of the employer's general anti-discrimination obligations under the *CHRA*. See Chapter 3: Existing Equity Responsibilities of Unions. A careful examination of the *Act* and the *CHRA* supports the view that unions may still turn to the CHRC to seek to enforce at least indirectly the *Act's* obligations and to enforce the employers equality obligations under the *CHRA*, which continue to exist.

At a minimum, a complaint under the *CHRA* might serve to ensure that the CHRC moves to fulfill its responsibility to enforce the *Act*. The process of determining whether or not a *CHRA* complaint can go forward may also provide an opportunity for review of an employment equity plan to ensure that it meets appropriate standards. Finally, there may be room for complaints by unions and employees to ensure enforcement of the *Act*'s obligations. These issues are reviewed further below.

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[38] Unions should be aware that a recent decision has placed in jeopardy the ability of unions to file human rights complaints which allege discrimination in a collective agreement to which they are a signatory. This *Bell Canada* decision, which is currently under appeal, is discussed further in Chpt. 3 - "Enforcement of Consultation and Collaboration Duties."

- Subsection 10(b) prohibits entering into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment that deprive or tend to deprive employees of employment opportunities on a prohibited ground of discrimination.

CHRA's Restrictions on Tribunal Remedial Authority

In addition to restrictions on complaints, the Human Rights Tribunal's remedial authority under the *CHRA* in relation to employers covered by the *Act* has been limited. Where the Human Rights Tribunal finds that a complaint against an employer covered by the *Act* is substantiated, it cannot order the employer under s.53(2)(a)(i) of the *CHRA* to *adopt a special program, plan or arrangement* containing

- positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce: *CHRA*, s. 54.1(2)(a), or

- goals and timetables for achieving that increased representation: *CHRA*, s.54.1, s. 54.1(2)(b).

Section 53(2)(a)(i) allows a *CHRA* Tribunal to order an employer to adopt "a special program, plan or arrangement" as referred to in section 16(1) of the *CHRA*. Section 16(1) provides that a special programme designed for a disadvantaged group to eliminate or reduce disadvantage is not a discriminatory practice.

It is not clear yet what policies and practices or goals will fall within this restriction but unions should argue for a narrow interpretation of this restriction. Only when such measures are included in a special program, plan or arrangement are they restricted. The Tribunal can still require an employer to take any and all other steps that are necessary to change their policies or practices or prevent them from having a discriminatory effect.

Determining what measures are restricted will depend on the facts peculiar to each workplace; i.e., what measures are required to remove barriers and effect proper accommodation and what measures go beyond that to correct underrepresentation: See *Appendix 10: Employment Equity Plan*: *"What are positive policies and practices"*.

Note: The amendment also includes an important clarifying provision that this restriction is not to be interpreted as limiting the Tribunal's power to order an employer to *cease or otherwise correct* a discriminatory practice: *CHRA*, s.54.1(3).

Employers covered by the *Act* are required to put in place employment equity plans containing "positive policies and practices" that are intended to correct underrepresentation - exactly the

types of provisions now barred as orders under s.53(2)(a)(i) of the *CHRA*. If the *Act* is effective, this amendment may not be of great concern to unions and designated group members. However, unions and designated group members will want to ensure employer accountability for the employer's obligations under the *Act*. At the very least, the standards for the employment equity programs required by the *Act* should not fall below what could have been ordered by a Human Rights Tribunal to remedy a complaint under the *CHRA*. As it is likely that the CHRC will not have sufficient resources to enforce the *Act*, unions need to ensure that they can still effectively enforce the rights of their members to be free from systemic discrimination.

Restriction of Statistical Complaints

The CHRC cannot deal with a complaint of discrimination under s. 7 or s. 10(a) against an *employer* dealing with policies and practices where the complaint is based solely on statistical information purporting to show under-representation in an employer's workforce of members of one or more designated groups: *CHRA*, s.40.1(2). This restriction does not apply to complaints under s.10(b) of discriminatory agreements. It also does not apply to complaints brought against unions.

Based Solely on Statistics

On its face, this restriction is limited to such complaints where they are based *solely* upon statistical information. Complaints which are based on statistical information as well as other information would still be allowed to proceed. Unions should argue this restriction should be interpreted narrowly as it limits citizen's access to almost-constitutional human rights protections.

Requiring a union to demonstrate something in addition to statistical information to support a *CHRA* complaint of employment discrimination is not a very onerous restriction as most complaints rely on a number of different types of evidence. Statistical information can still be relied on, provided that there is additional information to support the complaint.

What kind of additional information would be relevant, and how much additional information would be required, are matters which remain to be considered by the CHRC and the Tribunal, depending on the type of complaint.

... Complaint of Discrimination ...

Generally, a union complaint of employment discrimination would also include non-statistical information such as:

- evidence that policies or practices contain provisions, or are carried out in a manner, which fail to address needs or concerns of members of designated groups,

- evidence of interest by members of designated groups in employment opportunities in which they are under-represented, or

- evidence of unsuccessful efforts to alter policies or practices to respond to identified needs or concerns of members of designated groups.

This type of information certainly overlaps with the issues which should be raised and addressed in the employment equity process. The CHRC would likely want to know more about the status of the employment equity process as part of its investigation. Again, then, a *CHRA* complaint might provide unions with an avenue by which to address concerns it may have with the employment equity process.

Note: With respect to a *CHRA* complaint, it is important to remember that information obtained by the CHRC or a Tribunal under the *Act* cannot be used in proceedings under another statute (here the *CHRA*) without the employer's consent. In making a complaint, then, the information relied upon by the union must be obtained through a source other than the CHRC.

... Complaint of Failure to Comply with the *Act* ...

To seek direct enforcement of the *Act* through a *CHRA* complaint, the most obvious additional information required in a union complaint would be evidence of the employer's failure to comply with the *Act*'s requirements. The CHRC may be able to respond to this type of complaint by activating the *Act*'s enforcement provisions. Thus, the CHRC could require a compliance officer to conduct an audit, seek to negotiate an undertaking, or notify the CHRC of conduct that requires a direction. In this way, a union might be able to use the *CHRA* complaint to enforce the CHRC's duty to enforce the *Act.*

... *CHRA* Discretion not to Deal with Complaint ...

The CHRC may decide not to deal with a complaint under s. 10(a) regarding employer's policies or practices where it is of the opinion that the matter has been adequately dealt with in the employment equity plan. This restriction imposes an additional hurdle. A union will have to persuade the CHRC that the employer's plan is not adequate to address the problem raised by the complaint.

To properly exercise its discretion, the CHRC must examine the employment equity plan. As well, since the CHRC has the discretion to deal with the complaint even if it believes the matter was adequately dealt with by the plan, the union could argue that the matter should proceed so that the union itself could prove inadequacy of the plan.

In addition, this discretion to not deal with complaints only affect s. 10(a) complaints against employers. It does not arise with respect to general complaints of employment discrimination under s. 7 of the *CHRA*.

Co-ordination of the Collective Agreement and Employment Equity Plan

The *Act* makes the employment equity plan the ultimate sole responsibility of the employer, while the *Code* and collective agreements recognize the joint responsibility and liability of the unions and employers. This is the fundamental condition in the structure of the *Act*. It will therefore be important for unions to coordinate the negotiation of the collective agreement with the preparation of an employment equity plan as far as is possible, so that:

- unions can be involved in the content and enforcement of the employment equity plan, and
- changes affecting the collective agreement are not made without collective negotiation with the union.

Union Examination of Collective Agreement

Unions should:

- evaluate the potential discriminatory effect of collective agreement provisions, while being alert to ensure that employers do not use employment equity measures to overtake employees' legitimate collective bargaining rights;
- negotiate measures into the collective agreement to address the equity issues that the union has identified. Where this has been done the union will be able to directly enforce these measures through grievance arbitration, instead of being dependent on the CHRC;
- remove or modify collective agreement provisions that have been legitimately identified as barriers and which may otherwise become a potential source of liability for the union as well as the employer.

It will be advantageous to unions to participate in the employment equity process at the earliest stage possible, so as to be fully informed about the impact of the process on their collective agreement and about the validity of the conclusions reached by the employer in the review process.

Review Collective Agreement Provisions

The collective bargaining process provides unions and employers with a regular opportunity to review at each set of renewal negotiations the existing collective agreements to determine whether there are discriminatory provisions that should be removed or modified.

Collective Agreement Provisions Found Discriminatory[40]

- absenteeism policies that disadvantage disabled employees, for example, by providing that seniority will not accrue after a fixed period of absence[41]
- automatic termination clauses that allow disabled employees to be terminated without a showing of cause[42]
- hours of work & scheduling clauses that prevent employees from observing their religious holidays[43]
- drug and alcohol testing[44]
- mandatory retirement provisions[45]
- benefit provisions that provide lesser benefits for maternity leaves than for medical leaves[46]
- denial of same-sex benefits[47]
- union security clauses, where, for example, union dues are deducted over the religious objections of an employee[48]

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[40] See generally, M. MacNeil, M. Lynk & P. Engelmann, Trade Union Law in Canada (Aurora, Ont.: Canada Law Book, 1997).

[41] *Thorne v. Emerson Electric Canada Ltd.* (1993) 18 C.H.R.R. D/510 (Ont)

[42] *Ontario Nurses' Association v. Etobicoke General Hospital* (1993), 14 O.R. (3d) 40 (Gen. Div.).

[43] *Drager*; *MacEachern*, above note 33, 61, *OPEIU, Local 267 v. Domtar (Gohm)* (1992) 89 D.L.R. (4th) 305; *Renaud*, above, note 32 .

[44] *Imperial Oil Ltd. v. Entrop* (1998), C.H.R..R. D/433 (Ont. Ct. (Gen. Div.)) Leave to appeal granted by the Ontario Court of Appeal May 12, 1998.

[45] *Landry and Richmond Fisheries Ltd* (1991) 13 C.H.R.R. D/4. But note that it is not a discriminatory practice under the *CHRA* to terminate employment because a person has reached the normal retirement age for persons in similar positions and that under s.9 of the CHRA it is not a discriminatory practice to exclude or expel an individual from membership in an employee organization who has reached the normal retirement age from such an organization.

[46] *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167, 90 D.L.R. (4th) 702, 92 CLLC 17,023 (Q.B.).

[47] *Vogel v. Manitoba* (1995), 126 D.L.R. (4th) 72 (C.A.).

[48] *Kurvits v. Canada (Treasury Board)* (1991) 14 C.H.R.R. D/469

- seniority rights: there are very few decisions on seniority rights. However, in one recent case a requirement for departmental seniority that systematically excluded female telephone operators from advancement into preferred positions was found to be discriminatory[49]

Collective bargaining negotiations provide an opportunity for unions to seek to expand the rights and obligations included in the collective agreement. For example, unions might seek to expand the current scope of a collective agreement with respect to issues that are also addressed in legislation, such as human rights and health and safety issues.

Bad Faith Bargaining Complaint under the *Canada Labour Code*

... Introduction ...

There is no legal mechanism available to force employers to agree in bargaining to do something which they are not required to do, for example, to bring the employment equity process into the collective agreement. However, the employer's duty to bargain in good faith includes a duty not to make illegal demands. Unions can argue that an employer cannot propose a collective agreement provision which is discriminatory, e.g. has an adverse effect on a designated group. The duty to bargain in good faith could be interpreted to include a duty not to resist union proposals which seek to implement the employer's legal obligations under the *Act* and the *CHRA*.

... Eliminating Collective Agreement Discrimination ...

The good faith bargaining duty in section 50 of the *Code* might provide a means for unions to address during bargaining collective agreement provisions which they believe to be discriminatory. For example, a union may put forward a bargaining proposal to remove or amend a collective agreement provision on the grounds the provision 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 may 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 in line with human rights obligations.

Through the process of a bad faith bargaining complaint, the Canada Labour Relations Board ("CLRB") would have to determine whether or not a union proposal is required by law or whether it is one of a number of possible legal alternatives. If a union 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.

