PRO-ACTIVE EMPLOYMENT EQUITY OBLIGATIONS IN ONTARIO'S PROVINCIALLY REGULATED WORKPLACES

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

Moreover, respect for human rights is the law. Under the Code, employers, landlords and service providers are required to ensure that they are providing inclusive and non-discriminatory environments. Harassment and discrimination are a violation of the law, and organizations that fail to take adequate steps to prevent and address harassment and discrimination may be held liable. Ontario Human Rights Commission, Guidelines on Developing Human Rights Policies and Procedures, 19 June 1996, Revised: January 30, 2008

INTRODUCTION

Employers in provincially-regulated Ontario workplaces are required to pro-actively work and bargain with trade unions the establishment and maintenance of workplace employment equity ("EE").

Employment equity means a workplace that is free of unlawful discrimination and promotes the equality of disadvantaged groups who have suffered systemic discrimination. It is aimed at putting such groups on a level playing field with advantaged groups with respect to all aspects of employment. Once a level playing field is achieved in any particular area, steps must be taken to ensure this is maintained. Employment equity planning is the recognized systematic human rights method for workplace parties to identify and redress, within the spheres of their responsibility, such systemic discrimination.

The Importance of Employment Equity Planning

In the current recession, employment equity rights and obligations are an important union tool to further the equality and workplace interests of all bargaining unit members. Employers have no "discretion" to violate the *Code* because they think human rights enforcement is too `costly`or `difficult``. Employment equity measures also maximize productivity and economic viability by making full use of the skills of Ontario's diverse workforce. Yet many employers resist the notion and others see the process as exclusively an employer rather than a joint obligation. Unions have a long history of supporting employment equity - bargaining for equality promoting provisions in collective agreements and using equality promoting collective agreement provisions to further the rights of disadvantaged employees. Such union participation is also critical to protecting unions from incurring costly legal liabilities. With the Bill 107 *Code* reforms, both unions and dissatisfied employees have easier access to an adjudication of their human rights claims before the HRTO.

PART I OVERVIEW OF EMPLOYER AND TRADE UNION EMPLOYMENT EQUITY OBLIGATIONS

Employment equity planning and measures are required human rights actions. Based on the requirements of Ontario's human rights legal framework - the *Human Rights Code* (*"Code"*), *Labour Relations Act*,(*'LRA*") *Canadian Charter of Rights and Freedoms ("Charter")* for Government employers and collective agreement anti-discrimination provisions, employer and trade unions have the following key obligations and responsibilities:

1. Unionized employers have the pro-active obligation to engage in a joint workplace employment equity planning process with bargaining agents, despite the absence of a specific employment equity law. Where provincially-regulated unionized employers are also part of the Federal Contractors Programme, they are required to follow the provisions of the Federal *Employment Equity Act.* (See Appendix A – CHSMC Overview of Requirements of Federal *Employment Equity Act.*)

2. Human rights laws require workplace parties to engage in proactive investigation, planning and corrective and positive measures. This is necessary to ensure equality of employment for disadvantaged groups protected by Ontario's *Code* or by the *Charter* where a government employer. The *Code* provides that the following groups are protected from discrimination in relation to employment: persons disadvantaged by reason of their race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability (s.5). The *Charter* prohibits discrimination, and in particular where based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (s. 15(1)).

3. While the existence of proven discrimination in a particular workplace will require immediate remedial action, such proof is not necessary before EE planning steps must be taken. This is because human rights obligations extend to the pro-active awareness, identification and prevention of discrimination

4. These obligations flow from the overall societal evidence concerning the systemic employment discrimination faced by disadvantaged groups. The particulars of the actions which will need to be taken will depend on the specifics of the discrimination faced by each group and the size and nature of the workplace. (See Appendix C – CHSMC Examples of Employment Equity Measures.) While historically women, visible minorities, persons with disabilities and aboriginal peoples have been considered to experience the most discrimination and have been focus of specific EE legislation, the *Code* does not make this distinction and other *Code* protected groups, such as those experiencing discrimination based on age, sexual orientation or creed are also entitled to pro-active relief.

