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Employment Equity and the Merit Principle:
Will Ever the Twain Meet?

By

Brenda Gross

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario

August, 1998.

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Employment Equity and the Merit Principle: Will Ever the Twain Meet?

submitted by **Brenda Gross, B.A Hons.**
in partial fulfilment of the requirements for

the degree of Master of Arts

Thesis Supervisor

Chair, Department of Law

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September 24, 1998

ABSTRACT

This study focuses on the legal regimes of appointment by employment equity and merit to determine whether they operate together at the level of theory and practice. At the level of theory, the approaches of Judge Rosalie Abella and Iris Marion Young are examined as they provide analyses of employment equity and merit as traditionally conceived. The conceptualizations from Abella and Young are used to develop an approach integrating the principles of employment equity and merit. At the level of practice, the approach developed out of the work of Abella and Young is used to analyze the hiring practices within the federal Public Service of Canada. The Public Service is considered as an employer that implements policies promoting greater representation of women and other target groups (e.g. employment equity) while adhering to the principle of merit. Thus, through an examination of evidence drawn from a number of primary sources it is concluded that employment equity and merit, as presently conceived and put into practice, are not well integrated within the federal Public Service of Canada.

Acknowledgements

I am indebted to several individuals for the completion of this thesis:

My supervisor, Professor Rosemary Warskett, whose generous assistance and guidance was invaluable. Professor Warskett's time and patience was a motivating factor for completing this thesis.

My secondary supervisor, Professor Neil Sargent, for agreeing to be part of my committee.

My family and friends whose support, love and inspiration sustained me all along. I would not have achieved this accomplishment without their belief in my abilities and all their encouragement.

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CHAPTER ONE

INTRODUCTION

The term employment equity originated in Canada and was brought to the forefront by Judge Rosalie Abella in the Report of the Federal Royal Commission on Equality in Employment released in 1984. Although Abella was the public figure that put employment equity on the Federal Government of Canada's agenda, there had been activity from the women's movement on this topic for years. Specifically, the activity of the women's movement put pressure on the Federal Government which resulted in the establishment of the Royal Commission and the Report of the Commission on Equality in Employment. The term employment equity refers to "employment practices designed to eliminate discriminatory barriers and to provide in a meaningful way equitable opportunities in employment."¹ These programs target those groups in Canadian society which face employment disadvantages such as higher unemployment rates, limited occupational distribution and limited career progression compared with the rest of the work force. The following groups experiencing these employment disadvantages have been identified as designated groups or target groups: Aboriginal peoples, members of visible

minority groups, persons with disabilities and women. Thus, in their broadest sense, employment equity programs are designed to increase the employment opportunities for members of the designated groups by removing barriers that have prevented these groups access to opportunities and representation at all levels of the workplace.

The concept of employment equity is highly controversial primarily in terms of its relation to merit. The merit principle is based on the notion that people are hired for a job only if they are qualified; employers hire the best candidate for the job. On one side of the controversy, opposition to employment equity describes these programs at odds with equal opportunity and as undermining procedures designed to appoint the best person for the job.² It is claimed that, with employment equity, extraneous considerations will enter into the employment situation which may require an employer to hire someone who is not necessarily the best qualified for the job.³ The implication

¹ Abella, R., Report of the Commission on Equality in Employment, (Ottawa: Supply and Services, 1984) at 7.

² Matheson, D., Echenberg, A., Taylor, D., Rivers, D. & Chow, I., "Women's Attitudes Toward Affirmative Action: Putting Actions in Context" (1994) 24 Journal of Applied Social Psychology 2075 at 2076. Steele, S., The Content of our Character: A New Vision of Race in America, (New York, NY: St. Martin's Press, 1990). Carter, S., Reflections of an Affirmative Action Baby, (New York, NY: Basic Books, 1991).

³ Lepofsky, D., "Understanding the Concept of Employment Equity: Myths and Misconceptions" (1993) 2 Canadian Labour Law Journal at 7.

is that people hired through employment equity are somehow less qualified or unqualified. It is assumed that changing hiring standards means lowering them, thus, enabling the entry of individuals into positions who do not rightly belong. The underlying belief is that one cannot have diverse employees and have qualified employees at the same time. This approach assumes that appointment procedures that are based on a traditional conception of merit are the appropriate and only accurate ones.

Its proponents, on the other hand, argue that employment equity does not undermine merit, rather they emphasize the problem of employer bias.⁴ This approach insists that designated groups remain disadvantaged because they are being assessed by standards which are biased and as a result their qualifications tend to be undervalued and underappraised. Further, one cannot have an appointment system by merit where there are systemic barriers that impede full and equal participation by members of the designated groups. According to this view, employment equity is not preferential treatment but an acknowledgement that power and bias are at work in appointments.

⁴ Abella, R., "Equality, Human Rights, Women and the Justice System" (1994) 39 McGill Law Journal 489 at 530. Lepofsky, *supra* note 3 at 7. Winkelman, C.S. & Crosby, F.J., "Affirmative Action: Setting the Record Straight" (1994) 7(4) Social Justice Research 309 at 311.

The central purpose of this study is to examine the two legal regimes of appointment by employment equity and merit in order to determine whether the goals of these regimes can operate together at the level of theory and practice. Specifically, the focus is on the question; can the goals of the two legal regimes of appointment by employment equity and merit be integrated theoretically and practically? In addressing this question, this study is composed of five chapters including the introduction and conclusion.

The central task of chapter two is an examination of two theoretical approaches to the principles of employment equity and merit by Judge Rosalie Abella and Iris Marion Young. Both are important theorists in the debate of employment equity and merit. Abella puts forth a position based on a liberal distributive paradigm and suggests that the two legal regimes can be integrated. Young articulates a position that challenges and criticizes the liberal paradigm by arguing for justice as autonomy, affirmation of difference and empowerment. In contrast to Abella, Young suggests that employment equity and merit cannot operate together because merit is a myth that is subjectively determined and applied. Despite the division on this issue, each theorist's conceptualization will be analyzed with respect to its effectiveness in developing an approach that enables the two concepts to fit together in theory. Ultimately, it will be

argued that Abella's approach to employment equity and merit should be adopted as she provides conceptualizations that allows the two concepts to be integrated.

Chapter three will examine how the two concepts actually work in practice. In particular, the focus of this chapter will be on the hiring practices within the federal Public Service that are based on the principles of employment equity and merit. Section 10 of the Public Service Employment Act stipulates that,

appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.⁵

In the other legal regime, the Financial Administration Act, appointments incorporate the principle of equity in order to make the representation and distribution of the designated groups more equitable. The federal Public Service is governed by the Financial Administration Act and as such does not fall under the jurisdiction of the Employment Equity Act. Section 11(2.2) of the Financial Administration Act states that employment equity shall be implemented by,

Identifying and eliminating employment practices in the public service, not otherwise authorized by law, that results in employment barriers against persons in designated groups; and instituting such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment within the public service that is at least proportionate to their representation in the work force, or in those segments of the work force that are identifiable by qualification, eligibility or geography and from which the public service may reasonably be expected to draw or promote employees.⁶

The federal Public Service will be analyzed as a workplace whose mandate is aimed at promoting both greater minority representations while still purporting to maintain its hiring criteria. The last chapter, chapter four, will focus on the broader social context to examine factors that contribute to the success of the integration of employment equity and merit.

From the theoretical discussion and the analysis of the federal Public Service it will be maintained that employment equity and merit as they are presently conceived and put into practice do not operate together. That is, the two legal regimes are not integrated. The concept of merit is constructed separately from the notion of diversity such that the federal government's policies come into conflict with one another. Nevertheless, it will be argued that employment

⁵ Public Service Employment Act, R.S.C. 1985, c.54, s.10.

equity and merit have the potential to work together to achieve the goal of diversity and an increase in representation of designated groups. If the goal is a representative Public Service, changes will have to be made to include a revised definition of merit, a commitment to equity and a workplace that values diversity.

The evidence that was collected and used in chapter three to examine the current practice of the principle of employment equity and merit is from a variety of sources. First, I examined legal sources which include both statutes (e.g. Financial Administration Act, Public Service Employment Act, Employment Equity Act) and regulations (Public Service Employment Regulations). Second, pursuant to section 21 of the Public Service Employment Act, I examined appeal board decisions from 1980-1996 with the assistance of people in the Public Service Commission. The examination of appeal board decisions was undertaken in order to find out whether employment equity and merit come into conflict with one another in practice. Out of all the decisions considered, only one dealt with how employment equity and merit operate within the federal Public Service.

Documents dealing with the development of the principles of employment equity and merit are used which include the Report of the Commission on Equality in

⁶ Financial Administration Act, R.S. 1994, c.F-10.

Employment as well as Treasury Board documents as listed in the primary sources of the bibliography. Also, subsequent documents are used which deal with how employment equity and merit operate within the federal Public Service system. Lastly, informal interviews were undertaken with government officials who worked in both the Treasury Board and Public Service Commission. The primary purpose of the interviews was to assist me in finding documentary sources and they also gave me unofficial insight into how employment equity was working in practice within the federal government. Given the unofficial nature of these interviews the interviewee's remain anonymous.

The question can the goals of the two legal regimes of appointment by employment equity and merit be integrated theoretically and practically is an important one because some Canadians still face barriers to fair and equal employment. In particular, the skills and qualifications of women, persons with disabilities, Aboriginal peoples, and members of visible minority groups continue to be underutilized in the workplace as a result of attitudinal and other employment barriers.⁷

⁷ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, Looking to the Future: Challenging the Cultural and Attitudinal Barriers to Women in the Public Service (Ottawa: Minister of Supply and Services Canada, 1995) at 11. Canada. Task Force on Barriers to Women in the Public Service, Beneath the Veneer: Volume 1, 2 and 3,

As noted in the report Shaping the Future Public Service: Public Service Workforce 2000 by the Treasury Board Secretariat, the composition of the labour force appears to be shifting. By the year 2000, it is estimated that 59 percent of all women will be in the labour force, representing 45 percent of the total.⁸ In the Public Service the proportion of women increased from 33 percent in 1973 to 47.4 percent in 1995 and will probably continue to rise because women are expected to comprise over half of those entering into the labour force in the coming decade.⁹ Moreover, the racial mix of the labour force is also expected to change. The proportion of visible minorities in the population as a whole may rise to 10 percent over the next decade, from just over 6 percent in 1986. By the year 2000, visible minorities are forecast to comprise half of the annual growth in the labour force.¹⁰ As such, to achieve a fair share of labour force entrants, employers would have to find ways of accommodating and integrating a more diverse work force into existing institutional structures.

⁸ Canada. Treasury Board of Canada Secretariat, Shaping the Future Public Service: Public Service Workforce 2000, (Ottawa: Minister of Supply and Services Canada, 1989) at 15.

⁹ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1994-1995, (Ottawa: Planning and Communications Directorate, 1996) at 16.

¹⁰ Canada. Treasury Board of Canada Secretariat, supra note 8 at 15.

