St. Mary's Law Journal

Volume 26 | Number 3 Article 4

1-1-1995

Towards Equal Opportunity in Canada: New Approaches, Mixed Results Symposium - Human Rights in the Americas - Commentary.

John Hucker

COMMENTARIES

TOWARDS EQUAL OPPORTUNITY IN CANADA: NEW APPROACHES, MIXED RESULTS*

JOHN HUCKER**

I. INTRODUCTION

Human rights are supposed to move us beyond stereotypes and ensure that individuals are treated on the basis of their own abilities and needs. So, let me begin by questioning the stereotype of Canada. We are considerably more than the image sometimes presented of us—as a somnolent, snow-covered country, peopled by tolerant, hockey-loving individuals living on farms or in pristine cities free from crime and social tensions. In some ways, Canadian society is more relaxed than that of the United States, but it would be a mistake to exaggerate this placidity.

During the past quarter century, Canada has experienced profound demographic and cultural change, and its politics have

---

* This Commentary is a slightly revised version of a lecture presented at St. Mary's University on March 3, 1995 for the annual *St. Mary's Law Journal* Symposium.

** Secretary-General, Canadian Human Rights Commission; LL.B, University of Wales; LL.M, Yale University; Barrister and Solicitor, Ontario; former Professor of Law, Queen's University; Visiting Professor of Law, University of Florida; Senior Lecturer in Law, University of the West Indies. The opinions expressed in this Commentary are solely those of the author and do not necessarily reflect those of the Canadian Human Rights Commission.

gone through a period marked by continuing disputes between federal and provincial governments over the distribution of powers. In 1982, Canada rewrote its Constitution to include a far-reaching Charter of Rights and Freedoms.[1] Canada has recently entered into a major free trade agreement with the United States and Mexico,[2] has seen its former governing party reduced overnight from a majority to a residue of two members in the national Parliament,[3] and has witnessed the election in the Province of Québec of a government whose stated objective is to become a "sovereign" state.[4]

Levels of immigration into Canada have consistently outstripped those of the United States, when viewed in relation to overall population, which allows Canada at least an equal claim to being the proverbial land of immigrants.[5] Since the 1960s, Canada has abandoned its earlier reliance upon traditional sources of immigration such as Britain and western Europe, resulting in a preponderance of new Canadians from South and East Asia, the Caribbean, and Africa.[6] Since the 1970s, successive federal governments have also favored a policy of multiculturalism, which gives formal recogni-

---

1. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

2. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., 32 J.L.M. 605 (*entered into force* Jan. 1, 1994).

3. Murray Campbell & Jeff Sallot, *A Liberal Majority: Conservative, NDP Are Devastated; Bloc Takes Quebec*, GLOBE & MAIL (Toronto), Oct. 26, 1994.

4. *See* Anne McIlroy & Bertrand Marotte, *Parizeau: "Now We Want to Be a Normal People in Our Country"; PQ Promises '95 Unity Vote; Parizeau Wins Majority Despite Split in Popular Vote; Liberals Sweep Outaouais*, OTTAWA CITIZEN, Sept. 13, 1994, at A1 (suggesting that Separatist Party Quebecois' capture of majority government requires reevaluation of Quebec's position in confederation). "In a vote that will force Canada to again weigh Quebec's place in Confederation, the separatist Parti Quebecois captured a majority government Monday night." *Id.*

5. *See* W.L. Marr, *Post-War Canadian Immigration Patterns* (comparing Canadian, United States, and Australian immigration rates for 1950 to 1989), *in* THE IMMIGRATION DILEMMA 25 (Steven Globerman ed., 1992). In the 40 years from 1950 to 1989, annual immigration to Canada averaged approximately 139,000 persons. *Id.* Over the same period, the United States admitted an average of approximately 389,000 immigrants each year. *Id.* Expressed as an annual rate per 1,000 of each country's population, these numbers (taking into account fluctuations in levels from decade to decade) amounted, for Canada, to 9.9 in the 1950s, 6.3 in the 1970s and 4.9 in the 1980s; for the U.S. the corresponding figures were 1.5, 2.1 and 2.5. *Id. See generally* ECONOMIC COUNCIL OF CANADA, NEW FACES IN THE CROWD: ECONOMIC AND SOCIAL IMPACTS OF IMMIGRATION (1991) (evaluating economic effects and making recommendations for future of immigration).