5. As the exclusive bargaining agent and negotiator for collective agreements governing the workplace conditions of all employees, including disadvantaged group members, unions have both the right to participate in and negotiate EE provisions and also the obligation to do so. Employers often argue that they have no responsibility to bargain with trade unions on matters outside of the regular collective bargaining process. As the employment equity process subjects <u>all</u> employment systems, policies, and practices to review for discriminatory barriers, employers can no longer simply rely on "management rights" to fend off challenges to their authority to run the workplace. Pursuant to the *LRA*, employers have an obligation where there is a bargaining agent to bargain exclusively with that agent. Required human rights changes to pay, promotion practices and other matters found in the collective agreement must only be changed with consent of the trade union or by order of the OLRB or HRTO, if discrimination is found.

6. Proposing unlawful collective agreement provisions or failing to accede to necessary collective agreement amendments to rectify discrimination could violate the *LRA.* The human rights obligation to monitor and revise the collective agreement is a constant obligation and not just one which exists during renewal bargaining. The Union is entitled

and in fact required to seek amendments immediately, where discrimination is found.

7. A "human rights-based" EE planning process separate from but related to collective bargaining properly prioritizes EE planning and measures as required and time-sensitive human rights procedures and remedies. This helps to protect such measures from the notion that human rights compliance is "optional" or subject to cost-cutting agendas. Just as pay equity is a right not a discretionary pay increase, securing employment equity is mandatory. EE is a minimum standard like the minimum wage and is not subject to being obtained only in exchange for giving up other proposals in collective bargaining. Workers should not be required to continue to work in discriminatory conditions.

8. The courts have found bargaining agents must take action to ensure that any collective agreement they negotiate does not discriminate but rather promotes the equality of disadvantaged groups and that their representational responsibilities do not directly or through disparate impact discriminate against disadvantaged group members. While adjudicators have generally, although not always, recognized that unions have a lesser and different equality responsibility from employers, unions still face significant human rights liabilities. Trade union action to engage in employment equity planning and challenging of discriminatory collective agreement provisions or employer practices helps to discharge human rights responsibilities, minimize liabilities and maximize the benefits unions can bring to workplaces. To be effective in taking this action, trade unions will need to obtain production from employers of employment equity-related workplace information. (See CHSMC Checklist for Initial Employment Equity Production Request)

9. Where an employer refuses a trade union request to engage in appropriate employment equity planning or measures or fails to cooperate in agreeing to end a discriminatory practice, the best course of action for unions is to contest such action. This could take the form, depending on the circumstances, of a complaint under section 5 of the *Code* to the Human Rights Tribunal of Ontario ("HRTO"), a grievance under the anti-discrimination provisions in a collective agreement or a section 96 unfair labour practice complaint under the *LRA* alleging that the collective agreement is discriminatory or that the employer is bargaining in bad faith contrary to sections 54 and 17 of the *LRA* respectively.

10. While the Federal Government legislated a specific *Employment Equity Act ("EEA")* and Ontario passed and then repealed an *Employment Equity Act ("OEEA"*), the existence or repeal of these laws does not detract from the force of the EE obligations which flow from the *Code* which is a quasi-constitutional law or from the *Labour Relations Act* or from collective agreement provisions. The only legal discretion employers have is to identify, working with unions, the specific way, based on their particular workplace circumstances, to prevent discrimination and dismantle the patterns of human rights violations which may be operating.

PART II DEVELOPMENT OF EMPLOYMENT EQUITY PLANNING AND MEASURES AS HUMAN RIGHTS REMEDIES

1) The 1984 Royal Commission on Equality in Employment

While significant progress has been made with many important human rights precedents obtained

by unions, systemic discrimination continues to flourish in public and private sector Ontario workplaces. The term “Employment Equity” was coined by the current Supreme Court of Canada (“SCC”) Justice Rosalie Abella in the 1984 Report of the Royal Commission on Equality in Employment which she chaired.[1] This Royal Commission and subsequent Ontario Human Rights Commission Reports document the society-wide systemic discrimination faced by disadvantaged groups and the need for pro-active measures to address that discrimination.[2] This discrimination affects all aspects of the labour market experience including the ability to get work, the conditions of work, the retention of work and retirement conditions. It also includes workplace practices which were explicitly contained in collective agreements or resulted from its application or the representational actions of unions.