CHAPTER TWO

DO EMPLOYMENT EQUITY AND THE MERIT PRINCIPLE OPERATE TOGETHER AT THE THEORETICAL LEVEL?

In this chapter, two important theoretical approaches of employment equity and merit are examined in an attempt to establish whether the two principles can conceptually operate together. The first approach that will be addressed is the one put forth by Judge Rosalie Abella. Abella is important to this topic because not only has she written about employment equity academically but she is also the initiator for the establishment of employment equity programs in Canada. Judge Rosalie Abella was appointed in 1983 by the Canadian government to chair a Royal Commission to look into the problems encountered by women, visible minorities, Aboriginal peoples, and people with disabilities in the area of employment. Specifically, the Abella Commission was established to "inquire into the most efficient, effective and equitable means of promoting employment opportunities for and eliminating systemic discrimination against the designated groups."¹¹ The second approach that will be addressed is that of Iris Marion Young who is also important

¹⁰ Canada. Treasury Board of Canada Secretariat, supra note 8 at 15.

¹¹ Abella, R., supra note 1 at ii.

to this topic as she is the predominant theorist who has been very critical of both employment equity and merit. As such, Young's approach will be used to represent a paradigm which suggests that merit cannot be assessed "objectively". Despite the fact that these two approaches differ, the views of both theorists will serve to provide conceptualizations and definitions of employment equity and merit. Ultimately, it will be argued that Abella's approach should be adopted because contrary to Young she believes that the concept of merit should be retained at some level. Moreover, she provides conceptualizations that allow employment equity and merit to work in concert.

Any discussion about employment equity must begin with some basic notion of what it means to treat people equally. As such, the Abella Report begins with an attempt to define equality in employment. In Abella's view equality does not mean treating everyone the same but rather requires the accommodation of some differences. "Equality does not mean treating likes alike, it means knowing what outside action or remedy may be necessary so that people are in fact treated as equals."¹² This version of equality is based on the idea that equality could be achieved if all participants were given an equal opportunity to compete. Accordingly, for Abella

¹² Abella, R., supra note 4 at 13.

equality in employment is not a concept that produces the same results for everyone, rather

it is a concept that seeks to identify and remove, barrier by barrier discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential.¹³

The focus then of Abella's view of equality in employment is on reducing inequality which entails freedom from discrimination. While it is not always clear what actions and types of behaviour fall within the definition of discrimination, Abella provides that

discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.¹⁴

Abella's definition recognizes that discrimination could result not only from conscious bias, but also from inadvertent systems or practices. For example, a work schedule that requires all employees to work two shifts Monday to Friday plus one shift on Saturday may not seem discriminatory as all employees can be treated alike. Either the employee's work this schedule or they are dismissed. However, employee's that belong to religions which adhere to the belief that Saturday is the Sabbath, and that work is

¹³ Abella, R., supra note 1 at 3.

¹⁴ Ibid. at 2.

prohibited on the Sabbath, cannot work these schedules.¹⁵ Therefore, Abella's approach takes into consideration that a neutral employment policy or practice could have an adverse impact on the opportunities of certain groups of individuals because of personnel characteristics such as gender, race or disability.

Accepting the idea that discrimination does not need to be intentional, Abella's conceptualization recognizes that there are structural and social limitations placed on designated group members' opportunities. Designated group members are excluded or denied a full opportunity to demonstrate their abilities not because of the individual's capacity but because of an external barrier that inhibits their growth. For example, in recruitment searches or hiring discussions Abella suggests that the word "qualified" entails a largely subjective assessment. Essentially it means,

of all these people with a B.A. or M.B.A. or M.D. or LL.B., which one is most likely to fit in best? And that, of course, depends on the assessor's view of best, and of the prevailing workplace culture he or she seeks to perpetuate. And that usually means majoritarianism, which usually does not mean women or minorities.¹⁶

Abella recognizes that most of this behaviour is unconscious, societal and unintended but that the consequences of such practices nevertheless affects certain groups in a

¹⁵ Lepofsky, D., supra note 3 at 11.

disproportionately negative way. Her view is that discriminatory barriers in the workplace stand between a person's ability and his or her opportunity to demonstrate it. For Abella, employment barriers include both physical barriers as well as attitudinal barriers. Some examples of employment barriers that designated group members experience include: insufficient or inappropriate education and training facilities; inadequate information systems about training and employment opportunities; limited financial and personal support systems; short-sighted or insensitive government employment counsellors; employer's restrictive recruitment, hiring, and promotion practices; and discriminatory assumptions.¹⁷ As such, Abella maintains that 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 overwhelming that they cannot be overcome without intervention.

Abella's appreciation of the systemic nature of discrimination gives rise to her recognition that systemic forms of discrimination require systemic remedies. More specifically,

rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and

¹⁶ Abella, R., supra note 4 at 37.

¹⁷ Abella, R., supra note 1 at 24.

practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.¹⁸

For Abella, remedies for discrimination should focus on the impact rather than the intention behind behaviour or employment practices. This stems from her recognition that the impact of behaviour is the essence of systemic discrimination. Consequently, systemic remedies for Abella are a response to patterns of discrimination that flows from the structures or practices which result in exclusions of persons who by reason of their group affiliation are denied full opportunity to demonstrate their abilities. More specifically,

remedial measures of a systemic and systematic kind are the object of employment equity and affirmative action. They are meant to improve the situation for individuals who, by virtue of belonging to and being identified with a particular group, find themselves unfairly and adversely affected by certain systems or practices.¹⁹

Accordingly, for Abella, preventing discriminatory practices and structures from continuing to inflict harm requires seeking them out and taking steps to change them. It means making employers and managers respond by eliminating barriers

¹⁸ Abella, R., supra note 1 at 9.

¹⁹ Ibid. at 9.

that interfere unreasonably with employment options. To ensure equality in employment for all groups, Abella recommends that there must be effective communications network whereby potential employee and employer can become aware of each other. This means a commitment on the part of educators, employers and government to revise where necessary practices that unfairly impede employment opportunities for the designated groups and an end to patronizing and stultifying stereotyping. It means an end to job segregation and the beginning of an approach that makes available to everyone, on the basis of ability, the widest range of options.²⁰

Abella's employment equity program is designed "to open the competition to all who would have been eligible but for the existence of discrimination."²¹ Employment equity programs, Abella argues, are justified and essential interventions to adjust institutionalized systems or structures of organizations. They are designed to dissolve the effects of discrimination and to open equitably the competition for employment opportunities to those who have been excluded. She does not try to change the current system, rather, given this is the system she tries to make it equitable. According to Abella, we should rely on employment

²⁰ Ibid. at 5.

²¹ Ibid. at 10.

equity to ensure access without discrimination both to available opportunities and to the possibility of their realization.²² In order to improve conditions that affect access to employment, she proposes that the rules of the competition must be changed.

The competition for jobs must be made an impartial one, open to all who are qualified or qualifiable regardless of gender, ethnicity, race or disability.²³

Changing the rules of the competition may change who gets the rewards but Abella defends this on the basis that "if the new winners are people who ought to have been among the old ones, the system is not being unfair it is catching up."²⁴ Further, we will know when the competitions are really fair when women and minorities start routinely occupying places they never used to occupy at all.²⁵

In response to the position that equality for women and minorities violates the merit principle Abella's approach suggests that the merit principle is exactly what employment equity is trying to introduce. According to Abella,

it is a staggeringly insulting assumption to suggest to women and minorities that their increased participation is an invitation to violate the merit principle rather than an attempt to acknowledge it.²⁶

²² Ibid. at 10.

²³ Ibid. at 17.

²⁴ Abella, R., supra note 4 at 34.

²⁵ Ibid. at 34.

²⁶ Ibid. at 38.

Abella's employment equity strategy does not require the employer to reduce its job qualification standards below the level needed to do the job effectively and efficiently, nor does it require employers to accept a candidate who does not meet fair and appropriate job qualification standards. Abella makes it very clear that,

to be unwilling to hire someone because he or she lacks qualifications is entirely legitimate; to presume an absence of qualifications because of some stereotypical disqualifying assumption attributed to all individuals in a certain group is not.²⁷

She does not argue that we should abandon hiring criteria altogether because for Abella it is not that designated group members are underemployed as compared to others because of their lack of qualifications. Rather, in her view, they are underemployed because of the systemic discrimination that surrounds employment opportunities. The effect of which has been that many individuals who are or could be qualified have never been given the opportunity to demonstrate their ability or potential. This being the case, Abella goes on to propose that it may actually be premature to talk about how women and minorities are destroying the merit principle unless we are satisfied that is what we have had up until now. This is where employment equity comes into play for Abella in that through the implementation of employment equity a more

²⁷ Abella, R., supra note 1 at 213.

accurate application of merit will result. Therefore, this approach conceives that merit and employment equity can become an integral part of each other so long as women and minorities have complete access to the conditions for achieving merit.

In Iris Marion Young's view equality does not only refer to the distribution of social goods such as income, wealth or the distribution of social positions.

It refers primarily to the full participation and inclusion of everyone in a society's major institutions, and the socially supported substantive opportunity for all to develop and exercise²⁸ their capacities and realize their choices.

Unlike Abella, Iris Marion Young is arguing for a complete transformation of the employment system. Her approach proposes that sometimes different treatment for oppressed or disadvantaged groups is necessary to achieve equality. Young argues that to promote social justice, social policy should sometimes accord special treatment to groups. Specifically, her prescription for ending oppression is to displace an exclusionary meaning of difference with an emancipatory meaning of difference. Difference, according to Young, has always meant absolute otherness. This definition denies difference by suggesting that the group marked as different

²⁸ Young, I., Justice and the Politics of Difference, (New Jersey: Princeton University Press, 1990) at 173.

has no common nature with the normal or neutral ones.²⁹ The alternative to this meaning of difference, for Young, is an understanding of difference as specificity and variation. She argues for a politics that recognizes difference among social groups rather than one that represses difference. The objective would not be proportional representation but assured consideration of group perspectives, experiences and interests.

Young challenges the liberal conception of justice for taking no account of differences and for ignoring the existence of social groups. She argues that insisting equality entails ignoring difference has oppressive consequences in three respects. First, blindness to difference disadvantages groups whose experience, culture and socialized capacities differ from those of privileged groups.³⁰ The privileged groups implicitly define the standards according to which all will be measured which means that formerly excluded groups have to prove themselves according to those rules and standards. The consequence of this is that the real differences between oppressed groups and the dominant norm tend to put them at a disadvantage in measuring up to these standards which results in these

²⁹ Ibid. at 170.

³⁰ Ibid. at 164.

policies perpetuating their disadvantage.³¹ Second, blindness to difference allows these norms (expressing the point of view and experience of privileged groups) to appear neutral and universal. According to Young, there is no such thing as a group neutral point of view and as such it is the situation and experience of dominant groups that tend to define the norms. The result of which is that,

against such a supposedly neutral humanist ideal, only oppressed groups come to be marked with particularity; they, and not the privileged groups, are marked, objectified as the Others.³²

Third, the consequence of ignoring group difference is that groups who deviate from an allegedly neutral standard often internalize devaluation. When there is an ideal of general human standards according to which everyone should be evaluated equally, group differences means that group members will be marked as different, thus as unable simply to fit in.³³ Under these circumstances, Young argues that a denial of difference contributes to social group oppression. However, she argues that we must not allow differences to be the basis of oppression and domination and that in order to achieve equality we need to affirm and recognize group differences.