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[49] *Goyette*, above at note 28

Should the approach reflected in the *Bell Canada* case prevail, it will be arguable that unions have not only the ability but also the obligation to rectify collective agreement discrimination solely in the collective bargaining process. The Muldoon J. approach would deny unions access to the *CHRA* to challenge collective agreement discrimination, but would not absolve unions of liability for such discrimination in the context of a complaint by an employee.

The view underlying the *Bell Canada* case and the *Weber v. Ontario Hydro*[50] case (discussed below) is that responsibility for enforcing public statutory and common law rights, previously understood to exist out the collective bargaining relationship should be downloaded on to this private relationship. While this area of the law continues to be unsettled, unions may wish to give more consideration to addressing these issues at the bargaining table and to use the bad faith bargaining tool to ensure that these rights are not subsumed into the general give and take inherent in the negotiations process.

... Adding New Obligations ...

Different considerations arise if the union is not seeking to eliminate a discriminatory provision but is seeking to add new rights or obligations. The CLRB is unlikely to order an employer to agree to a union proposal to incorporate into the collective agreement the positive measures required by the *Act* as opposed to the elimination of collective agreement barriers.

Complaints Against Unions

It should be noted bad faith bargaining complaints can be filed by employers as well as unions. If a union were to resist an employer proposal to address what it believes to be discrimination in a collective agreement, the employer may bring a complaint against the union under the *Code*. The union could then be placed in the position of having to defend the collective agreement before the CLRB. A successful s. 37 complaint could lead to a CLRB remedial order against the union.

Employees can also bring duty of fair representation complaints against unions under s. 37 of the *Code*, which provides as follows:

> A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[50]Weber v. Ontario Hydro [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583

A union could argue that the CLRB should decline to deal with a s.37 complaint dealing with the union's failure to comply with the *Act*, as this s.37 duty is usually limited to collective agreement issues and not with obligations under other statutes. However, as many of the *Act*'s issues relate back to collective agreement rights, this argument may not be successful.

Collective Agreement Arbitration

Canada Labour Code Amendments to Arbitrator Powers

Arbitrators have always had the authority, and the obligation, to apply general laws in interpreting collective agreement provisions. Recently, some labour relations statutes have been amended to clearly specify this authority as a statutory power of arbitrators. A very broad provision of the this kind has recently been added to the *Code* by *Bill C-19*. It gives arbitrators

- the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is a conflict between the statute and the collective agreement: *Code*, s. 60(1)(a.1)

This new power is very wide-ranging and goes beyond using the *Act* as a interpretation tool. It says that the arbitrator can apply the *Act* and can also give relief in accordance with the *Act*. This broad wording provides strong support for interpreting the provision as conferring power on an arbitrator to enforce statutory provisions and obligations in the *Act* and the *CHRA* in the context of dealing with a grievance under a collective agreement. It is important to remember grievances can be filed by either the union or the employer.

Grievances

There are a number of ways in which the goals of the employment equity process are relevant to the collective agreement. Most collective agreements contain anti-discrimination provisions of some kind which can be relied upon to subject to scrutiny management powers which are exercised discriminatorily e.g.. training. Collective agreements also contain a variety of provisions dealing with areas specifically addressed by the *Act*, e.g. hiring and promotion.

Application of the *Act*

One way to try to enforce the *Act* indirectly through a grievance is to argue that the standard for an employer's obligations under a collective agreement anti-discrimination clause should at least be what is set out in the *Employment Equity Act*. For example, an employer should have a system for reviewing and eliminating barriers to equality in the workplace and establishing positive policies and practices to achieve employment equity. To use this approach, the union should be properly participating in the consultation and collaboration processes under the *Act*.

Implications of *Weber* Case

The decision of the Supreme Court of Canada in the *Weber* case opened the door to increasing union responsibility for enforcing employee rights which have been understood to arise outside the collective agreement. *Weber* and the companion decision in *O'Leary v. New Brunswick*, dealt with enforcement of common law and *Charter* rights. These cases have spawned considerable and conflicting jurisprudence over the past several years. The scope of the implications of the *Weber* analysis remains to be resolved. There have to date, however, been some decisions in which the *Weber* approach appears to have been expanded to require enforcement under the collective agreement of statutory rights for which an administrative enforcement regime exists. In other words, there are cases which have denied access to the administrative enforcement regime to employees covered by collective agreements.[51]

The *Weber* approach, together with the new *Code* language governing the arbitrator's powers with respect to employment-related statutes, might provide considerable support for an argument that a union can enforce the employer's obligations under the *Act* directly through the collective agreement.

CHARTER APPLICATIONS FOR GOVERNMENT EMPLOYERS

In the 1998 case of *Perera v. Canada* the Federal Court of Appeal upheld a Trial Court decision which allowed the applicant to proceed with a civil claim against the Canadian International Development Agency for systemic discrimination under section 24 of the *Charter of Rights and Freedoms* claiming as a remedy the ordering of an employment equity plan with positive measures and quotas.

This case opens the door to public sector employees being able to make an application alleging discrimination under the *Charter* instead of, or in addition to, a complaint under the *CHRA*.

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[51] e.g. *Cadillac Fairview Corporation Limited v. Saskatchewan Human Rights Commission et. al.* (1998) 31 C.H.R.R. D/107

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CHAPTER 5: REFERENCE MATERIALS

GETTING HELP

CANADIAN LABOUR CONGRESS

Contacts: CLC Human Rights Committee
Attention: Nancy Riche and Penni Richmond
Canadian Labour Congress
289 Promenade Riverside
OTTAWA, Ontario
Ph. 613-521-3400 Fax. 613-521-4655

or David Onyalo
National Representative
CLC
Ph.613-521-3400 Ext. 419

OTHER UNIONS\LABOUR FEDERATIONS

A number of unions prepared materials to deal with Ontario's Employment Equity Act, 1993. These include the Canadian Union of Public Employees, the Ontario Public Service Employees Union, the United Steelworkers of America and the Canadian Autoworkers.

The Ontario Federation of Labour also published an *OFL Guide to the Employment Equity Act, 1993* which was written by Mary Cornish and Suzanne Lopez.

These organizations could be approached for help and a copy of their materials.

HUMAN RESOURCES DEVELOPMENT CANADA ("HRDC")

As noted in Chapter 1, the HRDC is planning to issue numerous educational materials and guidelines.

Contact:

Gwenn Hughes
Manager, Workplace Equity Policy
Strategic Policy and Partnerships

Department of Human Resources Development
165 Hôtel de Ville
Hull, Quebec
K1A 0J2
Tel.: (819) 953-0127
Fax: (819) 994-0165
E-mail: gwenn.hughes@hrdc-drhc.gc.ca

RESOURCE MATERIALS

The following materials are helpful to have on hand in the union office:

Legislation:

1. *Employment Equity Act*
2. Regulations enacted under the *Act*
3. *Canadian Human Rights Act and Regulations*

HRDC:

Binder of Guidelines to the *Employment Equity Act* (Listed in Chpt 1)

Canadian Human Rights Commission

Framework for Compliance Audits

Legislative Background and Research Materials:

1. Judge R.S. Abella "Equality in Employment - A Royal Commission Report" (Abella Report) 1984
2. Canadian Labour Congress Briefs

Other Legal References:

Elliott, Cheryl, *Ontario's Equity Laws: A Complete Guide to Pay and Employment Equity* (Toronto: Canada Law Book, updated binders)

Ontario Pay and Employment Equity Guide, (Toronto: Commerce Clearing House, 1994)

Tarnopolsky, Walter & Pentney, William, eds, *Discrimination and the Law* (Toronto: Carswell, 1985)

Vizkelety, Beatrice, Proving Discrimination in Canada (Toronto: Carswell, 1987)

IV. Selected Resource Material

Carol Agocs, Catherine Burr & Felicity Somerset "Employment Equity: Co-operative strategies for organizational change" (Toronto: Prentice-Hall, 1992)

ArchType periodical published by the Advocacy Resource Centre for the Handicapped (Toronto)

Baker, David, Accommodation of Persons with Disabilities Under Employment Equity Legislation (can be obtained from ARCH)

Bevan, Lynn, The Employment Equity Manual: Implementing Employment Equity in Canada, (Toronto: Carswell, 1992)

Canadian Labour Congress, Challenging Racism: Going Beyond Recommendations, Report of the CLC National Anti-Racism Task Force, October, 1997

Cross Cultural Communication Centre "Employment Equity": How We Can Use it to Fight Workplace Racism" (Toronto) 1988

Calzavara, L. "Barriers to Women's Employment Opportunities" Report to the City of Toronto Women in Work Conference, pp. 51-88, October, 1987

Office of the Employment Equity Commissioner, "Working Towards Equality, The Discussion Paper on Employment Equity Legislation" (Toronto: Minister of Citizenship, Office of the Employment Equity Commissioner, Ontario, 1991)

Ontario Federation of Labour, Trade Union Guide to Carrying Out Joint Responsibilities under the Employment Equity Act, 1993 and its Regulations, (Toronto: Ontario Federation of Labour, 1994)

Ontario Metis and Aboriginal Association and Ontario Women's Directorate "Employment Equity for Aboriginal Women", July 1993

Ontario Women's Directorate, "Women in the Labour Market: Focus on Women with Disabilities", (January, 1993)

Ontario Women's Directorate, "Women in the Labour Market: Focus on Racial Minority Women", (January, 1993)

Ontario Women's Directorate, "Women in the Labour Market: Focus on Aboriginal Women", (January, 1993)

Sonpal-Valias, Nilima "Getting There: Minority Experiences in the Corporate Sector - A Literature Review", prepared for the Women of Colour Collective, November, 1991, pp.10-26

Toronto Board of Education, Interim Policy and Procedure on Racial and Ethnocultural Mistreatment (Toronto: Toronto Board of Education, 1994)

Weiner, Nan, Employment Equity: Making it Work, (Toronto: Butterworths, 1993)

EMPLOYMENT EQUITY NETWORKS

Alliance for Employment Equity

This Ontario organization which includes designated group advocacy associations and the labour movement has already conducted a training seminar on the *Act*. It can likely be counted on to provide ongoing help.

Alliance for Employment Equity
Suite 210
122 St. Patrick Street
Toronto, Ontario
M5T 2X8
Tel: (416) 974-9357
Fax: (416) 585-9424

DESIGNATED GROUP ADVOCACY ASSOCIATIONS

Many advocacy organizations having been working for the passage of employment equity legislation for many years. They have developed a great expertise on the issues which will need to be addressed by unions. Unions need to develop collaborative relationships with these organizations. Both national and provincial organizations exist. For example, ARCH, Disabled People for Employment Equity, Coalition of Visible Minority Women for Employment Equity. It is also important to contact appropriate First Nations organizations. Remember that union members or staff may already be active in these organizations and be able to provide links to them. The CLC can be contacted for more information on these organizations.