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

a. Starting with drawing a profile or “mapping” of the disadvantaged groups and their representation, or lack thereof and conditions of work at all levels of the workforce;

b. Then identifying and eliminating barriers in an organization's employment procedures and policies which were contributing to any inequitable conditions and lack representation throughout all workplace occupations and levels.

c. Developing positive policies and practices including reasonable accommodation to ensure the effects of systemic barriers are eliminated and equality of employment is promoted;

d. Preparing plans which set out the actions required for steps b and c above and appropriate targets and goals to work towards equitable representation of disadvantaged group members throughout a workforce; and

e. the monitoring, review and revision of those plans, as necessary.[3]

Securing workplace employment equity is a complex problem. Workers experience discrimination in many different workplace contexts and ways. Workers with multiple and intersecting disadvantages, such as women of colour, also experience greater and different disadvantage which

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

2 See http://www.ohrc.on.ca/en/resources/annualreports; and http://www.ohrc.on.ca/en/resources/factsheets.

3 For description of employment equity, see Human Resources and Development Canada website, http://www.hrsdc.gc.ca/eng/lp/lo/lswe/we/information/what.shtml. For history of employment equity see http://www.hrsdc.gc.ca/eng/lp/lo/lswe/we/information/history.shtml.

requires special attention.[4] Entrenched socio-economic and cultural factors sustain discrimination and are powerful constraints against progress. This is the reason why Justice Abella called for the entrenchment of equality promoting measures (sometimes referred to as `mainstreaming`) into workplace governance through employment equity planning. To be effective, such mainstreaming must start with a concrete analysis or mapping of the conditions of disadvantaged workers and the specific prejudices and barriers they face.

Back in its 1984 Report, the Commission made the following statement which highlights the massive discrimination problems which existed then and continue to exist:

> *"Employment equity is a strategy designed to obliterate the effects of discrimination and to open equitably the competition for employment opportunities to those arbitrarily excluded. It requires a "special blend of what is necessary, what is fair and what is workable". ... We need equal opportunity to achieve fairness in the process, and we need employment equity to achieve justice in the outcome."*
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> *"What is needed to achieve equality in employment is a massive policy response to systemic discrimination. This requires taking steps to bring each group to a point of fair competition. It means making the workplace respond by eliminating barriers that interfere unreasonably with employment options. It is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen" Equality in Employment: A Royal Commission Report - General Summary.1984.*

2) Specific Employment Equity Legislation

As a result of the Commission recommendations, the Federal Government enacted the *Employment Equity Act*.[5] It was subsequently strengthened and a Federal Contractors Programme enacted requiring such contractors, even if provincially regulated, to comply with its terms. (See Appendix A – CHSMC Overview of Requirements of Federal *Employment Equity Act*.) In 1995, the Ontario NDP government enacted the *Employment Equity Act* and the Tories repealed that *Act* less than a year later.

3) Supreme Court of Canada Human Rights Jurisprudence

(a) Systemic Discrimination Requires Systemic Remedies

Following on the Royal Commission, the Supreme Court of Canada over the last 25 years has issued decisions which call for increasingly wide-ranging and pro-active steps to be taken by employers working with trade unions to address the above-noted persistent systemic

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

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

discrimination.[6] These decisions are all based on its finding that human rights laws such as Ontario`s *Code* are fundamental or quasi-constitutional laws which must be interpreted liberally to achieve their objectives.[7] Initial SCC jurisprudence such as the 1987 decision in *Robichaud v. Canada (Treasury Board)* called for proactive employer measures. In *Robichaud,* the Court found that the Department of National Defence had a positive obligation to establish and to maintain a workplace free of sexual harassment.