6. W.L. Marr, *Post-War Canadian Immigration Patterns*, *in* THE IMMIGRATION DILEMMA 25–26 (S. Globerman ed. 1992).

tion to the country's diversity.[7] In Canada, this policy is often contrasted to the United States's "melting pot" approach. Today such Canadian cities as Toronto, Montreal and Vancouver have become cultural mosaics.[8]

All of this has made for a lively mix and a continuing debate over the steps which should be taken to ensure that the newer arrivals in the country are provided an equal opportunity to maximize their considerable talents. An increasingly rights conscious society has seen a number of groups attempting, with varying degrees of success, to place their interests on the national agenda. Perhaps most notable in this regard are the Aboriginal Canadians, who have argued eloquently for self-government and for recognition within the Canadian Constitution of their traditional rights.[9] Women's groups have also advocated change by enlisting the Charter's equal protection guarantees. Disabled persons have voiced their own concerns regarding the country's slow advancement toward fair treatment in the areas of public services and employment.

The Canadian media continue to feed readers and viewers a steady diet of social issues with a human rights and intercultural dimension. A small sampling from recent months shows coverage of the following: efforts by Muslim students to have their religious

---

7. *See* Canadian Multiculturalism Act, R.S.C., ch. 24, § 3(1) (1985) (Can.) (setting forth Canadian policy that enhances and protects multicultural heritage of all citizens). Section 3(1) states that "[i]t is hereby declared to be the policy of the Government of Canada to . . . recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage. . . ." *Id. See generally* NEIL BISSOONDATH, SELLING ILLUSIONS: THE CULT OF MULTICULTURALISM IN CANADA (1994) (attacking multiculturalism as policy which encourages fragmentation of Canadian Society rather than national unity).

8. *See, e.g.*, Lila Sarick, *Suburb in Transition, Ethnic Diversity Part 1: Immigrants Skip Downtown Stage*, GLOBE & MAIL (Toronto), Dec. 28, 1994, at A1 (noting that Toronto suburban Peel Region has high proportion of minorities unlike traditional suburban communities); Lila Sarick, *Suburb in Transition, Ethnic Diversity Part 2: Ethnic Melting Pot, or Cauldron?*, GLOBE & MAIL (Toronto), Dec. 29, 1994, at A4 (reporting difficult transition from white suburb to urban, multicultural society); Lila Sarick, *Suburb in Transition, Ethnic Diversity Part 3: A Region Grown Like a Gawky Adolescent*, GLOBE & MAIL (Toronto), Dec. 30, 1994, at A4 (describing problems of burgeoning population during time of government spending cuts in social services).

9. *See generally* ROYAL COMMISSION ON ABORIGINAL PEOPLES, PARTNERS IN CONFEDERATION: ABORIGINAL PEOPLES, SELF-GOVERNMENT, AND THE CONSTITUTION (1993) (providing legal and historical analysis of Aboriginal Canadians's claim).

holidays recognized within the public school system;[10] insistence by several branches of the Canadian Legion that Sikhs entering Legion premises be required to remove their turbans;[11] Toronto groups attempting to prevent the opening of a new production of the musical *Show Boat* on the grounds that its portrayal of blacks was racist;[12] and the efforts of some Montreal schools to ban the wearing of the *hijab* by Muslim students.[13]

II. THE HUMAN RIGHTS FRAMEWORK

Canadian history lacks the crystallizing series of events which so graphically marked the civil rights movement in the United States during the 1950s and 1960s. However, since the Second World War there has been a steady movement towards an anti-discrimination norm.[14] Under the constitutional division of powers in Canada, authority over civil rights rests primarily with the provinces rather than with the federal government. Federal jurisdiction is limited to federally regulated companies (primarily interprovincial enterprises, such as banks, radio and television stations, and transportation companies), Crown corporations (such as the Post Office),

---

10. *See* Bob Harvey, *Muslims Fight for Equal Holidays*, OTTAWA CITIZEN, Dec. 9, 1994, at A1 (arguing for equal rights to legal holidays under Charter of Rights and Freedoms for multicultural community).