³¹ Ibid. at 164.

³² Ibid. at 165.

³³ Ibid. at 165.

Affirmative action, Young argues, promotes attending to group differences in order to undermine oppression. She cites two reasons for preferring group conscious policies, that is, policies that consciously aim to increase the participation and inclusion of women and minorities. The first reason Young asserts is that policies that are universally formulated tend to be blind to differences of race, culture, gender, age or disability which often perpetuate rather than undermine oppression.

Universally formulated standards or norms, for example, according to which all competitors for social positions are evaluated, often presume as the norm capacities, values, and cognitive and behavioural styles typical of dominant groups, thus disadvantaging others.³⁴

Policies that take notice of the specific situation of oppressed groups can offset these disadvantages by functioning to counteract oppression and disadvantage. The second reason Young maintains is that group conscious policies function to affirm and recognize group specific cultures and experiences. According to Young,

group conscious policies are sometimes necessary in order to affirm the solidarity of groups, to allow them to affirm their group affinities without suffering disadvantage in the wider society.³⁵

She maintains that affirmative action is one of the many group conscious policies instrumental in undermining

³⁴ Ibid. at 173.

oppression. The primary purpose of affirmative action, according to Young, is to mitigate the influence of current biases and blindneses of institutions and decision makers. Thus, her primary argument for preferring policies that consciously aim to increase the participation and inclusion of disadvantaged groups is that they intervene in the processes of oppression thereby diminishing it.

The intervention of affirmative action policies, Young contends, has several positive dimensions. In addition to their function in counteracting oppression and in affirming differences,

through strong affirmative action policies an institution announces its acceptance of formerly excluded groups. Affirmative action policies also counter the particular group-related biases of institutions and decision makers which put women and people of colour at a disadvantage. Finally, inclusion and participation of women, people of colour, disabled people, and so on in institutions and positions carries the advantages of group representation in decision making bodies.³⁶

According to Young, the goal of achieving greater justice legitimates preferential treatment. This would sometimes entail overriding the principle of equal treatment with the principle that group differences should be acknowledged in policy. As such, Young supports affirmative action programs as an important

³⁵ Ibid. at 174.

means for undermining oppression, especially oppression that results from unconscious aversions and stereotypes and from the assumption that the point of view of the privileged is neutral.³⁷

She argues that in order to reduce oppression, sometimes recognizing particular rights for groups is the only way to promote their full participation.

Young goes on to criticize the liberal affirmative action debate for rarely questioning the justice of current practices in our society which mandates that positions should be distributed to the most qualified. She maintains that

in their debate, both proponents and opponents of affirmative action assume as a prima facie principle that social positions should be distributed to the "most qualified," disagreeing only on whether it is just to override that principle.³⁸

The affirmative action debate, according to Young, limits its discussion to the issue of the redistribution of positions within a given framework which Young claims results in supporting the status quo.

Even if strong affirmative action programs existed in most institutions, however, they would have only a minor effect in altering the basic structure of group privilege and oppression in the United States. Since these programs require that racially or sexually preferred candidates be qualified, and indeed often highly qualified, they do nothing directly to increase opportunities for Blacks, Latinos, or women whose social environment and

³⁶ Ibid. at 198.

³⁷ Ibid. at 12.

³⁸ Ibid. at 200.

lack of resources make getting qualified nearly impossible for them. Change in the overall social patterns of racial and gender stratification in our society would require major changes in the structure of the economy, the process of job allocation, the character of the social division of labour, and access to schooling and training.³⁹

What makes Young's discussion of affirmative action so distinct and different from Abella's, is that she addresses broader structural questions about the economy and how admission to positions is determined. Specifically, she examines the principle of merit in order to determine whether it should function as the principle of the distribution of positions.

Merit is defined as a principle which holds that positions should be distributed to the most qualified individuals. According to Young, using the merit principle to allocate positions is just only if the competence of individuals could be determined apart from values and cultural norms. Young raises the question as to whether or not merit can be objectively determined. In response to this question, her answer suggests that

it may be hard to believe, but in fact such normatively and culturally neutral measures of individual performance do not exist for most jobs. The idea of merit criteria that are objective and unbiased with respect to

³⁹ Ibid. at 199.

personal attributes is a version of the ideal of impartiality, and is just as impossible.⁴⁰

Her approach is that criteria that are used to determine qualifications include particular values, norms and cultural attributes. Consequently, if used they are not necessarily inappropriate but the point is that they are normative and cultural rather than neutral. Therefore, merit and its application is a myth and is always subjectively determined and applied. This being the case, what does Young propose in order to increase representation of disadvantaged people? According to Young, if no normatively and culturally neutral criteria for assessing qualifications exist, then representation of groups who are oppressed or disadvantaged is significant in establishing job goals and in establishing evaluation procedures. More specifically, Young maintains that

representation of groups who experience cultural imperialism is crucial both in establishing job goals and in establishing evaluation procedures, however, to ensure that their particular experiences, culture,⁴¹ and values are not excluded or disadvantaged.

Young's concern is with the representation of group experience, perspectives, and interests which leads her to argue that group representation is the only means of making evaluations fair because it balances values, priorities and

⁴⁰ Ibid. at 202.

⁴¹ Ibid. at 214.

knowledge.⁴² Thus, group representation implies that inclusion of oppressed or disadvantaged groups in decision making bodies will bring expressions of differing experiences, cultures and values into consideration which will provide for the effective recognition and representation of the distinct voices and perspectives of those groups that are oppressed or disadvantaged.

Abella and Young develop two different analyses of employment equity and merit. Abella is most concerned with achieving equality in employment for excluded groups. To Abella, employment equity and merit can work together as long as merit is refined. Abella argues that the method of distribution will continue to favour the dominant group in society until women and minorities have complete access to the conditions for achieving merit. This is where employment equity comes into play as a means of refining and transforming the merit principle. Young is concerned with the concept of justice and the meaning of difference. She argues for group-differentiated policies on the principle that they promote attending to group differences which is important in undermining oppression. However, unlike Abella, Young argues that merit and its application is a myth in the sense that it will always be subjectively determined. Although their conceptions of employment equity and merit differ, both argue

⁴² Ibid. at 214.

for group differentiated policies as a possible strategy for achieving equality for excluded groups.

The most troublesome point for me with these two approaches to employment equity and merit is the way in which they deal with such a complex problem. Both these theorists do well in describing the issues at hand, but their shorthand is in respect to their solutions. On the one hand, Abella, does not go far enough in her analysis of employment equity and merit. While acknowledging that employment equity and merit can be integrated thus applying merit in a more accurate manner, she does not explain or develop this. It is not made clear, through Abella's analysis, how institutions could further the social goal of equality/diversity, without abandoning standards that serve to demonstrate the objectivity of an institution's procedures. The challenge, which Abella falls short of meeting, is to establish criteria of admissions which, while not violating the essential precepts of a meritocracy, prevents bias in favour of white males from continuing to exist.

More generally, her idea that we can problematize the operation of applying standards without abandoning it altogether remains incomplete but nonetheless significant. This means that Abella would agree that one can acknowledge the discretionary authority of institutions while simultaneously accepting universalistic criteria for

determining admission to positions. However, because Abella tends to restrict her discussion of employment equity to the distribution and redistribution of positions she ends up not addressing structural questions. Her focus ends up being on the excluded groups rather than the structures and practices that continue to impede a fair assessment of a persons capabilities. Therefore, Abella's perspective is incomplete as it does not facilitate questions about normative criteria or the processes of assessment involved in determining these qualifications.

Young, on the other hand, while acknowledging that affirmative action policies could help in undermining oppression goes on to criticize such programs for having only a minor effect in altering the structure of group privilege and oppression. She maintains that the affirmative action debate takes place within an already existing framework which she claims functions to perpetuate economic and social inequality. As such, Young goes on to examine broader structural questions and issues of institutional organization. This leads her into a much more complex analysis of hiring practices and the merit principle. However, while providing a more complex analysis of how admission to positions are determined, her goal of undermining oppression and becoming more inclusive seems to

get lost as she proposes the solution of social group representation.

Young's discussion of group representation as a means of undermining oppression does not go far enough as it leaves many questions unanswered. Who will represent groups, how will they be selected and how can we guarantee group representation in decision-making? She simply assumes that representation of oppressed social groups in decision-making sites will result in consideration of group perspectives, experiences and interests which would consequently minimize domination. She tends to ignore the nature of groups and assumes that respect and affirmation will appear which must be explained or justified rather than assumed.⁴³ What Young ends up not doing is explaining how her solution will change the parameters of domination/power that exist in institutions as well as among groups. This is important to address because according to Young, most decision-making structures are hierarchical and thus entail subjecting most people to domination. Also, for someone who is trying to be all-inclusive she falls back on essentialist claims about the nature of women and minorities. Young assumes that the presence of an oppressed group member is sufficient in

⁴³ Harris, L.C., & Narayan, U., "Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate" (1994) 11 Harvard BlackLetter Journal 1 at 11.

representing the issues, perspectives and experiences of all of the group members. She devotes far too little space to the possibility of disagreements among the groups she classifies as oppressed. Therefore, if her goal is to undermine oppression she does not seem to provide a solution that will work towards accomplishing that very thing.

Young criticizes affirmative action's redistribution of positions as supporting the status quo and not doing anything to redress the problems that arise from a hierarchical division of labour. However, there is no indication that her solution rectifies this either. Furthermore, affirmative action policies were implemented in a society where institutions are predominantly the preserve of white males and as such any openings to people who were previously excluded is arguably an important change in the status quo. These changes may not have radically transformed institutions but

nevertheless, affirmative action policies serve important purposes - to partially counter the ways in which factors such as class, race and gender function in our society to impede equal access, equal opportunity and equal treatment; and to foster a greater degree of inclusion of diverse Americans in a range of institutions and occupations than would otherwise exist.⁴⁴

If it is a solution for social justice that Young is trying to find then group differentiated policies should not and

cannot be understood as compromising the solution for social justice. These policies have limited and specific goals and as such they should not be judged by their failures to solve problems that they were never designed to solve. Moreover, the recognition of the limited nature of the goals and effects of a policy should not detract from its conceptual and political importance nor from its positive effects.

