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**CHAPTER 6**

**THE APPLICATION OF AFFIRMATIVE ACTION IN CANADA**

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## **1 INTRODUCTION**

As in the case of the comparison with the US, many similarities exist between Canada and South Africa for purposes of comparing affirmative action in the two countries.<sup>1</sup> The Canadian view of affirmative action as a systemic remedy for systemic discrimination is in fact quite close to that of South Africa,<sup>2</sup> and the South African EEA is

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1 See chapter 1 par 4 above.

2 *Ibid.*

based on Canada's Employment Equity Act (CEEA).<sup>3</sup>

But, substantial differences between the two countries of course also exist, the main one – similar to that in the case of the US – being that minorities resulting from large-scale immigration have to be affirmed in Canada while a majority has to be affirmed in South Africa.<sup>4</sup>

The purpose of this chapter is sixfold: (a) to give a brief overview of Canadian history in order to explain Canada's approach to equality and the need for affirmative action measures; (b) to set out the legislative framework within which Canada's equality laws operate; (c) to analyse the Canadian position with regard to whether past personal discrimination is required as a prerequisite to benefit from affirmative action, or whether group membership will suffice (undertaken against the background of the various notions of equality<sup>5</sup>); (d) to describe the deficiencies of categorisation as used by the CEEA; (e) to establish the role of qualifications and merit in affirmative action; and (f) to establish whether citizenship is required in order to benefit from affirmative action.

Affirmative action in employment legislation and case law will be considered. But, because little case law has been found related to the workplace, case law in other contexts will be considered, for example programmes to economically empower aboriginal people. These have played an important role in developing the content of, and limitations to, affirmative action, and have consequently influenced affirmative action in the workplace as well. In this chapter, the Canadian, US and South African positions will be compared.

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3 Of 1985 (as amended). See chapter 1 par 4 above. The CEEA is reviewed every five years (as stipulated by s 44 of the CEEA, by a committee designated by the House of Commons). Lessons can be learnt from these reviews, as the Act's operation and effects are scrutinised comprehensively to address problems. Three reviews have taken place so far: in 1991, 1996 and 2001.

4 See chapter 1 par 4 above.

5 As set out in chapter 2 par 3.1 above.

## 2 HISTORICAL OVERVIEW

### 2.1 Introduction

North American inhabitants during the fifteenth century comprised Indians<sup>6</sup> (not a homogenous group and unevenly scattered across the territory) whose ancestors had discovered Canada<sup>7</sup> thousands of years earlier.<sup>8</sup> The Iroquois (with two confederations, the Five Nations and the Huron) were found in the Eastern Woodlands, while the nomadic Inuit (or 'Eskimos'), who arrived much later, spread across the Arctic to Greenland.<sup>9</sup> In time, the 'Métis' resulted as a result of contact between European and Indian people. 'Métis' means people that are part European and part Indian.<sup>10</sup>

### 2.2 Colonialism and slavery

North America, or the 'New World', was 'rediscovered' in the sixteenth century by French and British explorers searching for an alternative trade route to the East.<sup>11</sup> Native

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6 Or aboriginal peoples/First Nations/natives. Historically, these people were the prime targets of racism, which took the form of paternalistic policies and treatment (Kallen *Ethnicity* 35; Abu-Laban & Gabriel *Selling Diversity* 14). Legislation passed by parliament since 1876 continued a policy of 'wardship' to protect aboriginal peoples, who were considered to be rather 'childlike' and 'primitive' and incapable of managing their own affairs. The aboriginal peoples, however, saw themselves as 'sovereign' and entitled to occupy and use their ancestral lands and its resources (Kallen *Ethnicity* 69). They held that, after colonisation, their right to sovereignty was unjustly abrogated and their institutions of self-government systematically dismantled. However, the government of Canada has taken the view that aboriginal peoples were never 'nations' in the legal sense of the word and have no right to be treated as such (*ibid*). While agreements with aboriginal peoples (presumed to be 'uncivilised' at the time of contact) have been called treaties, they are not treaties entered into by sovereign nations in terms of international law (*ibid*).

7 The word 'Canada' is derived from an Indian word 'kanata', meaning 'village or community' (Simpkins *Canada* 9). See also Day *Multiculturalism and Canadian Diversity* 78-9.

8 Simpkins *Canada* 9.

9 The term 'Eskimo' is a derogatory Indian term meaning 'eater of raw meat', while 'Inuit', in the Indian language, means 'people' (see Day *Multiculturalism and Canadian Diversity* 78-9).

10 Or, in terms of South African terminology, 'coloureds'. These people were later grouped together with native people under the CEEA (see fn 325 below).

