INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

Bell & Howell Information and Learning
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA
800-521-0600

UMI[®]

**Equality Legislation
in the
Canadian Federal Public Service**

By

Micheline Nehmé

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirement for the degree of

Master of Arts

**Department of Law
Carleton University
Ottawa, Ontario**

August 2000

© Micheline Nehmé, 2000

National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisitions et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-57677-9

Canada

**Thesis Acceptance Form
M.A. Candidate**

**The undersigned recommend to the Faculty of Graduate Studies
and Research acceptance of the thesis**

**Equality Legislation in The Canadian
Federal Public Service**

Submitted by

Micheline Nehmé, B. SC. Hons.

**in partial fulfilment of the requirements for
the degree of Master of Arts**

Thesis Supervisor

Chair, Department of Law

**Carleton University
September 2000**

ABSTRACT

This thesis analyses the employment equity statutes in the Canadian federal Public Service and in particular the Treasury Board's 1986 *Employment Equity Policy*. The question is whether the *Employment Equity Policy* achieved its purpose and reduced inequalities for women in the federal Public Service workforce. Various notions of "equality" are examined with specific reference to the *Canadian Charter of Rights and Freedoms*, the *Employment Equity Policy* and the 1986 and 1995 *Employment Equity Acts*. The thesis argues that the purpose of the *Employment Equity Policy*—to achieve equality in employment—was not realized because the policy did not promote substantive equality. The 1995 *Employment Equity Act* introduced major changes. This thesis will argue that these most recent changes to the legislation were necessary and are more likely to promote substantive equality and reduce inequalities in the workplace. The conclusion is that the *Employment Equity Policy* did not have a significant impact on reducing inequalities in the federal Public Service, and that the 1995 *Employment Equity Act* will more likely achieve that purpose.

ACKNOWLEDGEMENTS

I would like to thank everyone who has helped to make this thesis a reality, especially, my two advisors, Professors Michael Mac Neil and Diana Majury who gave me many hours of their time, shared their expertise and provided me with excellent support and advice over the last year.

I would like to thank my colleagues and supervisors at both the Public Service Commission and Human Resources Development Canada for their ongoing encouragement toward completing my thesis, for providing me with financial support and the necessary time to complete my master's degree. Their support proved to me that we are moving towards achieving the equality I am discussing in this thesis.

I am grateful to many of my friends for their help and encouragement, to Trevor Purvis, Farouk Kaspaulaus, Cecile Catalfo, Daniel O'Connor and Stan Lee for their patience and the time they spent discussing the thesis with me. Their perspective and focus helped to shape the direction of this work.

My thanks and appreciation are also extended to my family and family-in-law for providing encouragement and support throughout the years. I would like to extend a special thanks to Christie Hoskins for spending many hours editing my thesis and for providing me with great suggestions for improvement. Finally, the encouragement and love of my husband Hunt kept me focussed on the important things in life.

TABLE OF CONTENTS

ABSTRACT.....	i
ACKNOWLEDGEMENTS	ii
CHAPTER ONE: INTRODUCTION	1
OUTLINE OF THE THESIS	6
CHAPTER TWO: METHODOLOGY AND STATISTICAL ANALYSIS.....	8
DATA SOURCES AND DEFINITIONS	10
CHAPTER THREE: THEORIES OF EQUALITY	13
Formal Equality	16
Substantive Equality	21
CHAPTER FOUR: <i>EMPLOYMENT EQUITY POLICY</i> AND THE <i>EMPLOYMENT EQUITY ACT</i>.....	34
BACKGROUND	34
Enforcement	46
Employment Equity Programs and Plans.....	48
Policies, Practices and Reasonable Accommodation	49
Numerical Goals and Timetables	53
CHAPTER FIVE: FEDERAL PUBLIC SERVICE WORKFORCE	59
INTRODUCTION	60
OVERALL DEMOGRAPHIC PROFILE.....	61
Age Profile	64
Changing Nature of Work.....	66

Recruitment	68
Separations	69
Promotions	70
WOMEN IN THE FEDERAL PUBLIC SERVICE	71
Representation	72
Recruitment, Promotions and Separations of Women.....	75
CHAPTER SIX: CONCLUSION	79
Research Gaps and Further Study	82
BIBLIOGRAPHY	84

CHAPTER ONE: INTRODUCTION

Canada has had three specific statutes for employment equity: the Treasury Board's 1986 *Employment Equity Policy (EEP)* (Canada:1996d) designed specifically for the federal Public Service; the 1986 *Employment Equity Act (1986 EEA)* (Canada:1985c) which only applied to federally regulated employers with 100 or more employees; and the 1995 *Employment Equity Act (1995 EEA)* (Canada:1995a) written to replace the 1986 *EEA* and the *EEP* by including both the federal Public Service and the federally regulated employers under one umbrella.

This thesis analyses employment equity in the federal Public Service. This entails an analysis of the *EEP*. The purpose of this policy was to achieve equality in the workplace and correct the conditions of disadvantage experienced by members of certain groups

I will argue that the *EEP* did not lead to a significant reduction in inequalities in the federal Public Service. My argument is that equality in employment is more likely to be achieved by programs and policies that are directed toward attaining substantive equality. This thesis uses the concept of substantive equality as a yardstick against which the success of employment equity policies are measured. I will show that the major problem with the *EEP* was that it did not contain an enforcement mechanism to ensure that federal departments and agencies were in compliance. While the policy appeared to be founded on substantive equality and was written so that it provided equal opportunity for everyone, it was without mechanisms to enforce or monitor the outcomes. The omission of an enforcement mechanism meant that the *EEP* did not significantly reduce inequalities in employment and thus did not achieve its ostensible goals. To prove this

assertion, the real reductions in the inequalities within the federal Public Service workforce are described and have been assessed for the nine-year period from 1991 to 1998¹.

The 1986 *EEA* came into force on August 13, 1986. It made employment equity mandatory for federally regulated companies with 100 or more employees but did not include the federal Public Service workforce.

The 1995 *EEA* introduced major changes for employment equity programs by including the federal Public Service as a target of the legislation and establishing an enforcement mechanism. This thesis will argue that major changes to the legislation were necessary to promote substantive equality and that these changes will likely achieve the designed purpose of reducing inequalities in the workplace.

The meaning of “equality” is widely debated. These debates go to the heart of arguments over policy changes in legislation and their contestation in the courts. The limitations of conventional notions of equality have been recognized, and a climate has been generated where more attention can be paid to the reduction of inequalities². As Majury noted,

¹ Data from the year 1991 was used because it was the first year for which there was access to a full database. The year 1998 was chosen because it was the last year for which departments and agencies reported under the *EEP*. Although the *EEA* came into force in 1996, departments and agencies had a full-year grace period to update their system. The first reporting year under the 1995 *EEA* was, therefore, between April 1, 1998, and March 31, 1999.

² For example: Abella, 1984; Brodsky and Day, 1989; Geller, 1991; MacKinnon, 1982; and Majury, 1991.

An equality guarantee implicitly acknowledges the existence of (current) inequalities and is directed toward the elimination or redress of those inequalities

The concept of equality is meaningful only in the context of an understanding and response to inequality. The process is one of moving from a state of inequality to a state of being in equality, but the primary focus must be on where we are now, that is on the inequality (1991:419).

Therefore, while the purpose of the *EEP* was to achieve equality in the federal Public Service, its success in helping to reduce inequalities will be assessed.

While legislation authorizing voluntary employment equity has existed in Canada since the mid-1970s³, there has been little improvement in the employment situation for women in the federal Public Service (Chapter 5). Several governmental research reports, such as the report by the Task Force on Barriers to Women in the Public Service called *Beneath the Veneer*, have shown that women have significantly lower participation rates, earn less and are segregated in marginal occupations more often than men (Canada, 1990). Women are frequently refused employment because of erroneous or biased conceptions about their knowledge, skills and abilities. If they are hired, they receive limited or no

³ The *Canadian Charter of Rights and Freedoms* (The Constitution Act 1982, C.11 (U.K.)), the *Canadian Human Rights Act* (S.C. 1976-77, C.33, as amended, 1977-78, C.22; 1980-81, C.54; 1980-81-82, C.111; 1980-81-82, C.143), and the *Ontario Human Rights Code* (S.O. 1981, C.53) and other provincial human rights codes allow governments and employers to take positive steps to remedy situations that amount to systemic discrimination. Therefore properly designed and implemented employment equity programs are protected from claims of "reverse discrimination". However, these statutes do not require governmental or non-governmental actors to enact or enter into any employment equity programs, and they are complaint-driven rather than being directives for positive action. As will be demonstrated, this type of legislation will not achieve substantive equality.

support, and face a continuous need to prove themselves in what often seems to be a hostile environment (Canada, 1991:6). The report, *Beneath the Veneer*, also concluded that cultural and attitudinal barriers were blocking women from full and equitable participation in the Public Service (Abella, 1994:2). The details of these barriers to employment include, but are not limited to, the employers' lack of sensitivity, sexism, the lack of positive role models, the lack of access to adequate training, hiring policies and procedures which favour majority groups but are unrelated to the actual requirements of the job (Canada, 1991:6-7).

Ideal employment equity legislation would address these barriers and systemic biases. Substantive equality will be achieved when the workplace is barrier-free, and when all individuals who are in, or wish to enter, the workforce have equal opportunities for hiring and promotion. While this can be measured to the extent that designated groups are represented as in their overall share of the Canadian population, it is crucial that the goal of equality be more than just a "number exercise"; it must result in a barrier-free environment. The goal of any employment equity policy should be the creation of a barrier-free environment and the creation of enforcement mechanisms to ensure that the goal is reached and maintained.

Another essential aspect for the success of employment equity initiatives is senior management's commitment to its principal objectives. The Consultation Group on Employment for Women found that there was no evidence of an organizational commitment to equity within the federal Public Service (Canada, 1995c). Senior-level male executives did not see that they had any responsibility to change the present imbalance in the workplace (Abella, 1984:15). Specifically, these men did not see the

issues as significant or as issues that they should concern themselves with, either personally or as managers (Abella, 1984:15). The Treasury Board Secretariat has noted that:

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 (Canada, 1994b:28).

Top-level support is essential for influencing the achievement of employment equity in the federal Public Service as it is senior managerial commitment that demonstrates whether or not equality will be achieved in the workplace. In the past, the absence of such support has meant that employment equity in the federal Public Service could not be achieved. Success in developing a representative workforce in the federal Public Service depends upon managers and employees valuing diversity and reflecting this belief in their actions. Research results from 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” (Canada, 1995c:16).

By examining various theories, this thesis provides a better understanding of discrimination and equality. I will argue that the substantive version of equality is the one most likely to provide the basis for meaningful employment equity legislation and to ultimately lead to a significant reduction in inequalities in the workplace. There are four designated groups under the *EEP*: women, aboriginal peoples, persons with disabilities and members of visible minorities. This thesis will only analyze the employment situation of women under the policy. I will show that omissions and oversights within

that policy prevented the reduction of inequalities for women. I will argue that the implementation of the 1995 *EEA* comes closer to attaining substantive equality.

OUTLINE OF THE THESIS

The following chapters will explore and critique various theories addressing the issues surrounding equality in employment. These theories will be applied to the Canadian context by analysing barriers to employment for women in the federal Public Service. Each chapter examines a different element of the issues facing the employment of women in the federal Public Service. This examination brings together different equality theories that contribute to a greater understanding of the barriers faced by women in Canada.

Chapter two outlines the approach and methodology used in this thesis to address the issue of barriers of employment for women in the federal Public Service. It discusses some of the methodological issues applicable to women.

Chapter three examines the construction of theories surrounding equality. The chapter begins by exploring the notions of formal and substantive equality. It demonstrates the contrast between formal and substantive approaches to equality and their implications in employment equity programs. This chapter discusses equality theory to determine what is required for substantive equality to be realized.

Chapter four discusses the *EEP*, 1986 *EEA* and 1995 *EEA*, and the background for the development of each. This chapter applies the theory of substantive equality, developed in chapter three, and determines that the *EEP* did not promote substantive equality. I suggest that there is nothing in the *EEP* to support the belief that it would

actually achieve substantive equality. This chapter will also argue that the 1995 *EEA* created conditions conducive to the attainment of substantive equality.

Chapter five analyses the federal Public Service workforce from 1991 to 1998.

This chapter will determine through statistics that the *EEP* did not lead to the achievement of equality. Analysis of workforce statistics since the implementation of the new legislation is premature since organizations have only reported once at this time. That data is not yet publicly available and will not be used in this thesis to assess the impact of the new legislation in reducing inequalities in the federal Public Service workforce. However, an analysis of the changes introduced by the new legislation could provide an indication of its potential success.

Chapter six includes the final discussion and conclusions about the findings in this thesis. This chapter also explores various research gaps and recommends further study in order to examine the full impact of the Canadian employment equity legislation.

CHAPTER TWO: METHODOLOGY AND STATISTICAL ANALYSIS

The *EEP*, 1985 *EEA* and 1996 *EEA* state as their purpose to “achieve equality in the workplace so that no person shall be denied employment opportunities or benefits”. The statistical portion of this thesis will examine the extent to which employment opportunities and benefits are unequally distributed to women within workplaces covered by the *EEP*, and what changes to inequality have occurred since the policy’s inception. Five measurements will be used to examine the employment situation and the changes in “opportunities” to see if inequalities are lessening for women. Improvements in employment opportunities will be measured by changes in: (1) the overall representation of women, (2) the distribution of women, (3) the recruitment of women, (4) the separations⁴ of women and (5) the promotions of women.