What Young is trying to do is challenge the whole workplace structure in order to undermine oppression and provide a workplace democracy. In an effort to achieve this goal, she examines the merit principle and concludes that the use of merit to determine who gets admitted to positions is always subjectively applied. Merit is a myth and has played a role in the construction of oppression in work relations. Instead of seeing the prevailing definition and application of merit as flawed, Young believes that one must reject any notion of a universal standard in order to promote minority opportunity. Therefore, she puts forth a reductionist view, whereby merit has no meaning except as a tool for those in power to perpetuate the existing social order. This conception of merit is problematic because it deconstructs merit into merely a method of group domination. The result is that Young is able to explain the subordinated position of certain minorities but is unable to provide an explanation

⁴⁴ Harris, L.C., & Narayan, U., supra note 43 at 11.

for competitive success. For example, how can Young explain what is happening when one person is accepted and another is turned down for an opportunity? Thus, Young's reductionist view of merit creates a paradox which leads me to believe that merit cannot or should not be discarded so easily.

Finding flaws with both Abella's and Young's conceptions of employment equity and merit it is Abella's conceptualizations which I think rightly focuses on what is needed to achieve equality in employment without discrediting merit altogether. She suggests that employment equity is an appropriate response to systemic discrimination. Not only will employment equity introduce merit but it will bring each group to a point of fair competition. It means making the workplace respond by eliminating barriers that interfere unreasonably with employment options."⁴⁵ Further, she makes the point that the merit principle has been misapplied in the past rather than repudiating it altogether and as such she calls for the revision of current merit standards. Viewing merit in this way avoids the dilemma of choosing between a restrictive view of merit or an idea of minority representation that casts merit aside.

This approach provides an alternative to Young's conception besides a complacent endorsement of the merit principle. It entails accepting merit while acknowledging

that it is not objectively valid in all respects or that it is unaffected by social problems. This understanding of merit also recognizes that individuals talents and efforts cannot be understood outside of a social context. Rather than rejecting the validity of existing standards entirely, standards can be seen as having been distorted by social factors which consequently disadvantaged particular groups. Thus, a belief in merit is not incompatible with acknowledging that societal standards can be applied in a discriminatory manner. It is also consistent with an understanding that some groups may not have been given a fair chance to acquire necessary skills. Therefore, instead of rejecting merit altogether, Abella's approach suggests that a reconceptualization of the meaning of merit which includes expanding or transforming the dominant understanding would suffice. However, in adopting Abella's model to employment equity and merit, it has been recognized earlier that her approach does not go far enough as she does not explain or develop what this reconceptualized meaning of merit entails. As such, Abella's approach needs to be expanded in order to have a general sense of what is needed for employment equity and merit to operate together.

Building on Abella's approach, this reconceptualized merit principle needs to take into consideration that merit

⁴⁵ Abella, R., supra note 1 at 254.

is not absolute. In other words, it should be recognized that "best qualified" does not mean the best person in the whole world for the job. Rather, it means the person who is perceived to be the best from among those who applied and whose talent is recognized. Workplace culture is related to conceptualizations of merit because it is those in the top positions who evaluate performance. Further, they are the ones who have the opportunity to judge on the basis of conformity to the cultural norms of the organization. As such, the revised definition of merit must do away with the monolithic conception of what it means to be the best which was generally based on the capacities developed in and valued by those who are dominant in terms of gender, race, ethnicity and class. This would entail a commitment to equity and an appreciation of diversity in that there must be an understanding that people should be able to participate and do so as women, visible minorities, Aboriginal peoples and persons with disabilities. Therefore, within the reconceptualization of the meaning of merit there should be a push for adherence to a merit principle stripped of its links to gender, stereotypes, middle class culture and so forth.

CHAPTER THREE

ARE EMPLOYMENT EQUITY AND THE MERIT PRINCIPLE OPERATING TOGETHER IN PRACTICE?

Having analyzed two different theoretical approaches to employment equity and merit, this chapter focuses on the federal Public Service in order to examine the two legal regimes and whether, in practice, they are integrated. The following questions are used to assess and analyze the evidence. Are the federal government's policies of merit and employment equity working together to achieve equality in employment? Or, is it the case that the federal government's policies are not integrated to achieve the goal of diversity and an increase in representation of designated groups. More specifically, has the definition of merit been expanded through the implementation of employment equity as Abella suggests? Or, has the traditional definition of merit remained such that the federal government's policies come into conflict with one another? This chapter's focus is on the federal government's hiring systems, because as an employer they played a leading role in implementing employment equity programs while still purporting to maintain its hiring criteria.

The merit system has been in existence since the 1918 Civil Service Act as the federal Public Service's regular staffing policy. This system which prevails in the Canadian Public Service, was and is intended to counter partisan appointments. Specifically, this system is intended to ensure that public servants advance according to their demonstrated skills, experience and abilities. Following the original legislation, the Public Service Employment Act, 1967, which is the legislation that governs employment in the Public Service preserved merit as the basic principle for appointments to and within the Public Service. Section 10 of the Act states that,

appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by other such processes of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.⁴⁶

While not specifically defined in the legislation, traditionally, the concept of merit has been interpreted as obtaining the best qualified person for the work to be done. Under this approach, it is only an assessment of relative merit that is used to competitively appoint the "best" qualified person. Selection according to relative merit is

based on the competence of a person being considered for appointment as measured against the competence of other persons. Thus, it is normally through a competitive process that relative merit is determined such that each candidate is compared to other candidates to establish who is the most qualified. This was later amended in 1992 to include selection according to merit that is based on an assessment of a person's qualifications as measured against a standard of competence.

Selections that are made to the Public Service which are based on merit are made through a closed competition. More specifically, this means that departments must use an internal process whenever it is determined that a sufficient pool of employees exists from which to make an appointment. According to section 11 of the Public Service Employment Act,

appointments shall be made from within the Public Service except where, in the opinion of the Commission, it is not in the best interests of the Public Service to do so.⁴⁷

In other words, recruitment from outside the Public Service may be initiated when it is considered to be in the best interest of the Public Service and should normally occur through a competitive process. Merit or relative merit is also to be determined by taking into account three types of selection criteria, such as organizational, geographic and

⁴⁶ Public Service Employment Act, R.S.C. 1985, c.54, s.10(1).

occupational. These are used to describe areas of selection. Specifically, section 13(1) states that,

the Commission may establish, for competitions and other processes of personnel selection, geographic, organizational and occupational criteria that prospective candidates must meet in order to be eligible for appointment.⁴⁸

Thus, merit or relative merit is to be determined according to a narrow set of factors in order to obtain the best possible match between the requirements of a particular job and the qualifications of the person selected.

As for the concept of preferred treatment or the actual use of special measures they are also not new. There are precedents in the Canadian context where governments have provided preferential hiring for specific classes of workers and instituted affirmative action programs with quotas. For instance, the Veterans Preference whereby the government offered special treatment to returned soldiers after World War I and World War II. A former civil servant who had

resigned his position to fight overseas was to be placed on the list of eligible persons for the position from which he had resigned, or for any other position for which he may have qualified.⁴⁹

Further, returned soldiers who had not formerly been civil servants and who were in receipt of pensions were put on a

⁴⁷ Public Service Employment Act, R.S.C. 1985, c.54, s.11.

⁴⁸ Public Service Employment Act, R.S.C. 1985, c.54, s.13(1).

special list. Anyone on this list who was found to possess necessary qualifications for a job was to be placed above all other candidates. The assumption was that certain citizens possess an attribute (military service) which entitles them to a reward (government job). In other words, veterans had to be qualified but not relative to all others who were eligible to apply in the competition. Thus, by law preference for appointment was given first to war service pensioners, second to veterans or to widows or widowers of veterans and third to non-veterans.

In addition to pursuing the goal of reintegrating veterans following the war, the federal government pursued the goal of establishing a bilingual federal government. In 1968 the federal government introduced the Official Languages Program which sought to increase the number of Francophones in the Public Service by setting goals and timetables. This program was created to "increase the representation of Francophones in the federal bureaucracy as well as to ensure that the public was served in both official languages."⁵⁰ In order to increase the representation of Francophone civil servants, special recruitment was authorized. However, unlike

⁴⁹ Hodgetts, J.E., et al., The Biography of an Institution: the Civil Service Commission of Canada, 1908-1967, (Montreal: McGill-Queen's University Press, 1972) at 463.

⁵⁰ Canada. Public Service Commission, Evaluation Assessment of Employment Equity in the Federal Government of Canada, (Ottawa: Audit and Review Branch, 1991) at 4.

the preference given to veterans, Francophones were not given preference because of any ascribed characteristics or because of service they gave to their country. Francophones were appointed because in relative terms they were more bilingual and therefore more qualified to perform the duties of the designated bilingual positions. This demonstrates that the way in which the merit principle was defined at that time could be expanded to include certain groups. Therefore, even before the federal Public Service adopted an employment equity policy, there existed a goal of eradicating inequalities in certain cases while fulfilling the functional needs of the organization.

The move towards bilingualism and the Veterans Preference in the Public Service indicated a recognition by the federal Public Service of the limitations of the traditional merit system. This was alarming to the federal government as the merit system which claimed to select those best qualified for any position should have been a system which cut across existing prejudices. Yet, despite the application of merit, various groups such as women and minority groups continued to be prevented from attaining equal representation in the workforce.⁵¹ The government as a meritorian who professed a belief in equality had to explain how merit appeared to be distributed so unevenly amongst

different social groups. Consequently, it seemed reasonable to suppose that discrimination was operating somewhere in the merit chain. As a result, by the late 1970's, the concept of systemic discrimination began to be discussed.

Systemic discrimination as defined by the Treasury Board of Canada,

refers to policies or practices, which are not intended to discriminate, but which have a disproportionate and adverse effect on members of designated groups, and for which there is no justification.⁵²

The premise that was postulated was that certain employment practices could unintentionally pose great or greater barriers to employment as did intentional acts of discrimination. The emergence of this approach to discrimination challenged the view that employment discrimination consisted of discrete incidents of conduct. According to the Canadian Human Rights Commission which did educational work around the concept of systemic discrimination and which was influential in the Treasury Boards policy,

discrimination includes, rather, any adverse differential treatment or impact, whatever its motivation...We cannot therefore define discrimination purely in terms of behaviour motivated by evil intentions; the definition has to include the impact of whole systems on

⁵¹ Ibid. at 5.

⁵² Canada. Treasury Board of Canada Secretariat, Treasury Board Manual, (Ottawa: Minister of Supply and Services Canada, 1991) at 2.

the lives of individuals - what is called structural or systemic discrimination.⁵³

The term "systemic discrimination" was developed to describe barriers that combine to create institutions that restrict the opportunities of women and minority groups. Employment barriers may exist in the traditional practices or informal operating procedures which are relied on in the course of training, hiring or promoting employees. They may also encompass structural features of society such as societal and cultural attitudes, values and expectations.