DICTIONARY OF TERMS

Definitions Of Terms In The *Act*

"aboriginal peoples"

persons who are Indians, Inuit or Métis: ***Act*, s.3.**

"Canadian workforce"

all persons in Canada of working age who are willing and able to work: ***Act*, s.3.**

"Commission"

the Canadian Human Rights Commission established under s.26 of the *Canadian Human Rights Act*: ***Act*, s.3.**

"compliance officer"

a person designated as an employment equity compliance review officer pursuant to subs.22(3): ***Act*, s.3.**

"designated groups"

women, aboriginal peoples, persons with disabilities and members of visible minorities ***Act*, s.3.**

"Members of visible minorities"

persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour: ***Act*, s.3.**

"Minister"

such member of the Queen's Privy Council for Canada as is designated by the Governor in Council as the Minister for the purposes of this ***Act: Act*, s.3.**

"Panel"

the Human Rights Tribunal Panel established under s.48.1 of the *Canadian Human Rights Act*: ***Act*, s.3.**

"persons with disabilities"

persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

(a) consider themselves to be disadvantaged in employment by reasons of that impairment, or

(b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reasons of that impairment,

and includes persons who functional limitations owing to their impairment have been accommodated in their current job or workplace: ***Act*, s.3.**

"prescribed"

prescribed by the regulations: ***Act*, s.3.**

"private sector employer"

any person who employs one hundred or more employees on or in connection with a federal work, undertaking or business as defined in s.2 of the *Canadian Labour Code* and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees, but does not include

(a) a person who employs employees on or in connection with a work undertaking or business of a local or private nature in the Yukon Territory or the Northwest Territories, or

(b) a departmental corporation as defined in s.2 of the *Financial Administration Act*: ***Act*, s.3.**

"representatives"

(a) those persons who have been designated by employees to act as their representatives, or

(b) bargaining agents, where bargaining agents represent the employees: ***Act*, s.3.**

"Tribunal"

an Employment Equity Review Tribunal established by subs.28(1): ***Act*, s.3.**

Definitions Of Terms For Purposes Of The *Act*

"employee", in respect of

(a) **a private sector employer,**

a person who is employed by the employer, but does not include a person employed on a temporary or casual basis for fewer than 12 weeks in a calendar year

(b) **a portion of the public service of Canada referred to in para. 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* applies,**

a person who has been appointed or deployed to that portion pursuant to that Act, but does not include

(I) a person appointed on a casual basis pursuant to s.21.2 of that Act, or

(ii) a person appointed for a period of less than three months; and

(c) **a portion of the public service of Canada referred to in para. 4(1) (b) or (c) of the Act to which the *Public Service Employment Act* does not apply,**

a person appointed to that portion in accordance with the enactment establishing that portion, but does not include a person employed on a temporary or casual basis for a period of less than three months: ***Regs.*, s.1(2).**

"hired", in respect of

(a) **an employee employed by a private sector employer,**

engaged by the employer

(b) **an employee employed in a portion of the public service of Canada referred to in para. 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* applies,**

initially appointed to the public service of Canada pursuant to that Act

(c) **an employee employed in a portion of the public service of Canada referred to in para. 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* does not apply**

initially appointed in a manner provided in the enactment establishing that portion: ***Regs.*, s.1(2).**

"occupational group", in respect of

(a) **the workforce of a private sector employer or a portion of the public service of Canada referred to in para. 4(1)(c) of the Act,**

an occupational group set out in column I of an item of Schedule II; and

(b) **a portion of the public service of Canada referred to in para. 4(1)(b) of the Act,**

an occupational group set out in column I of an item of Schedule III: ***Regs.*, s.1(2).**

"promoted" in respect of

(a) **an employee employed in a portion of the public service of Canada referred to in para. 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* applies**,

has the meaning that corresponds to the definition "promotion" in subs.2(2) of the *Public Service Employment Regulations;*

(b) **an employee employed in a portion of the public service of Canada referred to in para. 4(1)(b) or (c) of the Act to which the *Public Service Employment Act* does not apply,**

has the meaning customarily used by that portion

(c) **an employee employed by a private sector employer**

permanently moved from one position or job in the employer's organization to another position or job that

(I) has a higher salary or a higher salary range than the salary or salary range of the position or job previously held by the employee, and

(ii) ranks higher in the organizational hierarchy of the employer,

and includes a reclassification of the employee's position or job where the reclassification position or job meets the requirements of subpara.s (I) and (ii): ***Regs.*, s.1(2).**

"salary", in respect of

(a) **a private sector employer,**

remuneration paid for work performed by an employee in the form of salary wages, commissions, tips, bonuses and piece rate payments, rounded to the nearest dollar, but does not include overtime wages

(b) **a portion of the public service of Canada referred to in para. 4(1)(b) of the Act,**

means the rate of pay paid to an employee under a collective agreement or the rate approved by Treasury Board under any other applicable pay authority

(c) **a portion of the public service of Canada referred to in para. 4(1)(c) of the Act,**

the rate of pay paid to an employee under a collective agreement or any other applicable pay authority: ***Regs.*, s.1(2).**

"termination", in respect of an employee,

retired, resigned, laid off, dismissed or otherwise having ceased to be an employee, but does not include laid off temporarily or absent by reason of illness, injury or a labour dispute: ***Regs.*, s.1(2).**

Definitions Of Terms For Purposes Of The Regulations

"Act"

the Employment Equity Act.(Loi): ***Regs.* s.1(1).**

"Designated CMA"

a census metropolitan area referred to in Schedule I and set out in the Statistics Canada publication entitled *Standard Geographical Classification* SGC 1991, published in April 1992, as amended from time to time: ***Regs.*, s.1(1).**

"Employment equity report"

a report that a private sector employer is required to file under s.18 of the Act: ***Regs.*, s.1(1).**

"Former Regulations"

the *Employment Equity Regulations* made pursuant to the *Employment Equity Act,* R.S., c. 23 (2nd Supp.): ***Regs.*, s.1(1).**

"Permanent full-time employee"

a person who is employed for an indeterminate period by a private sector employer to regularly work the standard number of hours fixed by the employer for the employees in the occupational group in which the person is employed: ***Regs.*, s.1(1).**

"Reporting period"

the calendar year in respect of which an employment equity report is filed: ***Regs.*, s.1(1).**

"Temporary employee"

a person who is employed on a temporary basis by a private sector employer for any number of hours within a fixed period or periods totaling 12 weeks or more during a calendar year, but does not include a person in full-time attendance at a secondary or post-secondary educational institution who is employed during a school break: ***Regs.*, s.1(1).**

GENERAL DICTIONARY OF EMPLOYMENT EQUITY TERMS

Adverse Impact

The effect of an employment practice or process which disproportionately excludes or negatively affects any identifiable group from employment opportunities or creates inequality in conditions of work.

Availability Rate

An estimate of the number of persons of a designated employment equity group qualified to work for an employer. The estimate can be based on the internal or external labour pool from which employers can reasonably be expected to recruit, and is often expressed as a percentage of the total qualified labour pool.

Bona Fide Occupational Requirement

An employment requirement that is in fact necessary for safe, efficient and reliable performance of the essential duties of the job.

Business Necessity

A business practice that is essential to the safe and efficient operation of the organization.

"Cheap Screening"

Use of arbitrary and potentially discriminatory selection requirements to reduce the number of job applicants. An example may be the "Grade 12 diploma" requirement. If a certain level of literacy is required by the job, other screening methods, such as skill tests or requests for evidence of equivalent experience, might be more appropriate.

Credentialism

Use of formal job requirements not justified by the needs of the job.

Feeder Group

Levels in an occupational group from which the employer may reasonably be expected to promote employees into a higher group.

Representation

The number or percentage of a designated group employed by an employer.

Underrepresentation

Rate of representation of a designated group in an employer's work force that is below the availability rate.

Utilization (Representation) Rate

The representation of a designated group in an employer's work force as a proportion of the group's availability, i.e.. representation divided by availability.

APPENDICES

APPENDIX 1:
EMPLOYMENT EQUITY DECISIONS UNDER THE *CHRA*:

Canadian National Railway v. Action Travail des Femmes

CN's workplace practices discriminatory

The Supreme Court of Canada found that CN discriminated against women when they carried on certain practices which had the effect of excluding women and which were not job related requirements. These practices included:

- the use of two mechanical aptitude tests for coach cleaner work when there was no mechanical work involved.
- the requirement to be able to lift a brakeshoe with one hand which male applicants were not asked to do
- welding experience for all entry level positions
- interviewing practices where interviewers relied on their "intuition" and experience and where jobs were presented with a negative picture and exaggerated problems.

Definition of systemic discrimination

The Court defined systemic discrimination in an employment context as:

> discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group that the exclusion is the result of "natural" forces, for example that women 'just can't do the job'. [52]

Why are employment equity programmes necessary?

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[52] (1987) 8 C.H.R.R. D/4210, p. D/4227

...To break the cycle of discrimination...

The Court stated that to combat such discrimination it is necessary to:

> "create a climate in which both negative practices and negative attitudes can be challenged and discouraged."[53]

The Court said that an employment equity programme including hiring goals may be the only way systemic discrimination can be ended.

> I have already stressed that systemic discrimination is often unintentional. It results from the application of established practices and policies that, in effect, have a negative impact upon the hiring and advancement prospects of a particular group. It is compounded by the attitudes of managers and co-workers who accept stereotyped visions of the skills and "proper role" of the affected group, visions which lead to the firmly held conviction that members of that group are incapable of doing a particular job, even when that conclusion is objectively false.
>
> An employment equity program such as the one ordered by the Tribunal in the present case, is designed to break a continuing cycle of systemic discrimination. 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 programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears. [54]

...To remedy past discriminatory acts and attempt to prevent future acts...

The Court said that such a programme:

> tries to break the causal link between past inequalities suffered by a group and future perpetuation of the inequalities. It simultaneously looks to the past and to the future, with no gap between cure and prevention. Any such programme will remedy past acts of discrimination against the group and prevent future acts at one and the same time. That is the very point of affirmative action.[55]
>
> The point demands repetition... When a program is said to be aimed at remedying past acts of discrimination, such as by bringing women into blue-

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53 Above, p. D/4227
54 Above, p. D/4230
55 Above, p. D/4229-4230

> collar occupations, it necessarily is preventing future acts of discrimination because the presence of women will help break down generally the notion that such work is man's work and more specifically will help change the practices within that workplace which resulted in the past discrimination against women. From the other perspective, when a program is said to be aimed at preventing future acts of discrimination (again by bringing women into blue-collar occupations), it necessarily is also remedying past acts of discrimination because women as a group suffered from the discrimination and are now benefitting from the program.[56]

The Court said that since the remedy is "directed towards a group" which has been discriminated against, it is not "merely compensatory but is ...always designed to improve the situation for the future, so that a successful employment equity programme will render itself no longer necessary at some point.[57]

Employment equity programme works in three ways

The Court said:

> 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 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

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56 Above, p. D/4230

57 Above, p. D/4230

"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.[58]

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.[59]

National Capital Alliance on Race Relations v. Canada (Health & Welfare)

Why an employment equity program was required at Health Canada

The NCARR decision deals with discrimination against visible minorities at Health Canada. Although 25% of Health Canada's employees were visible minorities, only 1 of the 118 members of senior management was non-white. The Tribunal found that members of visible minorities were interested in progressing into management and had the necessary technical and professional skills to do so, but were blocked from advancing into senior management positions by a range of barriers that included the following:

- Managerial experience leading to promotion to senior management was obtained through acting positions, through the exercise of supervisory responsibilities and through management training programs. Visible minorities were disadvantaged in obtaining this experience because:
  - Visible minorities were given proportionately fewer acting positions than others.
  - Acting appointments were often made without a competition and on an informal basis.

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58 (1997) 28 C.H.R.R. D/179, p. D4230-31

59 Above, p. D4231 [emphasis added]

- White employees were more often asked by their managers to apply for acting positions, while visible minorities had to be more proactive in finding out about opportunities for acting positions.

- Visible minorities received less management related training than non-visible minorities.

- White employees were more often informed of management training opportunities by their managers while visible minorities had to be much more self-reliant in finding out about these opportunities.

- White employees who had held acting positions or had management training were more likely to be given supervisory responsibility than visible minority employees with otherwise the same experience.

- Visible minorities were viewed by senior management as culturally different and not suitable for managerial positions that involved interpersonal skills.

- White employees were almost twice as likely to serve on selection boards as visible minority employees.

- Visible minorities were "bottle-necked", that is, they were concentrated in a department that contained few positions at the level from which personnel were drawn into general management positions.

Terms of the Employment Equity Order

In order to eliminate the discriminatory employment barriers facing visible minorities at Health Canada, as well as to redress the effects of past discrimination, the Tribunal ordered a series of seven "Permanent Measures" as well as eighteen "Temporary Corrective Measures". This order provides a useful illustration of the features of an employment equity program.

...Permanent Measures...

The Permanent Measures included orders to do the following:

- Set standards to ensure that visible minority employees are evaluated not only on experience, but also on desirable skills in determining suitability for promotion.