11 Reynolds & Flores *Foreign Law* 1; *Canada Handbook* 31; Day *Multiculturalism and Canadian Diversity* 17; Abu-Laban & Gabriel *Selling Diversity* 14. The French established a series of trading

people – and not black people as in the other English colonies – were enslaved by the colonisers.<sup>12</sup> Small numbers of black slaves were brought in from the time of the founding of Halifax,<sup>13</sup> and, after the American Revolution, thousands of freed black slaves, as well as blacks who were still enslaved (brought in by whites), came into Canada.<sup>14</sup> In later years, Chinese labour was imported into Canada.<sup>15</sup> Slavery was thus practised, but not to the same extent as in the US.<sup>16</sup> It came to an end only when the Emancipation Act<sup>17</sup> was passed by the British Parliament.

During the eighteenth century, the series of wars fought by England and France on the European continent spread to North America. The Treaty of Utrecht<sup>18</sup> confirmed Quebec to France, while the rest of Canada was either confirmed or ceded to England by France.<sup>19</sup> The Treaty of Paris<sup>20</sup>, which ended the Seven Years War, also ended the French presence in the territory, and it became a British colony.<sup>21</sup>

In time, taxes imposed by the British triggered the American War of Independence. With the American Declaration of Independence in 1776, a large part of North America (known today as the US) became independent.<sup>22</sup> Colonies not part of this process remained under the control of the British Empire. However, soon thereafter, a measure of

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posts in 1598 in the area of Quebec, while the first English settlements were established in 1638 (Tarnopolsky & Pentney *Discrimination and the Law* par 1.2).

12 Tarnopolsky & Pentney *Discrimination and the Law* par 1.1; Ujimoto 'Ethnic Identity and Citizenship' 264.

13 Tarnopolsky & Pentney *Discrimination and the Law* par 1.2.

14 *Op cit* 1-1; 1-2. See Winks *Blacks in Canada* for a detailed history of slavery in early Canada.

15 Tarnopolsky & Pentney *Discrimination and the Law* par 1.2; ILO Report Outlawing Discrimination 1.

16 Tarnopolsky & Pentney *Discrimination and the Law* par 1.2; 1-3; ILO Report Outlawing Discrimination 1.

17 Of 1833 (see also fn 23 below).

18 Of 1713.

19 Reynolds & Flores *Foreign Law* 1.

20 Of 1763 (*Canada Handbook* 32).

21 Reynolds & Flores *Foreign Law* 1; Abu-Laban & Gabriel *Selling Diversity* 37; *Canada Handbook* 32. The British colonial administration unsuccessfully endeavoured to unify the administration of justice and the legal system of Quebec, because of the fact that many of the French cultural, political and legal rights were officially recognised in the Quebec Act of 1774.

22 Wiechers *Staatsreg* 177 (see chapter 5 par 2.3 above).

self-government was granted to the provinces of Ontario (made up mainly of English people) and Quebec (made up of French people). The Constitutional Act divided Quebec into Upper and Lower Canada, mainly along ethnic lines.<sup>23</sup> After trouble about the fact that the colonies' legislation could be vetoed by non-elected representatives in the British Parliament, the Act of the Union<sup>24</sup> was passed. This had the effect of combining Upper and Lower Canada into the Province of Canada. Soon thereafter, British colonial policy established that the colonies should elect their own representatives and that they be responsible to both their voters and the British Parliament.<sup>25</sup> Subsequently, the Colonial Laws Validity Act<sup>26</sup> was passed to give the colonies greater powers, but some restrictions remained.<sup>27</sup>

### 2.3 Independence from the British

Canada became a federation with four provinces and two territories in the late nineteenth century.<sup>28</sup> Independence was established owing to: (a) the British desire to cut colonial expenses; (b) the need of the North American people to pull together out of economic necessity; and (c) to lessen chances of US annexation.<sup>29</sup>

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23 Both Upper and Lower Canada took some steps to abolish slavery in 1793, but only with the Act on the Abolition of Slavery of 1833 was slavery officially ended in the British Empire (Tarnopolsky & Pentney *Discrimination and the Law* par 1.2).

24 Of 1841.

25 Wiechers *Staatsreg* 182-4. Policy was established that there should be as little as possible interference in the affairs of the colonies.

26 Of 1865.

27 It was clarified that colonial legislation would be invalid with regard to British law only if it were clear that the British Parliament had intended the law to apply to a specific colony (Bekink *South African Constitutional Law* 52; Wiechers *Staatsreg* 186-7).

28 Blanpain *International Encyclopedia* 9-12; Whyte, Lederman & Bur *Canadian Constitutional Law* 2-15. Currently with ten provinces and three territories.