These measurements will be examined at the overall workforce level and by occupational categories⁵ covered by the *EEP*. These are the key indicators of the reductions in inequalities in employment because they demonstrate any under-representation, occupational segregation, and areas where there are retention, recruitment and promotion concerns.

⁴ “Separations” refers to the number of employees removed from the federal Public Service payroll during the fiscal year that the data covers. It is a measure of the flow of persons out of the federal Public Service.

⁵ There are six occupational categories for the federal Public Service: executive, scientific and professional, administrative and foreign services, technical, administrative support and operational.

Although each measurement provides important information on what changes are occurring in the women's workforce, no one indicator on its own is sufficient to determine whether inequalities are being significantly reduced. An increase in the number of women in management jobs, for example, could indicate a number of changes, but some of these will not result in equality in employment. If the number of men is increasing at an equal or greater rate, then the representation rate of women would not be increasing. Alternatively, the increased number could be due to changes in title rather than to promotion or hiring activities. The change in title might not involve increases in an individual employee's salary or in the work they perform. For an accurate interpretation of the statistics, it will be necessary to examine all of the measurements together; that is representation rates, recruitment, separations and promotions in conjunction with increased numbers.

The employment situation and changes for women are examined for the federal Public Service as a whole. This examination will provide a broad description of the employment situation for women in the workforce covered by the *EEP*. The representation of women in the federal Public Service is compared to the Canadian labour market rate to determine if they are over-represented or under-represented. During this examination, the following questions will be answered:

1. Were there any improvements in the situation of women in general?
2. Did the *EEP* appear to have any effect?

In addition to these general lines of inquiry, chapter five will answer the following specific questions:

1. Were women under-represented or over-represented in the total workforce, in the indeterminate⁶ and term⁷ workforce, and how did their representation change during the period examined?
2. Were women segregated into specific occupational categories and, if so, did this segregation change during the period examined?
3. Were women under-represented or over-represented in specific occupational categories, and what, if any, were the changes in their representation during the period examined?
4. What was the share of recruitment, retention rate and promotions of women during the period examined?

DATA SOURCES AND DEFINITIONS

Two sources of data will be used:

1. Treasury Board Secretariat (TBS) is responsible for collecting statistics on all federal departments and agencies. The TBS' Annual Report to Parliament and other sources, such as databases from the TBS and the Public Service Commission of Canada, will be used.

⁶ Part-time or full-time employment with no fixed duration.

⁷ Part-time or full-time employment for a fixed, predetermined period.

2. The 1996 Census of Canada will be used, in particular the set of measures provided by the Census known as the Canadian labour market availability standards.

The Canadian labour market availability indicators are provided by TBS to departments and agencies to be used as benchmarks when implementing employment equity programs. These benchmarks are used to determine if departments' and agencies' workforces are representative, and to assist in setting goals and timetables. Moreover, they assist departments and agencies in monitoring their success in achieving a representative workforce.

The methodology used for producing Canadian labour market availability statistics is based on the assignment of four-digit codes from the National Occupational Classification (NOC) system to public service jobs. These statistics describe the representation and distribution of designated group members by labour force activities⁸, by occupational categories and by various labour market areas⁹. The Canadian labour market availability statistics have been customized for each department and agency to account for geographic distribution of employees across Canada and variations in occupational skill requirements.

⁸ "Labour force activities" refers to the total labour force, the experienced labour force, or the total population 15 years of age and over.

⁹ "Labour market areas" refers to the geographic area from which a department and an agency can reasonably be expected to recruit employees: national, provincial or Census Metropolitan Area (CMA). The CMAs are set out in the Statistics Canada publication entitled *Standard Geographical Classification SGC 1991*, which was published in April 1992 but is amended from time to time.

As mentioned earlier, the Census of Canada is the source of data for women. Statistics Canada collected the most recent information in 1996. Data, by gender, was collected from persons in every household in the country.

Women in the 1996 Census are defined as female, aged 15 years or older, who worked at any time in the 16 months prior to the Census (From January 1, 1995 to May 11, 1996).

CHAPTER THREE: THEORIES OF EQUALITY

One of the most prominent themes in recent discussions of equality has been the question of whether policies aimed at eliminating inequalities between groups should follow a principle of equal or differential treatment. The debate has arisen partly as a result of efforts to justify specific policies, such as those concerning employment equity and pregnancy leave/benefits. The discussion of equality theory is important in this thesis because both the *EEP* and the 1995 *EEA* are based on notions of “fairness” and “equality”; and yet the measures constructed to achieve this are exclusionary in nature and are not the same for all oppressed groups. Despite being created for a small number of designated groups and achieving limited results for some of those groups, employment equity in the federal Public Service has failed to achieve the kind of equality that makes a substantive difference in results.

Liberal theory has had a significant impact on the understanding of equality. Theorists such as Rawls (1971), Dworkin (1981) and Kymlicka (1989) have attempted to develop distinct measures related to what constitutes equality, defining the parameters of what equality means in a liberal democratic nation. Liberal theories of equality proclaim that all individuals deserve to be treated equally; everyone should have access to the things necessary to make us all equal human beings. Classical liberal theorists have been responsible for the idea that people have equal moral worth and deserve equal concern and respect because they are autonomous agents (Koggel, 1998:42).

Formal and substantive approaches to equality are familiar foci in these discussions. Formal equality prescribes neutral and equal protection of the law. It suggests that people who are alike are to be treated alike, thereby giving everyone the

right not to suffer discrimination so there is equality of opportunity in society.

Substantive equality emphasizes the need for special remedial provisions for disadvantaged group members in order to facilitate process and results. The goal of substantive equality is to ameliorate the position of disadvantaged groups in relation to non-disadvantaged groups in society.

The *Canadian Charter of Rights and Freedoms* has been one area in which the question of formal and substantive equality has been raised. In terms of employment equity, there is no legal requirement under the *Charter* that applies directly to such programs. The *Charter*, however, has become a key issue in the debate over which approach to equality should be taken to adjudicate cases of discrimination. The debate has not been over the justifiability of employment equity policies—that issue has for all practical purposes, been neutralized by the *Charter*'s explicit protection of such programs in Section 15(2). Rather, the Supreme Court's attempt to interpret the equality guarantee of Section 15(1) has given rise to controversy over what sort of model of equality will emerge from the jurisprudence. There seems to be evidence that the emerging idea of equality is based upon the recognition that there are disadvantaged groups in society and that differential treatment of groups could be justified in order to address this long term and continuing disadvantage. Such a reading would seem to privilege the substantive version of equality in that it would recognize the lack of an "equal starting point" and the need for differential treatment to compensate for the inequality.

In *Andrews v. Law Society of British Columbia*¹⁰, the Supreme Court of Canada established that Section 15 is designed to promote the interests of disadvantaged groups, primarily those related to the enumerated grounds of discrimination outlined in Section 15(1) and Section 15(2).

This chapter examines the different approaches to equality in Canada and the interpretations of Canada's equality rights by the Supreme Court of Canada. The Supreme Court is important in this thesis because its decisions indicate that it is developing a substantive approach to equality. The contrast between formal and substantive approaches to equality and their implications for employment equity programs is also demonstrated in this chapter. While formal equality theorists tend to view employment equity measures as interfering in each individual's formal right to compete, substantive theorists view these measures as removing formal barriers and promoting equality from a results oriented perspective (Koggel, 1998:210).

Each concept of equality necessitates different legislative approaches and different actions on the part of those who implement them. If formal equality between men and women is the goal, for example, equal pay for equal (the same) work might be considered sufficient to ensure that equality exists. On the other hand if equality means substantive equality for men and women, then formal equality will be woefully inadequate and specific actions will need to be taken to address inequality.

¹⁰ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143.

Formal Equality

Developed in the United States to assess whether a statute adhered to the constitutional principle of “equal protection of the laws,” (Sheppard, 1986:200) formal equality is the concept underlying the Canadian Bill of Rights’ jurisprudence. The aim of the principle is to ensure that legislation treats similarly those who are similarly situated. This approach gives “neutral meaning and universal application to equality” (Majury, 1991:414). It has been argued that the treatment of individuals through this approach to equality poses a paradox: “The equal protection of the laws is a ‘pledge of the protection of equal laws,’ but . . . law may classify . . . and the very idea of classification is that of inequality.”¹¹ This paradox is resolved by treating similarly those who are similarly situated in order for the law to be a reasonable classification, and therefore constitutionally valid (Sheppard, 1986:201). Hence, according to T.W. Wakeling, this requirement of equality does not preclude classificatory systems in law which have long been established as legitimate in the eye of the judiciary (Wakeling, 1986:413).

With its emphasis on “equality of opportunity” or procedural equality (Rogers, 1986:139; Sheppard, 1986:196), formal equality approaches are firmly rooted in liberal ideology. As such, formal equality has three central features (Sheppard, 1986:197). First, it is individualistic and assumes that society is made up of autonomous individuals, each having the right to be treated the same as other individuals. Second, liberal equality is guaranteed by a non-interventionist state which interferes only when one individual

¹¹ Tussman and tenBroek, cited in (Sheppard 1986: 201).

violates the individual rights of another. It does not assume responsibility for securing substantive or distributive equality. Third, there is faith in the neutrality of the “rule of law,” as espoused by A.V. Dicey in his influential constitutional writings. Dicey’s conception of the rule of law espoused the “universal subjection of all classes to one law administered by the ordinary courts” (Sheppard, 1986:197). Formal equality is preoccupied with a means-end relationship. Accordingly, judges do not attend to the constitutional propriety of the legislative ends themselves which might allow for “more equal” results in decision making (Bayefsky, 1985:14). The liberal formal conception of equality is influenced by the principle of judicial restraint that impedes the courts from supplanting legislative authority with its own (Rogers, 1986:139-140).

The formal equality approach requires groups or individuals seeking a right or benefit to prove that they are like the group that already enjoys the right or benefit being sought. The norm of “likeness” that they must meet is a norm set by the advantaged group. In practice, this means that the standards for access to opportunities are generally the standards of the able-bodied, white male. Instead of challenging that norm, the disadvantaged groups have to prove that they fit it. While this approach might help women who have been able to enter male-dominated jobs since they receive the same wage and benefits, it will not reduce the barriers and discriminations which exist for most women who are attempting to enter those occupations. It also would not address discrimination faced by women who are in those occupations when they are confronted by concerns related to family responsibilities and sexual harassment. Instead of providing a means to break down barriers, the similar treatment model can perpetuate them, requiring disadvantaged groups to be “like” advantaged groups by fitting into an

“unquestioned and unchallenged institutional status quo” (Sheppard, 1992:11-12). In the context of employment equity, it “reinforces the status quo instead of challenging it, and . . . benefits only a minority of individuals from historically disadvantaged groups who can emulate the ways of being historically advantaged” (Sheppard, 1992:11-12).

Formal equality cannot deal with the ongoing effects of disadvantage experienced by groups as a result of historical discrimination. It does not address “adverse effect” discrimination created, for example, by using neutral criteria like height and weight requirements or educational requirements which are not in fact necessary for the job, thereby affecting certain groups disproportionately because they do not meet the criteria in question. The removal of barriers advocated by conventional equal opportunity approaches does not take into account the need to accommodate difference and diversity in dealing with discrimination. Where barriers have been in place for a long time simply removing them will not restore individuals or groups to the positions they would have been in, had those barriers never existed. Some have used the “race” analogy to develop this argument (Koggel, 1994:8). Koggel asserts that past and ongoing discrimination mean that some competitors in the “race of life” are disadvantaged by lack of talent or education, less time or money, and prevailing stereotypes about their worth. Merely removing the formal barriers that have stood in their way in the past will not improve their opportunity to compete for a fair share of the distribution of economic, social and educational benefits. Thus equality requires that special measures or programs be available to give all participants “meaningful equal opportunity”(Koggel, 1994:46). This does not mean that equality of opportunity has no significance. Rather, substantive

equality theorists recognize that equality of opportunity is not sufficient to guarantee significant redress.

Formal equality theory supports compensation for individuals who can prove that they were the victims of direct and deliberate discrimination (Koggel, 1994:45). In this context, where a wrong is committed, for example, by an employer discriminating on a prohibited ground, the wrongdoer must correct it. This is usually accomplished by stopping the discriminatory practice and ensuring that it is not repeated in the future. “Wrongdoing” is primarily seen as an isolated act of discrimination against an individual, as opposed to societal policy against an entire group (Crenshaw, 1988:1342).

Accordingly, redress is for individuals and does not recognize that individuals are victims of discrimination because of the stereotyping, marginalization and stigmatization about the groups they belong to. Furthermore, efforts to redress wrongdoings are balanced against the competing interests of privileged workers even where those interests were actually furthered by the subordination of specific disadvantaged groups (Crenshaw, 1988:1342). Thus from a formal equality perspective, the aim of legal remedies in the context of anti-discrimination would be compensation for victims, not the equitable distribution of jobs for all groups.

Formal equality does not prohibit or attempt to address inequality of condition; it focuses on legislative motivation or intent. The “similarly situated” test for legislation ensures equal application to all those who have the classificatory trait. In so doing, it “risks reducing the equal protection of the laws to a tautology” (Sheppard, 1986:202). This approach allows equality to be a “formalistic classificatory exercise” (Sheppard, 1986:201). There is also the criticism that the “similarly situated” test, as the reflection

of a theory of equality, is “at worst a formalistic and empty one or at best an incomplete one”(Smith, 1988:82). The ambiguity of this test leaves unresolved the questions: “Who counts as a similarly situated person, and what counts as similar treatment?” (Smith, 1988:82). The conclusion that one person is “like” another is often disputable (Baker, 1987:498-499).