- Train selection-board members in bias-free interviewing techniques and, where possible, use selection boards that are diverse in composition.

- Train all managers and human resource specialists on strategies to recruit, promote and retain visible minorities, including sensitization to diversity and employment equity issues, including systemic barriers.

- Conduct workshops on the benefits of a diverse workforce and human rights legislation, with mandatory management attendance.

- Set clearly defined qualifications for all senior managerial positions and ensure that these criteria are known to everyone interested in moving into senior management and to all those involved in the staffing process.

- Develop in advance those parts of the selection process intended to assess necessary skills and use them when filling acting appointments.

- Develop a computerized inventory of visible minority and white employees in feeder positions who are interested in advancement, so that this information is available to staffing managers when acting positions become available.

...Temporary Corrective Measures...

The "Temporary Corrective Measures" included these orders:

- Appoint visible minorities into the Senior Management category at twice the rate of availability for five years in order to reach 80% proportional representation of this designated group within this time frame.

- Appoint visible minorities into the groups from which management are drawn at twice the rate of availability for five years in order to reach 80% proportional representation in those groups.

- Appoint visible minorities to acting positions for four months or longer, at twice the rate of availability for four to five years (depending on the group) to enable visible minorities to develop the requisite job qualifications needed to be screened into permanent competitions when they become available.

- In any competition where visible minority candidates have been considered but a visible minority candidate was not selected a report is to be provided outlining why the visible minority candidates were not found to be qualified.

- All Staffing Notices are to state that the employer is an "Equal Opportunity Employer" and that the advertisement is aimed at visible minorities.

- Individual career plans are to be developed for all employees (white and visible minority) in feeder group positions who are interested in advancement.

- Outreach recruitment sources for visible minorities are to be developed and used when hiring into feeder groups where the tribunal found significant underrepresentation.

- Mentoring programs are to be established, with training of current Senior Management on methods of mentoring a culturally diverse workforce. Good mentoring is to be rewarded.

- Visible minorities are to be invited to attend management training sessions and courses and 25% of the seats are to be set aside for visible minorities.

- A person is to be appointed with full powers and responsibility for ensuring the implementation of the special temporary corrective measures and to carry out any other duties to implement this order.

- Senior management are to undergo an annual performance assessment regarding full compliance with the order.

- An Internal Review Committee is to be created, to include an equal number of departmental managerial representatives and delegates from the Advisory Committee on Visible Minorities with additional expertise to be made available on an as required basis to monitor the implementation of this plan. The Committee shall meet on a quarterly basis.

Perera v. Canada

In the 1998 case *Perera v. Canada* [60], the Federal Court of Appeal upheld the right of the visible minority applicants to proceed with a civil claim against their former employer, the Canadian International Development Agency ("CIDA") claiming that CIDA engaged in systemic discrimination against them, including biased promotion procedures and assignment of work which violated their rights to equality under section 15 of the *Charter of Rights and Freedoms*.[61] The Federal Court of Appeal decided that the Trial Division has 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.[62]

Specifically the court upheld the applicants' right to proceed with a request that CIDA be ordered:

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60 [1998] F.C.J. No.13 (Court File No. A-146-97).

61 Para. 2

62 Para. 29-30

(i) to cease forthwith the discriminatory practices and, in order to prevent the occurrence of the same or similar practices, to take measures, within a reasonable time, including the adoption of a special program or plan, designed to rectify the adverse effect of the discriminatory practices on visible minorities in CIDA, particularly the discrimination that prevailed in the period between April 1985 to March 1992;

(ii) to implement an Employment Equity Program which would ensure that in the next five years:

(aa) at least 20% of all new appointments to the senior management category in CIDA, in each year, will be from the visible minority group;
(bb) at least 20% of all new hires in CIDA, in each year, will be from the visible minority group;.....

In upholding this claim, the Court noted that the Supreme Court of Canada in *Action Travail Des Femmes* and *R. v. Robichaud* had found such measures to be warranted in cases of systemic discrimination.

> ...in cases where attitudes or behaviour need to be changed, an instrumental approach to remedies is necessary in order to enforce compliance with the purposes and objectives of human rights codes or legislation. It necessarily follows, in my view, that the Courts must have, under section 24 of the Charter, the power to impose similar remedies when they deem it appropriate. Indeed, it would be astonishing if the Federal Court, as a Superior Court of record with a supervisory jurisdiction did not have jurisdiction to enforce constitutional equality rights in the federal sphere by providing to an aggrieved citizen an appropriate and just remedy pursuant to section 24 of the Charter. [63]

The *Perera* Court stated that superior courts such as the Federal Court Trial Division "have played and continue to play a role in redressing wrongs committed in the employment context." [64]

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[63] Para. 28-29
[64] See above

APPENDIX 2: EMPLOYMENT EQUITY REGULATIONS

What Regulations can be made

In addition to the general regulation-making power, the *Act* specifies that regulations can be made that:

- define certain key terms in the *Act*;
- set out the methods for carrying out the *Act's* obligations, and;
- set the rules for the establishment and maintenance of records that employers will be required to keep: *Act*, s.41

Public Sector Regulations

- can be made only after consultation with the Treasury Board
- cannot define expressions in a manner that is inconsistent with the meaning that expression or any similar expression is given under the *Public Service Employment Act*: *Act*, s.41

CSIS, Canadian Forces and RCMP

Regulations that apply to the Canadian Security Intelligence Service, the Canadian Forces or the Royal Canadian Mounted Police

- can adapt the application of the *Act* or *Regulations*;
- can give a matter a different effect than the matter has by virtue of the *Act* or *Regulations;*
- shall be made on the recommendation of the Treasury Board after consultation with
  - the Solicitor General, in the case of a regulation respecting the CSIS or the RCMP;
  - the Minister of National Defence in the case of a regulation respecting the Canadian Forces: *Act*, s.41(6).

Employment Equity *Regulations* Topics

- Interpretation of Terms, s.1
- Calculation of Number of Employees, s.2
- Collection of Workforce Information ss.3-5
- Review of Employment Systems, Policies and Practices ss.8-10
- Employment Equity Records, s.11-12
- Tribunal Certificate, s.13.
- Private Sector Employer Report, ss.14-31
- Schedule I - Designated CMAS (Census Metropolitan Areas as set out in Statistics Canada publication *"Standard Geographical Classification SGC 1991"*
- Schedule II - Occupational Groups, s.4(1)(c) of the *Act.*
- Schedule III - Occupational Groups s.4(1)(b) of the *Act*
- Schedule IV - Workforce Survey Question - Questions
- Schedule V - Employment Equity Tribunal Certificate
- Schedule VI - Employer Identification Report Summary and Certification of Accuracy -Form 1
  - Occupational Groups - Permanent Full Time, Part-Time Employees Form 2
  - Salary Summary Permanent Full-Time & Part-Time Employees - Form 3
  - Permanent and Temporary Full-Time Employees Hired Form 4
- Schedule VII - Industrial Sectors
- Schedule VIII - Salary Sections

APPENDIX 3: WHAT EMPLOYERS ARE COVERED?

Federally Regulated Private Sector

More Than 100 Employees

The *Act* applies to private sector employers who employ one hundred or more employees in the federally-regulated sector: *Act*, s.3, 4(1)(a).

The Federally-Regulated Private Sector

Includes

- federal works, undertakings or businesses as defined in s.2 of the *Canada Labour Code*
- corporations established to perform functions or duties on behalf of the Government of Canada, with the exception of

  works, undertakings or business of a local or private nature in the Yukon Territory or the Northwest Territories, or

  departmental corporations as defined in s.2 of the *Financial Administration Act*

Public Sector

Schedule I - *Public Service Staff Relations Act*

The *Act* applies to all portions of the public service of Canada set out in Part I of the Schedule I to the *Public Service Staff Relations Act* and to those portions of the public service set out in Part II of Schedule I that employ one hundred or more employees. *Act*, s.4(1) [See Appendix 4 for further details.]

Over 100 employees in other Designated Portions of the Public Service

The Act will also apply to any other portions of the public sector employing one hundred or more employees, including the Canadian Forces and the Royal Canadian Mounted Police, as are specified by Regulation. *Act,* s.4(1)(d).

Calculation of Number of Employees

The number of employees shall be calculated on the basis of the number at the time in a fiscal year when the number of employees employed in that portion of the public sector is the greatest: Regs, s.2.

Federal Contractors

Although the *Act* does not directly cover federal contractors, those employers that are covered by the Federal Contractors Program will be required to meet the standards that are set out in the *Act*.

The Federal Contractors program applies to companies that employ 100 or more people, and which obtain goods and services contracts with the Government of Canada that are valued at $200,000 or more. These employers are required to achieve and maintain a fair and representative workforce, and to implement an employment equity plan that meets the program criteria.

The *Act* provides that the obligations of the Federal Contractors Program with regard to implementation of employment equity, will be equivalent to those of employers under the *Act*. Therefore, although the *Act* does not apply directly to Federal Contractors, they will still be required to meet the standards set out in the *Act*: *Act*, s.42(2)

Human Resources Development Canada will carry out the Minister's responsibility to administer the Federal Contractors Program for Employment Equity: *Act*, s.42(2).

Special Provisions Re: Aboriginal Organizations

There are some special provisions in the *Act* governing private sector employers engaged primarily in promoting or serving the interests of aboriginal peoples, one of the *Act's* designated groups. These employers may give preference in employment to aboriginal peoples or employ only aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the *CHRA*: *Act*, s.7. In the result, the *Act* does apply to such employers, but with necessary modifications.

Guideline 8 (not issued yet) will discuss the impact of the provision relating to employers engaged primarily in promoting or serving the interests of Aboriginal peoples. It will also provide background information on the situation of Aboriginal peoples.

APPENDIX 4: WHO IS THE EMPLOYER?

EMPLOYERS IN THE PUBLIC SECTOR

For Part I Employees: Treasury Board and Public Service Commission

The Treasury Board and the Public Service Commission are responsible for carrying out the obligations of an employer for employees of those parts of the public service that are set out in Part I of Schedule I to the *Public Service Staff Relations Act* (excluding RCMP members).

Civilian employees of the RCMP are deemed to be included in Part I of Schedule I. The implementation of employment equity for these employees is therefore also the responsibility of the Treasury Board and the Public Service Commission.