Starting with the nature of discrimination itself, these cases recognized that discrimination is systemic and calls for systemic remedies. Earlier formal notions of equality which regarded discrimination as an exceptional and individual circumstance requiring intention, have given way to understanding that discrimination is often structural and embedded in economic and work practices and systems which are in turn rooted in prevalent cultural and social practices and prejudices. This has led to the concept of indirect discrimination where barriers which have a disproportionately negative effect on a group are just as discriminatory as those which directly give preference or exclude because of a person's group status.[8] Remedying and preventing discrimination requires a recognition that existing social and legal arrangements have benefitted dominant groups and disadvantaged others due to prejudice and stereotypes. This leads to the need for proactive employment equity or affirmative action measures which seek to restore the balance and transform institutional practices to accommodate disadvantaged groups' needs.[9]

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

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

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

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

(b) Employment Equity SCC Decisions

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

> *An employment equity programme is thus designed to work in three ways: First, by countering the cumulative effects of systemic discrimination, such a programme renders future discrimination pointless. To the extent that some intentional discrimination may be present, for example in the case of a foreman who controls hiring and who simply does not want women in the unit, a mandatory employment equity scheme places women in the unit despite the discriminatory intent of the foreman. His battle is lost.*
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> *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.*
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> *Thirdly, an employment equity programme helps to create what has been termed a "critical mass" of the previously excluded group in the workplace. This "critical mass" has important effects. The presence of a significant number of individuals from the targeted group eliminates the problems of "tokenism"; it is not longer the case that one or two women, for example will be seen to "represent" all women... Moreover, women will not be so easily placed on the periphery of management concern. The "critical mass" also effectively remedies systemic inequities in the process of hiring (since once sufficient numbers of minorities\women are hired, the normal processes of the workplace will lead to those women referring their friends and relatives for employment.)*
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> *If increasing numbers of women apply for non-traditional jobs, the desire to work in blue collar occupations will be less stigmatized. Personnel offices will be forced to treat women's applications more seriously. In other words, once a "critical mass" of the previously excluded group has been created in the workforce, there is a significant chance for the continuing self-correction of the system. (1997) 28 C.H.R.R. D/179, p. D4230-31*
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> *In attempting to combat systemic discrimination, it is essential to look to past patterns of discrimination and to destroy those patterns in order to prevent the same type of discrimination in the future. p. D4231*

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

discriminatory practices.

The 1999 *British Columbia (Public Service Employee Relations Commission) v. B. C. Government and Service Employees Union ("BCGEU")*[10] decision is a watershed one. It more explicitly provided the foundational basis for requiring employers, working with trade unions to engage in equality planning. The Court made it clear that employers must act to prevent and eradicate discrimination. They are not to wait for complaints, proven discrimination cases or requests for accommodation before taking action. They must ensure that workplace standards and rules are designed for equality from the outset.

> "Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. **They must build conceptions of equality into workplace standards.** By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that **the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible.** ... The standard itself is required to provide for individual accommodation, if reasonably possible." [emphasis in bold added] para. 68

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

> *does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness. para. 42*

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

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

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

(c) Trade Union Human Rights Liability Decisions

While adjudicators have recognized in most circumstances that they have different and lesser human rights responsibilities than employers, they are still very significant. There are a long line of cases holding unions liable for discriminatory provisions in a collective agreement or where the union has blocked an equality promoting accommodation for a disadvantaged group employee. See *Central Okanagan School District No. 23 v. Renaud [1992] 2 S.C.R.970. Roosma v. Ford Motor Co. Of Canada* 91995) 24 C.H.R.R. D/89 (Ont. Bd.Inq) *Canada Safeway Ltd. V. Alberta (Human Rights and Citizenship Commission ,) (1999) 34 C.H.R.R. D/478 , affd 47 C. H. R. R d/220 ABCA 246 leave to appeal to SCC refused.*

It is clear from the jurisprudence that a significant factor in determining the liability of the union will be the pro-active steps the unions has taken to prevent or eradicate any discrimination. Failure to take appropriate human rights steps has exposed unions to significant and in some cases equal liability with the employer. The actions of trade union employees have been deemed to be the actions of trade union for purposes of liability. See *Ryan v. St. John's City 92007) 60 C.H.R.R. D/134 (N.L. BB. Inq.).* Where unions have been exempted from liability or found to be less liable than an employer is where the union can show they have taken active steps to redress the discriminatory impacts on the disadvantaged group member. With the Bill 107 reforms to Ontario's *Code,* dissatisfied employees in bargaining unit have easier access to an adjudication of their human rights claims before the HRTO.