11. *See* Editorial, *A Shameful Vote by Legionnaires*, TORONTO STAR, June 2, 1994, at A24 (reporting vote at national convention where Royal Canadian Legion membership failed to approve proposed by-law which would have required local Legion branches to admit member or invited guest who was required, by his religious faith, to wear headdress). This decision prompted widespread editorial condemnation. *See, e.g., id.* (stating that "the vote reeks of racism, ignorance and intolerance by a group of former soldiers"); Editorial, *Disgraceful Decision by the Legion*, THE GAZETTE (Montreal), June 2, 1994, at B2 (calling decision "a disgraceful insult to the many Sikhs and Jews who have fought—and died—for Canada and allied countries").

12. *See* William Walker, *Public Agency Cash Fuelled Racism Row*, TORONTO STAR, Sept. 27, 1994, at A1 (revealing secret funding of anti-racism groups by government agency); Kate Taylor, *When an Excursion Is Not Just Another Field Trip*, GLOBE & MAIL (Toronto), Nov. 5, 1994, at C1 (reporting student's perceptions that musical accurately depicted history).

13. *See* Richard Mackie, *Muslim Headgear Polarizes Quebec*, GLOBE & MAIL (Toronto), Dec. 12, 1994, at A7 (noting that pending report by Quebec Human Rights Commission addresses means of defusing controversy).

14. *See generally* WALTER S. TARNOPOLSKY & WILLIAM F. PENTNEY, DISCRIMINATION AND THE LAW 2-2 to 2-7 (1985) (finding anti-discrimination legislation as early as 1793).

and of course its own operations.[15] Provincial anti-discrimination statutes began to emerge in the 1940s and the first human rights commission was established in Ontario in 1962. Today all ten provinces and the federal government have enacted human rights legislation.[16]

Under the common statutory model, human rights commissions accept complaints from individuals alleging they are victims of a discriminatory act in employment, accommodations or the provision of services. If the complaint is found to have substance, a process of conciliation will usually ensue, followed, if necessary, by referral of the complaint to a board of inquiry (or tribunal) empowered to hand down binding decisions. Available remedies may include the payment of damages, an offer of employment, and changes to discriminatory practices.[17]

Although the scope and coverage of the provincial statutes vary, they are in general quite broad, including prohibitions not only against discrimination on the grounds of race, color, and religion, but also against discrimination pertaining to sex, age, disability, marital or family status and, in most provinces, sexual orientation.[18] As in the United States, Canadian law does not limit discrimination suits to intentional acts; rather, liability may result from the adverse impact of seemingly neutral or inoffensive rules.[19] For example a minimum height requirement could be found to be

---

15. *See id.* at 3–1 to 3–4 (determining anti-discrimination laws within Parliament's jurisdiction if related to subject class under criminal law or judicially determined to fall under Peace, Order and Good Government Clause).

16. *See generally id.* at 2–6 to 2–25 (providing overview of legislation enacted).

17. *See, e.g.*, Canadian Human Rights Act, R.S.C., ch. H-6, § 53 (1985) (Can.) (allowing Tribunal to order cessation of discriminatory practice, compensation of victim, or award of benefits).

18. The Canadian Human Rights Act does not include sexual orientation as a prohibited ground of discrimination, but this omission was challenged under § 15(1) of the *Charter* as denying equal benefit of the law to homosexuals. Haig v. Canada, 94 D.L.R. 4th 1 (Ont. C.A. 1991). The Ontario Court of Appeal upheld the challenge and directed that sexual orientation should be read into § 3(1) of the Canadian Human Rights Act as a prohibited ground. *Id.* at 14–15. Since the *Haig* decision, the Canadian Human Rights Commission has accepted complaints of sexual orientation discrimination while continuing to call upon the government to amend the *Act* to include sexual orientation as a forbidden type of discrimination. *See* CANADIAN HUMAN RIGHTS COMMISSION, 1993 ANNUAL REPORT 55–58 (urging amendment to allow certainty in law).