Where the Treasury Board and Public Service Commission is responsible for carrying out the obligations of an employer, a reference to an employer is deemed to be a reference to the Treasury Board and the Public Service Commission: *Act*: 4(6)(a)

At present, the Treasury Board and PSC will act as employers for the following:

Atlantic Canada Opportunities Agency
Canada Information Office
Canada Labour Relations Board
Canadian Artists and Producers Professional Relations Tribunal
Canadian Centre for Management Development
Canadian Dairy Commission
Canadian Environmental Assessment Agency
Canadian Grain Commission
Canadian Human Rights Commission
Canadian Intergovernment Conference Secretariat
Canadian International Development Agency
Canadian International Trade Tribunal
Canadian Penitentiary Service
Canadian Radio-television and Telecommunications Commission
Canadian Space Agency
Canadian Transportation Accident Investigation and Safety Board
Canadian Transportation Agency
Civil Aviation Tribunal
Competition Tribunal
Defence Research Board
Director of Soldier Settlement
The Director, the Veterans' Land Act
Emergency Measures Organization
Energy Supplies Allocation Board
Federal-provincial Relations Office
Fisheries Prices Support Board
Foreign Investment Review Agency
Government Printing Bureau
Hazardous Materials Information Review Commission
Human Rights Tribunal Panel
Immigration and Refugee Board
International Joint Commission (Canadian Section)
Law Commission of Canada
Maritimes Marshland Rehabilitation Administration
NAFTA Secretariat - Canadian Section
National Archives of Canada
National Farm Products Council
National Library
National Parole Board
Office of the Chief Electoral Officer
Office of the Commissioner for Federal Judicial Affairs
Office of the Commissioner of Official Languages
Office of the Coordinator, Status of Women
Office of the Correctional Investigator of Canada

Office of the Governor-general's Secretary
Office of the Grain Transportation Agency Administrator
Office of the Superintendent of Bankruptcy
Offices of the Information and Privacy Commissioners of Canada
Patented Medicine Prices Review Board
Prairie Farm Rehabilitation Administration
Privy Council Office
Public Service Commission
Royal Canadian Mounted Policy
Royal Canadian Mounted Police External Review Committee
Royal Canadian Mounted Police Public Complaints Commission
Royal Canadian Mounted Police - Civilian Employees Only
Staff of the Federal Court
Statistics Canada
Tariff Board
Tax Court of Canada
Veterans Review and Appeal Board

The Treasury Board and the Public Service Commission may authorize a Chief Executive Officer or deputy head to carry out their obligations under this Act, who in turn can authorize one or more persons to carry out those obligations: Act, s.4(7) & (8)

For Part II Employees - Part II under the *Public Service Staff Relations Act*

The portions of the public sector set out in Part II of Schedule I to the *Public Service Staff Relations Act* ("PSSRA") are the employers for employees employed in that portion. They are currently as follows:

Atomic Energy Control Board
Canada Communication Group
Canada Investment and Savings
Canadian Advisory Council on the Status of Women
Canadian Food Inspection Agency
Canadian Nuclear Safety Commission
Canadian Polar Commission
Canadian Security Intelligence Service
Communications Security Establishment, Department of National Defence
Economic Council of Canada
Indian Oil and Gas Canada
Medical Research Council
National Capital Commission
National Film Board
National Energy Board
National Research Council of Canada
National Round Table on the Environment and the Economy
Natural Sciences and Engineering Research Council
Northern Pipeline Agency
Office of the Auditor General of Canada
Office of the Correctional Investigator of Canada
Office of the Superintendent of Financial Institutions
Public Service Staff Relations Board
Science Council of Canada
Security Intelligence Review Committee
Social Sciences and Humanities Research Council
Staff of the Non-Public Funds, Canadian Forces
Statistics Survey Operations

For Part II Employees - under the *Public Service Employment Act*

Where the *Public Service Employment Act* gives a role to the Public Service Commission for part of the public service, that Commission shares the employer's responsibilities: *Act*, s.4(5)

Where this provision applies any reference to an employer in the *Act* is deemed to be a reference to the employer portion of the public service and the Public Service Commission: *Act:* s.4(6).

APPENDIX 5: WHO IS AN EMPLOYEE?

Definition of Employee: Private Sector

Everyone employed for at least 12 weeks

Everyone who is employed by the employer for 12 weeks or more over a calendar year is covered by the *Act* and must be included in a workforce survey. This definition includes part-time employees and temporary employees whose periods of employment are broken up, but total at least 12 weeks in the course of a year: *Reg*, s.1(2)(a)

Students are not employees

Students enrolled in full-time studies who are employed during the school break are not to be counted as employees.

Independent Contractors are not employees

Truly "independent" contractors are not employees and are therefore not covered by the *Act*. In some cases people who are treated by an employer as independent contractors may in reality be employees. In that case the *Act* would apply. The test for determining whether a person is an employee or an independent contractor for the *Act* 's purposes is not set out in the *Act*.

Likely, the proper test will look at criteria which will further the purpose of the *Act*, which is to achieve employment equity. This may require a broader test than the usual control test used in the employment context, i.e. looking at the extent of control that the employer has over the individual's work and whether the individual shares in the profit and risk of the business.

Guideline 4: "Collection of Workforce Information" sets out factors to consider in determining whether an employment relationship exists (p. 41).

Definitions of Types of Employees

Permanent Full-Time Employees

A person employed for an indeterminate period to regularly work the standard number of hours fixed by the employer: *Reg. s.1(1).*

Permanent Part-Time Employee

A person employed to regularly work fewer than the standard number of hours fixed by the employer: *Reg. s.1(1).*

Temporary employee

A person employed on a temporary basis for any number of hours for a fixed period or periods totaling 12 weeks or more during a calendar year, but does not include a person in full-time attendance at a secondary or post-secondary educational institution who is employed during a school break. *Reg s.1(1).*

Seasonal employees.

Employees who are employed on a regular basis every year on either a full-time or part-time basis will normally be considered to be permanent employees. *(Guideline* 4, p.42).

DEFINITION OF EMPLOYEE: PUBLIC SECTOR

Everyone is an "employee" for the *Act*'s purposes who is appointed to a portion of the public service to which this *Act* applies. The only exceptions are persons appointed on a casual basis pursuant to section 21.2 of the *Public Service Employment Act* and those persons appointed for a period of less than three months: *Reg. s.1(2)(b)*

Canadian Forces and Royal Canadian Mounted Police

Members of the Canadian Forces and the Royal Canadian Mounted Police are deemed to be employees for the *Act*'s purposes: *Act*, s. 4(3).

APPENDIX 6: INFORMING EMPLOYEES

Communication to employees is an essential feature of the employment equity process. To ensure the effectiveness of the process everyone in the workplace needs to understand the purpose of the *Act*, why it is necessary and how it will be implemented. Misunderstanding of employment equity often contributes to a backlash against employment equity which can undermine the process and be very harmful for designated group members in the workplace.

EMPLOYER DUTY TO INFORM EMPLOYEES ABOUT EMPLOYMENT EQUITY

Every employer must provide information to its employees explaining

- the purpose of employment equity
- the measures the employer has undertaken or is planning to undertake to implement employment equity and
- the progress the employer has made in implementing employment equity: *Act*, s.14.

Guideline on Communications

A Guideline is to be issued dealing with "Communications".

Monitoring Employer Communications

Unions should carefully monitor employer conduct in communicating with employees. Employers may treat this obligation to inform as an opportunity for direct communication with employees on other issues. It is still an unfair labour practice for employers to engage in certain kinds of direct communication with employees. Unions should request copies of any communications provided directly to employees and make sure that these communications do not undermine the union's role as bargaining agent.

Employer Required to Consult Unions About Informing

Employers must consult unions about the assistance they could provide in communicating with employees: *Act*, s.15(1). Effective and ongoing communication is the cornerstone of a successful employment equity program. As *Guideline 3: Consultation and Corroboration*

recommends, communication cannot be a one-time event, but should take place on a continuous basis (p.7).

Where fellow employees are seen to support employment equity, employee acceptance of the initiatives is greatly enhanced. This has positive effects throughout the process, from accurate survey results through to effective implementation.

GETTING EMPLOYEES ON SIDE

Public education plays a very important role in encouraging positive attitudes towards promoting equality in the workplace. The employer's obligation to inform employees of employment equity activities should be carried out with this larger public education objective in mind. HRDC should also play an important public education role through its responsibility to foster public understanding and promote the purpose of the *Act*.

There are many popular misconceptions about employment equity. The participation of unions will be invaluable in educating employees. Unions will likely be instrumental in convincing employees that no-one who is unqualified will be promoted as a result of employment equity, that seniority will be respected in the employment equity process, and that the removal of barriers (i.e. job requirements that are not linked to job performance) is to everyone's benefit. It is better for everyone if misgivings about the *Act* and the process are dealt with up-front and openly.

***Guideline 3* Suggestions for Union's Role in Informing Employees**

- educating employees about employment equity
- providing input to publications
- identifying issues of which management may not be aware
- participating in joint labour-management information sessions
- participating in employee meetings
- helping to ensure that designated group members are aware of training programs, targeted measures and procedures for obtaining reasonable accommodation
- assisting employees in the completion of the workforce survey (*Guideline* 3, pp.7-8)

APPENDIX 7: WORKFORCE SURVEY

PURPOSE OF THE SURVEY

Employers are required to collect information about their workforce by conducting a workforce survey using a workforce survey questionnaire before the preparation of the employment equity plan: *Act*, s.9(1)(a); *Regs.*, s.3(1)

Guideline 4: Collection of Workforce Information provides detailed information on this step in the process. The Table of Contents of this Guideline is found in Appendix 14. *Guideline 4* recommends that the groundwork for a workforce survey should be laid well ahead of the survey itself, and includes a detailed and useful discussion of how to best to ensure the effectiveness of the survey (pp.8-12).

How is Workforce Information Used?

Establish Numerical Goals

- to create a profile which shows how many designated group members are employed in the employer's workforce and in what occupations. By indicating the nature and degree of underrepresentation of designated group members, this profile can then be used to establish short-term numerical goals for hiring and promotion to increase the representation of underrepresented groups.

Identify Areas for Measures to Eliminate Barriers

- to help identify problem areas in which barriers may need to be eliminated and reasonable accommodations may need to be made. These areas can then be further examined through the employment systems review to assess the nature of the barriers and the kind of measures needed to remove them.

Measure Progress

- creates a snapshot picture against which progress can be measured once measures are implemented.

What is the Role of the Union?

Employers have an obligation to consult and to collaborate with the unions on the workforce survey. *Act*, s.15(1)(a) Assistance from employee representatives in communicating with employees is of particular value to the equity process at the survey stage *Guideline* 4: p.6. A union may seek to involve a compliance officer if there are concerns about how the employer is carrying out the survey.

Unions can play an important role in making sure that employees are fully informed about a survey before it is conducted. Unions can take this role on themselves or can work with employers to prepare an appropriate education/information campaign.

Only those employees who identify themselves to an employer, or agree to be identified by an employer as members of one or more designated groups (other than women) can be counted for purposes of implementing employment equity: *Act*, s.9(2). The *Act* therefore relies upon voluntary self-identification to generate the employer data upon which employment equity implementation will depend.

Given this reliance on self-reporting, employees must be properly informed about the importance of accurately completing the survey, and properly educated about how to do so. Employees must also be assured that the information collected is confidential and cannot be used against them or for non-employment equity purposes.

THE WORKFORCE SURVEY QUESTIONNAIRE

Introduction

A workforce survey questionnaire is used to collect the required information and must:

- be provided to each employee: *Regs.*, s.3(1) See also Appendix 5 of this Guide "Who is an Employee?".
- contain some means for the employer to identify the employee who returns it. Identification can be by name or by a code: *Regs.*, s.4.

Guideline 4 contains useful advice about the distribution of the questionnaire and the value of providing assistance to employees in completing the questionnaire (pp. 29 - 32)

Required Contents

Questions About Designated Group Membership

The questionnaire must contain questions which ask whether the employee is

- a member of a visible minority
- a person with a disability, or
- an aboriginal person: *Regs.*, s.3(1).

The survey is not required to ask whether the employee is a woman. This omission appears to be based on the assumption that the employer's existing employment records will contain this information. Employers *must* use their personnel records to determine the number of women in their workforce to ensure the highest degree of accuracy (*Guideline 4*, p.19).

Definitions of Designated Groups

The questionnaire must also contain either the *Act*'s definitions of the designated groups or a similar definition: *Regs.*, s.3(2). *Guideline 4* contains a lengthy discussion of these definitions (pp. 21-25).

Definitions of the Designated Groups

Aboriginal peoples

- people who are Indians, Inuit or Métis. The *Act* does not consider aboriginal peoples to be members of visible minorities: *Act*, s.3.

Visible minorities

- persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour: *Act*, s.3.

Person with disabilities

- persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment **and** who
- consider themselves to be disadvantaged in employment by reason of that impairment; or
- believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment;

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace: *Act*, s. 3.

Note: The definition of persons with disabilities has two elements. The person must objectively have a disability but must also believe either that they are disadvantaged in employment or that employers would consider them to be disadvantaged.

Schedule IV Questionnaire

Schedule IV to the *Regulations* contains a Workforce Survey Questionnaire with questions and definitions. Any questionnaire which is substantially in this form will satisfy the requirement to provide definitions of the terms: *Regs.*, s.3(3). A copy of the Schedule IV questionnaire is set out below:

Schedule IV

(*Regs.* s.3(3))

WORKFORCE SURVEY QUESTIONNAIRE - QUESTIONS

1. For the purposes of employment equity, "aboriginal peoples" means persons who are Indian, Inuit or Métis.

Based on this definition, are you an aboriginal person?