(d) *Canadian Charter of Rights and Freedoms*

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

The 2008 Supreme Court of Canada decision in *R. v. Kapp*, 2008 SCC 41, found that the purpose of the equal treatment provisions in section 15(1) of the *Charter* are to prevent governments from making distinctions which perpetuate or impose disadvantage (para. 25) and the purpose of section 15(2) permitting affirmative action is to ameliorate the conditions of disadvantaged groups, "enabling governments to pro-actively combat discrimination.`` The Court found that these two sections are confirmatory of each other and "work together." (para. 37) and that affirmative action measures are not "justified discrimination" or discrimination in any sense. The Court noted that the formal "like treatment" model may in fact produce inequality. "There must be accorded, as nearly as possible , an equality of benefit and protection and no more of the restrictions, penalties, or burdens imposed upon one than another. (Page. 23) The Court cited the SCC's ruling in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171 that:

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

(e) Human Rights Tribunal Orders

Human Rights Tribunals have also made many orders requiring positive accommodation and equality promoting measures to make workplaces inclusive and to eradicate the negative discriminatory impacts which workers experience. In considering the type of systemic orders to make, the following factors have been identified to assess the deficiencies in the way an enterprise is handling discrimination complaints and to therefore target the necessary remedial measures: 1) the promptness of the institutional response to the complaint; 2) the seriousness with which the complaint was treated; 3) the procedures in place at the time to deal with discrimination and harassment; 4) the resources made available to deal with the complaint; 5) whether the institution took the complaint seriously, then provided a healthy work environment for the complainant; and 6) the degree to which action taken was communicated by the complainant.[11]

Canadian tribunals have ordered a wide range of systemic remedies including: 1) developing and implementing a comprehensive workplace harassment and discrimination policy, which includes a definition of harassing behaviours and an internal complaints process;[12] 2) reviewing internal workplace standards or restrictions that adversely impact certain groups and bringing them into human rights compliance;[13] 3) implementing "special programmes" or plans to remedy past discrimination as well as prevent future discrimination;[14] 4) changing hiring and/or recruitment practices in order to achieve proportional representation in the organization;[15] 5) creating a workplace race relations committee (which may include external members) to set objectives and measures to improve workplace race relations;[16] 6) establishing an internal review committee to monitor the implementation of human rights orders or plans including periodic reports to senior

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

12 *Curling v. Torimiro* (2000), 38 C.H.R.R. D/216, 4 C.C.E.L. (3d) 202 (Ont. Bd. Inq.); *Drummond v. Tempo Paint* (1999), 33 C.H.R.R. D/184 (Ont. Bd. of Inquiry) at D/190; *Moffatt v. Kinark Child and Family Services* (1999), 33 C.H.R.R. D/184 (Ont. Bd. of Inquiry) at D/360; *Miller v. Sam's Pizza House* [1995] NSHRBID No. 2

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

14 *Canadian National Railway Co. v. Canada (Human Rights Comm.) and Action travail des femmes (1987),* 8 C.H.R.R. D/4210 (S.C.C.) [Eng./Fr. 24 pp.] S.C.C. Upholds Affirmative Action -- Order of a Tribunal which requires that a company hire one woman in every four new hires into unskilled blue-collar jobs.; *Canada (A.G.) v. Green*, op.cit., at 27; *Pitawanakwat v. Canada (Dept. of Secretary of State)* (1994), 21 C.H.R.R. D/355; Gauthier v. Canada (Canadian Armed Forces), op.cit.