Advocates of formal equality have concerns regarding the Court as an appropriate forum for the actualization of equality measures. While some equality seekers hope their goals will be realized through constitutional interpretation, the advocates of formal equality generally believe that this will be better accomplished in the policy-making realm. For the latter group, the policy-making sphere is better suited to consider “questions of justice, fairness, or efficiency.” This venue is where minority groups should seek to remove deliberate barriers (Knopff, 1987:286). Rainer Knopff and F.L. Morton note that “the degree and scope of legislated politics occasioned by the *Charter* far surpasses what we had become accustomed to under the constitutional law of federalism” (1992:1). These advocates believe that the enhanced judicial role is controversial as it involves appointed judges overriding the policy decisions of elected representatives (Knopff et al., 1992:5). Even Colleen Sheppard, a noted proponent of substantive equality, recognizes the limitations of the rule of law, believing that it is impossible to address the diverse social realizations of inequality through legal formulas (1986:216).

According to Marshall, the rule of law is problematic because “the equal subjection of all classes to a common rule . . . does not in itself imply any qualitative view about the sort of law to which all should be subject” (Marshall, cited in Bayefsky, 1985:3). Formal equality restricts the entitlement to equality to those similarly situated:

as a result the relevance for other people is limited (Brodsky et al., 1989:148-149). It also emphasizes differences that exist in law, while disguising those that exist in society (Brodsky, 1987:320-321). For those reasons, Bayefsky maintains that a myopic focus on the achievement of formal equality is “severely limited;” one may be “free to try [but] born to lose” (1985, 3:5).

Formal equality removes the legal barriers without examining the equality of the outcomes or results for individuals. Therefore, to achieve equality in the workplace one needs to go beyond formal equality and its inherent shortcomings. Until employment equity laws actually require results and enforce change they will not be effective in reducing inequalities.

Substantive Equality

Substantive equality provides a means to address the more fundamental inequalities. The objective for equality-seeking activists is not simply a demand to be treated as others are treated in society, but rather the recognition and amelioration of impediments particular to disadvantaged groups. It has been argued that, in general, Canadian law is neutral on its face, “and yet women [and other disadvantaged groups] are still subordinate in Canadian Society . . . [because] many laws, policies, procedures, and legislative gaps, though neutral on their face, have a disparate or adverse effect” (Brodsky, 1987:320-321).

Substantive equality designates positive rights upon certain people, particularly members of disadvantaged groups. Not satisfied with the negative act of simply eliminating discrimination between similarly situated individuals, it seeks to realize equality across groups in society through proactive measures. It requires actions that will

achieve greater equality of resources and rights in ways that ensure that members of disadvantaged groups are no longer disadvantaged.

With the rise of the regulatory welfare state, this approach to equality expands the liberal emphasis upon procedural guarantees of equality, and extends those guarantees to social, political and economic outcomes (Sheppard, 1986:198). The Parliamentary Sub-Committee on Equality Rights put it in the following way:

Equality is an elusive concept, it is much easier to narrow it down by stating what it does not mean than by trying, initially, to articulate what it does mean. We can safely say that, in our view, it doesn't necessarily mean either sameness of treatment or patent equality (Canada, 1985e:5).

Equality cast against a more results-oriented approach to discrimination is premised on the understanding that differential treatment is justified in order to improve the position of oppressed groups and their prior inequalities (Majury, 1991:415). Unlike formal equality, substantive equality requires that accommodations be made for a group's special characteristics (Baker, 1987:502). It addresses the fact that liberalism, with its focus on the individual, neutralizes the realities of disadvantaged groups. A recognition of those realities is necessary to resolve problems of discrimination (Rogers, 1986:149). Some have distinguished between substantive equality as the assertion of a group right and formal equality as the assertion of an individual right (Tarnopolsky, 1986:160). As a group right, equality is a claim by an individual or a group of individuals based on their membership in an identifiable group. This raises the issue of what, then, are the relevant criteria to constitute an identifiable group positioned to pursue substantive equality?

Discrimination was described by the Supreme Court in *Andrews v. Law Society of British Columbia* as "a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of

imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages, available to other members of society.”¹² In short, discrimination does not mean simply making distinctions between individuals or groups and equality does not mean treating everyone the same.

The Court has provided clear guidance on the issue of which characteristics are relevant factors upon which differential treatment might be based in order to achieve equality in Canada. Lynn Smith described these characteristics:

... people have them at birth, they are difficult or impossible to change, they are closely connected with people’s sense of identity and self-worth, they have historically been the basis for discrimination in the pejorative sense, that is, of exclusion, powerlessness, political and economic disadvantage. (1988:83)

Substantive equality attempts to improve the lives of traditionally disadvantaged people who are subject to discrimination on the basis of “race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” ¹³ as enumerated in Section 15.

The substantive approach promotes temporary assistance or the allocation of goods for disadvantaged people in order to bring about real equality of opportunity (Bayefsky, 1985:15). As the political realm holds limited prospects for change in Canadian society, the constitutional avenue, particularly Section 15 of the *Charter*, holds

¹² *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR. (4th) 1, (SCC.), at 18. (Subsequent references are to 56 DLR).

¹³ Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act*, 1982 (UK) c.11. Section 15 took effect on April 17, 1985.

out hope for many equality seekers. It has been suggested that Section 15 is consistent with modern Canadian conceptions of the capacities and responsibilities of government where “minimum standards of welfare—welfare payments, subsidized housing, unemployment insurance, public health insurance, legal aid—are exceptions which distinguish us from American society, even now” (Bayefsky, 1985:24). Some have argued that the existence of Section 15(2) “acknowledges that society does not correspond to the traditional liberal myth of undifferentiated, atomized individuals” (Sheppard, 1986:207).

The substantive approach to equality is controversial; its implications are not readily acceptable to a significant sector of society, such as those from the traditionally conservative political spectrum. Public policies promoting substantive approaches to equality are also controversial. The issue of employment equity became an emotional one in the Ontario election of 1995; Premier Mike Harris won a majority of seats with his promise to abolish the province’s equity legislation. Many members of society believe that employment equity is unnecessary (Mitchell, 1995). However, recent figures released by Statistics Canada revealed that members of visible minorities in Canada were more likely to be university-educated than other Canadians; but as a group, they were also more likely to be unemployed (Canada, 1996c). Pay equity is also argued to be unnecessary even though 1999 Canadian statistics demonstrate that women working full-time earned 80% of what their male counterparts make. Peter Rogers argues that there has been a misunderstanding of employment equity where issues of race or gender

are concerned. He contends that critics of employment equity fail to appreciate that it is not “significantly different in principle” from a progressively scaled income tax¹⁴, as both promote substantive approach to equality through differential distribution schemes (1986:167). Nevertheless, public policies with a substantive approach to equality can be contentious if emphasis is placed upon individual attributes, such as education, in the interpretation of statistics, rather than upon the social, economic, and political position of disadvantaged groups in general. This discrepancy is one reason for the debate between formal and substantive approaches to equality.

The main difference between formal and substantive approaches to equality in law involves the focus of judicial attention on the effects of government legislation. With formal equality, the effects of classificatory systems of legislation are accepted as long as the legislation does not have an unreasonable discriminatory purpose. However, under a substantive approach, intention is not necessary in order for there to be a finding of discrimination. It is the examination of the outcome of legislation that permits the achievement of substantive equality (Rogers, 1986:32).

Equality Rights in the *Canadian Charter of Rights and Freedoms*

15 (1) “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national, or ethnic origin, colour, religion, sex, age, or mental or physical disability.”

¹⁴ Progressive income tax schemes are not without controversy of their own.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

One area in which the approaches so far discussed, the formal and the substantive approach to equality, may have concrete implications for women is in the debate over the constitutional interpretation of the equality guarantees of the *Canadian Charter of Rights and Freedoms*. Since the *Charter*'s entrenchment there has been an array of literature focusing on which approach the courts would take in defining the meaning of Sections 15(1) and 15(2).

According to feminist legal scholars, the approach that must be taken in cases dealing with gender inequality is one that recognizes the centrality of the social subordination experienced by women (Smith, 1992:211-233; Lahey, 1987:73-77; Greschner, 1987:59-70). Sex discrimination must be understood within the societal context in which it exists and not simply as one particular instance of injustice. More importantly, a model of equality which recognizes the cultural specificity of women's experience and the need to accommodate this difference must be adopted (Sheppard, 1986:195-223). Such a model must reject the strict equal treatment standard as inherently discriminatory—based upon male norms; when applied to women, it perpetuates their disadvantage.

The substantive approach to equality recognizes the limitations of mere "equality before the law and equal protection of the law." These were the focus of the initial formulations of equality guarantees in the *Charter* during its negotiations and drew their emphasis from the jurisprudence surrounding the Bill of Rights (Brotsky, 1987:323). After the contentious *Bliss* and *Lavell* decisions, women and other equality-seeking

groups demanded that the outcomes of legislation be acknowledged in the *Charter*'s equality guarantee (Brodsky, 1987:323). As a result of their efforts, Section 15(1) explicitly calls for "equality under the law" and "the right . . . to the equal benefit" of the law in order to protect all individuals and groups in society, not simply those who are "similarly situated." The title change of Section 15 in the January 1981 proposal for the *Charter*, from "non-discrimination rights" with its negative, equal opportunity implications, to the affirmative standard of "equality rights," supports the idea that substantive equality is a goal of the provision (Bayefsky, 1985:24). In addition, Section 15(2) restates the value of affirmative action programs which have "as [their] object the amelioration of conditions of disadvantaged individuals or groups." Section 28, which guarantees sex equality, is the result of the collective efforts of women during the constitutional negotiations leading up to the *Constitution Act*, 1982¹⁵. Thus the *Charter* provides the necessary framework for judicial interpretation to guarantee substantive equality.

Beginning with the *Andrews* case, the court rejected the similarly situated test as an approach to equality stating that the method "will not necessarily result in equality"¹⁶. The test does not consider the effects of legislation, effects that are acknowledged to be important by the Court when interpreting Section 15(1). It is "seriously deficient in that

¹⁵ For consideration of the successful lobbying efforts of women, consult Penny Kome, *The Taking of Twenty-Eight*.

¹⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 at 144.

it excludes any consideration of the nature of law.”¹⁷ Therefore, the Court concludes that the test is not appropriate in *Charter* interpretation.

Justice McIntyre states: “For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinctions.”¹⁸ For the Court, it is the context of the impugned legislation that is important in the determination of unconstitutional discrimination under the *Charter*. The equality guarantee is interpreted not only in light of the assessment of the context of the impugned law but also by the context of the place of the group in the entire social, political and legal fabric of society¹⁹. According to J. Wilson, in *Turpin v. The Queen*, the context of the legislation determines the existence of discrimination because the similarly situated test, based exclusively on analysis of the impugned law, is likely “to result in the same kind of circularity [of the test] clearly rejected by this Court in *Andrews*.”²⁰

In a succession of decisions, the Court rejects the similarly situated test that underpins an exclusive emphasis on the formal approach to equality. For example, in *R v. Hess and Nguyen*, the importance of avoiding the “rigid formalism that the Court [urged] in *Andrews* and *Turpin*” is affirmed²¹. The Court again confirms its position on

¹⁷ *Ibid.* at 166.

¹⁸ *Ibid.* at 167.

¹⁹ *Ibid.* at 152.

²⁰ *Turpin v. The Queen*, [1989] 1 SCR 1296 at 1332.

²¹ *R v. Hess and Nguyen*, [1990] 2 SCR 906 at 929.

the test in *McKinney v. University of Guelph*: “The *Charter* protects not only from direct or intentional discrimination but also from adverse impact discrimination. The similarly situated test has not survived *Andrews*.”²²

Presently, the Court assesses both the application and the effects of the impugned legislation. As endorsed by the Court in *Thibaudeau v. Canada*, “it is the effect that an impugned distinction has upon a claimant which is the prime concern under s.15(1).”²³ In the concurrent decision of *Miron v. Trudel*, the Court states that in the first step of Section 15(1) analysis, the claimant must show denial of an equality right “as compared with some other person.”²⁴ It considers the effects of the law upon the claimant in relation to other persons when assessing the relevancy of a claimant’s group membership. This approach allows recognition and subsequent remedy of the effects of impugned legislation upon disadvantaged groups, unlike the neutral application of legal principles under the similarly situated test. Thus the Court does not restrict its analysis to the application of the impugned legislation upon its designated objects as consistent with a strictly formal approach to equality.

The Court could have reached a similar conclusion by adhering to principles of formal equality only, but it chose to go further in order to pursue substantive equality. In this case, the issue was the exclusion of common-law couples from automobile insurance protection. The majority of the Court found that the exclusion of unmarried partners

²² *McKinney v. University of Guelph*, [1990] 3 SCR 229 at 234.

²³ *Thibaudeau v. Canada*, [1995] 2 SCR 627 at 628.

²⁴ *Miron v. Trudel*, [1995] 2 SCR 418 at 419.

from accident benefits available to married partners under a standard insurance policy violates Section 15(1) of the *Charter*. As a strictly formal approach to equality would suggest, the Court argued that this exclusion of unmarried partners was a discriminatory classification because these people have similar responsibilities and they are in the same circumstances as married couples. As such, the equality guarantee ensures that the legislative intention of sustaining families when one member is injured is realized through the extension of the impugned provision to both married and unmarried couples²⁵.