19. *See Re Ontario Human Rights Commission and Simpsons-Sears Ltd.*, 23 D.L.R. 4th 321, 329, 331 (S.C.C. 1985) (finding "It is the result or the effect of the action complained of which is significant" and "To take the narrower view and hold that intent is a

discriminatory in its negative consequences for women or members of certain ethnic groups who have applied for such positions as firefighters or police officers.

In this sense, human rights laws have undoubtedly been helpful to the victims of discriminatory acts, but have been of limited value in providing remedies against discriminatory laws. Hence, the 1982 entrenchment in the Canadian Constitution of the Charter of Rights and Freedoms has had great significance for equality-seeking groups. Section 15(1) of the Charter now guarantees equality before the law.[20] The Charter also has far-reaching implications as it applies to federal and provincial laws and to the actions of both levels of government.

During the past decade, the Charter has been the focus of extensive litigation. In the seminal case of *Andrews v. Law Society*,[21] the Supreme Court of Canada adopted a liberal approach in advancing the concept of equality under Section 15. In *Andrews*, the Court held that a Provincial law restricting admission to the practice of law to Canadian citizens was not compatible with the equal treatment required by Section 15(1).[22] The decision emphasized that "[b]oth the enumerated grounds themselves and other possible grounds of discrimination recognized under Section 15(1) must be interpreted in a broad and generous manner."[23]

The combined impact of the Charter and human rights laws has encouraged a general acceptance within Canada of the need to address discriminatory practices. Examples of overt discrimination on the grounds of race or religion are now rare, and equal opportunity has become a leitmotif of political dialogue. This is not to say, however, that unanimity exists on what equal opportunity should mean in practice. Some observers argue that the pendulum has swung too far in the direction of special measures for women and minorities and that human rights commissions have acquired an unacceptable level of power, unrestrained by political accountabil-

---

required element of discrimination under the Code would seem to me to place a virtually insuperable barrier in the way of a complainant seeking a remedy.").

20. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1).

21. 56 D.L.R. 4th 1 (S.C.C. 1989).

22. *Andrews*, 56 D.L.R. 4th at 36–37.

23. *Id.* at 18.

ity.[24] On the other hand, racial minorities have criticized human rights agencies as being insufficiently sensitive to the realities of discrimination.[25] In addition, early expectations that the commissions would provide prompt, inexpensive remedies have run into several roadblocks. Today, human rights complaints can drag on for several years, particularly when recourse to a tribunal hearing or judicial review is involved.

The pattern of cases coming before human rights tribunals has also shifted over the past decade. For most commissions, race cases, which were the most significant category in the earlier days, are now less numerous than complaints alleging discrimination on the grounds of disability, sex, or age.[26] In recent years, older workers have challenged mandatory retirement practices and hiring policies favoring younger job applicants.[27] Complainants have also had success in requiring employers to "reasonably accommodate"

---

24. *See* David Frum, *Limit the Ambitions of Human Rights Commissions*, FIN. POST (Toronto), Aug. 10, 1994, at 11 (proposing changes in human rights codes to limit grounds of discrimination, jurisdiction of commissions, and add expiration dates to applicable statutes).

25. Perhaps the most contentious example of the school of thought which argued that the commissions themselves were part of the problem, was a report prepared in 1993 for the Ontario Rights Commission. *See The Donna Young Report: The Handling of Race Complaints at the Ontario Human Rights Commission* filed with The Anti-Racism Committee at 3 (Oct. 23, 1992) (on file with the *St. Mary's Law Journal*) (concluding that "individual and systemic racism exists at the Commission"). The Report also argued that "the legal presumption of innocence is inappropriate at the investigatory stages of race discrimination complaints." *Id.* at 9. *The Donna Young Report* was not published but was leaked to the press in the Summer of 1993. The reaction was overwhelmingly negative. *See, e.g.*, Derek Ferguson & Desmond Bill, *Racism Report a Surprise to Minister*, TORONTO STAR, July 14, 1993, at A1 (reporting commission's use of report to generate thought and discussion without endorsing report's recommendations); Richard Mackie & Gay Abdate, *Boyd Rejects Human Rights Report on Racism*, GLOBE & MAIL (Toronto), July 15, 1993, at A14 (noting rejection of proposal by Attorney-General and Citizenship Minister as counter to Canadian notion of justice).