This approach adopted by the Treasury Board illuminates Abella's, as both recognize that systemic discrimination prevents people from being employed and deprives them of equal employment and opportunity. An example of systemic discrimination operating as a barrier is the requirement that people must be of a certain height or weight to apply. This may seem like a neutral job requirement but it can operate to exclude certain members of designated groups at the hiring stage. For example, if these physical standards are based on male dimensions, and women are on the average smaller than men, the majority fall below the requirement and thus cannot apply for the job even though the job itself may be performed by a person of any size. Similar to Abella's approach, the

⁵³ Chabursky, L., "The Employment Equity Act: An Examination of Its Development and Direction" (1992) 24(2) Ottawa Law Review at 319.

federal government was beginning to acknowledge that systemic discrimination operates as a barrier that restricts equal opportunity or results for designated groups. Accordingly, the solution was seen in terms of providing a more comprehensive response to the problem of inequality which would include results-based approaches with goals and timetables.⁵⁴ Therefore, recognizing that the merit system was preventing equal results, the federal government developed the remedy of affirmative action.

Employment equity was introduced into the Public Service of Canada in 1983 as a program called Affirmative Action. This program was to be implemented across the Public Service of Canada to ensure "more equitable representation in it of women, Aboriginal peoples and persons with disabilities."⁵⁵ Visible minority groups were added as a designated group in 1985. Specifically, the Treasury Board of Canada stated that,

it is our intention to deal with any barriers which are found to have kept women, indigenous people and handicapped persons out of the Public Service or concentrated in lower levels. It is not our intention to promote the appointment of unqualified individuals to Public Service positions. The merit principle will still prevail in all Public Service hiring.⁵⁶

⁵⁴ Canada. Public Service Commission, supra note 50 at 6.

⁵⁵ Canada. Treasury Board of Canada, News Release 1983.

⁵⁶ Canada. Treasury Board of Canada, News Release 1983.

Therefore, besides the recognition that the regular staffing process produced barriers that resulted in disadvantages to the designated groups, the Treasury Board still believed that representation of the designated group members could be achieved through the day to day application of merit. As a result, affirmative action in the Public Service was not governed by any statutory requirement to implement employment equity rather it was to be implemented within the context of the merit principle and existing legislation.

The Treasury Board established a timetable for the affirmative action program which began with training departmental staff in affirmative action analytical techniques, setting numerical goals, analytical work consisting of a workforce audit and an analysis of employment systems and practices.⁵⁷ Once these steps were completed departments were required to develop action plans that were to be reviewed by the Treasury Board Secretariat and ready for implementation by 1985-1986. The plans describe the methods that each federal department would use to implement affirmative action within their organizations.

While waiting for the approval of the action plans, the Treasury Board in co-operation with the Public Service Commission implemented a number of special measures

⁵⁷ Canada. Treasury Board of Canada, News Release 1983.

initiatives which were to give immediate impetus to the program.

Temporary special measures are integral to affirmative action in order to remedy the effects of past inequities and to achieve more equitable representation in a timely fashion.⁵⁸

The initial programs began in 1983 and included the Access Program, the National Indigenous Development Program, the Northern Careers Program, the Women's Career Counselling and Referral Bureau. In 1986 and 1987 two other programs were added which included the Option Program and the Visible Minority Employment Program. These programs were set up to address the under-representation of the four designated groups by offering incentives to prepare persons in the designated groups for employment and advancement opportunities. According to the Treasury Board President,

the government is committed to a non-discriminatory Public Service that is representative of the Canadian people. We are convinced that equitable representation of women, indigenous people and handicapped persons can only be achieved through strong pro-active measures....⁵⁹

This was to be achieved by using numerical targets or goals. Targets are the basic guides for recruitment and promotions as well as for the retention of persons in designated groups. They apply to each designated group and are calculated for each department. Targets are not quotas and as such they do

⁵⁸ Canada. Treasury Board of Canada, News Release 1983.

not represent a mandatory number of persons to be recruited or promoted within a specific period. Rather, they are an

estimate of what can be achieved when systemic barriers are eliminated and some special measures are put in place to accelerate training and developmental experience.⁶⁰

More specifically, numerical goals represent a number that indicates what the recruitment and promotion rates of persons in designated groups should be in comparison with the relevant segments of the work force or the Public Service. These numerical goals were to be determined by each department according to the existing composition of the departmental workforce.

On June 27, 1983 a Royal Commission on Equality in Employment was established by the federal government to study discrimination in the workplace against women, Aboriginal peoples, disabled persons and visible minorities. The mandate of the Commission was specifically to report on the most efficient, effective, and equitable ways of promoting equal employment opportunities and eliminating systemic discrimination.⁶¹ By establishing a Royal Commission to look into the problems encountered by the designated groups, the government was acknowledging that attempts to alter this situation had proved inadequate.

⁵⁹ Canada. Treasury Board of Canada, News Release 1983.

⁶⁰ Canada. Treasury Board of Canada, News Release 1983.

⁶¹ Abella, R., supra note 1 at 1.

The Commission, chaired by Judge Rosalie Abella tabled its findings in October 1984 in the Report of the Commission on Employment Equity. The report concluded that there is a need for employment equity to be implemented in order to

eliminate discriminatory barriers in the workplace and to improve where necessary the participation, occupational distribution, and income levels of women, native people, disabled persons, and individuals in ethnic and racial minority groups.⁶²

The Commission further recommended that a voluntary program was not enough. Instead, it suggested that a law be passed requiring all federally regulated employers, government departments, businesses and corporations in the federally regulated private sector to implement employment equity. This legislation was to be made up of three major components including,

a requirement that federally regulated employers take steps to eliminate discriminatory employment practices; a requirement that federally regulated employers collect and file annually data on the participation rates, occupational distribution, and income levels of employees in their workforces, by designated groups; and an enforcement mechanism.⁶³

The federal government responded to this by introducing measures that affected both the federally regulated portion of the private sector and the Public Service. Therefore,

⁶² Ibid. at 203.

⁶³ Ibid. at 203.

following the Abella Report, employment equity in the federal context was further developed.

The developments began in 1986 when the Employment Equity Act became law and also when employment equity was applied to the federal Public Service. The Employment Equity Act was viewed by the federal government as an instrument to force organizations to take a proactive position against discrimination in whatever form it existed.⁶⁴ It applies to federally regulated employers with 100 or more employees as well as to federal Crown corporations. The Act requires employers to improve employment opportunities for designated groups through the development and implementation of employment equity programs. The other development which took place and the more important of the two for the purpose of this paper is the employment equity policy that was applied to the Public Service.

The federal Public Service did not fall under the jurisdiction of the Employment Equity Act, but instead used internal policy as its instrument of authority. Following the Abella Report and the Employment Equity Act, it was the terminology of the federal Public Service's policy that was revised and reformed. The terminology of the policy changed from affirmative action to employment equity. The rationale for this change, according to Judge Abella, was to get away

from the concept of quotas with which affirmative action had become so closely associated. Judge Abella maintained that,

in creating our own program in Canada, we may not wish to use quotas and we should therefore seriously consider calling it something else if we want to avoid some of the intellectual resistance and confusion.⁶⁵

Besides the semantic changes of the policy, little else appears to be different from the program that was announced before the Abella Report. The program's purpose is still to recruit, promote and retain qualified employees by removing barriers in employment practices and by putting in place positive policies. Also, departments were still required to undertake analyses and prepare their action plans that were to be submitted for implementation to the Treasury Board. Essentially, the principle of employment equity and the mandate of the policy remained the same. As the Treasury Board's President said,

the principle of employment equity is already accepted within the federal Public Service, and the measures announced today reflect the government's commitment to ensure this principle is further reflected in federal employment policies and practices.⁶⁶

The measures that were taken were only designed to strengthen the federal government's affirmative action program and to reinforce the government's commitment to employment equity.

⁶⁴ Canada. Public Service Commission, supra note 50 at 12.

⁶⁵ Abella, R., supra note 1 at 7.

⁶⁶ Canada. Treasury Board of Canada, News Release 1985.

This revised program was governed by a policy based on the Treasury Board's authority as the employer of the Public Service of Canada.

After the Abella Report and efforts by the government to balance merit with employment equity, the statistics revealed minimal gains that designated group members made within the Public Service. In 1993, the Employment Equity Council of Deputy Ministers published its report entitled Framework for Advancing Employment Equity in the Public Service of the 1990's which noted the progress made so far. In the decade since the creation of the Public Service's employment equity program, the representation of women increased from 42.9 percent to 45.9 percent. From 1988 to 1992, the overall representation of Aboriginal peoples increased from 1.7 percent to 2.0 percent, persons with disabilities from 2.7 percent to 3.0 percent and persons in a visible minority group in Canada from 2.9 percent to 3.7 percent.⁶⁷

Although, there have been increases in representation, there still tended to be under-representation of members of designated groups in certain occupational categories and at various levels. Women constituted 45.9 percent of the Public

⁶⁷ Canada. Treasury Board of Canada. Employment Equity Council, Framework for Advancing Employment Equity in the Public Service of the 1990s, (Ottawa: Minister of Supply and Services Canada, 1993) at 2.

Service, but 83.2 percent of the Administrative Support category.⁶⁸ It became apparent that despite the fact that many women were entering the workforce, they continued to be segregated in low-paying, administrative support positions. Similarly, persons with disabilities and Aboriginal peoples were represented in this category to a greater degree than in higher paid categories. Visible minorities constituted 8.2 percent of the scientific and professional category, but they only constituted 2.3 percent of the Executive Group.⁶⁹ Visible minorities were under-represented compared to their presence in the population and Aboriginal peoples and persons with disabilities were virtually absent from the workforce. Therefore, even with the federal governments initiatives and some changes, the statistics revealed that much remained to be done as there continued to be under-representation of designated group members in the Public Service workforce. The goal of equitable representation and distribution within the Public Service of the designated groups clearly had not occurred.

Other evidence of the problem of implementing employment equity and merit can be seen upon examination of appeal decisions from the Public Service Commission. Under section 21 of the Public Service Employment Act, public

⁶⁸ Ibid. at 2.

⁶⁹ Ibid. at 2.

servants may appeal the appointment of another public servant. When they do so, the Public Service Commission authorizes an Appeal Board to establish whether merit has been respected in the selection process leading to the appointment. The Appeal Board issues its decision, which is binding on the Commission. Where merit has not been respected the Commission will revoke or adopt measures to correct the irregularities. Thus, the appeal system constitutes a recourse mechanism as well as feedback on how staffing is being handled in the Public Service.

In 1988, the appeal of Lindblad was launched against three appointments that were made to the Public Service without competition. In this appeal it was alleged by the appellant that the appointments made were not according to merit. Specifically, it was alleged that the,

department failed to observe the merit principle embodied in section 10 of the Public Service Employment Act, which principled that all appointments to the Public Service be made from the most qualified of those available.⁷⁰

The department, on the other hand, replied that the three appointments were made according to merit in the sense that

⁷⁰ Public Service Commission of Canada, Lindblad (1988) 9(1) Appeal Board Decisions at 120. This was the only appeal board decision that dealt with how employment equity and merit operate within the federal Public Service. It would seem to indicate that very few appointments were made based on employment equity during the period of 1980-1988.

the appointments would help meet the departments employment equity targets.