Under formal equality, this conclusion would mean that the impugned legislation is simply under-inclusive. Yet, the Court goes beyond formal reasoning. It asserts that it is the purpose of Section 15 to protect against discrimination in order to avoid “the violation of dignity and freedom, an historical group disadvantage, and the danger of stereotypical group-based decision-making.”²⁶ As common-law couples constitute a disadvantaged group according to the Court, a substantive approach to equality gives the same treatment to common-law couples for the first time. In these decisions, the Court moves beyond formal guarantees to promote substantive results.

A recent case that has significantly improved equality law is *Law v. Canada (Minister of Employment and Immigration)*²⁷. This case was about a 30-year-old woman without dependent children or disability who was denied survivor's benefits under the

²⁵ *Ibid.* at 425.

²⁶ *Ibid.* at 500.

²⁷ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.

Canada Pension Plan (CPP). The question the Court raised in this case was whether the age distinction drawn by Sections 44(1)(d) and 58 of the *CPP* infringed on equality rights under Section 15(1) of the *Charter* on the basis of age. The case was initially heard by seven justices on January 20, 1998, and was later re-heard by the full Court on December 3, 1998. By unanimous decision, the Court found that the impugned provisions did not violate Section 15 of the *Charter* and it was not, therefore, necessary to turn to Section 15(1) of the *Charter*.

The decision canvassed the developments in the jurisprudence relating to Section 15 of the *Charter*. The Court stated that:

[...] the present case is a useful juncture at which to summarize and comment upon these basic principles, in order to provide a set of guidelines for courts that are called upon to analyze a discrimination claim under the *Charter*.²⁸

The Court elaborated principles for analysis under Section 15 and recasted three basic elements of the Section 15 test in a manner similar to that in which it was stated in *Andrews*.

This case is important law because it reaffirms the *Charter* and the principle of substantive equality espoused by the Court in *Andrews*. However, there is an existing body of case law which is much more equivocal, such as *Egan v. Canada*²⁹. This case helps to illustrate the inherent contestability of legal discourse and the indeterminacy of legal form. Although this discussion is outside the scope of the thesis, it is nevertheless

²⁸ *Ibid.* at 3.

²⁹ *Egan v. Canada*, [1995] 2 SCR 513.

important to mention because of the issue of indeterminacy of legal language and the existence of such a contrasting body of case law which highlights the fact that this remains a contested and a contestable terrain.

The 1982 *Canadian Charter of Rights and Freedoms* is the primary legal instrument used to define and discuss notions of equality. The *Charter* was part of the foundation which entrenched equality as part of the dominant discourse in Canada (Koggel, 1998:216). The purpose of equality rights (Section 15) in the *Charter* is to eliminate discrimination which occurs where, for example, a person, because of a personal characteristic, suffers disadvantages or is denied opportunities available to other members of society (Canada, 1997a:11).

The *Charter* protects both individuals and groups from discrimination, including discrimination in employment, on the basis of race, colour, national or ethnic origin, ancestry or place of origin, sex, language and grounds determined by the Court to be analogous to those listed in Section 15. The *Charter* provides the foundation for on-going discussions and re-definition of equality.

The *Charter* also helps to promote equality by providing an interpretative backdrop for other pieces of legislation and policy. Human rights legislation further outlines the restrictions on discrimination in employment situations. In most Canadian jurisdictions, discrimination against someone for their race or colour, religion, physical or mental disability, age, sex, national or ethnic origin, sexual orientation, ancestry or place of origin, or language is prohibited under human rights legislation (Canada: 1998). These laws work in conjunction with the *Charter*.

The *Charter* protects employment equity programs by allowing certain laws and programs that favour disadvantaged individuals or groups. In terms of promoting employment equity programs, the *Charter* in Section 15(2) has provided good support. Bayfesky explains, “the *Charter* explicitly provides for the legitimacy of affirmative action programs The goal in such cases must be the amelioration of actual conditions, not only an equal chance to strive for success. The aim is sufficient to reduce present inequalities so as to erase handicaps in the competition” (Bayfesky, 1986:11). The entrenchment of equality in the *Charter* strengthens employment equity measures.

This overview of equality theories in Canada has been provided because it is the basis for understanding why the *EEP* did not achieve its stated purpose. This thesis will demonstrate that the *EEP* failed to reduce inequalities for women in the federal Public Service workforce. While the policy appeared to promote substantive equality it did not have the mechanisms to require any substantive equality measures. Although it was required that departments and agencies point out the numerical inequalities which existed in their workplaces and address these shortcomings, the *EEP* did not state how employment conditions for women needed to be improved, did not provide methods for these improvements and did not have an effective monitoring and enforcement provision which would more likely promote substantive equality.

CHAPTER FOUR: *EMPLOYMENT EQUITY POLICY AND THE EMPLOYMENT EQUITY ACT*

This chapter argues that employment equity must promote substantive equality in order to reduce inequalities in the workplace experienced by members of the designated groups. The purpose of this chapter is to determine to what extent the *EEP* and the *EEA* will guarantee substantive equality. First, a background section provides information on the development of the *EEP* and the *EEA*. An examination of the *EEP* in achieving equality follows.

BACKGROUND

The 1995 *EEA* is a statute that emerged from about 30 years of experience with anti-discrimination programs. Employment equity started in Canada as a small experiment in eliminating workplace discrimination through a voluntary approach for a few interested employers. From this, it has changed over the years to mandatory programs which include almost all federally regulated employers with 100 or more employees, the federal Public Service and provincially regulated employers which have goods and services contracts with the federal government worth \$200,000 or more.

Initially, exclusion of certain groups from employment and from promotions was seen as a human relations problem—the result of bias or malice. To eradicate this type of conduct from the workplace, human rights legislation was enacted from the 1940s to the 1970s by both federal and provincial governments. By the mid-1970s however, questions were being raised about the overall effectiveness of these individual complaint-based statutes in combating broad-based employment disadvantages which continued to be experienced by certain groups. It became apparent that exclusion could result not only

from conscious bias, but also from unintentional practices or systems. Even a seemingly neutral employment policy or practice could have an adverse impact on the opportunities of certain groups of individuals.

The federal government began a voluntary affirmative action program in 1978 for the private industry. In 1979, it initiated one for federal contractors and Crown corporations. In 1980, a pilot affirmative action program was developed in three federal government departments, an initiative that was extended to all departments of the federal Public Service in 1983. At this time the program was directed at women, aboriginal peoples and persons with disabilities. Members of visible minorities were included in 1985. The legal basis for these programs was the *Canadian Human Rights Act*. Section 16.1 of the *Act* states that “it is not a discriminatory practice for a person to adopt or carry out a special plan or arrangement designed to prevent disadvantages . . . or to eliminate or reduce disadvantages that are suffered by any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods . . . or employment in relation to that group.”

In 1982, the *Canadian Charter of Rights and Freedoms* constitutionally affirmed the right to equality. Although some progress was being made in the federal Public Service and with private sector employers which were voluntarily implementing what was then called affirmative action, the status of the designated groups in the labour force continued to be poor. The Canadian government acknowledged in 1983 that these programs had proven inadequate and on June 27, 1983, established a Royal Commission

to look into employment problems encountered by women, aboriginal peoples, persons with disabilities and visible minorities (Abella, 1984). The Commission's terms of reference required it to "inquire into the most efficient, effective, and equitable means of promoting employment opportunities, eliminating systemic discrimination, and assisting all individuals to compete for employment opportunities on an equal basis" (Abella, 1984: ii).

Judge Rosalie Silberman Abella was appointed the Commissioner. Her *Equality in Employment: A Royal Commission Report* (Abella Report) released in 1984 contained 117 recommendations. As a result of the Abella Report, the Affirmative Action Program was revised and renamed "Employment Equity." The term employment equity refers to "employment practices designed to eliminate discriminatory barriers and to provide in a meaningful way equitable opportunities in employment." (Abella, 1984:7).

Abella recommended that a voluntary employment equity program was not sufficient. She suggested that a law be passed requiring all federally regulated employers, including Crown corporations, government departments, agencies and businesses, and corporations in the federally regulated private sector to implement employment equity (Abella, 1984:203). Employers would be obliged to develop and maintain employment practices designed to eliminate discriminatory barriers and to improve, where necessary, the representation of women, aboriginal peoples, persons with disabilities and visible minorities (Abella, 1984:255). According to Judge Abella, employment equity legislation needed to have three major components: 1) a requirement that employers implement employment equity; 2) a requirement that employers collect and annually file data, by designated group, on the participation rates, occupational

distribution, and income levels of employees in their workforces; and 3) an enforcement mechanism (Abella, 1984:255). Abella stated that “equality demands enforcement. It is not enough to be able to claim equal rights unless those rights are somehow enforceable. Unenforceable rights are no more satisfactory than unavailable ones” (Abella, 1984:10). Abella also recommended that employers be required to have employment equity committees which consisted of representatives of management, labour and designated group members in their workplaces. The goal of imposing a statutory obligation to implement employment equity, according to Abella, was to expand employment opportunities of qualified designated group members by eliminating discriminatory barriers in the workplace (Abella, 1984:255). In this regard, results, not systems, should be reviewed initially (Abella, 1984:255). If the results were found to be unreasonably low, the enforcement agency would determine whether or not they were a reflection of discriminatory practices. If they were, the employer would be advised to amend these practices (Abella, 1984:256).

In response to the Abella Report, the government announced three major initiatives. First, the *EEA* came into force on August 13, 1986. It made employment equity mandatory for federally regulated companies with 100 or more employees. The second initiative announced was the *Federal Contractors Program* for employment equity which covered companies with 100 employees or more that submit bids or tender for federal contracts to deliver goods or services valued at \$200,000 or more. These employers must certify their commitment to implement employment equity initiatives in order to be included on the list of suppliers and as a condition of their contract. The third

initiative was an *EEP* covering the entire federal Public Service, because the public service was not subject to the 1986 *EEA*.

In 1992, employment equity in the federal Public Service was given a legislative base through amendments to the *Financial Administration Act* resulting from the passage of the *Public Service Reform Act*. The obligations of the federal Public Service became comparable to those under the 1986 *EEA*.

The major difference between these initiatives and the previous ones was the change in terminology, from affirmative action to employment equity. The reason for this change was to get away from the concept of quotas associated with the American version of affirmative action.

Given the innovative nature of the program, the 1986 *EEA* stipulated that a parliamentary review committee should be established five years after implementing the *Act* to assess its impact. The committee, chaired by Member of Parliament Alan Redway noted in its report (Canada, 1992) essentially the same thing Abella had noted eight years earlier—that designated group members were not making as much progress in the labour force as they should. Although the government of the day did not respond to the Redway Report before a federal election in 1993, the new government took action when it came to power. The data on the status of designated groups demonstrated to the new government the need for strong legislative action on behalf of women and minorities. While the data demonstrated that women and members of visible minority groups were making some progress, such as increased representation in the workforce covered by the 1986 *EEA*, the labour force situation for aboriginal peoples and persons with disabilities was changing only slightly. Although the 1986 *EEA* was having some impact, it was felt progress

could be faster. As a result of the report of the parliamentary review committee and increasing pressure by well-organized advocacy groups, the government responded by developing new and improved legislation, the result of which was the *EEA* of 1995. This new *Act* received royal assent on December 15, 1995. The *Act* and its Regulations³⁰ subsequently came into force on October 24, 1996, creating a new legislative framework for employment equity that governs both private and public sector employers under federal jurisdiction. Some parts of the Public Service, including the Canadian Forces and the Royal Canadian Mounted Police were not included in the *Act*, but may be specified by Order of the Governor in Council on the recommendation of the Treasury Board. These employers argued for special exemption to accommodate their operational effectiveness. However, such a sweeping exception is clearly unjustifiable because employment equity practice recognizes that the obligation to provide equality in the workplace must take into account *bona fide* occupational requirements (BFOR)³¹. In other words, there has never been an expectation that an employer will adopt measures, employ individuals, or accommodate special needs if these clearly run counter to genuine prerequisites for the safe and effective performance of a job. The BFOR criterion has been applied to considerations of operational effectiveness in the past and would always

³⁰ “Regulations” means the *Employment Equity Regulations* made pursuant to the *Employment Equity Act*, R.S.C., c. 23 (2nd Supp.).

³¹ For example, a job may require a certain level of colour vision in order to be performed safely and efficiently, thereby precluding from consideration a person who does not meet this level. However, employers should try to find alternative approaches to the job so that such restrictive requirements can be eliminated.

be taken into account. Such an exemption may also imply, inappropriately, that operational effectiveness is somehow incompatible with the protection of designated groups' right to equitable treatment. These employers have not yet been included under the 1995 *EEA*.

Upon the coming into force of the 1995 *EEA*, the 1986 *EEA*, its Regulations and the relevant provisions of the *Financial Administration Act* were repealed. The purpose of employment equity did not change in the 1995 *EEA*. The 1995 *EEA*, however, is more detailed in its approach and is much more specific in defining employer obligations than previously existed. The most significant change for employers is that the 1995 *EEA* clearly provides the Canadian Human Rights Commission with a mandate to conduct on-site compliance reviews in order to monitor compliance. It also allows for the establishment of Employment Equity Review Tribunals to hear employment equity cases. The 1995 *EEA* also establishes that seniority rights for layoff and recall and workforce adjustment measures are deemed not to be employment barriers for the purposes of the *Act*.

The 1995 *EEA* ensures that equivalent program requirements exist for those employers that are subject to the *Act* and those that are subject to the Federal Contractors Program. The 1995 *EEA* also dispels some of the myths that surround employment equity. It states that the obligation to implement employment equity should not be construed as requiring employers to take measures which would cause them undue hardship, requiring the promotion or hiring of unqualified individuals, contradicting the merit principle in the public sector, or requiring the creation of new positions in the

employer's workforce. The 1995 *EEA* makes it clear that implementing employment equity does not require quotas.