26. See CANADIAN HUMAN RIGHTS COMMISSION, 1993 ANNUAL REPORT 106 (showing race and color complaints declining by 1993 to 6% of total). In the same year complaints alleging discrimination based on disability, gender, and age amounted respectively to 30%, 25% and 12% of the total received by the Commission. *Id.*

27. Efforts to overturn mandatory retirement rules have had setbacks. *See* McKinney v. University of Guelph, 76 D.L.R. 4th 545, 676 (S.C.C. 1990) (holding Canadian Charter of Rights and Freedoms does not apply to mandatory retirement provisions of universities); Dickason v. University of Alberta, 2 S.C.R. 1103, 1138 (1992) (finding practice of mandatory retirement reasonable and justifiable under terms of Individual's Rights Protection Act).

disabled workers[28] and those whose religious beliefs require their absence from the workplace during regular working hours.[29]

Notwithstanding these advances, continuing challenges face those who seek a broader and more structured response to historical patterns of discrimination. Although the issues brought so vividly to the forefront in the United States by the civil rights movement have not been mirrored in Canada, continuing pressure by women and minority groups has led to the passage of legislation by the federal and Ontario governments aimed at securing equal opportunity in the workplace. I shall examine these initiatives—particularly those of the federal government—in the next section.

III. From Individuals to Groups

In the now famous case of *Action Travail des Femmes v. Canadian National Railway*,[30] the Supreme Court of Canada in 1987 handed down a ground-breaking decision requiring the Canadian National Railway to implement a "special program" of recruitment for women.[31] The action that led to this decision started with a human rights complaint brought by a group of female workers acting through their union.[32] The complainants alleged that they had been the victims of longstanding recruitment practices which penalized women seeking to obtain employment with the railway in non-traditional blue collar jobs.[33] At the time the complaint was filed, women comprised only 0.7 percent of that category, compared to a national figure of 13 percent.[34] A human rights tribunal agreed with the complainants and directed the railway to hire women for at least one out of every four blue-collar job vacancies until such time as their representation level in the company equaled their availability rate in the workforce.[35] In affirming the

28. *See Re Ontario Nurses' Ass'n and Etobicoke Gen. Hosp.*, 104 D.L R. 4th 379, 382 (S.C.C. 1993) (holding that upon finding of discrimination based on disability, arbitrator must determine if employer could reasonably accommodate disabled employee).

29. *See* Central Alberta Dairy Pool v. Alberta Human Rights Commission 72 D.L.R. 4th 417, 439 (S.C.C. 1990) (placing burden on employer to show efforts to accommodate employee's religious beliefs up to point of undue hardship).

30. 40 D.L.R. 4th 193 (S.C.C. 1987).

31. *Action Travail des Femmes*, 40 D.L.R. 4th at 216.

32. *Id.* at 195.

33. *Id.* at 199.

34. *Id.*

35. *Action Travail des Femmes*, 40 D.L.R. 4th at 201–02.

tribunal's decision, the Supreme Court rejected the argument that the tribunal had exceeded its jurisdiction by imposing such a program.[36] The Court concluded that the pattern of systemic discrimination against women—including, for example, the use of strength tests that were found to be of no direct relevance to the ability to do the work involved—justified a structured and far-reaching remedy.[37]

Canadians tend to view the term "affirmative action" with some suspicion. A decade ago, in her ground breaking Royal Commission report, *Equality in Employment*, Judge Rosalie Abella observed that "[p]eople generally have a sense that 'affirmative action' refers to interventionist government policies, and that is enough to prompt a negative reaction from many."[38] Judge Abella suggested that, if Canada was to take positive steps to attack the underrepresentation in employment of women and visible minorities, a new term, "employment equity," should be adopted. In general, Judge Abella's nomenclature has found more favor than its American synonym. For its part, Parliament, acting upon the substantive thrust of the Abella Report, passed the Employment Equity Act of 1986 (1986 Act).[39] Passage of the new law signaled an acknowledgment that existing anti-discrimination legislation and voluntary affirmative action measures had not proved sufficient in themselves to remove historical barriers to employment which confronted women, aboriginal peoples, visible minorities, and persons with disabilities—the so-called designated groups of employment equity.