After taking both sides into consideration the Appeal Board decided that their intervention was warranted. They further concluded that the department appointed the three candidates in priority to all others because they had completed a developmental assignment in the department, they were native and their appointments would assist the department in meeting its employment equity targets. These were all considered positive motivations but the Appeal Board went on to find that,

while the department proceeded with the best of intentions, as creatures of statute, the Department must operate within the applicable laws governing its activities, one of which is, as already pointed out, that unless excluded from the operation of the Public Service Employment Act and Regulations, all appointments are to be made from among the best qualified available. In this case, the reasons given by the Department are incompatible with the merit principle... I am unable to conclude with certainty that the merit principle was at the base of these appointments and, in these circumstances, the benefit of the doubt must be resolved in favour of the merit principle.⁷¹

Moreover, after interviewing the chairperson of this Appeal Board, it was revealed that the only relevant factor to be considered as far as he is concerned is the law. That is, whether the selection of the successful candidates has been

made in accordance with the merit principle as maintained in section 10 of the Public Service Employment Act. The chairperson further disclosed that although the department had great intentions to fulfil its employment equity goals, there was no legislative basis to protect the appointments from not having to be compared against other candidates. This is further evidence that in practice employment equity and merit come into conflict with one another.

Even after the Abella Report and the establishment of employment equity programs, it would seem that the Appeal Board of the Public Service Commission is still using the traditional merit principle. Supposedly, the government was taking steps through the implementation of employment equity programs to correct the imbalances of the merit system. However, what was really occurring was that the government was promoting employment equity while at the same time the law that governs the Public Service was safeguarding the concept of merit as traditionally defined.

This Appeal Board decision reasserted the traditional concept of merit rather than a revitalized concept of merit. By concluding that merit was not at the base of the appointments because the department "did not compare the appellants qualifications to those of the appointees" the Appeal Board reaffirmed that merit still means the best

⁷¹ Ibid. at 125.

qualified comparatively.⁷² Best qualified in this case was interpreted as the best person in the whole world for the job which is only determined by comparing candidates qualifications to one another. Preserving this traditional concept of merit creates the assumption that employment equity is based on a departure from the merit principle. More specifically, merit as traditionally defined creates and maintains a stigma. That is, candidates hired through employment equity are perceived as unable to achieve success on the basis of their merit because their qualifications are not compared to all others. Therefore, this appeal demonstrates the incompatibility between the traditional definition of merit and employment equity as managers end up faced with a choice between failing to implement government policy or violating the Public Service Employment Act. Consequently, it is not surprising that merit continues to be the prevailing system because as this appeal shows departments must operate according to the laws that govern its activities.

The government observed that more needed to be done in order to help the Public Service better reflect the population it served. As indicated by the statistics, the inequalities remained extremely pervasive. The solution was seen in enshrining the Public Service employment equity

⁷² Ibid. at 123.

program into law. As such, in December 1992, the government announced that "it is moving to put the federal Public Service's employment equity program into law."⁷³

Legislative changes were made starting with the Public Service Reform Act which amended a number of Acts including, most significantly for employment equity, the Financial Administration Act. Through an amendment to the Act, the Treasury Board's authority and responsibilities for employment equity in the Public Service were given an explicit legislative foundation. The Treasury Board was made responsible in law for designating employment equity groups in the Public Service and for identifying and eliminating employment practices that result in employment barriers against persons in designated groups. The Treasury Board was also made responsible for

instituting such positive policies and practices and making such reasonable accommodation as will ensure that persons in designated groups achieve a degree of representation in the various positions of employment within the public service that is at least proportionate to their representation in the workforce, or in the segments of the workforce that are identifiable by qualification, eligibility or geography and from which the public service may reasonably be expected to draw or promote employees.⁷⁴

⁷³ Canada. Treasury Board of Canada, News Release 1992.

⁷⁴ Financial Administration Act, R. S. 1994, c.F-10, s.11.

The employment equity policy was evolving since its inception while its objective continues to be the same. Under the provisions of the Act, the main purpose of the Treasury Board's policy on employment equity is "to enable the equitable representation and distribution in the Public Service of Aboriginal peoples, members of visible minority groups, persons with disabilities and women."⁷⁵ The Treasury Board still seeks to improve employment and career opportunities for Aboriginal peoples, persons with disabilities, persons in a visible minority, and women. They also still seek to correct conditions of disadvantage experienced by these groups in their employment. Further, the Financial Administration Act also requires the President of the Treasury Board to submit a report to Parliament on the state of employment equity in the Public Service each year.

The Public Service Reform Act also included amendments that would provide a basis in law for the Public Service Commission's role in implementing employment equity programs. These amendments strengthened the role of the Public Service Commission in employment equity by making explicit provisions in the Public Service Employment Act. The Act was amended to incorporate employment equity into legislation under section 5.1 and to provide the tools necessary under subsection 13(2)

⁷⁵ Canada. Treasury Board of Canada Secretariat, supra note 52 at 1.

and section 35(2)(d). Section 13 gives the Commission the authority to establish criteria for competitions and other processes of personnel selection that prospective candidates must meet in order to be eligible for appointment. More specifically, subsection 13(2) states that the Commission

may establish different criteria for groups of persons that are disadvantaged, including women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada.⁷⁶

This provides the Public Service Commission with the authority to include designated group members in competitions for which they would not otherwise meet the geographic, organizational or occupational criteria for entry. Specifically, these area of selection criteria were a barrier to women and other target groups as they were often unable to meet the criteria. For example, women are generally in administrative positions and not eligible to apply for other occupational group jobs. As such, under this subsection of the Act any or all the criteria in an established area of selection may be expanded to include members of the designated groups. Expanding areas of selection in this way is encouraged to obtain a representative pool of candidates for competitions. This is similar to the preference given to veterans as designated group members still have to be

qualified but not relative to all others who were eligible to apply in the competition. Section 35(2)(d) gives the Commission the authority to make regulations

respecting the appointment to and within the Public Service of persons from disadvantaged groups, including women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada and excluding any such persons or a group of persons from the operation of any or all of the provisions of this Act.⁷⁷

This permits the Commission to make regulations to set aside some or all of the provisions of the Public Service Employment Act to assist in the appointment of persons in the context of employment equity programs.

With the new amendments, the Commission's primary contribution to employment equity has remained unchanged. It has always been the Commission's role to ensure "that appointments to and within the Public Service are conducted in accordance with the merit principle and applied in a fair, equitable and transparent manner."⁷⁸ Under the Public Service Employment Act, the Commission continues to have the exclusive authority to appoint persons to and from within the federal Public Service and to ensure that staffing is carried

⁷⁶ Public Service Employment Act, R.S.C. 1985, c.54, s.13(1).

⁷⁷ Public Service Employment Act, R.S.C. 1985, c.54, s.35(2)(d).

⁷⁸ Canada. Treasury Board of Canada Secretariat, supra note 52 at 14.

out in accordance with merit. However, as mentioned earlier, as a result of the amended Public Service Employment Act, in limited circumstances, an appointment can be made based on individual merit rather than relative merit. Individual merit means that,

a person may be appointed based on an assessment of the person's qualifications against a standard of competence rather than a comparative assessment of the relative competence of all potential appointees.⁷⁹

This amendment to the concept of merit expands its interpretation to encompass an assessment of an individual's qualifications that rests on that person's own competence. Candidates who are appointed based on individual merit are not compared to other candidates to establish who is the most qualified. Rather, they are assessed against a set of qualifications that are established as part of a standard of competence by the manager and approved by the Commission. This expansion of merit signified a move towards an approach to workplace equality that was broadening the meaning of merit to include the contribution of previously excluded groups. Specifically, this was an important structural change that could be used to appoint members of designated groups if managers were so inclined.

As revealed in a 1991 report entitled Evaluation Assessment of Employment Equity in the Federal Government of

Canada the likelihood of managers being compelled to do this in practice remains to be seen. The evaluation of employment equity in the federal government was a joint study of the Public Service Commission and the Treasury Board Secretariat. The purpose of the study was to assess the ability of the federal government's policy and programs in meeting the employment equity objectives. As concluded in this report, managers in particular expressed concerns that the merit principle is in conflict with employment equity goals and vice versa. Specifically,

they believe that the idea of providing some form of preferential treatment through the regular staffing process in an effort to ensure equitable representation of target group members undermines merit.⁸⁰

The impression that managers had from appointing designated group members under the Public Service Employment Act was that they are less able or qualified than the non-target group members who compete through the regular staffing process. Consequently, as the earlier statistics showed, target group members were not usually successful under the Act. Thus, structural changes to the concept of merit may be taking place but if these changes are to take affect management has to be willing to use them and appoint members of target groups.

⁷⁹ Ibid. at 7-3.

⁸⁰ Canada. Public Service Commission, supra note 50 at 32.

Shortly after structural changes were made to the concept of merit, the Public Service Commission pursuant to the amended section 35 of the Public Service Employment Act made a new regulation respecting employment in the Public Service. The change that took place was the amendment to the Public Service Employment Regulations which included section 44 for employment equity. This section states that

the appointment of a member of an employment equity group to a position in accordance with an employment equity program is excluded from the operation of section 10, subsection 12(3) and sections 13 and 21 of the Act.⁸¹

As section 44 indicates an appointment made in accordance with an employment equity program is excluded from section 10 of the Public Service Employment Act which requires that all appointments are to be made based on merit. In light of this regulation, the expansion of the definition of merit to include individual merit ends up being insignificant with respect to employment equity appointments as they are excluded from merit altogether. As well, appointments made through employment equity are not subject to the appeal process which is the only procedure that offers the possibility of redress to employees who believed that they suffered from an inadequate appraisal of their merit.

These changes in the law indicate that the government has given up on an approach which integrates employment

equity within the context of the merit principle. Specifically, the government has gone on to implement changes to the law which separates the hiring process of employment equity from merit altogether. According to the regulations, one is now either appointed based on merit in accordance with the Public Service Employment Act or appointed because of employment equity which is excluded from the Public Service Employment Act and the merit principle. Merit has not been reformulated, rather it has been separated from employment equity altogether. Therefore, managers are left with the assumption that employment equity and merit are counter to one another as they are faced with a choice between appointing candidates in accordance with the Public Service Employment Act or in accordance with employment equity.

The federal government thought that legislating employment equity and amending the Public Service Employment Act would do more to help the Public Service better reflect the public it serves. However, despite having put employment equity into law, current statistics still tell us that not much has changed.

⁸¹ Public Service Employment Regulations, 1993, s.44.

There is comfort in imagining that the amendment of a regulation and the implementation of a new policy will, on their own, provide a quick fix solution. With few exceptions, such is not the case.⁸²

From the 1992/93 and 1994/95 annual reports of the Treasury Board, it was reported that the overall representation of women increased from 46.1 percent to 47.4 percent, Aboriginal peoples increased from 2.0 percent to 2.2 percent, persons with disabilities from 3.1 percent to 3.2 percent and persons in a visible minority group in Canada from 3.8 percent to 4.1 percent.⁸³ Although there has been an increase in representation, one must look to see where designated group members are being employed as they still tend to be clustered in certain occupational categories and at lower levels. As 1995 statistics show, women constituted 47.4 percent of the Public Service, but only 19.1 percent of the executive category and 84.1 percent of the Administrative Support Category.⁸⁴ These results show that, even with the implementation of employment equity, there is little change in women's representation in non-traditional occupations or

⁸² Canada. Task Force on Barriers to Women in the Public Service, supra note 7 at 61.