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

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

management;[17] 7) appointing a person responsible with full powers to ensure implementation orders are carried out;[18] 8) requiring managers to attend a training programme to identify and address instances of harassment and inappropriate behaviour;[19] 9) training management to mentor a cross-culturally diverse workforce;[20] 10) requiring management to circulate to all employees information on available resources, complaint procedures and remedies for those with harassment concerns;[21] 11) implementing annual performance assessments of managers which include evaluation of their compliance with human rights measures;[22] 11) requiring attendance of all employees at human rights education programmes;[23] 12) requiring the employer to state in all staffing notices and job postings and advertisements that the enterprise is an "Equal Opportunity Employer";[24] and 13) implementing individual career plans and training programs for visible minorities. [25]

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

(f) Groups Covered By Employment Equity Obligations

While specific legislated employment equity laws such as the federal *Employment Equity Act* have limited the designated protected groups to women, persons with disabilities, Aboriginal people, and members of visible minorities, in our view, the *Code* does not exempt employers and trade unions from taking EE action with respect to the other *Code* protected groups. While any EE process will likely disclose significant EE concerns with respect to the above-noted 4 groups, other groups such as those who experience discrimination because of their age, sexual orientation or creed also need to be included in the EE process.

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

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

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

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

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

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

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

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

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

PART III ONTARIO EQUITY LAWS AND ONTARIO HUMAN RIGHTS COMMISSION POLICIES

1) Ontario Equity Laws and Obligations

In Ontario, employment equity obligations flow from a number of different specific laws: the *Human Rights Code,* the *Labour Relations Act (`LRA``),* the *Pay Equity Act (`PEA`*),anti-discrimination collective agreement provisions and the *Canadian Charter of Rights and Freedoms* for government workers.

(a) *Human Rights Code*

Equal Treatment

> *5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.*
>
> *(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.*
>
> *6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.*

Special Programs

> *A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I. R.S.O. 1990, c. H.19, s. 14 (1).*

The jurisprudence interpreting these statutory provisions to include employment equity obligations is set out in Part II above.

(b) *Labour Relations Act*

Collective Agreement Not to Discriminate

> *54. A collective agreement must not discriminate against any person if the discrimination is contrary to the Human Rights Code or the Canadian Charter of Rights and Freedoms.*

Duty to Bargain Collective Agreement in Good Faith

> *17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every*

reasonable effort to make a collective agreement.

Union Duty of Fair Representation and Referral

> *74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in 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, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.*
>
> *75. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.*

As a result of section 56 of the *LRA,* disadvantaged group members are bound by the provisions of collective agreements negotiated by employers and trade unions. As a result, the *LRA* provides that such collective agreement cannot discriminate. Accordingly, employers, as well as unions, will violate the *LRA* if they enter into, renew or apply collective agreements in a way which causes discrimination. This includes where a provision has a disparate impact on a disadvantaged group. As well, an employer has a duty under section 17 of the *LRA,* along with the Union, to bargain in good faith for a collective agreement. This duty has been found to include a duty not to make illegal demands. Just as a proposal by an employer to pay less than the minimum wage required by the *Employment Standards Act* would be an illegal demand, so is a proposal for a collective agreement provision which would violate the *Code.* In light of the role of unions as an exclusive bargaining agent, they are bound not to discriminate in their representational or referral duties.

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

(c) *Pay Equity Act*

> *7(2) No employer or bargaining agent shall bargain for or agree to compensation practices that, if adopted, would cause a contravention of subsection (1).*

Under *PEA,* there are specific employer obligations to establish and maintain pay equity for female job classes with comparable male job classes. As well, section 7(2) obliges both the employer and the union to not bargain to disrupt compensation practices that provide for pay equity in the University or to bargain for any compensation practice that does not provide for pay equity for female job classes. See *St. Joseph's Villa* (19 August 1993) 0345-92 (PEHT) and *Ottawa Board of Education* (1995), 6 P.E.R. 45 the Union is prohibited from condoning the University's failure to maintain pay equity. See *York Region Board of Education* (CUPE) (1995), 6 P.E.R. 3. Employers and unions after agreeing to their original pay equity plan must monitor the University workplace for any changes which would affect the validity of the original pay equity plan. In addition, there is jurisprudence under the *Code* which finds that the existence of a specific *Pay Equity Act* does not remove the jurisdiction of the *Code* to address the issue of discriminatory pay.