The stated objective of the 1986 Act is to achieve equality in the workplace "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."[40] To this end, the government requires federally regulated

---

36. *Id.* at 205.

37. *Id.* at 200–16.

38. ROSALIE S. ABELLA, REPORT OF THE COMMISSION ON EQUALITY IN EMPLOYMENT 7 (1984).

39. An Act Respecting Employment Equity, ch. 31, 1986 S.C. 1065 (Can.). The Act covered federally regulated employers with more than 100 employees. *Id.* § 3. This amounts to approximately 10% of the total Canadian workforce. CANADIAN HUMAN RIGHTS COMMISSION, 1993 ANNUAL REPORT 65.

40. An Act Respecting Employment Equity, ch. 31, § 2, 1986 S.C. 1065 (Can.).

employers to identify and eliminate any employment practices resulting in employment barriers against persons in the designated groups. In addition, the 1986 Act requires an annual numerical reporting of the representation levels in their workforce of each of the designated groups as well as their distribution by occupational category and salary ranges.[41] A similar breakdown includes the number of employees hired, promoted, and terminated. Finally, the 1986 Act requires employers to prepare an annual plan indicating how they intended to achieve employment equity.[42]

The 1986 legislation represented the inevitable trade-off between those, particularly employers, who continued to argue that voluntary affirmative action programs would achieve the desired results over time, and the advocates of more forceful government intervention, who sought a strong statutory framework supported by penalties for non-compliance. As the perhaps inevitable compromise, the 1986 Act has not won any popularity awards. It is, however, an initiative which broke new ground in signaling to employers that they had a role, beyond that of defending themselves against individual human rights complaints, in addressing the causes of systemic discrimination.

The 1986 Act failed to include sanctions for employers whose substantive employment records were sub-par. Instead, as a partial response to criticism of the legislation's weakness, the Act requires that the annual report be made available to the Canadian Human Rights Commission (CHRC).[43] Ministerial statements at the time suggested that the Commission would thereby be in a position to monitor progress under the 1986 Act, but it was given no new powers to act upon the data. Although the Commission has had some success in working with employers on joint employment equity reviews, the lack of a clear enforcement mechanism has hampered its attempts to use the annual report data as the basis for action under the Canadian Human Rights Act.[44] Canadian law has

41. *Id.* § 6.

42. *Id.* § 5.

43. *Id.* § 8.

44. Canadian Human Rights Act, R.S.C., ch. H-6, (1985) (Can.); CANADIAN HUMAN RIGHTS COMMISSION, 1993 ANNUAL REPORT 70. Joint reviews have been utilized by the Commission as a non-adversarial approach to achieving improvement in the performance of employers where representation of one or more of the target groups is significantly below availability rates. *Id.* at 69. Commission staff members work with employers se-

yet to resolve the question of whether evidence of statistical underrepresentation, alone, may constitute reasonable grounds for a discrimination complaint.[45]

Six years after the 1986 Act came into force, a Parliamentary committee[46] concluded that changes were necessary if the legislation was to become an effective tool. The committee's report noted that confusion existed regarding enforcement of the law, and recommended a number of amendments. However, no action was taken prior to the 1993 defeat of the Conservative government. As part of its election platform, the new Liberal government had promised to strengthen the 1986 Act,[47] and in late 1994, it tabled Bill C-64,[48] a comprehensive series of amendments aimed at making the Act significantly more effective.