⁸³ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1992-1993, (Ottawa: Communications and Coordination Directorate, 1994) at 37, Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1994-1995, (Ottawa: Planning and Communications Directorate, 1995) at 16.

in the senior levels. Similarly, persons with disabilities and Aboriginal peoples are still represented in this category to a greater degree than in higher paid categories.⁸⁵ While those who self-identified as persons in a visible minority group in Canada constitute 8.6 percent of the scientific and professional category, they only constitute 2.4 percent of the Executive Group.⁸⁶

The focus on numbers that has characterized the employment equity program to date has remained essential to measuring progress towards the goal of equitable representation of designated groups in the Public Service.⁸⁷ As indicated by the statistics, much still remains to be done in order to achieve the goal of equitable representation of persons in designated groups. Designated groups still continue to remain under-represented in many occupational groups as well as at the more senior levels within most occupational groups. However, it is recognized that numbers may be essential in assessing progress towards the goal of

⁸⁴ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1994-1995, (Ottawa: Planning and Communications Directorate, 1996) at 16.

⁸⁵ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1994-1995, (Ottawa: Planning and Communications Directorate, 1996) at 16.

⁸⁶ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1994-1995, (Ottawa: Planning and Communications Directorate, 1996) at 31.

⁸⁷ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1992-1993, (Ottawa: Communications and Coordination Directorate, 1994) at 28.

equitable representation but they still have to be used with regard to their limitations that are inherent in such factors as self-identification.

Voluntary self-identification by way of questionnaires is the procedure by which the information on the representation of Aboriginal peoples, persons with disabilities, and persons in a visible minority in the Public Service is obtained. This procedure may respect the employee's right to privacy but at the same time some may choose not to self-identify thereby resulting in an under-reporting of the numbers of persons in designated groups. Thus, numbers do have their shortcomings but any other method was beyond the confines of this paper. Accordingly, using the numbers approach it has been demonstrated that employment equity may have become law and structural changes may have been made but the goal of achieving equality in employment for designated groups in the federal Public Service remains an issue.

CHAPTER FOUR

EMPLOYMENT EQUITY AND MERIT GOING BEYOND THE NUMBERS

Upon the reading of the statistics one is tempted to conclude that the operation of employment equity and merit are not successful. However, since the amendments to the employment equity policy have only come into existence in 1993, it is perhaps too early to come to any definite conclusions based on statistics alone. What can be maintained is that notwithstanding the government's employment equity laws and programs, progress towards equality in the workplace remains exceedingly slow. Accordingly, it has been established that there continues to be barriers to employment of the designated groups. Many women have reported to the Consultation Group on Employment Equity for Women "that the obstacles women face are not disappearing and indeed may be worsening."⁸⁸ This chapter focuses on the realization that the hiring processes of employment equity and merit could benefit not only from structural changes but also from an increased emphasis on adopting employment and appointment

⁸⁸ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, Looking to the Future: Challenging the Cultural and Attitudinal Barriers to Women in the Public Service (Ottawa: Minister of Supply and Services Canada, 1995) at 3.

policies that value diversity and is committed to employment equity.

It has been recognized that employment equity is more than just numbers. In her Report of the Commission on Equality in Employment, Abella said that corporate employment practices cannot be assessed fairly in a cultural vacuum.⁸⁹ Several other reports also concluded that progress of employment equity will be achieved only if there is a change in the workplace culture as well as a better understanding of the purpose of employment equity.⁹⁰ This is not to say that numbers have no importance because as set out in chapter three targets or goals are the basis for measuring results of employment equity programs. Furthermore, as Abella maintains, it is in the results that one may find evidence that barriers which are inequitable impede individual opportunity. However, even Abella recognizes that employment equity goes beyond the numbers when she states that,

these results are by no means conclusive evidence of inequity, but they are an effective signal that further examination is warranted to determine whether the disproportionately negative impact is in fact the result of inequitable practices, and

⁸⁹ Abella, R., supra note 1 at vii.

⁹⁰ Ibid. at vii. Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, Gender Balance: More Than Numbers, (Ottawa: Minister of Supply and Services Canada, 1992) at 3. Canada. Task Force on Barriers to Women in the Public Service, supra note 7 at 1.

therefore calls for remedial attention, or whether it is a reflection of a non-discriminatory reality.⁹¹

For Abella, it is important to determine whether or not low results reflect discriminatory practices because if they do the employer would be advised to amend these practices. However, if the results were due to a non-discriminatory reality such as an absence of hiring opportunities or qualified applicants there would be no such need. Consequently, the achievement of the targets does not necessarily mean that an equitable environment has been achieved and conversely, failure to achieve targets is not necessarily a sign that barriers to employment equity exist.

Numbers only partially represent the complex relationship among policies and practices within the federal Public Service. Research shows that principle obstacles for achieving equity within the Public Service are cultural and attitudinal. Specifically in 1990, the Task Force on Barriers to Women in the Public Service in its report Beneath the Veneer concluded that cultural and attitudinal barriers were blocking women from full and equitable participation in the Public Service.⁹² The report also stressed that the solution to systemic discrimination in employment cannot consist merely of measures that increase the representation of

⁹¹ Abella, R., supra note 1 at 2.

minorities in the workplace. Rather, the solution must also include measures designed to change traditional attitudes and stereotypes about the employment of minority groups. Until the federal government finds ways to change the attitudes and practices that create barriers, its commitment to equal opportunity will be questioned.⁹³ Therefore, the Task Force recognized that the goal of employment equity in the Public Service would not be achieved unless there was both an increase in the numbers and a culture that values diversity.

Several other studies that followed Beneath the Veneer came to the same conclusion. In 1992, a report by the Consultation Group on Employment Equity for Women, also found that cultural change was necessary in order to remove the barriers to employment equity for women.⁹⁴ Further, in 1995, the Consultation Group on Employment Equity for Women conducted a follow-up study to Beneath the Veneer in order to examine whether the prevailing culture and attitudes in the Public Service had changed to support equity. This report entitled, Looking to the Future: Challenging the Cultural and Attitudinal Barriers to Women in the Public Service concluded that there has been little progress since Beneath the Veneer in changing cultural and attitudinal barriers. Specifically,

⁹² Canada. Task Force on Barriers to Women in the Public Service, supra note 7 at 120.

⁹³ Ibid. at 120.

it reported that the Public Service workplace culture continues to conform to the norms of a traditional male-dominated culture.⁹⁵ This evidence of a lack of change is problematic because traditionally, this culture did not value the contribution of women, visible minorities, Aboriginal peoples and persons with disabilities nor did it provide them with equal access to career opportunities. Rather, the traditional norms made the workplace a tougher environment for women than for men.⁹⁶ Consequently, it is not surprising that women reported that they do not yet find the Public Service to be an equitable workplace.⁹⁷

The traditional workplace culture and attitudes have definite influences on designated group members achievement of employment equity. Although it is not acceptable to be open about sexist or racist attitudes, this does not mean that they have disappeared. A surprising degree of support for sexist attitudes was reported as existing within the Public Service.

On stereotyping, 65% of men and 52% of women believe that some jobs are best suited to one gender or the other. In the management ranks, 56% of men and 30% of women hold this to be true. Twenty percent of men and 11% of women

⁹⁴ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 90 at 1.

⁹⁵ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 88 at 1.

⁹⁶ Ibid. at 36.

⁹⁷ Ibid. at 1.

believe that men make better managers than do women. In the ranks of senior managers, 16% of men and 2% of women believe this.⁹⁸

The traditional attitudes and stereotypes may have become more subtle but as the evidence shows they continue to prevail within the Public Service. These stereotypes and social values that are at work within the federal Public Service contribute to determining the occupations and hence the salaries attributed to women, Aboriginal peoples, visible minorities and persons with disabilities.⁹⁹ Further, they contribute to a different Public Service work experience for designated group members compared to non-designated group members. One example of the traditional attitudes and stereotypes that exist in the Public Service is that women are not management material. This may only be a belief but the effect of such belief, as reported by the Consultation Group on Employment Equity for Women, is that women who reach senior levels have to work harder and meet tougher standards.¹⁰⁰ Consequently, women are less likely to be managers, to supervise others or be involved in top-level

⁹⁸ Canada. Treasury Board of Canada. Task Force on Barriers to Women in the Public Service, supra note 7 at 62.

⁹⁹ Canadian Advisory Council on the Status of Women, Re-evaluating Employment Equity: A Brief to the Special House of Commons Committee on the Review of the Employment Equity Act (Ottawa, Canadian Advisory Council on the Status of Women, 1992) at 14.

¹⁰⁰ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 88 at 13.

positions that involve decision-making activities. Nothing in the literature suggests that women are less competent than men in performing in the workplace under similar circumstances, given similar abilities and effort. However, as Abella maintains, we should not be "ingenuous in believing that once access is expanded, the equal opportunity will translate into treatment as an equal."¹⁰¹ Therefore, if the workplace culture includes, stereotypes and assumptions about people because they belong to a certain group, designated group members will be prevented from the achievement of equality in employment.

Another reason that merit and employment equity are not operating together is because of the lack of top-level management's commitment to employment equity. The Consultation Group on Employment Equity for Women found that there was no evidence of an organizational commitment to workplace equity in the Public Service. Senior-level men did not see that they had a responsibility as executives to change the present imbalance in the workplace.¹⁰² Similarly, these men did not see the issues as significant nor as issues that they should concern themselves with personally, or as managers.¹⁰³ This is especially alarming since the Public Service Commission delegates many of its staffing authorities

¹⁰¹ Abella, R., supra note 1 at 10.

¹⁰² Ibid. at 15.

to the departments. In accepting delegation, it is the departments that become responsible for ensuring that staffing is conducted in a manner that reflects the values underlying selection according to the newly defined merit principle: fairness, equity and transparency.¹⁰⁴ Therefore, lack of commitment on the part of top-level management and those in personnel departments is problematic as they are the ones who sets the standards for the Public Service. Research results on organizations that have moved most successfully towards equity within the workplace have all noted that "the attitudes and actions of the top-level manager were critical to success in every instance."¹⁰⁵ They have the most direct control over the employment practices that restrict opportunities of women and minority groups and foster discriminatory attitudes among other employees. The federal government themselves have noted that,

¹⁰³ Ibid. at 15.

¹⁰⁴ Canada. Treasury Board of Canada Secretariat, supra note 52 at 3.

¹⁰⁵ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 88 at 16.

in order to achieve the numbers, managers have to focus on incorporating the principles of employment equity and an appreciation for diversity into the management culture and practices of their organizations.¹⁰⁶

As such, top-level support is essential for influencing the achievement of employment equity because it is their actions that demonstrate to their staff whether or not a commitment to achieve equality must occur. Thus, success in achieving increased representation for designated groups depends on managers and employees valuing diversity and reflecting this belief in their actions.