(d) Anti-Discrimination Collective Agreement Provisions

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

2) Ontario Human Rights Commission Policies

The Ontario Human Rights Commission has issued 21 Policies most of which are employment-related and cover the various *Code* grounds. (See Appendix D – List of Ontario Human Rights Commission Guidelines.) All explain the need for planning pro-active steps and measures to be taken by employers and trade unions to provide a discrimination-free workplace. These Guidelines now have a formal status under sections 30 and 45.5 of the *Code* as providing guidance to the Human Rights Tribunal of Ontario ("HRTO") for the application of the *Code*.[26]

(a) *Guidelines on Developing Human Rights Policies and Procedures*

These Guidelines, updated in January, 2008 provides specific advice about what employers and trade unions must do in order to address their pro-active human rights obligations and secure a discrimination-free environment. The following excerpts clearly show the Commission's call for planning, remedial measures and monitoring by employers and unions and the involvement of the union as a "key partner".

> Under the Code, employers, service providers and housing providers have the ultimate responsibility for ensuring a healthy and inclusive environment, and preventing and addressing discrimination and harassment. They must ensure that their organizations are free from discriminatory or harassing behaviour.
>
> An organization can be held responsible for discrimination where the discrimination is carried out indirectly. For example, an employer that authorizes an employment agency to discriminate on its behalf can be found liable for discrimination.
>
> Organizations have an obligation to be aware of whether their policies, practices and programs are having an adverse impact or resulting in systemic discrimination based on a Code ground. Whether or not a formal complaint has been made, organizations must acknowledge and address potential human rights issues.
>
> Organizations that fail to take steps to prevent or address discrimination or harassment may experience serious repercussions. Human rights decisions are full of findings of liability and assessments of damages that are based on, or aggravated by, an organization's failure to appropriately address discrimination and harassment. An important factor in the assessment of liability or damages is the presence or absence of appropriate policies and procedures for preventing and responding to discrimination and harassment.
>
> An organization may respond to complaints about individual instances of discrimination or harassment, but it may still be found to have failed to respond appropriately if the underlying

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[26] See also Human Rights at Work, 2008, Ontario Human Rights Commission, http://www.ohrc.on.ca/en/resources/Policies/atwork?page=atwork-Contents.html. It is essential that workplace parties look to these policies for guidance as they may be found liable under the *Code* if they do not.

problem is not resolved.[4] There may be a poisoned environment, or an organizational culture that excludes or marginalizes persons based on a Code ground. In these cases, the organization should take further steps, such as training and education, or barrier review and removal, in order to address the problem.

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

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

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

These *Guidelines* further state:

> ``*A complete strategy to prevent and address human rights issues should include the following elements:*
>
> *a. A barrier prevention, review and removal plan;*
> *b. Anti-harassment and anti-discrimination policies;*
> *c. An internal complaints procedure;*
> *d. An accommodation policy and procedure ;*
> *e. An education and training program.``*

(b) *Policy and Guidelines on Disability and the Duty to Accommodate*

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

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

The Policy states such actions are part of

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

It calls for developing disability accommodation policies and procedures, accessibility review plans, identifying potential barriers and implementing the necessary procedures to make facilities, procedures and services accessible. "Conducting the accessibility review will show to what extent an organization is accessible to persons with disabilities and what needs to be done." Such planning and steps help an organization meet their duty to accommodate. Para.5, 5.2

PART IV TAKING ACTION TO ACHIEVE AND MAINTAIN EMPLOYMENT EQUITY

1) The Employment Equity Planning Process

Parts I, II and III of this document have outlined the general steps in the employment equity process. While the specifics of any employment equity planning processes will vary depending on the size and nature of the workplace and the scope of the issues which need to be addressed, it is still useful to review the process contained in sections 1-17 of the federal *EEA.* For an overview of these requirements, see Appendix `` ` "CHSMC Overview of Federal Employment Equity Act Requirements;" the Canadian Human Rights Commission website on Employment Equity and the Trade Union Guide to the *Employment Equity Act,* by Mary Cornish and Amanda Pask (available at www.cavalluzzo.com).