The most notable changes encompassed within Bill C-64 are the conferral upon the CHRC of powers to undertake compliance audits of federally regulated employers[49] and to direct an employer to prepare an appropriate employment equity plan, including short-term hiring goals.[50] Bill C-64 sidesteps the issue of past discrimina-

---

lected for review to identify practices which may have contributed to low representation levels. They may also negotiate hiring goals, and other features of new or amended employment equity plans with employers. *Id.* The Commission has had positive experiences in working with a number of employers, including Canada's six major national banks. *Id.* at 70. Where third parties have filed human rights complaints, relying upon data showing low representation as *prima facie* evidence of discrimination, the Commission has been unable to make significant progress, in the face of court challenges mounted by respondents. *Id.*

45. *See* Lynn Bevan, *Employment Equity: Lessons from and for the United States*, 1 CAN. LAB. L.J. 441, 454-55 (1993) (noting one court's frustration with use of statistical data); *Action Travail des Femmes*, 40 D.L.R. 4th at 212 (reporting that low level representation of women in blue collar jobs was only one type of evidence which pointed to discriminatory policies).

46. SPECIAL COMMITTEE ON THE REVIEW OF THE EMPLOYMENT EQUITY ACT, A MATTER OF FAIRNESS (1992) (Ottawa, House of Commons).

47. *See* CANADIAN HUMAN RIGHTS COMMISSION, 1993 ANNUAL REPORT 64 (noting that in election campaign, new government promised to include federal agencies and public service in Employment Equity Act and grant Canadian Human Rights Commission power to begin investigations).

48. House of Commons of Canada, Bill C-64, 35th Parliament, 1st Sess. (1994). After First Reading on Dec. 12, 1994, the Bill was referred to Committee. Public hearings commenced on January 30, 1995.

49. *Id.* §§ 21 & 22. CHRC compliance officers would be authorized to enter an employer's premises, require the production of records, copy materials and obtain print-outs from the employer's data systems. *Id.* § 22.

50. *Id.* § 23.

tion against particular groups and requires no finding of culpability in the traditional sense of intentional (or even unintentional) wrongdoing. Rather, the focus is on rectifying imbalances in the workforce through better planning and recruitment practices, underpinned when necessary by hiring goals, but not by quotas.[51]

IV. A Progress Report

Thirty years of human rights laws and the advent of the Charter have sensitized Canadians to the importance of equal opportunity for racial and other minority groups. The intervention of human rights commissions has led to the settlement of many individual cases and the recognition by recalcitrant or unaware employers and providers of services that they must change discriminatory practices. Experience has shown, however, that education and individual remedies are not in themselves sufficient agents of change and that underlying patterns of discrimination must be addressed in a more systematic way. Hence, the movement towards employment equity that has occurred, notably at the federal level and within the Province of Ontario.

Caution is generally appropriate in pronouncing the effectiveness of these laws. It is clearly too early to assess the impact of the Ontario legislation, the Ontario Employment Equity Act,[52] which came into force in 1994 and provides most employers with a grace period before enforcement becomes a reality. The results achieved by its federal counterpart may provide some insight. In his 1994 annual report on the 1986 Act, the Minister of Human Resources Development noted that, of the four target groups, visible minori-

---

51. *Id.* § 30(1). This section states: "No compliance officer may give a direction [which] would . . . impose a quota on an employer. . . ." *Id.* Section 30(2) defines a quota as "a requirement to hire or promote a fixed and arbitrary number of persons during a given period." *Id.* § 30(2).

52. An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women, S.O., ch. 35 (1993). The Act came into effect on September 1, 1994. It applies to all public sector employers with 10 or more employees and to private sector employers with 50 or more employees. *Id.* § 7. It includes a phased-in compliance schedule, under which government ministries and agencies must have employment equity plans in place by September 1, 1995 and large public sector companies by March 1, 1996. *Id.* § 23.