The federal Public Service is included in the 1995 *EEA* and so is subject to the same program requirements as those facing private sector employers. Although the public service was required, before the 1995 *EEA* was passed, to implement employment equity as legislated in the *Financial Administration Act*, many private sector employers, designated group members and unions wanted the public sector to be subject to the same legislation they were. This issue was perceived as a matter of fairness.

While the 1995 *EEA* clearly outlines core employer obligations, certain essential details are left to regulations. These regulations were finalized following Canada-wide consultations with groups representing employers, labour and designated groups. In seeking to achieve its goal, the 1995 *EEA* requires employers to analyze the representativeness of their workforce, and to take action where any of the four designated groups are under-represented relative to the Canadian labour market availability of similar skilled designated group members. This action is to consist of:

- (a) identifying and eliminating employment barriers against persons in designated groups that result from the employer's employment systems, policies and practices that are not authorized by law; and
- (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in:
 - (i) the Canadian workforce, or

(ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees. (Section 5)

As mentioned earlier in this chapter, the main purpose of the *EEP* was very similar to the 1995 *EEA*: to increase the representation of designated group members in Canada in those occupations in which they are currently represented to a lesser extent than their representation in the Canadian labour market. This involved five basic steps:

1. surveying the composition of the internal workforce to identify areas where biases might be having an effect;
2. identifying and removing unfair barriers to members of traditionally disadvantaged groups;
3. putting in place policies and practices aimed at redressing the effects of past discrimination and providing equitable opportunities to members of these groups;
4. accommodating special needs, particularly those of people with disabilities; and
5. establishing goals and timetables for making the composition of the internal workforce more representative.

Furthermore, the *Financial Administration Act* also required the president of the TBS to submit an Annual Report to Parliament on the situation of employment equity in the federal Public Service.

The activities stipulated by the *EEP* were undertaken to ensure that the representation of designated group members in the various occupations was at least

proportionate to their representation in the Canadian labour market³². Some of these activities involve the creation of employment equity plans which include goals that departments or agencies intended to achieve in implementing employment equity and the timetables for the implementation of those goals. However, these plans did not have to be submitted to anyone or made available to the public. These requirements could, on the surface, be construed as promoting substantive equality. The required implementation of employment equity, the preparation and implementation of the employment equity plans could be seen to promote substantive equality.

The *EEP* did not have any mechanisms that ensured that departments and agencies were required to undertake steps to create a barrier-free working environment for the designated groups. While departments and agencies were required to implement an employment equity program and prepare employment equity plans, which included goals and timetables, there were no criteria listed to be followed by those preparing those programs and plans. Furthermore, there were no requirements to submit them or for them to be reviewed in any fashion. Nor was there any penalty if they were not created or implemented. Also, there was no penalty for failing to accomplish the goals developed in the plans. There were no fines if departments and agencies failed to develop and implement an employment equity program, did not consult with employees representatives/bargaining agents or did not prepare employment equity plans, goals and

³² Canadian Labour market for women is based on the most recent Census of Canada.

timetables. There was no penalty if a department or an agency did not demonstrate a reduction in inequalities existing in their workforce.

While the *EEP* stated that departments and agencies were to set up an employment equity program which could achieve substantive equality, there was little guidance, direction, review or monitoring, and absolutely no enforcement mechanism. The only enforcement mechanism was the accountability of Ministers to Parliament. The President of the TBS tabled an annual report to Parliament on the state of employment equity in the federal Public Service as a whole, not even by department and agency. In short, it did not ask whether there was a reduction in inequalities faced by designated group members and, therefore, it did not monitor substantive equality. The latter would happen only with enforcement requirements that guaranteed the removal of employment barriers, the implementation of positive policies and practices, that reasonable accommodation was carried out, and which set out time frames for the achievement of employment equity and that the statistics were reflective of these changes. In other words a policy that requires departments and agencies to undertake these activities must be enforced. The statistics should not be the objective of the policy but should, rather, be used as a monitoring technique, to assess whether a workforce is representative of the community. The statistics were the basis on which a department or an agency was assessed to determine if they were achieving equality.

While the *EEP* required departments and agencies to implement employment equity in consultation with employees' representatives and where applicable a bargaining agent, it did not define "consultation." Nor did it require committees to be established or the inclusion of designated group members in the consultation process.

The *EEP*'s major deficiency was the lack of an effective monitoring and enforcement provision, and the confusion as to who was to conduct monitoring and enforcing of this nature. This policy fell short of Abella's recommendation. By instituting the sort of enforcement mechanism Abella recommended in her report, the 1995 *EEA* would more likely promote substantive equality, since this would be achieved through an enforcement mechanism. Its absence was the major weakness of the *EEP*.

As noted in Chapter 3, inequalities are more likely to be reduced by legislation that promotes substantive equality rather than merely formal equality. One example of the limitations of a simple equality of opportunity initiative and the need to couple this with a more results oriented approach is the following. A number of organizations financially reimburse employees upon their completion of work-related courses taken outside the organization. It appears that this achieves equality since every employee has equal access to this benefit. However, it will not achieve substantive equality. Only those employees who have the money on hand to initially pay for the courses will be able to take advantage of this opportunity for training and the resulting promotions that are likely to occur. A number of employees might not be in this financial position and therefore substantive equality will not be achieved. Only when everyone has access to the courses will equality be realized. Substantive equality, in this example, is the elimination of barriers faced by some individuals and the implementation of positive measures to accommodate their differences.

Unlike the *EEP*, a number of revisions were made to the 1995 *EEA* which helped to promote the realization of substantive equality. These revisions are divided into two areas. The first area pertains to enforcement—what is being enforced (the collection and

reporting of numbers versus the creation of a barrier-free environment) and who is responsible for doing the enforcing. The second area pertains to the actual requirements for the implementation of employment equity—the employment equity program and the development of an employment equity plan, goals and timetables. In addition to the lack of enforcement in these areas, the *EEP* did not provide criteria to be followed by departments and agencies when complying with the requirements. These issues will be discussed later in this chapter.

This is not to say that all the problems that existed previously will be resolved with the 1995 *EEA*. A number of concerns still remain. In particular, the section which prohibits the Canadian Human Rights Commission from accepting complaints under the *Canadian Human Rights Act* based on data showing under-representation of designated group members in an employer's workforce. This provision would unfairly limit the rights of individuals and groups to file complaints when they believe they have been the subject of inequality. Another concern is the failure to include the Royal Canadian Mounted Police and the Canadian Forces immediately under the legislation. These two employers employ thousands of Canadians. Employment equity should apply without exemption to all employers under federal jurisdiction.

Enforcement

The *EEP*'s major weakness was the absence of an effective enforcement mechanism, both for what was being enforced and for who was doing the enforcing. The only enforcement mechanism this policy had was the reporting of data. While the data was a useful assessment and monitoring tool, it was only used as an instrument to indicate that problems existed. If problems were indicated, there was nothing required

under the policy to rectify these problems. It was assumed that the threat of bad publicity would force the federal Public Service to take action. However, even though some departments and agencies' records became well known and clearly demonstrated unsatisfactory effort, this frail sanction had little effect in improving their employment practices.

Under the 1995 *EEA*, the enforcement agency, the Canadian Human Rights Commission, has access to the department or the agency's employment equity plan to determine if steps have been undertaken to identify and eliminate barriers, institute positive measures and make reasonable accommodations. The enforcement agency is then in a position to determine if discriminatory practices might be in effect, conduct an investigation, and if they did exist, to order remedies (Abella, 1984: 255-56). Therefore, the numbers would be used to indicate the need for change and would not be an end in themselves.

In addition to problems with what was being enforced, there were also problems with who was doing the enforcing. Under the policy, there were no express provisions for monitoring or enforcement. While the Canadian Human Rights Commission was entitled to conduct voluntary reviews and accept third party complaints, its response was time-consuming, complex and overly bureaucratic, and did not produce significant results. It did not have sufficient independence to act with the necessary authority to monitor the performance of employers. Under the 1995 *EEA*, the Canadian Human Rights Commission is given the power to conduct on-site compliance reviews in order to monitor compliance. The 1995 *EEA* also allows for the establishment of Employment Equity Review Tribunals to hear employment equity cases. This change in the *EEA*

results in a strong enforcement mechanism and a strong enforcing body. These are major steps towards ensuring that the 1995 *EEA* is more likely to achieve substantive equality. The next major area is the implementation of employment equity programs and the development of employment equity plans.

Employment Equity Programs and Plans

Under the *EEP*, departments and agencies were required to adopt an employment equity program designed to identify and eliminate systemic barriers to employment, to institute supportive measures to accommodate members of designated groups in the workplace, to have a representative workforce, and to develop employment equity plans with goals and timetables for achieving quantitative and qualitative goals. These requirements remained the same in the 1995 *EEA* but the process of compliance was different. In addition to the enforcement concerns discussed above, the *EEP* did not set out how employment equity measures had to be implemented. Departments and agencies developed employment equity plans, goals and timetables on a voluntary basis. There were no specific requirements or standards to be followed. The 1995 *EEA* is very specific about the development and contents of the programs and plans. These programs have to be formalized, comprehensive, management-supported, and reflect a true commitment to change. Departments and agencies are accountable for their employment equity programs and plans and are audited by the Canadian Human Rights Commission to determine if they are in compliance with the 1995 *EEA*.

Policies, Practices and Reasonable Accommodation

Mandatory qualitative goals and timetables are crucial to an employment equity plan which strives to achieve substantive equality. However, they are not sufficient by themselves. The atmosphere and culture in the workplace must accommodate members of the designated groups, otherwise they will not apply for positions within the organization, they will not stay if they obtain a position, and they will not feel it worthwhile to train or develop new skills in order to move up in the hierarchy.

Special measures and accommodations are necessary to remove the effect of systemic discrimination. Systemic discrimination is unconscious and unintentional. It comes from years of doing something a certain way. In its discussion paper "Working Toward Equality," the Ontario Government notes four types of measures: barrier elimination measures, job accommodation measures, positive measures and supportive measures (Canada, 1991:35). In order to achieve substantive equality, the 1995 *EEA* requires federal departments and agencies to include all of these measures in an employment equity plan.

Barrier elimination measures permanently change employment systems and place emphasis on the implementation of policies to remove systemic or intentional barriers to employment within the workplace. Barrier elimination includes implementing barrier-free interviewing and selection policies and practices to ensure all tests or questions are job-related and free from racial, gender and disability bias. It also includes barrier-free selection involving the consideration of equivalent qualifications for jobs in which designated groups are under-represented. Examples of this would be giving recognition to volunteer experience, fairly assessing prior learning and work experience, and the

elimination of non-essential job qualifications and requirements that pose barriers to the employment of designated group members, including requirements for Canadian experience.

Job accommodation measures result in the accommodation of individual differences and eliminate systemic barriers. Examples of job accommodation measures include the adoption of technical aids or devices, the modification of job duties, Braille print or readers, visual alarm systems and shift schedule adjustments (Canada, 1991:35).

Positive measures are temporary measures to be used until equitable representation occurs. They are used to increase the hiring and promotion of designated groups. Increasing the number of designated groups, and creating a critical mass helps to foster a chain reaction. The increased presence of designated groups creates a more supportive workplace climate. Designated group members will then be more likely to remain in the workplace. In turn, their presence will attract other members of their group, and so on (Canada, 1991:35). In addition positive measures that include using external and internal recruitment policies and practices that are appropriate to inform designated group members of employment opportunities should be used. Examples include advertising job opportunities in newspapers and other media which focus on audiences from the designated groups, and disseminating recruitment information through community organizations representing designated group members. The creation of bridging positions, that is, the establishment of positions which allow designated group members to acquire skills and abilities to compete for positions in which they are underrepresented, should be encouraged.

Supportive measures are designed to remove barriers which have a disproportionate impact on designated group members. Examples of supportive measures would include the implementation of policies which permit an individual to balance work and family responsibilities, flexible working arrangements and the establishment of mentoring programs (Canada, 1991:36).

The Abella Report noted that in order for employment equity to exist, there must be affordable access to child care for working parents. If there is no access to child care which suits their shifts or their hours of work, parents do not have equal opportunity in the workplace. The school day is shorter than the working day, there is no public provision for child care during the summer, parental and family leave provisions are inadequate for those with dependent children. Women still bear the majority share of family responsibilities. For them to achieve equality in the workplace, departments and agencies must adjust their expectations of workers and acknowledge that female employees have family responsibilities that may need to be attended to during the working day or night. While it is recognized that the *EEP* and both *EEA* did not and will not solve many of these problems, a number can be addressed such as the issue of hours of work. In 1999, the TBS developed a Telework Policy which authorizes an employee to perform the duties of his or her position that are ordinarily performed at the employee's designated workplace at an alternative location, usually the employee's home. The issue of child care may be more difficult to address because of the employer's perception associated with the cost of such a program.

One of the major problems faced by designated group members is racial and sexual harassment. In order to address this problem, policies designed to prevent sexual

and racial harassment must be a requirement of the employment equity legislation, and it should include severe penalties for offenders. On-site training and education should be conducted during regular working hours for all employees to sensitize them to the issues, and an internal complaint mechanism should be established. Sensitivity training to ensure a welcoming and accessible environment for persons with disabilities should be required.

The importance of language training for immigrants has been repeatedly emphasized, particularly for immigrant women³³. Universal access to language training should be a basic right since it is essential to the immediate settlement and long-term integration of immigrants into Canadian society. However, the provision of language training is of little value if it is inaccessible or provided at a time when family responsibilities prevent attendance. Adequate language training should be supported with adequate child care and transportation allowances.