Yes No

2. For the purposes of employment equity, "persons with disabilities" means person who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment and who

(a) consider themselves to be disadvantaged in employment by reason of that impairment, or

(b) believe that an employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment,

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace.

Based on this definition, are you a person with a disability?

Yes No

3. For the purposes of employment equity, "members of visible minorities" means persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour.

Based on this definition, are you a member of a visible minority?

Yes No

Membership in More than One Designated Group

The employer must inform employees, either on the questionnaire or in a notice accompanying the questionnaire, that a person may be a member of *more than one* designated group: *Regs.*, s.3(4).

Self-Identification / Voluntary Answers

The questionnaire must indicate that responses to the questions on the questionnaire are voluntary: *Regs.*, s.3(6)(a). This does *not* prevent an employer from requiring each employee to return the questionnaire: *Regs.*, s.3(7).

Confidentiality

The questionnaire must indicate that the information collected in it is confidential and will only be used by, or be disclosed to, other persons within the employer's organization in order for the employer to carry out its obligations under the *Act*: *Regs.*, s.3(6)(b).

Optional Contents of the Questionnaire

The questionnaire can include additional questions that are related to employment equity. *Regs*, s.3(5).

Obtaining Consent to be Contacted

Due to the confidentiality requirements, it is not possible to contact persons who have identified themselves as a member of a designated group unless they have given their express consent to be contacted. *Guideline 4* notes that a particularly useful additional question is one which asks employees if they agree to have their responses linked to their names and provided to "managers", so that designated group members can be contacted directly for advice and input, or to be advised of measures which may benefit the group of which they are a member: (*Guideline 4*: p.19).

Unions who are engaged in the employment equity process need to engage in consultations with designated group members and may therefore wish to take the position that any "consent" question should include a consent to be contacted by "employee representatives" carrying out their duties under this *Act*, in addition to "managers".

Questions about Membership in Other Disadvantaged Groups

Employers and unions continue to have responsibilities under the *Canadian Human Rights Act* to make sure that workplace practices do not discriminate against workers on grounds of discrimination covered by the CHRA but which have not been identified as designated groups for purposes of the *Act* e.g. age, sexual orientation.[65] One of the easiest ways to carry out this human rights responsibility would be to include these workers in employment equity planning.

There is nothing in the *Act* which would prevent unions from proposing to employers that other disadvantaged groups be included in the discussion of workplace practices and barriers, and the development of measures in the employment equity plan. For example, unions might seek to

[65] *CHRA*, s.2

address the disadvantages in employment experienced by gay, lesbian and bi-sexual workers, even though they were not included as a designated group under the *Act*.

Other Additional Questions

Further examples of additional questions would be requests for additional detail about membership in a designated group, such as the nature of a disability, requests for details about accommodations required, or a space for comments. Appendix D of *Guideline 4* contains answers to some frequently asked questions about additional questions.

Information to be Provided with the Questionnaire

The information and instructions that are included with the questionnaire can have a significant impact on response rates and accuracy.

***Guideline 4* recommends that the questionnaire should:**

- make clear to employees that they are free to change their responses at any time
- clearly state that employees may self-identify as members of more than one designated group
- state that responses are confidential and that the information will only be used to help the implementation of employment equity.
- if there is a consent question it should be clear who will have access to the information and how it will be used. (*Guideline 4*, p.28)

CONFIDENTIALITY OF INFORMATION

Information collected by an employer for this workforce survey is confidential and must be used only for the purpose of implementing the employer's obligations: *Act*, s.9(3).

Union Access to Results of the Survey

Wherever possible unions should raise with the employer before a survey is conducted the form in which the union is to receive its results. As the completed questionnaires must include some means by which the employer may identify the employee who filled it in, one way to maintain confidentiality is to use a code, pre-printed on the questionnaire and known only to management. *Guideline 4* takes the view that only those individuals responsible for carrying out the employer's

obligations under the *Act* should see the completed questionnaires (p.9). This restriction appears to be unnecessary where employees are identified only by code.

Where a survey has some open-ended questions, unions should ensure that they will receive this information in a usable form. It may, for example, be relevant to know the group membership of a person making a particular comment. Since the responses to open-ended questions may serve to identify the employee making them, it may be advisable for questionnaires that include open-ended questions or room for comments to indicate that responses to these questions will be made available as part of the results of the survey to management personnel and employee representatives carrying out the implementation of equity in the workplace.

WORKFORCE SURVEY RESULTS MUST BE UPDATED

Employer must Update Workforce Survey Results by:

- providing a workforce survey questionnaire to
  - an employee when the employee begins employment
  - an employee who wishes to change any information previously submitted on a questionnaire, or
  - an employee who requests it;
- making necessary adjustments to the survey results to take into account the responses to the additional questionnaires received;
- making necessary adjustments to the survey results to take into account members of designated groups who have been terminated: *Regs.*, s.5.

USE OF PREVIOUS SURVEY

Where Previous Survey is Reliable

An employer is not required to conduct a workforce survey of all or part of its workforce if the following conditions are met:

- the employer already conducted a survey of all or part of its workforce before the *Regulations* came into force, i.e. October 23, 1996;

- the previous survey had such questions, and was conducted in a such a manner, that it achieved results which are likely to be as accurate as the results that would be achieved using the workforce survey questionnaire now required;
- responses to the questions in the previous survey were voluntary, and
- the survey results have been kept up to date in accordance with the current requirements of the Regulations: *Regs.*, s.3(8).

Where Existing Employment Equity Plan Replaced

Where the employer replaces its employment equity plan with a new plan, an employer will not be required to conduct a new workforce survey, provided that the previous survey results have been kept up to date in accordance with the current *Regulations* requirements: *Regs.*, s.3(9).

Union Role in Monitoring Use of Previous Data

Up to date and accurate workforce survey results and analysis are essential for ensuring the validity of the ultimate employment equity plan. Unions should be vigilant to ensure that the previous survey provides an accurate foundation for employment equity planning. Remember that the *Act* does not technically require an employment systems review to be conducted at all in occupational areas where no underrepresentation is found through the survey. For a number of reasons, including costs, employers will likely try to use a previous survey even if it does not technically comply.

Union Request for Previous Survey Information

Unions should ask to be provided with all the information about the previous survey, including:

- a copy of the questionnaire used and the results;
- all information given to the employees about the survey;
- all information about how the survey was administered and what was communicated to employees;
- all information concerning the process for updating the previous survey and the latest results and date of those results.

To meet the condition of being up-to-date, unions should be able to argue that the information should be current at least as of the effective date of the *Act*, namely October 23, 1996 and perhaps later.

Accuracy Safeguards

To meet the condition of producing results that are as accurate as a new survey, ensure the accuracy safeguards found in the *Act*'s workforce survey process set out above are met.

Ask the Employer the Following Questions about the Previous Survey

1. Were employees advised that they could decline to complete the questionnaire?
2. Did all employees receive the questionnaire and return it?
3. Can the employer identify from each questionnaire which employee completed it?
4. Were employees told that their answers were confidential?
5. Were employees told they could be a member of more than one designated group?
6. Were employees provided with assistance to complete the questionnaire?
7. Were employees given information about the principles of employment equity and the purpose of the previous survey before they completed it?
8. Was the union involved in all aspects of the conduct of the previous survey?
9. Were designated group members consulted about carrying out the survey?

If the answer to any of these questions is no, it is likely that the previous survey results will not be as accurate as if a new workforce survey questionnaire were completed. Many previous workforce surveys were administered unilaterally by the employer. Unions can argue that the absence of union involvement means the survey will not likely be as accurate as when it is carried out in collaboration with the union. It is generally acknowledged that the involvement of workers in the employment equity process substantially increases the likelihood of the process achieving appropriate results.

Guideline 4 suggests that "generally speaking, a workforce survey that was in compliance with the old Regulations is likely to be in compliance with the new ones, provided that the previous self-identification responses were fully voluntary and the survey has been kept up to date. However, it also notes that "when in doubt, it is always preferable to conduct a new workforce survey..." (p.35)

What Happens if there is a Dispute

Neither the *Act* nor the *Regulations* provide a mechanism for resolving a dispute about the use of a previous survey. A union which has concerns about the accuracy of a previous survey should seek the assistance of a compliance officer. (See Chapter. 4: Enforcing Employment Equity)

APPENDIX 8: WORKFORCE ANALYSIS

PURPOSE OF THE ANALYSIS

Once the survey is completed, the next step is to compile the workforce data and analyze it: *Act*, s.9(1)(a). The workforce analysis determines:

- the number of designated group members for each occupational group of the employer's workforce, and
- the degree of underrepresentation of designated group members. *Regs.*, s.6(1)

This workforce analysis is the trigger for the employment systems review and forms the cornerstone of the employment equity plan. It is therefore of the utmost importance that it be conducted in such a way as to produce meaningful results.

Guideline 5: Workforce Analysis deals with this area and its Table of Contents is reproduced at Appendix 14.

WHAT INFORMATION MUST BE USED

The employer must conduct an analysis of its workforce based on:

- the information collected through the workforce survey questionnaire, and
- relevant information contained in any other employment records maintained by the employer: *Regs.*, s.6(1).

The *Act* and *Regulations* do not set out what other information would constitute "relevant information" which can form the basis of the workforce analysis. However, the *Guidelines* indicate that employers are required to use personnel records as the source of information concerning the gender of the workforce, in order to ensure the highest degree of accuracy (*Guideline 4*, p.19; *Guideline 5*, p.2)

Unions should insist that the workforce analysis indicate the information it is based on. Where the employer uses other information to conduct the analysis, unions should ask to be provided with copies of this information to ensure that it does not distort information obtained through the survey. If the union and the employer cannot agree on whether or how other information can be used in the analysis, assistance should be sought from a compliance officer.

STEPS IN A WORKFORCE ANALYSIS

1. Compile data on designated group members

2. Code all job titles according to the National Occupational Classification (NOC) four-digit level and then group them into the fourteen Employment Equity Occupational Groups (See p.19 of *Guideline 5*)

3. Design the analytic framework with reference to the geographic recruiting area and the educational, professional and skill levels required for each occupational category

4. Calculate the internal and external representation rates of each designated group by occupational category

5. Calculate the underrepresentation by comparing the actual number of designated group members in your organization with the expected number based on the external availability rate by occupational group.
   See *Guideline 5*, pp. 11 - 18

UNDERREPRESENTATION

How is Underrepresentation determined

Introduction

Underrepresentation is found when the percentage of people in an occupational group within the workforce is lower than the percentage of qualified designated group members in the external workforce in the relevant recruitment area. In other words, a group is underrepresented when there are proportionally more qualified members available to do the work in the region than are found in a particular workplace. If there is no underrepresentation an employer does not need to conduct an employee systems review of that occupational group: *Regs.* s.8

To determine the numbers of designated group members who are available to do a job, it may be necessary to look at the qualifications that are required to perform the work and at the number of qualified group members who live in the recruitment area for the job in question.

Accordingly, employers are directed to determine the degree of underrepresentation by comparing how designated group members are represented in each occupational group of its

workforce against their representation in whichever of the following comparator groups is the most appropriate:

- the Canadian workforce as a whole, or
- those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography, and from which the employer may reasonably be expected to draw employees: *Regs.*, s.6(1)(b).

Use of Labour Market Information in Canadian Workforce

In order to determine representation in the relevant segments of the Canadian workforce, employers must use:

- the labour market information made available by the Minister under s.42(3) of the *Act*, or;
- information from other sources determined by the Minister to be relevant labour market information: *Regs.*, s.6(2).

"Canadian workforce" means all persons in Canada of working age who are willing and able to work: *Act*, s.3.

Occupational Groups Defined Using NOC System

An employer's workforce is broken down into "occupational groups" for this analysis as designated in the *Regulations*.

The *Regulations* use the National Occupational Classification (NOC) system, which classifies jobs according to skill type and skill level.