29 Blanpain *International Encyclopedia* 9-12.

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### 3 LEGISLATIVE FRAMEWORK

#### 3.1 Introduction

Canadian constitutional principles were derived from the English, as found in historical British texts and unwritten conventions.<sup>30</sup> However, in time, these were modified into comprehensive, constitutional and ordinary legislation, and with specific reference to anti-discrimination.<sup>31</sup>

#### 3.2 British North America Act of 1867<sup>32</sup>

The British North America Act consolidated, and represented in written form, the Canadian constitutional equivalent of the Magna Carta.<sup>33</sup> It provided for a supreme Canadian Parliament – a British-style Parliament – with a Governor-General representing the Queen as Head of State.<sup>34</sup> A specific legislative function was given to the provinces, and the central Canadian Parliament was given jurisdiction over the rest.<sup>35</sup> The Act made no mention of equality, discrimination and dignity (similar to the

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30 Blanpain *International Encyclopedia* 6-8; Reynolds & Flores *Foreign Law* 12; Whyte, Lederman & Bur *Canadian Constitutional Law* 2-1-2-7.

31 Blanpain *International Encyclopedia* 6-8; Chotalia *Canadian Human Rights Act* xlv.

32 Later renamed the Constitution Act (see fn 118 below).

33 Of 1215 and the Bill of Rights of 1688 (Reynolds & Flores *Foreign Law* 12).

34 *Canada Handbook* 34; Blanpain *International Encyclopedia* 13-16; Sharp, Swinton & Roach *Charter of Rights and Freedoms* 4-5. It was not complete independence, as the British Parliament could still veto legislation.

35 Sharp, Swinton & Roach *Charter of Rights and Freedoms* 4-5.

situation in the US).<sup>36</sup> The Canadian Constitution therefore did not codify all the rules of the new nation.<sup>37</sup>

### 3.2.1 Early case law

#### 3.2.1.1 *Bryden case*

In *Union Colliery Co of Columbia Ltd v Bryden*,<sup>38</sup> the Privy Council<sup>39</sup> found legislation of the province of British Columbia prohibiting the employment of any 'Chinaman' underground in mines to be unconstitutional, ultra vires and illegal, but on the basis of Parliament's exclusive authority in all matters concerning the rights and privileges of Chinamen who were resident in the provinces of Canada.<sup>40</sup>

Although no explicit reference was made to the concept of equality, the Privy Council's judgment in *Bryden* did hold out some hope that, despite the absence of any explicit anti-discrimination provision, the courts might be prepared to protect racial minorities on the basis of the doctrine of division of powers.<sup>41</sup>

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36 Leibowitz & Spitz 'Human Dignity' 17-1; Hogg 1 5. The facets of dignity have come to be protected under the rubric of other specifically enumerated rights such as, for example, section 7 of the Canadian Charter of Rights and Freedoms which protects life, liberty and security of the person (Leibowitz & Spitz 'Human Dignity' 17-1-2). See, in this regard, *Rodriguez v British Columbia* (1993) 107 DLR (4<sup>th</sup>) 342, [1993] 3 SCR 519. Tarnopolsky & Pentney *Discrimination and the Law* par 16-85 point out that human dignity, which is not found in the Charter or the Bill of Rights, is thus a purely judicial construct. Notwithstanding this, several decisions by the Canadian Supreme Court have furthered human dignity as both a goal and a criterion of Charter equality rights (see, for example, *Law v Canada (Minister of Employment & Immigration) (Law)* [1999] 1 SCR 497, 10 DLR (4<sup>th</sup>) 1 discussed in par 3.6.3.1(i)B below).

37 Hogg 1 5 (see chapter 5 pars 3.1; 3.2 above).

38 [1899] AC 580, 68 LJPC. 118, 81 LT 277 (PC) as referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 13; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-7-1-9.

39 Then Canada's court of last resort. This jurisdiction was ended in 1949 (Reynolds & Flores *Foreign Law* 5).

40 At 587-8, as referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 12-3; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-7.

41 As referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 12-3; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-7-1-10.



### 3.2.1.2 *Tomey Houma case*

Shortly after *Bryden*, however, in *Cunningham v Tomey Houma*,<sup>42</sup> a naturalised Japanese resident of British Columbia was unsuccessful in his challenge directed at the province's voting law, which denied the vote to people of Japanese descent. The Privy Council followed a different approach from that in *Bryden* supra. It emphasised the protection of the provinces' legislative authority. The right to vote was seen as a privilege that the province was entitled to grant or withhold as it saw fit. It held that the Constitution's granting of powers was 'too narrow' to preclude discrimination on racial grounds. Race, like gender, it held, was simply a category the province was entitled to adopt in determining who should be able to vote.<sup>43</sup>

### 3.2.1.3 *Quong-Wing case*

Similarly, in *Quong-Wing v R*,<sup>44</sup> a Saskatchewan law that made it an offence to employ white women in restaurants, laundries or other places of business or amusement owned, kept or managed by any 'Chinaman', was upheld. A majority of the Supreme Court viewed the legislation as a valid exercise of the provincial legislative capacity to establish proper conditions of employment for women. It convicted the applicant, Quong-Wing, a 'Chinaman' and a naturalised Canadian citizen, of employing a white woman. It held:<sup>45</sup>

[T]he difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of *degree, not of kind* (own emphasis).