Along with a lack of commitment on the part of executives in incorporating employment equity principles within the Public Service, it has been established that there is widespread misunderstanding of the Public Service employment equity policies.

The views of these policies were almost universally negative. But, in fact, many of these negative views arise from confusion about and misunderstanding of the policies.¹⁰⁷

Underlying this confusion over the concept of employment equity is a lack of understanding about what employment equity is and what it is not. Employment equity appears to be based on misconceptions of how the policy operates which are

¹⁰⁶ Canada. Treasury Board of Canada, Employment Equity in the Public Service: Annual Report 1992-1993, (Ottawa: Communications and Coordination Directorate, 1994) at 28.

¹⁰⁷ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 88 at 17.

entirely understandable in view of the complexities of the issues and the obscurities of the laws. The most common misunderstanding is associating employment equity with quotas despite the fact that quotas are not a part of the Public Service employment equity programs. For example,

when managers are asked what employment equity means to them, their immediate response is equitable representation, which is synonymous with targets and quotas for some.¹⁰⁸

Under the government's employment equity policy, departments are expected to set targets which are different than quotas, in that, they are used to judge the progress or lack of progress. They are merely indicators, as opposed to quotas which actually sets the number of designated group members that must be recruited or promoted within a specific period.

This misunderstanding of associating employment equity programs with quotas has raised the issue of merit and its relationship to the concept of employment equity. Specifically, associating employment equity with quotas instead of with targets has produced a perception that designated group members are being appointed to positions for which they are not qualified. For example, most men in the public service (54%) believe that employment equity programs give women an unfair advantage. Most men in senior-level jobs (59%) also believe that these programs have placed women in

¹⁰⁸ Canada. Public Service Commission, supra note 50 at 22.

jobs beyond their expertise and training.¹⁰⁹ Thus, hiring through employment equity has left the impression that designated group members in general are less able or qualified than non target group members who compete through the regular staffing process.

In light of the legislative changes examined in chapter three which excludes employment equity hirings from merit, this misunderstanding is not surprising. The separation of the two systems has left the impression that there is a separate category of hiring criteria for designated group members that is unrelated to merit but related to the institutional goal of achieving equality in the workplace. According to the interviews that were done for the report Beneath the Veneer, one woman maintained that,

the general resentment caused by affirmative action programs and hiring quotas for women is undermining their original intent. When women are hired in current competitions, too often their competence is immediately questioned by those who feel that they were chosen for gender reasons alone. I feel that most women would rather compete on their own merits.¹¹⁰

Implementing employment equity as an additional hiring process to the merit system has created assumptions that individuals hired through employment equity do not belong or that their inclusion is somehow illegitimate. Although there

¹⁰⁹ Canada. Task Force on Barriers to Women in the Public Service, supra note 7 at 61.

¹¹⁰ Ibid. at 55.

appears to be this perception that employment equity results in appointments of people that are not based on competence, paradoxically, this perception changes after having personal experience of working with them.

Virtually all of the participants had worked with senior-level women and they generally agreed that these women were competent and effective in their jobs. Only a few men who had not worked with senior-level women expressed any stereotypical reservations about the potential competence of women in executive positions.¹¹¹

There is an inconsistency between perceptions and personal experience. In this respect, it is not employment equity per se, but the legislative changes along with prevalent misunderstandings about the nature of these programs that are responsible for insuring the continuation of treating designated group members as perpetual outsiders.

If there was an intent to convey a different message with the new policy, for instance education of managers on the benefits of a representative workforce, this has not yet been achieved¹¹²

as the misunderstandings of employment equity produces negative perceptions of these policies which work to prevent the Public Service from being an equitable environment. Therefore, while employment equity has become part of mainstream government policy, a major challenge remains. More

¹¹¹ Canada. Treasury Board of Canada. Consultation Group on Employment Equity for Women, supra note 88 at 14.

¹¹² Canada. Public Service Commission, supra note 50 at 22.

remains to be done with respect to the Public Service hiring policies so that employment equity is valued, rather than seen as a burden.

CHAPTER FIVE

CONCLUSION

This study has demonstrated that employment equity and merit are not integrated in theory or conceptually within the practice of the federal Public Service. The work of both Judge Rosalie Abella and Iris Marion Young were examined as they provide important analyses of employment equity and merit as traditionally conceived. For Abella, employment equity and merit cannot operate together because the traditional merit principle limits who is regarded as meritorious. Instead of promoting neutrality and fairness, the merit principle has fostered subordination. As such, she makes the point that the merit principle has been misapplied in the past and that employment equity is essential as it will improve and extend the concept and application of the merit principle. That is, the reconfiguration of merit will come about through the inclusion of designated group members. Thus Abella, believes that employment equity and merit can be integrated by including designated group members into the existing system's parameters rather than discrediting the notion of merit altogether. This approach differs from Young's analysis of employment equity and merit because Young questions the concept of merit altogether and suggests that

merit is a myth in that it is both culturally and socially bound. Consequently, from Young's standpoint, the two legal regimes cannot be integrated together because there is no such thing as a neutral and objective merit principle.

Through an examination of the federal Public Service it has also been concluded that employment equity and merit are not integrated but rather operate as separate concepts and legal regimes. However, to merely suggest that no progress has been made within the Public Service would prove to be incorrect. In 1983, the federal government set up the Abella Commission to study discrimination within the workplace against women, Aboriginal peoples, disabled persons and visible minorities. As a result of the Commission's report, the government legislated employment equity into law in 1992 by amending the Financial Administration Act and subsequently the Public Service Employment Act. However, as noted in chapter three, these changes were limited with the amendment to the Public Service Employment Regulations in 1993 which separates the hiring process of employment equity from merit altogether. According to the regulations, the appointment of a member of a designated group is excluded from the operation of the Public Service Employment Act and from the merit principle.

Although changes took place within the Public Service the goal of equitable representation and distribution of the

designated groups has not occurred. Before the legislative reforms, the statistics from the Treasury Board and the Public Service Commission revealed that designated group members progress remained exceedingly slow as they continued to be under-represented within the Public Service. However, even after the structural changes, it was also revealed that not much has changed. Several reports that went beyond statistics came to the same conclusion. As discussed in chapter four, it was reported that full and equal participation of designated group members within the Public Service was being prevented because of a traditional workplace culture, a lack of commitment to equity and a lack of commitment to the goal of diversity.

Like all policies, and maybe more than some, employment equity is far from perfect. However, the cost of heightened tensions is outweighed by the long-term gains generated by adding opportunities for women, visible minorities, Aboriginal peoples and persons with disabilities. Employment equity does more than just promote the presence of fair numbers of designated group members within organizations through hiring practices. Employment equity programs are designed to eliminate barriers in employment that have disadvantaged women, visible minorities, Aboriginal peoples and people with disabilities from the labour force because of their group affiliation. But employment equity alone cannot

be expected to break the "glass ceiling" and it has not done so. The principles of employment equity can be stated but their enactment in organizational life is clearly difficult.

The analysis of the two theoretical approaches and the practices within the federal Public Service indicate that employment equity is controversial in relation to merit. However, the question remains, can employment equity and merit be integrated? The success of employment equity and merit depends on a number of factors. Similar to Abella, I believe that the two legal regimes have the potential to work together within the existing system following some modifications. To that end, what is needed is a two-pronged approach to employment equity. One that includes both legislated changes while at the same time a focus on adopting a workplace culture that is committed to employment equity and values diversity.

At the core of a system in which employment equity and merit has the potential to work together is a reconceptualized meaning of merit. Traditionally, merit has been interpreted as obtaining the best qualified person for the job. While it is not specifically defined in the legislation it has evolved to the point where the definition is well accepted. However, underlying the justification of the use of the merit principle exists a monolithic conception of what merit is and what it means to be the best. Generally,

in Canada, merit has had nothing to do with individual capacities instead it has had to do with the capacities developed in and valued by those who are dominant in terms of gender, race, ethnicity and class. As the discussion of Abella and the federal Public Service has shown, in spite of all intentions to be fair the existing meritocracy is biased. Consequently, instead of promoting neutrality and fairness, the merit principle has systematically excluded and disadvantaged members of designated groups. Thus, until formerly excluded groups have complete access to the conditions for being perceived as meritorious and have a significant role in shaping institutional norms and standards, the meritocratic method of distribution will continue to be exclusive. The point is not that notions of merit, criteria and standards are indeterminate rather the point is that they were developed without certain groups in mind and without participation from those groups. Recognizing that the concept of merit has been constructed without reference to the virtues and values of women, visible minorities, Aboriginal peoples and persons with disabilities calls into question the assumption that it is neutral and universally constructed.

From Abella's analysis of employment equity and merit conceptualizations are provided that allow the two concepts to work in concert to further equality for excluded and

disadvantaged group members. To that end, the definition of merit must be more expansive to include the contribution of previously excluded groups. In other words, we need to broaden the meaning of merit to include other cultures. Merit has to mean more than belonging to the dominant group within society. It has to mean that people must be able to participate and do so as women, visible minorities, Aboriginal peoples, and persons with disabilities. In order for this to occur there must be an understanding that merit is not absolute and as such needs to be stripped of its links to gender, stereotypes, middle class culture. Those defining and putting into practice the merit principle must appreciate that individual talents and efforts cannot be understood outside a social context that values certain talents and not others. Therefore, until the dominant conception of merit changes, employment equity and merit will not work harmoniously together because the structures will continue to systematically exclude those who are considered different by turning their differences into a basis for exclusion.

Another important element to an approach where employment equity and merit operate together is an appreciation and commitment of diversity by managers and employees. This is important because as demonstrated in chapter four, laws and policies can be created but their enactment is clearly difficult if people do not accept their

basis. From the analysis of the federal Public Service we can see that when a law is created that managers are not compelled to implement in practice, the results are meagre. Further, the reports that have examined employment equity within the Public Service have demonstrated that a lack of commitment to equity is a barrier to women, visible minorities, Aboriginal peoples and persons with disabilities. This is especially true if the managers are the ones with the lack of commitment as they have the most direct control over the employment practices that restrict opportunities of women and minority groups and foster discriminatory attitudes among other employees. Therefore, employment equity may be enshrined in law but without an appreciation of diversity and a commitment on the part of managers the law will remain stated rather than enacted in practice.

Lack of commitment is linked to lack of change in merit. Although it is recognized that change does not occur automatically, it should be managed and supported by commitment from the top. Managers that are committed to the ideal of diversity and equity are in a better position to make the necessary adjustments within the workplace to eliminate discriminatory barriers and give designated group members fairer access to employment opportunities. There are targets that managers should attempt to meet with respect to employment equity. But there is also no evidence to suggest

that sanctions will be placed on those who fail to meet them. Thus, until managers are required to change their definition of merit, the problem of achieving equality for designated groups will continue to exist. Employment equity and merit; will ever the Twain meet?

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