Flexible working hours and part-time employment can benefit women with family responsibilities. However, it must be ensured that flexible and part-time workers are not abused by organizations. Employees working in these positions should be paid the same rates as full-time workers and they should receive the same, albeit pro-rated, benefits. Part-time workers who wish to work full-time should be considered for full-time positions, as they become available. The employment equity plans should contain an

³³ See the Royal Commission on the Status of Women (1971).

analysis of part-time workers who want to move into full-time work, goals for moving them into these jobs and provisions for training where applicable.

The employment equity policies, practices and accommodation requirements were not listed in the *EEP*, nor was their implementation mandatory. Equality in the workplace could not be achieved if policies, practices and reasonable accommodations were only codified, not implemented. Under the 1995 *EEA*, it is mandatory for departments and agencies to include them in their employment equity plan. Moreover, departments and agencies have to provide guidance, direction and specific education on what they entail. These plans are submitted to the Canadian Human Rights Commission for monitoring. Organizations that fail to implement these plans are considered to be in non-compliance.

Numerical Goals and Timetables

An important method of ensuring reduction in the workplace inequalities experienced by women is the adoption of effective and mandatory qualitative goals and timetables. The Human Rights Tribunal and the Supreme Court of Canada decisions found in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* and *Action travail des femmes*³⁴ provide a good example of concrete changes being required of an employer, Canadian National Railway (CN), to improve the employment situation of women. While this case was a decision of the tribunal set up

³⁴ (1984), 5 Canadian Human Rights Reporter (C.H.R.R.). D/2327 (Cdn. Human Rights Trib.). (1987), 8 C.H.R.R. D/4210 (S.C.C.).

under the *Canadian Human Rights Act* which was upheld by the Supreme Court of Canada and thus does not directly relate to the *EEP*, it certainly pertains to equality in employment and provides a good precedent for requirements of data collection, reporting and goals.

The order of the tribunal provides excellent quantitative and qualitative examples of what an employer can be reasonably and legally required to do. The first part of the order required CN to cease and/or alter certain discriminatory hiring and employment practices. The second part set a goal of 13% female participation in the targeted job positions, and established a requirement that CN hire at least one woman for every four job openings until that goal was reached. Women held only 0.7 percent of blue-collar jobs at CN. The third part required the filing of periodic progress reports with the Canadian Human Rights Commission.

The Supreme Court went even further and stressed the fact that the goal of 13% found in the tribunal's order appeared to be modest considering that the 13% participation rate of women in blue collar jobs across Canada at the time arguably constituted a significant under-representation of women in that segment of the labour market³⁵. It underscored that the objective of 13% female participation was not arbitrary, for it corresponded to the current national average of women involved in non-traditional occupations³⁶. This rate of remedy in both decisions stresses that the number of members

³⁵ *Ibid.* at D/4217.

³⁶ *Ibid.* at D/4229.

of the designated groups present can be an important indicator of discrimination and can be an important factor in eliminating systemic discrimination, and that the Canadian labour market availability shows women's under-representation in that labour market segment. To truly measure the effectiveness of the tribunal and Court orders, one would have to actually look at the CN employment profile at some subsequent time.

The Supreme Court decision quoted Abella (1984) and noted, among other things, that systemic discrimination in employment is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, which may not have been designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces; for example, that women "just can't do the job."³⁷ The Court noted what the tribunal had found, that the presence of only a small number of women in non-traditional jobs tended to perpetuate exclusion, and, in effect, to cause additional discrimination³⁸. The Court also stated that in order to render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participants in the workforce, it is essential to combat the effect of past systemic discrimination³⁹. This requirement for "critical mass" could not possibly have been

³⁷ *Ibid.* at D/4227.

³⁸ *Ibid.* at D/4229.

³⁹ *Ibid.* at D/4232.

reached by setting the existing participation rate in non-traditional jobs (13%) as the hiring goal. Thus they have doubled the hiring goal to one in four hires to attain the 13% participation rate in non-traditional jobs.

It is also significant that the order of the tribunal was expressed in terms of an “employment” goal, rather than a “hiring” goal. The tribunal held that the systemic discrimination at CN occurred not only in hiring but also once women were on the job. The evidence revealed that there was a high level of publicly expressed male antipathy toward the women in non-traditional jobs which contributed to a high turnover rate among women⁴⁰. As well, many male workers and supervisors saw any female worker in a non-traditional job as “upsetting” and a “job thief.” To the extent that promotion was dependent upon the evaluations of male supervisors since a disproportionate number of males held supervisory positions, women were at a significant disadvantage. Moreover, because women generally had a low level of seniority, they were more likely to be laid off, thus further reducing their representation in the category. For the employment equity program to be effective in creating the “critical mass” and in destroying stereotypes, the goals had to be expressed in terms of actual employment numbers. Otherwise, the reasonable objectives of the scheme could have been defeated. The dominant purpose remained to improve the employment situation for women at CN in the future⁴¹.

If the reasoning of these two decisions was followed, in order to achieve substantive equality, the *EEP* needed to be revised so that the setting of employment

⁴⁰ And presumably, fed the myth that “women can’t hack it in the blue collar jobs.”

equity representation goals would not be a random process essentially developed by departments and agencies. The end result of an organization's quantitative portion of their employment equity plan would be clearly established, closely monitored and strictly enforced. The specific procedure for setting goals and timetables is important since it determines the reliability and validity of the data which is used to measure an organization's progress in reducing inequalities. None of these requirements were established under the *EEP*.

This chapter argued that employment equity must promote substantive equality in order to reduce inequalities in the workplace experienced by members of the designated group. The chapter provided background information on the development of the *EEP* and both *EEA*, and determined to what extent the *EEP* guaranteed substantive equality. On its surface, the *EEP* appeared to be based on substantive equality. It was not. The *EEP* did not require "results"—it only required the reporting of data. There was no penalty if the data did not demonstrate a reduction of the inequalities that existed in a department or an agency's workforce. While departments and agencies were required to implement employment equity programs and prepare employment equity plans which included goals and timetables, there were no criteria listed to be followed by those preparing those programs and plans. Furthermore, there was no requirement to submit them or review them by any monitoring agency. Nor was there any penalty if they were not created or implemented. Also there was no penalty for failing to accomplish the goals developed in the plan. While the *EEP* stated that departments and agencies were to

⁴¹ (1987), 8 C.H.R.R. at D/4232 (S.C.C).

set up an employment equity program which could achieve substantive equality, there was little guidance, direction, review or monitoring, and no enforcement. For these reasons, the *EEP* could not actually lead to the reduction of inequalities in the workplace of the federal Public Service.

CHAPTER FIVE: FEDERAL PUBLIC SERVICE WORKFORCE

The purpose of this chapter is to assess the effectiveness of the *EEP* in assisting in the reduction of the employment inequalities experienced by women in the federal Public service. This chapter is solely based on quantitative analysis. This analysis will support my argument that the *EEP* was not successful in achieving the result intended, to reduce the inequality that existed in the employment situation of women in the federal Public Service. The chapter is conducted in two parts. First, a general overview of the total workforce in the federal Public Service and the changes that occurred from 1991 to 1998. This part is intended to provide the readers with a general overview of the demographic profile of the federal Public Service as a whole. Second, I will describe the employment situation of women in the federal Public Service.

The chapter will demonstrate that while there was some improvement between 1991 and 1998⁴², there remain major problems for women in the workplace. It will be shown that women have been provided with employment opportunities in the federal Public Service; their overall representation is not the major problem. However, these opportunities have not been equal across the board. Of far greater concern is their segregation in the administrative support occupations, compression in low level positions,

⁴² The year 1991 is the first one for which there was access to a full database. The year 1998 was chosen because it was the last year for which departments and agencies reported under the *EEP*. Although, the *EEA* came into force in 1996, departments and agencies had a full-year grace period to update their system. The first reporting year under the 1995 *EEA* was, therefore, between April 1, 1998, and March 31, 1999

low representation in high level positions, and lack of promotions into these high level occupations.

INTRODUCTION⁴³

To perform well, the Public Service must constantly attract, motivate and retain a corps of talented and dedicated public servants. As in many other public sector organizations, factors such as downsizing, loss of experienced employees, competition with the private sector for employees with critical skills, and a lack of attention to medium and long-term human resources planning have led to the need to focus on the health and sustainability of the federal Public Service. The planning challenges for the Public Service of the future include: the ageing of the Public Service workforce, the critical shortages in certain occupations, changes in the way that work is organized across government, under-representativeness and the employment equity program.

In response to these challenges, the Clerk of the Privy Council set forth a renewal initiative for the federal Public Service, known as *La Relève* (Canada, 1997b). Initial plans for this renewal identified the need to strengthen the capacity to collect, analyze and apply demographic data as a key input to human resources and business planning processes. This capacity is essential for the identification of public service wide risks and trends that are a critical element in the articulation of departmental plans.

⁴³ While originally developed for inclusion in this thesis, the material in this chapter draws extensively upon a report I authored which has, in the interim, been published by the Public Service Commission of Canada under the title *Demographic Profile of the Federal Public Service for the Fiscal Years 1994 – 1997*.

Comprehensive demographic databases or other data sources are required for the development of employment equity strategies, the forecasting of future recruitment needs, ensuring adequate planning for the executive cadre, replenishing the pool of younger workers, and enhancing development and mobility opportunities for the existing workforce. The three central agencies in the federal Public Service, the Treasury Board Secretariat, the Public Service Commission and the Privy Council Office focused on eight key project areas. Recruitment, Employment Equity and Retention Strategy were among these eight projects. The Privy Council document states:

The number of young people in the Public Service is historically low. The Public Service is not representative of the population it serves. The age profile of the Public Service, especially the leadership pool, is a serious concern (including executive-feeder groups). The rate of retirement among managers, particularly at senior levels, is becoming high. There is an impending critical skills shortage in specific areas. And there is insufficient data on the Public Service work force to support strategic human resources planning and forecasting.

These factors point to the urgent need for a comprehensive recruitment and retention strategy to ensure the continuity of a knowledgeable and skilled work force that is representative of the population it serves.
(Canada, 1997b:7)

OVERALL DEMOGRAPHIC PROFILE

As a result of spending reductions and the ongoing reorganization of the federal Public Service emerging from Program Review, the total number of employees in the

Public Service has decreased significantly in the past eight years, from 240,537 in 1991 to 194,728 in 1998, a decrease of 19.0% or about 46,000 employees.⁴⁴ (see chart 1).

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373A, 1991 to 1998.

During this period, indeterminate employment dropped from 198,990 to 159,669, a decrease of 19.8%, and term employment decreased from 41,460 to 27,181, a decrease

⁴⁴ All data in this chapter is based on year end as of March 31. This information relates to all employees in that part of the federal Public Service subject to the *Public Service Employment Act (PSEA)*.

of 34.4% (see chart 2). Approximately another 8,000 employees worked in the federal Public Service in casual⁴⁵ and or seasonal jobs.

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373A. 1991 to 1998.

Despite these major changes in the size of the federal Public Service, the proportion of indeterminate employees remained relatively stable. The proportion of indeterminate employees dropped from 82.7% of the total workforce in 1991 to 82.0% in 1998. During this period, the share of term employees decreased from 17.2% to 14.0%,

⁴⁵ "Casual employees" refers to people hired for a specified period of no more than 90 days by any one department or agency during the fiscal year. Casual employment was introduced in 1993-94. To accommodate new legislative provisions that were implemented on June 1, 1993, the Public Service Commission introduced new procedures whereby departments were to report all specified period appointments, irrespective of length. Previously departments were required to report only specified period appointments of six months or more.

whereas employment of casuals increased to 2.5% of the total federal Public Service population. These latter figures include both Cooperative Education Program (COOP) and Federal Student Work Experience Program (FSWEP), as well as regular specified period hires. While this change is relatively small overall, one can expect this trend to continue in the future, as this reflects a general trend in employment patterns within the Canadian labour market (Canada, 1996b:22).

Age Profile

Program Review has also produced a shift in the age profile of the federal Public Service. In the eight years between 1991 and 1998, there was a substantial decline in the number of public servants under the age of 35 (see chart 3). This is a direct consequence

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373D, 1991 to 1998.

of little new hiring and substantial downsizing across the federal Public Service. These changes are a result of a number of factors including the ageing of the baby boom

generation and the impact of federal Public Service downsizing, which tended to turn off recruitment and promotions, and to increase separations⁴⁶ at the highest end of the spectrum. The proportion of employees under 35 years declined from 35.1% in 1991 to 23.8% in 1998. The proportion of employees over 55 decreased from 7.9% to 6.1% in 1998. At the same time, those between the ages of 35 and 55 have increased from 57.1% to 70.2%.

The constriction of the overall age pattern could potentially create a number of difficulties in terms of managing the ongoing planning of the federal Public Service, and meeting existing demographic challenges. The incentive programs⁴⁷ have significantly reduced the Public Service replacement potential for the next five to six years. The vast majority of persons who would have retired between now and 2004 have left the federal Public Service (through cash-outs) and their positions have been abolished. In effect, this curtails opportunities to fill positions with persons under 35 and limits the ability of the government to deal with pressing corporate issues such as employment equity.

Another effect of this compression in age distribution is that starting in the year 2004, those presently in the age group 45-54 will be eligible to retire in increasingly large numbers. Without a well planned strategy, the federal Public Service could end up emulating existing problems.

⁴⁶ "Separations" includes people who retired or resigned, as well as persons whose specified period of employment (terms) in the federal Public Service ended.