In this system there are fourteen "Employment Equity Occupational Groups" or EEOGs, which are sub-categorized into 522 "occupational unit groups" (known as the four-digit or "NOC" level). See column 1 of Schedule II of the *Regulations* for a listing of these groups.

Labour market information can be obtained for both levels of this NOC classification system, as well as for the working age population as a whole. *Guideline* 5 sets out some of the factors to consider in deciding the level of detail at which to look for comparator figures. It states that an analysis at the level of the fourteen group EEOG level is a "bare minimum" requirement, and that in most cases a more carefully structured and detailed analysis is recommended (p.28).

Choice of Appropriate Comparator Group

Neither the *Act* nor the *Regulations* provide any guidance as to how to choose the "appropriate" comparator i.e. the Canadian Workforce as a whole or the recruitment pool in the relevant recruitment area: (*Regs* s. 6(i)(b). There is a similar lack of guidance as to the relevant

recruitment area. The results for the analysis may vary significantly depending upon which comparator is chosen.

Guideline 5

- indicates only that the "relevant" geographical area is the area from which the employer would normally be expected to draw employees for a certain position. It notes by way of example that higher level positions are often advertised nationally, while unskilled labour tends to be drawn from the immediate local area;

- suggests that the judgment of what is an "appropriate" comparator group should be based on "a thorough knowledge of the skill or educational levels required for the positions in the employer's workforce" (p.7).

One common barrier to employment equity is the use of inaccurate or inflated requirements for formal education and prior experience. Workers will often be in the best position to know the real requirements of a job, and unions should be particularly vigilant to ensure that the employment barriers that are supposed to be removed in the employment equity process do not distort the analysis at this early stage.

Unions will need to monitor the workforce analysis process carefully. To do this, they will need access to the workforce survey results and to the labour market information for each of the possible comparators. Unions should then look at the potential comparator(s) that the employer did not choose or does not want to choose to see whether there is a significant difference in result. If there is a significant difference, a union should try to get the employer to change the comparator(s). Failing that, it may want to bring the discrepancy to the attention of a compliance officer and urge the CHRC to take this issue on and, if necessary, take it forward to the Tribunal.

Data understate qualified designated group members.

Guideline 5 reminds employers that external representation figures are already "inherently conservative" in that they only list persons who have had some work experience in the relevant group within the seventeen months prior to the census. In the result, the official data systematically understates the numbers of persons who are qualified and able to work, but have been excluded from the workforce by the very types of barriers that the *Act* aims to remove.

Guideline 5 therefore recommends that "employers should err on the side of generosity in choosing appropriate segments of the Canadian workforce for purposes of comparison" (p.24). The discrepancy between qualified persons and availability data may be judged in part by reviewing the tables indicating highest level of schooling and major field of study, and unions may wish to ensure that this data is taken into account when the external comparator figures are set.

When is a gap significant?

lateral movements and promotions from parts of the workplace where designated group members are located, and the members of units where no underrepresentation is found may benefit from such measures.

Where Acceptable Pre-existing Review Exists

Where the results of an old employment systems review would be "likely to be the same as the results that would be achieved by a [new] review" employers are not obliged to conduct a new review: *Regs.*, s.10.

The concerns outlined above about the use of previous workforce data and analysis would apply equally to the employment systems review.

Factors to Consider in Reviewing Old ESR

- how long ago was the ESR undertaken?
- have there been many changes in the number of employees and their occupational profile?
- have there been many changes to human resource policies and practices?
- has representation changed substantially?
- have plans based on previous ESR's produced demonstrable results? (*Guideline 6*, p.4)

Since most previous reviews will have taken place without union involvement, unions can take the position that the results of a review conducted without their participation is not "likely to be the same" as one conducted with their collaboration. The full participation of employees is vital to the identification of barriers.

CONTENT OF THE EMPLOYMENT SYSTEMS REVIEW

An employment systems review is an examination of all an employer's policies and practices to see if they have a negative impact on members of the designated groups. If they do, these "systemic barriers" to the full participation of designated group members must be replaced or modified in the employment equity plan. The ESR should include an analysis of the accommodations of the distinct needs of members of designated groups to ensure that they can fully participate in the workplace.

Examples of Barriers

- hiring practices using word of mouth only, without a plan to reach out to other communities

  If a workplace is not already representative, word of mouth hiring will perpetuate the imbalance

- not recognizing relevant qualifications of immigrants

- requirements for Canadian experience

- any practices which unnecessarily limit the pool of people considered for jobs

- selection processes that are based on the subjective responses of interviewers

  Interviewers tend to feel most comfortable with people "like themselves". This can become a barrier where the required objective qualifications for a position are not clearly set out

- rules which make employees choose between their job and practising their religion or having a family

Barriers In Collective Agreements

In some cases, collective agreement provisions might be identified as a barrier. Examples of employment barriers in collective agreements and the effects of barriers in collective agreements are discussed in Chapter 3 and Chapter 5. The special rules relating to seniority provisions that may have an adverse impact are also discussed in Chapter 3.

STEPS IN CONDUCTING AN ESR

***Guideline 6* Recommended Steps for Conducting an ESR:**

1. Involve a cross-section of employees and provide appropriate training
2. Determine where underrepresentation exists
3. Determine which human resource policies and practices need to be examined
4. Conduct a statistical analysis and determine adverse impact on designated group members
5. Examine how human resource policies may have created adverse impact on designated group members
6. Examine how human resource practices may have created adverse impact on designated group members
7. Write report with findings.

Where there is a joint labour-management committee (or committees) in place, they should be involved in the conduct of the employment systems review. It is necessary to conduct an employment systems review for all areas of the workplace irrespective of whether underrepresentation is found, since the absence of underrepresentation is not decisive of whether discrimination is taking place or whether appropriate accommodations are in place. However, the workforce survey can provide valuable information about where discriminatory barriers lie.

APPENDIX 10: EMPLOYMENT EQUITY PLAN

PREPARE EMPLOYMENT EQUITY PLAN

The employer must prepare an employment equity plan which eliminates any unfair barriers that were identified in the course of the employment systems review and which includes reasonable accommodations and positive measures aimed to correct any underrepresentation that was identified in the workforce survey: *Act* s.5(a) The employment equity plan must include both short-term and long-term measures: *Act* s.10.

The plan may be a separate document, or may be part of broader document, such as a business plan. However, where it is part of a broader document, it must be separable in order to facilitate an audit by the CHRC (*Guideline 7*, p.8)

Role Of The Union

Unions must be consulted about the preparation and implementation of employment equity plans and must collaborate with employers in the preparation and implementation of employment equity plans: *Act*, s.15

SHORT-TERM MEASURES

What are They?

The following measures must be instituted in the short-term, that is, in no less than one year and no longer than three years:

- ✔ positive policies and practices for the hiring, training, promotion and retention of persons in designated groups and for the making of reasonable accommodations for those persons, to correct the underrepresentation of those persons identified by the workforce analysis
- ✔ measures to eliminate any employment barriers identified by the employment systems review
- ✔ a timetable for the implementation of the above two measures
- ✔ short-term numerical goals for hiring and promotion to increase representation of designated group members. *Act*: ss. 5 &10

Considerations in Establishing Numerical Goals

In establishing short term numerical goals employers must consider:

- the degree of underrepresentation of persons in each designated group in each occupational group within the employer's workforce;
- the availability of qualified persons in designated groups within the employer's workforce and in the Canadian workforce;
- the anticipated growth or reduction of the employer's workforce during the period in respect of which the numerical goals apply;
- the anticipated turnover of employees within the employer's workforce during the period in respect of which the numerical goals apply; and
- any other factor that may be prescribed: *Act*, s.10(2).

What are Positive Policies and Practices?

Under the *Act*, positive policies and practices under the *Act* are measures that go beyond the elimination of barriers. These measures aim to overcome the effects of the barriers that have been and are faced by designated group members and to actively promote a diverse workplace.

Positive policies and practices might include:

- changes in work practices available to all workers and of special significance to designated group members, such as job sharing and mentoring, or flexible work arrangements
- targetted measures, such as outreach programs and advertising in community publications
- special temporary measures, such as setting aside training spots for designated group members to create a critical mass in an area of underrepresentation (see *Guideline 7*: pp.11-13)

Note: a measure may be a positive practice in one workplace and a measure necessary to eliminate a barrier in another. For example, if a workplace has a scheduling system which is not necessary for the functioning of the workplace and which makes it difficult for women with child care responsibilities to participate in the workforce, this would be a barrier which should be eliminated, and may be removed by the introduction of flexible work hours. In another workplace the work hours may not constitute a barrier to women, but such an arrangement might be introduced to a workplace where their representation

is low as a positive measure to make the workplace more attractive to women (and of course to employees generally).

What is Reasonable Accommodation?

Accommodation means the steps that are taken to adapt the workplace to the particular needs or characteristics of a designated group or individual group members. It includes providing wheelchair access, providing the special equipment required by a disabled worker, allowing a worker leave for religious observance, or an exemption from the dress code for religious reasons. See Chapter 3 and *Guidelines 6 and 7* for a discussion of this issue.

Accommodation is only necessary where the rule that is varied is legitimate in its application to other workers (e.g. Sundays off). Where the rule that has a discriminatory effect is not otherwise legitimate, the rule should be removed entirely.

The recent amendments to the *CHRA* in *Bill S5* now provide in section 15(2) that steps to accommodate must be taken unless the accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

An employment equity plan must set out a means by which employees can request accommodation and an outline of how the employer will ensure that such requests are dealt with appropriately. See *Guideline 7, p. 15.*

LONGER-TERM GOALS

The longer term refers to the period following the first three years. The plan must include:

✔ the employer's longer term goals for increasing the representation of persons in designated groups in the employer's workforce, and

✔ the employer's strategy for achieving those goals.

REASONABLE PROGRESS

Employers must:

- design a plan that is capable of producing reasonable progress towards the implementation of employment equity: *Act*, s.11;
- monitor the plan to make sure that reasonable progress is being made; and
- review and revise the plan accordingly *Act*, s.13 & 15.

No definition of what is "reasonable" progress is given in the *Act* or *Regulations*. Ultimately the employer and the CHRC will have to come to an agreement based on the particular circumstances of the employer (*Guideline 7*, p.21). If the union believes that the plan does not constitute "reasonable progress", the assistance of a compliance officer should be sought. It also may be possible to file a *CHRA* complaint or grievance under an anti-discrimination clause in collective agreement. See Chapters 3 and 4.

Minimum Standard

Where overall representation in the workforce is not changing significantly, due to downsizing or low rates of hiring, *Guideline 7* suggests that a "bare minimum standard" for reasonable progress is that, when hiring and promotion does take place, the percentage of designated groups among the new hires and promotions cannot be lower than their percentage representation in the availability pool for the position, and should, in most cases, exceed this level (*Guideline 7*, p.22). In other words, although the employer may not be in a position to correct the overall representativeness of the workplace, it cannot continue to discriminate in the new steps it does take.

APPENDIX 11: IMPLEMENTING THE PLAN

Reasonable Efforts

The employer must make "all reasonable efforts" to implement the plan and do so in consultation and collaboration with its unions: *Act*, ss.12(a), s.15. Full attainment of a plan's qualitative and quantitative goals can be taken as evidence that all reasonable efforts have been made. Where goals are missed, the employer should be able to show that this was the result of factors beyond its control *(Guideline 7*, p.24).

Factors to consider in Assessing Reasonable Efforts

- the degree to which various components of the plan have been implemented according to schedule;
- an indication of ongoing senior-level support, on the part of both the employer and the union, for employment equity generally and, in particular, for implementation of all elements of the plan
- the setting up of a joint labour-management committee or forum;
- the devotion of adequate financial and human resources to facilitate implementation of each element of the plan;
- utilization of the expertise of employees - including those who are members of designated groups - and external sources, such as HRDC Regional Workplace Equity Officers, community and advocacy organizations, employer associations, regional and national labour federations, government departments and agencies, and consulting firms; and
- the establishment of regular review mechanisms to ensure that, as much as possible, time frames are adhered to and goals are met. *Guideline 7*

WHAT EMPLOYMENT EQUITY DOES NOT REQUIRE

Employment equity does not require that employers hire or promote unqualified persons; create new positions or suffer undue hardship in order to achieve equity: *Act*, s.6.