The Ontario law resembles its federal counterpart, but has enforcement powers—*e.g.*, audit and the issuance of orders—which go beyond the 1986 federal law and are similar to those proposed to be conferred on CHRC compliance officers under the Federal Bill C-64.

ties appeared to have advanced most during the preceding year.[53] Women have also achieved a measure of success with a substantial increase in representation in upper and mid-level management positions since 1987.[54] The report found, however, that little progress had been achieved for the two most seriously disadvantaged groups—aboriginals and persons with disabilities—who were employed at less than half their availability rates in the workforce.[55]

A pessimist might argue that employment equity laws arrived a few years too late. Indeed, their initial level of success would conceivably have been higher had they existed between the 1960s and the early 1980s, when economic expansion and growth in jobs were features of life. It is more difficult to advance the representation of, say, disabled persons when employers are preoccupied with downsizing as the answer to offshore competition. This is not to say, of course, that no effort should be made, for even in a period of retrenchment, hiring continues.

A characteristic of employment equity programs is their reliance upon numbers. Statistics certainly have a role to play and may indicate problem areas. However, to the extent that employment equity is seen as a numbers game, it runs counter to traditional human rights thinking, which has emphasized the need to treat people as individuals rather than cyphers for the particular group to which they happen to belong.

Furthermore, practical problems have arisen from the manner in which levels of representation are measured. The numbers obtained under the federal and Ontario employment equity legislation depend upon employees identifying themselves, through a survey or questionnaire, as members of a target group. Employers have frequently argued that not everyone is prepared to do this. Anecdotal evidence would appear to support this claim. Some workers may be afraid to self-identify, particularly if they are disabled and their disability is not apparent. Others may view their

---

53. HUMAN RESOURCES DEVELOPMENT CANADA, 1994 EMPLOYMENT EQUITY ACT ANNUAL REPORT 5 (1994). The Report states: "The representation of members of visible minorities increased to 8.09% from 7.9% in 1992. Relative to the other designated groups, this group experienced the most significant increase." *Id.*

54. *Id.* at 44–45.

55. *Id.* at 47, 51. Persons with disabilities were represented in the federal workforce at 2.56% versus an availability of 6.5%. *Id.* at 51. Aboriginal Canadians were represented at slightly over 1% versus an availability rate of 3%. *Id.* at 47.

identification as a member of a target group as contrary to their desire to be judged as individuals.

Employers themselves are not happy about the interventionist nature of employment equity regimes. Particularly at a time when less rather than more government is the order of the day, employment equity is viewed in some quarters as an unwelcome intrusion into the market. Concerns expressed during the federal-law debates in the mid 1980s have receded with the passage of time. However, in the months leading to its enactment in 1994, the Ontario Employment Equity Act generated vocal opposition and it continues to face criticism.[56] To date, public reaction has been muted to the recently announced proposed changes to the Federal Act.[57] Of course, not all or even a majority of employers are opposed to employment equity. Some employers, particularly the larger ones, have found the exercise to be valuable in enriching their workforce through the recruitment and promotion of highly qualified but sometimes overlooked candidates.[58]

Questions can legitimately be asked about the end point of employment equity. At what stage will we be able to pronounce victory? Does the exercise continue until the percentage of, say, disabled persons or racial minorities in every Canadian city is mirrored in their representation level in each employer's workforce? Presumably not: the continuing evolution of business and the fluidity of demographic change will preclude the achievement of such symmetry. However, I would argue that employment equity has a place as a weapon in the human rights armory as long as two out of three qualified aboriginals and one out of two qualified but disabled persons continue to be without work in Canada. Its introduction has already made employers examine their own approaches to hiring and promotion, and it can, I believe, serve to narrow at least the most glaring disparities between the availability

---

56. *See* James Wallace, *Equity Law Ripped: "Flawed" NDP Program Blasted From All Sides*, TORONTO SUN, Mar. 15, 1995, at 2 (citing critics as saying that "the toughest employment equity law in North America has provoked a bitter 'backlash' six months after becoming law").

57. House of Commons of Canada, Bill C-64, §§ 21–23, 30(1), 35th Parliament, 1st Sess. (1994).

58. *See generally* CANADIAN BANKERS ASSOCIATION, BANKING ON EMPLOYMENT EQUITY: A CASEBOOK (1994) (noting that banking industry has been openly supportive of Employment Equity).

and representation in the workforce of historically disadvantaged groups. As such, it can contribute in a significant way to the achievement of equal opportunity.