⁴⁷ Early Retirement Incentive (ERI) and the Early Departure Incentive (EDI) were in effect across the Public Service in 1995-96 through 1997-98.

There are other demographic factors outside of Program Review that will impact on future departure patterns. One important variable is the age difference between genders. Women are presently concentrated in the younger age bands while men tend to be concentrated in the age bands of 46-55 and above. About 35.3% of men are 45 years and above compared to only 26.7% for women⁴⁸. The difference in age distribution between men and women can be explained in part by the effect of past discrimination faced by women and by the fact that, until recently, women tended to leave the workforce earlier than men. Given that women now remain in the labour force longer and do not take as much time out for child bearing as they once did, it is probable that the population of women will exceed that of men in the near future. This is evident in the dramatic rise in the number of women in the federal Public Service over the last 10 years.

Changing Nature of Work

The nature of work is undergoing pivotal changes largely in response to the introduction of new technologies and wide-spread multi-skilling. These factors have significantly affected the types of jobs performed by employees, mainly increasing the demand for skills such as policy analysis and computer specialists while decreasing the need for clerical work. Work is becoming more knowledge based. A shift in skill sets such as higher educational requirements, downsizing in the federal Public Service, the

⁴⁸ Source: Public Service Commission. Monitoring and Information Directorate, Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373D, 1991 to 1998.

introduction of new technology, and devolution of service delivery have all contributed to the occupational re-organization in the federal Public Service. While downsizing has affected all occupational categories, the impact of the reductions has been less dramatic in the scientific and professional, and administrative and foreign service occupational categories. The result has been a shift in the public service population (see chart 4) away from the administrative support, technical and operational categories toward the scientific and professional, and administrative and foreign service categories. This trend, which has been occurring since before the Program Review, is evidence of the increasing “professionalisation” of the federal Public Service.

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373B. 1991 to 1998.

Recruitment

Recruitment into the federal Public Service has fluctuated over the eight-year period between 1990-91 and 1997-98. The total number of indeterminate and term employees recruited almost doubled during the eight-year period, from 11,627 to 21,988, but peaked at 33,060 in 1994-95 (see chart 5). On a face of it, recruitment seemed to have increased significantly; however, a more detail analysis shows that most of the recruitment (88%) was for term jobs.

While “permanent” jobs declined, there was a shift in recruitment toward more “at risk” term and casual jobs over the eight-year period. In 1990-91, indeterminate recruitment accounted for 54% of that for the total federal Public Service, by 1997-98, this proportion only represented 12%.

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate, Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373A, 1991 to 1998.

Separations

There has been a marked increase in separations of federal Public Service employees over the eight years, from 18,846 in 1990-91 to 29,775 in 1997-98 (see chart 6). This represents a two-fold increase (from 8.2% to 16.9%) in the overall separation rate for the federal Public Service over this period. During the three years of Program Review between 1995 to 1997, over half (52.3%) of the separations were the result of the ERI and EDI incentive programs.

A growing concern in the federal Public Service is the large number of expected departures in five to ten years from now. Retirements will increase dramatically, starting in five years, and will peak in 10 to 15 years as the majority of baby boomers reach

Source: (Nehmé, 1998)

Data source: Public Service Commission, Monitoring and Information Directorate, Monitoring and Analysis Division, Reporting and Analytical Services, Report: DS26373A, 1991 to 1998.

retirement age. Based on projections which take into account age and years of service, it is estimated that 9.3% (or 16,000) of the current Public Service indeterminate population will be eligible to retire in the next five years⁴⁹. This proportion is estimated to increase dramatically between the year 2003 and 2013 due to the increase in the age profile of the federal Public Service⁵⁰.

Promotions

Promotions in the federal public service declined significantly in the eight-year period studied. It declined from 27,245 in 1991 to a low of 9,921 in 1996, and increased again to 19,792 in 1998, a decrease of 27% over the whole period (see chart 7). The decline occurred in indeterminate jobs only. However, 87% of Public Service promotions occurred in indeterminate positions.

⁴⁹ Data is based on information provided by the Public Service Information Visualization System.

⁵⁰ Note that this projection is based in current static population, therefore, one has to be careful in drawing this conclusion. It is clear that any projections or forecasts of future staffing patterns crucially depend on the assumptions made. There are various reasons why these assumptions may not be realized, such as, dramatic changes in recruitment patterns.

Source: (Nehmé, 1998)

Data source: Public Service Commission, Monitoring and Information Directorate, Monitoring and Analysis Division, Reporting and Analytical Services, Report: DS26373A, 1991 to 1998.

WOMEN IN THE FEDERAL PUBLIC SERVICE

One of the key issues for the federal Public Service continues to be employment equity. Over the last decade, employment equity efforts in the federal Public Service have not significantly improved the employment situation of women.⁵¹ This section assesses the effectiveness of the *EEP* in assisting in the reduction of employment inequalities experienced by women in the federal Public Service.

⁵¹ Data on women were obtained from two files: appointment data received from departments and the Public Works and Government Services Canada Pay System.

Representation

From 1991 to 1998, there were positive and negative changes in the employment situation for women in the federal Public Service. The positive changes included an increase in their overall representation, from 46.8% in 1991 to 50.8% in 1998. Their representation has exceeded that in the Canadian labour market of 48.7% (see chart 8).

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373C, 1991 to 1998.

In contrast to these positive changes, there were a number of negative trends. Women remained concentrated in term employment. In 1991, 23.8% of all women were employed in term positions. By 1998, the proportion had dropped to 18.8%. Still with this decline, women remained highly concentrated in term jobs compared to their male counterparts. The proportion of men employed in term positions decreased from 11.5% in 1991 to 9.8% in 1998.

Despite the increase in the overall representation of women, they remain occupationally segregated. In 1998, 48.3% of women remained concentrated in the administrative support category. The comparable figures for men were 9.7%. In 1998, only 0.8% of all women in the federal Public Service were employed in the executive group (EX) compared to 0.7% in 1991 (see chart 9). In 1998, men accounted for more than triple (2.5%) the figure of women in the EX group.

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373B. 1991 to 1998.

The pattern of low representation of women at senior levels is changing. Over the past eight years, there have been substantial increases in the number and representation of women in the EX group. In 1998, 709 or 24.3% of incumbents of EX positions were women, compared with 371 or 13.6% eight years earlier. However, this progress was not consistent across all levels; there remain significant compression problems. Among those executive women, over 80% were classified at the lower levels of the EX group, namely

EX01 and EX02 levels, while only 1.7% were at the highest level (EX05). This compares with 75% and 3.0% respectively for executive men. Therefore, even with the federal government's efforts, the creation of the *EEP*, and some changes in the situation of women, these statistics reveal that much remained to be done as there continued to be under-representation of women in the federal Public Service. There was little change in women's representation in non-traditional occupations or in the senior levels. The goal of equitable representation and fair distribution within the federal Public Service of women clearly had not occurred.

The ability of the *EEP* to assist in the reduction of workplace inequalities for women varied between departments and agencies. There were positive changes between 1991 and 1998 for some departments and agencies, but these positive changes did not occur across the federal Public Service. From a total of 70 departments and agencies with 100 or more employees, only 14 met or exceeded the Canadian labour market availability rate for women. Moreover, even though some departments and agencies achieved an overall representation of women at a macro level, significant problems remained at the micro level. Women in most of these organizations remained under-represented in the executive group and in the non-traditional occupations.

Recruitment, Promotions and Separations of Women⁵²

During the eight-year period studied, there was a total of 101,346 women recruited to the federal Public Service. On the positive side, over 60% of all recruitment activities during the total period belonged to women. However, the negative side to this is that over 90% of the women were recruited into term jobs and less than 10% were recruited for indeterminate jobs (see chart 10).

Source: (Nehmé, 1998)

Data source: Public Service Commission. Monitoring and Information Directorate. Monitoring and Analysis Division. Reporting and Analytical Services. Report: DS26373A. 1991 to 1998.

⁵² Data on term employment have to be interpreted with caution, since the measurement of inflow and outflow in the federal Public Service may include more than one action for term employees. For example, a single individual may be renewed as a term employee four times during the year, accounting for four separations and four recruitment actions.

Women's share of recruitment increased significantly during the eight-year period, from 48.3% to 61.6%. This is, however, mainly due to the increase in their share of recruitment in term jobs rather than indeterminate. Their share of recruitment exceeded their Canadian labour market availability of 48.7%. This means that women in the public service are being recruited at a higher level than in the Canadian labour market generally. However, in 1998, about two-thirds of women were recruited in the administrative support category and only 0.3% were recruited in the executive group. The comparable figures for men during the same period were 22% and over 1% respectively.

Of the total promotions in the federal Public Service, the proportion of promotions that went to women decreased during the eight-year period, from 53.6% to 52.3%. This share still exceeded their internal representation in the federal public service of 50.6% and exceeded their Canadian labour market availability. However, 55.3% of all promotion activities for women were in term jobs compared to 41.8% for men. Moreover, similar to the trends in recruitment, two-third of the promotions of women occurred at the administrative support level.

The separations of women from the federal Public Service were also a cause of concern. During the eight-year period, almost 55% of all separations were women. Moreover, their rate of separations compared to men was disproportionately high. It varied from a low of 8.8% in 1993 to a high of 33.4% in 1995, whereas for men, it ranged from a low of 6.4% to a high of 28.9%.

On the face of it, women seemed to be doing well in the federal Public Service⁵³: their representation increased during major downsizing, their share of recruitment also increased during the past eight years, and their share of promotions remained higher than their internal representation. They were also represented and recruited at a higher level than their Canadian labour market availability. Despite these improvements, almost half of all women (48.3%) remained employed in the administrative support category compared to only 9.4% of all men. Moreover, they remained highly concentrated in term employment, and most of their recruitment and promotions occurred in term positions and in low level positions within the federal Public Service. Women also had a disproportionately high separation rate compared to men.

Barriers and glass-ceilings remained in the system. Women were still finding it difficult to break into non-traditional areas of employment and they continued to be under-represented in technical and operational areas. Only 4.5% and 3.3% respectively of all women were employed in the technical and operational categories compared to 14.3% and 20.1% for men. Moreover, despite increases in representation over the eight years in the executive group, representation remained below that of the Canadian labour market for that group.

⁵³ This is for comparison purposes only. For those private sector employers subject to the *FEA*, the representation of women in the private sector was 44.3% in 1998. Women's share of hiring was 41.4% in 1998 (Canada, 2000:79). However, it should be cautioned that when interpreting the data between the public and private sector, the situation of women in the private sector is beyond the scope of this thesis.

There is obviously much progress and many changes yet to be made in order to meet the corporate objectives of achieving a representative Public Service which reflects the Canadian population across all levels of the federal Public Service and in all departments and agencies.

While recruitment is a major avenue for creating a representative workforce, demographic analysis demonstrates that recruitment is just one element of this strategy. Any successful strategy for addressing equity issues must be based on a comprehensive understanding of the demographic structure of the workforce and a well planned course of action. Age distribution, gender, recruitment, promotion and departure patterns all impact differently on the planning for the various groups and levels within the federal Public Service. While there has been a variety of improvements in the situation of women in the federal Public Service, the *EEP* has not had a significant impact in its goals of reducing inequalities faced by women in the federal Public Service workplace.

As indicated earlier in this chapter, the analysis described above was based solely on quantitative data and shows only part of the picture. To reach a full and meaningful conclusion regarding the situation of women in the federal Public Service, one needs to look beyond the quantitative data and analyze policies and practices to determine if discrimination exists, and to institute special measures and accommodations to remove the effect of discrimination. The statistics can only be used as an instrument to indicate that problems existed; they do not, however, assess departments and agencies' accomplishment towards achieving a representative workforce.

CHAPTER SIX: CONCLUSION

The different approaches to equality in Canada examined in this thesis demonstrate the tension between the rights of individuals and groups. Formal equality prescribes neutral and equal protection of the law. As a result, it ensures that legislation treats those who are similarly situated in the same way in order to promote formal equality. People who are alike are to be treated alike because everyone has the right not to suffer discrimination. The objective of substantive equality is also to prevent discrimination but, in contrast to the focus on purely formal equality, it emphasizes the need of special remedial provisions for disadvantaged group members in order to facilitate substantive rather than merely formal equality. The goal of substantive equality is to ameliorate the position of disadvantaged groups in relation to non-disadvantaged groups in society.

The thesis observed that in the interpretation of the *Charter*'s equality provision, the Supreme Court generally follows a substantive approach to Section 15. This is logical as the clause expressly guarantees "equality under the law" and "the right . . . to the equal benefit" of the law, a formulation which goes beyond the formal equality focus of the Bill of Rights. Therefore, the effort of equality seekers to move beyond the limitations of the Court's decisions under the Bill of Rights, which encouraged judicial restraint and a formal approach to equality, appears to be (at least partially) successful.

The *Charter*'s guarantee of equality in Canada is a complex right. It applies to "every individual . . . without discrimination" so everyone is equal under the law, yet it can also protect laws that exclusively benefit disadvantaged groups in society.

Legislative attempts to eliminate stereotypes and structural barriers against disadvantaged

groups can produce public discontent because proactive measures may be perceived to violate the commonsense notion of the right to equality. The backlash against the role of the positive state is a serious impediment to the achievement of substantive equality. This was perhaps most evident in the 1995 Ontario election, when the Progressive Conservative Party during their campaign promised to eliminate the controversial public policy of employment equity.