APPENDIX 12: MONITORING, REVIEWING AND REVISING PLAN

MONITORING OF PLAN

Employers must:

- ✔ make all reasonable efforts to implement their employment equity plan, and
- ✔ monitor implementation on a regular basis to assess whether reasonable progress toward implementing employment equity is being made: *Act*, s.12.

The content of the obligation to make "all reasonable efforts" to ensure that "reasonable progress" is being made is discussed in Appendix 11 "Employment Equity Plan". *Guideline 9* covers Monitoring, Review and Revision and is not yet available.

Role Of The Union

Unions must be consulted about the implementation and revision of employment equity plans and must collaborate with employers in the implementation and revision of employment equity plans: *Act* s. 15(1). Unions should ensure that the employer puts in place regular review mechanisms to determine whether the plan is being adhered to and whether the goals are being met in a timely fashion. Employee representatives, including bargaining agents should seek and be given access to the results of these monitoring mechanisms, so that they may meet their responsibility under the *Act* to collaborate in the implementation and revision of employment equity plans.

PERIODIC REVIEW AND REVISION OF PLAN

Employers must review the plan at least once during the one to three year period for which the short term-numerical goals are established and revise it by

- ✔ updating the numerical goals, taking into account the required factors, and
- ✔ making any other changes that are necessary as a result of implementation assessment or as a result of changing circumstances: *Act*, s.13.

The review process should consider each of the assumptions on which the original plan was based and consider whether they remain the same, and if not, what changes are required. It is important for unions to keep clear records of the reasons behind each feature of the employment equity plan. These records will be valuable in both the CHRC's audit process and in monitoring and reviewing the plan's implementation.

APPENDIX 13: EMPLOYMENT EQUITY RECORDS

WHAT RECORDS MUST EMPLOYERS ESTABLISH AND MAINTAIN?

Employers must keep records concerning the workforce, the plan and the implementation of employment equity: *Act*, s.17.

Employment Equity Records must include the following:

(a) a record of each employee's designated group membership, if any;

(b) a record of each employee's occupational group classification;

(c) a record of each employee's salary and salary increases;

(d) a record of each employee's promotions;

(e) a copy of the workforce survey questionnaire that was provided to the employees and any other information used by the employer in conducting its workforce analysis;

(f) the summary of the results of the workforce analysis;

(g) a description of the activities undertaken by the employer in conducting its employment systems review;

(h) the employer's employment equity plan;

(i) a record of the employer's monitoring of the implementation of its employment equity plan, and

(j) a record of activities undertaken by the employer and information provided to employees. *Regs., s.11.*

Note: Employment equity information is confidential and information concerning designated group status should NEVER be kept in an employee's personnel file.

Guideline 10 - Record Keeping - deals with this issue in some detail. Its table of contents is found in Appendix 14.

HOW LONG MUST RECORDS BE KEPT?

Personal Information of Terminated Employees

Where an employee is terminated records of his or her designated group membership, if any, occupational group classification, salary and salary increases, and promotions are to be kept for two years after the date of their termination: *Regs.*, s.12(1).

Employment Equity Records

Employment Equity Records (those records set out in *Regs* s.11(e) to (j)) must be kept for two years after the period covered by the employment equity plan; *Regs.* s.12(2).

Where a private sector employer has generated its annual employment equity report using specially designed computer software such as Employment Equity Computerized Reporting System (EECRS), the employer shall maintain a copy of the database or other computer record used to generate the report for two years after the year in respect of which the report is filed: Regs., s.12(3).

Record Costs

The Government believes that the provisions of the *Act* and *Regulations* dealing with the maintenance of records are not expected to result in undue costs to most employers. The more costly records that employers are required to maintain under these *Regulations*, (i.e. individual employees' records relating to salary, occupational classification, promotions and designated group membership) were also required to be maintained under the 1986 *Act*. Many employers have already made significant investments in developing systems to capture employment equity data as part of their obligations under the 1986 *Act*. In addition, the *Regulations* reduce the length of time for which employers must maintain their records from three years under the Act of 1986 to two years, which, in part, reduces any extra cost which may be incurred because of the new record keeping requirements.[66]

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[66] Employment Equity Regulations, SOR/96-470.

PRIVATE SECTOR EMPLOYMENT EQUITY REPORTS

Employers Required to File Annual Reports

Every private sector employer is required to file an annual report on or before June 1st of each year: *Act*, s. 18. The obligation to file reports rests solely with the employer.

Consolidated Reports

Two or more related federal employers with common control and direction may apply to the Minister for authorization to file a single consolidated report. *Act*, s.18(7).

Exemption For Maximum Of One Year

Employers may apply to the Minister for an exemption from the reporting requirements of the Act for a period not exceeding one year. The Minister can grant this request if s/he believes that there are special circumstances that warrant an exemption: *Act*, s.18(8).

CONTENT OF PRIVATE SECTOR REPORTS

Private Sector Reports must contain the following information:

(a) the industrial sector in which its employees are employed, the location of the employer and its employees, the number of its employees and the number of those employees who are members of designated groups;

(b) the occupational groups in which its employees are employed and the degree of representation of persons who are members of designated groups in each occupational group;

(c) the salary ranges of its employees and the degree of representation of persons who are members of designated groups in each range and in each prescribed subdivision of the range; and

(d) the number of its employees hired, promoted and terminated and the degree of representation in those numbers of persons who are members of designated groups: *Act*, s.18(1).

Note: The employer who must file a report is the person or organization that was the employer on December 31 in the immediately preceding year: *Act*, s.18(2).

Regulations and Forms

Employers must provide the above information on pre-set forms that are attached as Schedules to the *Regulations*. *Regulations* are also contained in the detailed technical instructions on how to complete these forms. For further detail, review *Guideline* 11: Employment Equity Report.

Self-identification

Only those employees who identify themselves to their employer, or agree to be identified as aboriginal peoples, members of visible minorities and persons with disabilities are to be counted as members of those designated groups for the purposes of the report: *Act*, s.18(4).

Description of Implementation

Employers are required to include in their report a narrative description of the measures taken during the reporting period to implement employment equity and the results achieved.

Description of Consultations with Employee Representatives

Employers must include a narrative description of the consultations that have taken place between themselves and their employees' representatives during the reporting period *Act*, s.18(6).

Although there is no formal requirement that employee representatives sign off on this description, *Guideline* 3 recommends to employers that employee representatives should be given an opportunity to review this description, prior to filing, so that they may provide input and recommend changes. Where this has occurred, *Guideline* 3 advises employers to add this fact into its description to assist in demonstrating that it has met its responsibilities under the Act (p.15-16)

If a union believes that the employer's description of consultations is inaccurate or misleading, the assistance of a compliance officer should be sought.

Certificate Required

An annual employment equity report must be signed by the employer (or a senior officer of a corporation) and must contain a statement certifying the accuracy of the information contained in it: *Act*, s.18(5), *Regs.*, s.16(1)&(2)

WHO SEES THE REPORTS?

Employee Representatives

Employers are required to provide unions and other employee representatives with a copy of the annual report at the time that the report is filed with the Minister: *Act*, s.18(9).

The CHRC

When the Minister receives a report, a copy is sent to the CHRC: *Act*, s.18(10).

The Public

All reports are available for public inspection and anyone can obtain a copy from the Minister for no more than the cost of reproduction: *Act*, s.19(1).

Employers can apply to the Minister to ask that their report be withheld from public inspection for a period of not more than a year. The Minister may grant such a request if s/he believes that there are special circumstances warranting the withholding: *Act*, s.19(2). Such special circumstances would probably include instances where the plan contains information that reveals business plans confidential to competitors.

MINISTER'S REPORT

The Minister is required to prepare an annual report that consists of a consolidation of the employer reports, together with an analysis of those reports. This report is to be tabled before the House of Parliament within 15 days of its completion: *Act*, s.20.

PUBLIC SECTOR EMPLOYMENT EQUITY REPORTS

Annual Report By Treasury Board

The Treasury Board is responsible for carrying out the responsibilities of an employer under the Act for certain portions of the public service (see page 103 of this Guide - "Who is the Employer?").

The Treasury Board is required to table an annual employment equity report before each House of Parliament for those portions of the public service for which it bears responsibility as an employer: Act, s.21(1), s.4(1)(b)

Contents Of Report

The Treasury Board Report is the same in substance to the private sector reports, with some minor adaptations to the context of the public service.

The Treasury Board Report must contain information on the following:

(a) a consolidation and analysis of

- (I) the number of employees employed in each portion of the public service referred to in para. 4(1)(b) [these being the portions for which the Treasury Board is responsible for carrying out employer responsibilities] and the number of persons who are members of each designated group so employed,
- (ii) the total number of employees employed in all portions of the public service referred to in para. 4(1)(b) in each province and in the National Capital Region and the number of persons who are members of each designated group so employed,
- (iii) the occupational groups of employees and the degree of representation of persons who are members of each designated group in each occupational group,
- (iv) the salary ranges of employees and the degree of representation of persons who are members of each designated group in each range and in any subdivision of the range, and
- (v) the numbers of employees hired, promoted and terminated and the degree of representation, in those numbers, of persons who are members of each designated group;

(b) a description of the principal measures taken by the Treasury Board during the reporting period to implement employment equity and the results achieved;

(c) a description of the consultations between the Treasury Board and its employees' representatives during the reporting period concerning the implementation of employment equity; and

(d) any other information that the President of the Treasury Board considers relevant: *Act*, s.21(2).

REPORTS OF OTHER PUBLIC SERVICE DEEMED EMPLOYERS

Certain portions of the public service are deemed to be the employer for the purposes of the *Act*. See Appendix 4: Who is the Employer? These portions of the public sector, excepting the Canadian Security Intelligence Service, are responsible to provide an employment equity report to the President of the Treasury Board within six months after the end of each fiscal year.

The President of the Treasury Board will then put those reports before Parliament along with the report concerning the portions of the public service for whom the Treasury Board acts as the employer. *Act*, s.21(3). The contents of the reports by portions of the public service are the same as the report required of the Treasury Board. *Act*, s.21(4).

REPORT OF CANADIAN SECURITY INTELLIGENCE SERVICE

The Canadian Security Intelligence Service is required to provide an annual report to the President of the Treasury Board within six months after the end of each fiscal year. The President of the Treasury Board will then table that report, together with the other public sector reports, before each House of Parliament: *Act*,.21(5).

Contents of Report

The reports required from the Canadian Security Intelligence Service are similar in substance to those required of private and other public sector employers, except that CSIS reports will not show the actual number of its employees. All figures are therefore to be expressed only as percentages. The CSIS must report:

(a) the percentage of employees employed in that portion who are members of each designated group;

(b) the occupational groups of employees in that portion and the percentage of persons who are members of each designated group in each occupational group;

(c) the salary ranges of employees in that portion and the percentage of persons who are members of each designated group in each range and in any subdivision of the range;

(d) the percentage of employees hired, promoted and terminated in that portion who are members of each designated group;

(e) an analysis of the information referred to in paras (a) to (d); and

(f) the information referred to in paras (2)(b) to (d) in relation to that portion: *Act*, s.21(6).

WHO SEES THE PUBLIC SECTOR REPORTS?

Employee Representatives

Employee representatives are to be provided with a copy of any public sector report as soon as possible after it is laid before each House of Parliament. The body responsible for ensuring that employee representatives are provided with a copy is in each case the body responsible for making the report. *Act*, s.21(8) .

The CHRC

The Treasury Board President is required to send a copy of each public sector report to the CHRC, as soon as possible after a report is laid before each House of Parliament: *Act,*, s.21(7).

APPENDIX 14: TABLE OF CONTENTS FROM RELEASED GUIDELINES

See Attached Table of Contents