In summary, the EE planning process means working with the employer to identify and eliminate barriers which operate against protected groups arising from employers' policies, procedures and practices; instituting positive policies and practices to accelerate progress towards a representative workforce; and c) making reasonable accommodations of differences to ensure that persons in the designated groups achieve a level of representation in each occupational group in the employer's workforce that reflects their availability in the labour force. Depending on the nature, size and structure of the workplace, this usually involves the following steps:

a. conduct a self-identification survey of the workforce to collect information on the disadvantaged group members in the workforce;

b. conduct a workforce analysis to ascertain the degree of under-representation of those groups in the various workplace occupational groups

c. carry out an employment systems review of all employer policies, procedures and practices, including collective agreement provisions and their application;

d. identify barriers and positive policies and practices which would make reasonable accommodation and promote equitable representation in the workplace;

e. prepare and implement an employment equity plan which would eliminate the discriminatory barriers, institute positive policies and practices with respect to hiring, training, promotion and retention of members of designated groups to make reasonable progress towards a representative workforce.

f. monitor the plan's implementation and revise as necessary.

Throughout the above-noted steps, it is important to provide information to employees to explain

the EE process and for the employer to establish and maintain appropriate EE records which can be used to measure progress.

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

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

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

While there is a good argument that the employer should engage in joint decision-making with the Union concerning employment equity measures, the best way to ensure a clearly enforceable right is to include an express requirement in the collective agreement that the parties develop an employment equity plan which is then incorporated into the collective agreement.

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

3) Union Responsibility To Work Towards Employment Equity

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

As the exclusive bargaining agent for employers, trade unions have the obligation under section 6 of the *Code* to carry out their representational responsibilities in a manner which does not discriminate. The 1992 *Renaud* decision found that a union, as the exclusive bargaining agent for employees may become a party to discrimination and liable to pay damages in two ways: 1) where a union has signed a collective agreement that is discriminatory; or 2) where a union blocks reasonable accommodation by the employer. As well, the Court in *BCGEU* specifically stated at para. 65 that the union is "obliged to assist in the search for possible accommodation."

A finding of joint liability depends on the facts of the case. See *Thomson v. Fleetwood Ambulance Service* 96 CLLC pra. 230-007 (Ont. Bd. Inq) where union was not held liable for discriminatory

collective agreement provisions where the union had tried to remove the provision and had filed a grievance. See also *University of Ottawa and APUO 91999085* L.A.C. (4th) 214 (Ont. Arb. Bd. Adams) where the union was found not to be equivalent of co-conspirator. While the top up provision in the collective agreement was only for parental leave for adoptive and not birth parents, the union was not found liable as it had originally proposed a universal top up and had filed grievance over the issue.

4) The Relationship Between Employment Equity, Accommodation and Collective Bargaining

It is very important that the process of carrying out employment equity responsibilities is kept distinct from but related to the regular collective bargaining process. Ensuring enforcement of basic human rights standards is quite a different process from the give and take and compromising on issues which takes place in collective bargaining where the union is responsible for balancing the interests of its membership as a whole. The requirement to have a non-discriminatory collective agreement is a minimum standard like the minimum wage. It is not negotiable. For a full discussion of this issue in context of pay equity see the 2004 Federal Pay Equity Review Task Force Report

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

5) Where Employer Fails to Carry Out Its Employment Equity Obligations

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

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

An application can also be filed under the *Code* with the HRTO under the new Bill 107 system.

Employers may argue such application should be dealt with as a grievance under anti-discrimination provisions of the collective agreement. The HRTO may decide to initially defer to that process. (See Cornish, Faraday & Pickel, *Enforcing Human Rights in Ontario*, Canada Law Book, April, 2009.) Where a rectification of the collective agreement is required, a Tribunal application or Labour Board complaint may be preferable.

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

Conclusion

In the current recession, employment equity rights and obligations are an important union tool to further the equality and workplace interests of all bargaining unit members. While some employers have recognized that employment equity measures maximize productivity by making full use of the skills of Ontario's diverse workforce, many resist the notion and others see the process as exclusively an employer rather than a joint obligation. Unions have a long history of supporting employment equity. Even after the 1995 repeal of the *OEEA* by the Harris government, unions continued to bargain for equality promoting provisions in collective agreement and to use anti-discrimination CA provisions to further the rights of bargaining unit employees who have been disadvantaged by systemic discrimination.