In terms of promoting employment equity programs, the *Charter* 15(2) has provided good support. The Supreme Court of Canada has also showed us, through the decisions examined in chapter 3, the important aspects of some of the discussions with respect to Section 15 and what is required to afford equality. These decisions by the Court are a step forward in the fight for equality rights of disadvantaged groups and should provide a useful guidance for policy and programs that are directed toward attaining substantive equality.

Equality seekers and others in Canadian society should remember the following testimony of the editor and publisher of *Canadian Human Rights Advocate*, Kathleen Ruff:

While the *Charter* is a legal document, it is also a political document. The legal approach is one route with many hurdles, particularly for those Canadians who are the most disadvantaged and the most powerless. To be effective and not to be just fine words, the *Charter* needs commitment and leadership by government in adopting policies and changing laws to redress discrimination.⁵⁴

⁵⁴ Kathleen Ruff, cited in Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs. *Equality for All*. 1985. P.129.

This thesis has also shown that the *EEP* did not promote substantive equality and has not had a significant impact on reducing the employment inequalities experienced by women in the federal Public Service. There were no mechanisms to ensure employers implement employment equity programs and employment equity plans. Unless employment equity legislation promotes substantive equality, it is unlikely to reduce the inequalities faced by women. The 1995 *EEA* provided changes which could possibly correct some of the problems and which would incorporate the theory of substantive equality resulting in a more equitable workplace for all employees. Only by having a "results oriented" approach will discrimination for these individuals be reduced in the workforce. Mandatory quantitative and qualitative goals and timetables and an effective enforcement mechanism are the fundamental elements to ensure that employment equity legislation promotes substantive equality and will result in equality in employment.

The statistical chapter 5 appears to show that there was improvement from 1991 to 1998 in the employment situation of women in the federal Public Service. However, this improvement was not significant and was only on the surface. Although the *EEP* was in place to promote equality in the federal Public Service for women, there remains much to be concerned about in their employment situation in the federal Public Service and in achieving equality in the workplace.

This suggests that only when departments and agencies are forced to reduce the barriers faced by the women or any of the designated groups, will they invest the resources necessary to effect the fundamental changes required. In addition, top-level commitment is an important aspect for legislation to succeed. Without commitment from senior management in the public service, any legislation would fail to achieve its

purpose. Based on this interpretation, the 1995 *EEA* with its changes could possibly correct some of the problems and incorporate the theory of substantive equality, resulting in a more equitable workplace for all employees.

The thesis has shown that until employment equity laws actually require results and enforce change, they will not be effective in reducing the inequalities which existed and still exist.

Research Gaps and Further Study

This thesis provided an examination of the equality legislation in the Canadian federal Public Service. It provided an assessment of the employment situation of women only. It was not within the scope of this thesis to explore inequality experienced by the other designated group members. Both the *EEP* and the *EEA* lack a subdivision of target categories; it is assumed that an increased representation of women demonstrates decreased discrimination and that groups, such as the visible minorities, form a homogeneous category that experiences discrimination in a uniform way. Because members within a target group may achieve benefits at varying rates, such broad categories may mask longstanding discriminatory practices against specific subcategories, for example, blacks, Chinese, Japanese. Further research and analysis need to explore the area of multiple disadvantages in order to determine the extent to which barriers to employment exists for all members of designated groups and the success of the employment equity legislation.

The federal Public Service currently collects, through voluntary self-identification, data on designated groups by subcategories. However, the data is very

limited and inaccessible for research and analysis. There is a need for more quantitative and qualitative research at subcategory levels.

An in-depth qualitative analysis through the use of surveys and interviews would also be important in order to fully understand the extent of discrimination facing women and other designated groups.

There is also a need to examine the impact of employment equity legislation on its total universe, not only the federal Public Service. The federally regulated employers, which include large employers such as all major banks and large communication and transportation industries, account for a significant part of the workforce subject to the *EEA*. It would be important to compare the federal Public Service with the private sector to determine if employment equity is working better in some industries.

BIBLIOGRAPHY

- Abella, Judge Rosalie Silberman. 1994. "Equality, Human Rights, Women and the Justice System". *McGill Law Journal* 489. 39 (1994).
- . 1987. "The Dynamic Nature of Equality". pp. 3-10 in Martin, Sheilah L. and Kathleen E. Mahoney, Eds. *Equality and Judicial Neutrality*. Carswell, Toronto.
- . 1985a. "Equality at Work and at Home". *Policy Options Politiques*. 6(10):27-32.
- . 1985b. "Toward Employment Equality for Women". *Canadian Business Review*. 12(1985) Summer: 7-14.
- . 1984. *Equality in Employment. A Royal Commission Report*. Ministry of Supply and Services Canada, Ottawa.
- Baker, David. 1987. "The Challenging Norms of Equality in the Supreme Court of Canada." *Supreme Court Law Review*. Volume 9. pp. 497-555.
- Bayefsky, Anne F. 1985. "Defining Equality Rights." In *Equality Rights and the Charter of Rights and Freedoms*. Anne F. Bayefsky and Mary Eberts (Eds.) Toronto: Carswell, pp. 1-79.
- Brodsky, Gwen. 1987. "Women and the Canadian Charter of Rights and Freedoms." In *The Canadian Women's Legal Guide*. M.J. Dymond. Toronto: Doubleday. pp. 319-336.
- Brodsky, Gwen and Shelagh Day. 1989. *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* Canadian Advisory Council on the status of Women, Ottawa.
- Canada. 1985a. *Canadian Charter of Rights and Freedoms*, R.S.C. (Constitution Act 1982, Part O of Schedule B of the Canada Act, 1982. U.K. 1982.
- . 1985b. *Canadian Human Rights Act*. R.S.C. 1985, C.H-6.
- . 1985c. *Employment Equity Act*, R.S.C. 1985, C.23.
- . 1985d. *Public Service Employment Act*, R.S.C. 1985, C.54.
- . 1985e. Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs. *Equality for All*. Ottawa: Parliamentary Committee on Equality Rights.

- 1986. *Canadian Human Rights Act*. "Equal Wage Guidelines". Legislation and Regulations. *Canadian Human Rights Reporter*. February/March 1987.
- 1990. Task Force on Barriers to Women in the Public Service, *Beneath the Veneer: Volume 1, 2 and 3*. Minister of Supply and Services Canada, Ottawa.
- 1991. Minister of Citizenship. "Working Towards Equality. The Discussion Paper on Employment Equity Legislation". *Office of the Employment Equity Commissioner*.
- 1992. Parliament. House of Commons. *A Matter of Fairness. Minutes of Proceedings and Evidence of the Special Committee on the Review of the Employment Equity Act*. 24th Parliament. 3rd Session. Ottawa: Queen's Printer for Canada.
- 1994a. *Financial Administration Act*, R.S.C. 1994, C.F-10.
- 1994b. Treasury Board of Canada. *Employment Equity in the Public Service: Annual Report 1992 – 1993*. Ottawa: Communications and Co-ordination Directorate.
- 1995a. *Employment Equity Act*, R.S.C. 1995, C. 23.
- 1995b. *Employment Equity Regulations*, R.S.C. 1995, C. 23.
- 1995c. 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.
- 1996a. Canadian Human Rights Commission. *1996 Annual Report*. Ottawa: Minister of Public Works and Government Services Canada.
- 1996b. Human Resources Development Canada. *The Future of Work: Trends in the Changing Nature of Employment*, Applied Research Branch, Strategic Group
- 1996c. Statistics Canada. *Census 96*. Ottawa: Supply and Services Canada.
- 1996d. Treasury Board of Canada. *Employment Equity Policy*. Internet edition available at: http://www.tbs-sct.gc.ca/ee/ENG/ABOUTEE/Policies/aboutee_1-4.html.
- 1997a. Canadian Heritage. *The Contents of the Canadian Charter of Rights and Freedoms*. A Guide produced by the Human Rights Directorate. Internet edition available at: <http://www.pch.gc.ca/ddp-hrd/english/charter/contents.htm>.

- , 1997b. Privy Council Office. *La Relève: A Commitment to Action*.
- , 1998. Canadian Human Rights Commission. *Prohibited grounds of discrimination in Canada*. Internet edition available at: <http://www.chrc-ccdp.ca/publications/prohibit-motifs.asp?l=e>.
- , 2000. Canadian Human Rights Commission. *Annual Report 1999*. Ottawa: Minister of Public Works and Government Services Canada. Internet edition available at: <http://www.chrc-ccdp.ca/ar-ra/ar99-ra99/menu.asp?l=e>
- Crenshaw, Kimberlé. 1988. "Race, Reform, and Refreshment: Transformation and Legitimation in Antidiscrimination Law." 101 *Harvard Law Review* 1331.
- Dworkin, Ronald. 1981. "What is Equality? Part 2: Equality of Resources". *Philosophy & Public Affairs*. V.10, No.4.
- Geller, Carole. 1991. "Equality in Employment for Women: The Role of Employment Equity". *Canadian Journal of Women and the Law*. 4(2):373-406.
- Greschner, Donna. 1987. "Judicial approaches to Equality and Critical Legal Studies." *Equality and Judicial Neutrality*. Sheila L. Martin and Kathleen E. Mahoney (Eds.). Toronto: Carswell.
- Knopff, Rainer. June 1987. "What do Constitutional Equality Rights Protect Canadians Against?" *Canadian Journal of Political Science*. XX:2. pp. 267-285.
- Knopff, Rainer and F.L. Morton. 1992. *Charter Politics*. Toronto: Nelson.
- Koggel, C. 1998. *Perspectives on Equality: Constructing a Relational Theory*. Lanham, Md.: Rowman & Littlefield Publishers, Inc.
- , 1994. "A Feminist View of Equality and Its Implications for Affirmative Action" 7 *Canadian Journal of Law and Jurisprudence*.
- Kymlicka, Will. 1989. *Liberalism, Community, and Culture*. Oxford: Claredon Press.
- Lahey, Kathleen. 1987. "Feminist Theories of (in)Equality." *Equality and Judicial Neutrality*, ed by Sheilah L. Martin and Kathleen Mahoney. Toronto: Carswell. pp. 73-77.
- MacKinnon, Catherine A. 1982. "Feminism, Marxism, Method, and the State: An Agenda for Theory" signs: *Journal of Women in Culture and Society*.
- Majury, Diana. 1990-1991. "Equality and Discrimination According to the Supreme Court of Canada." *Canadian Journal of Women and the Law*. Volume 4. pp. 407-439.

- Mitchell, Alana. 1995. "Members of Minorities Hold More Degrees." *The Globe and Mail*. June 14, 1995.
- Nehmé, Micheline. 1998. Public Service Commission of Canada. *Demographic Profile of the Federal Public Service for the Fiscal Years 1994 – 1997*. Internet edition available at: http://www.psc-cfp.gc.ca/prcb/rd/demo/dem_prof/dem_proe.htm.
- Nelken, David. 1981. "The 'Gap Problem' in the Sociology of Law: A Theoretical Review" 1 *Windsor Yearbook of Access to Justice*, pp. 35-61.
- Ontario. 1981. "A Guide to the Human Rights Code", 1981.
- Peters, Suzanne. 1995. *Exploring Canadian Values: Foundations for Well-Being*. Ottawa: Canadian Policy Research Networks.
- Rawls, John. 1971. *A Theory of Justice*. Oxford University Press, Oxford.
- Rogers, Peter. 1986. "Equality, Efficiency, and Judicial Restraint: Towards a Dynamic Constitution." *Dalhousie Law Journal*. Volume 10:2. pp. 139-193.
- Sheppard N. Colleen. 1992. Study paper on Litigating the relationship between Equity and Equality. *Ontario Law Reform Commission*. pp. 11-12.
- , 1986. "Equality, Ideology, and Oppression: Women and the Canadian Charter of Rights and Freedoms." *Dalhousie Law Journal*. Volume 10:2. pp. 195-223.
- Smith, Lynn. 1988. "Judicial Interpretation of Equality Rights Under the Canadian Charter of Rights and Freedoms: Some Clear and Present Danger." *University of British Columbia Law Review*. Volume 23:1. pp. 65-95.
- , 1986. "A New Paradigm for Equality Rights." *Righting the Balance: Canada's New Equality Rights*. Lynn Smith et al. (Ed.) Saskatoon: Canadian Human Rights Reporter.
- Tarnopolsky, Walter. 1986. "Ways for Insuring the Protection of Minorities." 27 *Les Cahiers de Droit*. pp. 155-160.
- Tussman, J. and J. Tenbroek. 1949. "The Equal Protection of the Laws." 37 *California Law Review* 341.
- Wakeling, T.W. 1986. "An Introduction to s. 15(1) of the Charter." *Alberta Law Review*. Volume XXIX:3. pp.412-440.

CASES

Andrews v. Law Society of British Columbia, [1989] 1 SCR 143.

Attorney General of Canada v. Lavell, [1974] SCR 1349.

Bliss v. Attorney General of Canada, [1979] 1 SCR 183.

Canadian National Railway Co. v. Canada (Human Rights Commission) and Action travail des femmes (1984), 5 Canadian Human Rights Reporter (C.H.R.R.) D/2327 (Cdn. Human Rights Trib.). (1987), 8 C.H.R.R. D/4210 (S.C.C.).

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497.

Mackay v. The Queen. [1980] 2 SCR 370 at 406, cited in T.W. Wakeling, "An Introduction to Section 15(1)," p .413.

McKinney v. University of Guelph, [1990] 3 SCR 229.

Miron v. Trudel, [1995] 2 SCR 418.

R v. Hess and Nguyen, [1990] 2 SCR 906.

Thibaudeau v. Canada, [1995] 2 SCR 627.

Turpin v The Queen, [1989] 1 SCR 1296.