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42 [1903] AC 151 as referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 13-4.

43 As referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 14; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-9-1-10.

44 (1914), 49 SCR 440, as referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 14; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-10-1-12.

45 At 445, as referred to in Sharp, Swinton & Roach *Charter of Rights and Freedoms* 13; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-10-1-12.

### *Evaluation of early case law*

Early case law held out little hope that equality and non-discrimination would receive the liberal endorsement of the court. On the contrary, it appeared that the then existing inequality found in Canadian society was being perpetuated. This was probably due to the fact that the British North America Act did not make provision for equality, as mentioned above.<sup>46</sup>

## **3.3 Equality gains support**

### **3.3.1 World War II**

Generally, concern for the protection of human rights emerged only after World War II.<sup>47</sup> As Canada was a signatory to both the Universal Declaration of Human Rights<sup>48</sup> and the International Covenant on Civil and Political Rights,<sup>49</sup> this influenced the adoption and drafting of the Canadian Bill of Rights.<sup>50</sup> The Canadian government at that stage recognised that not everyone had benefited from the existing social organisation and that the government had an active role to play in remedying this situation.<sup>51</sup>

Evidence showed that human rights legislation was mainly embraced because of racial and religious discrimination in Canadian society.<sup>52</sup> In addition, the role of women was almost exclusively domestic and they were treated in a paternalistic way.<sup>53</sup> Through

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46 See par 3.2 above.

47 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 14; Bakan et al *Canadian Constitutional Law* 1141; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-5.

48 See chapter 2 par 3.2.3 above.

49 See chapter 2 par 3.2.4 above.

50 Of 1960.

51 Orton 'Section 15 and Benefits Programs' 288; Abu-Laban & Gabriel *Selling Diversity* 131.

52 Leibowitz & Spitz 'Human Dignity' 17-1; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 15; ILO Report *Outlawing Discrimination* 63.

53 Chabursky 'Employment Equity Act' 349-50 holds that patriarchy led to racist and sexist practices and laws resulting in systemic, structural discrimination and inequality. In this regard, women: (a) faced discriminatory entry barriers to training programmes and to the workplace; (b) were turned

public policy and the law, it was held, the state upheld gender inequality and constructed women as 'second-class' citizens.<sup>54</sup> Also, disabled people were kept dependent.<sup>55</sup>

### **3.3.2 Canadian citizenship**

After World War II, pressure for distinct Canadian citizenship increased.<sup>56</sup> Those living in the territory were designated as British subjects resident in Canada. The Citizenship Act<sup>57</sup> eventually granted Canadian citizenship to those living in Canada. Both foreign- and native-born residents obtained Canadian citizenship.<sup>58</sup> This was in contrast to the past when immigrants of colour were denied citizenship and the vote.<sup>59</sup> It was thus the beginning of recognising their dignity and full membership in Canadian society.

### **3.3.3 Affirmative action**

It is interesting that the first affirmative action-type programmes found in Canada after World War II were not a response to discrimination. As a gesture of gratitude, war veterans were given preferential treatment in respect of jobs in the public service.<sup>60</sup> Another example was the affirmative action programme to increase the number of francophone Canadians in the federal public service and so promote bilingualism and biculturalism.<sup>61</sup> Only

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away from training programmes because they involved a 'man's trade'; and, (c) were often routed into dead-end clerical positions without the time or opportunity to develop skills that might lead to alternative careers. See also Monahan *The Charter, Federalism and the Supreme Court of Canada* 128 who argues that the fact that women have been largely excluded from the political process was the main reason for their socially and economically inferior position.

54 Abu-Laban & Gabriel *Selling Diversity* 42-3.

55 Abella Report 1 (see par 4.1.2.2(a)(iv) below).

56 Troper 'Immigrant City' 342.

57 Of 1947.

58 Troper 'Immigrant City' 342; Fleras & Elliot *Engaging Diversity* 61 (see also par 3.3.2 below).

59 Fleras & Elliot *Engaging Diversity* 256.

60 Chabursky 'Employment Equity Act' 321; Abu-Laban & Gabriel *Selling Diversity* 134.

61 Chabursky 'Employment Equity Act' 321; Abu-Laban & Gabriel *Selling Diversity* 134; Kallen *Ethnicity* 237-8.

much later were affirmative action programmes found in response to discrimination.<sup>62</sup>

### 3.4 Canadian Bill of Rights of 1960

The Canadian Bill of Rights<sup>63</sup> (hereafter the 'Bill of Rights') secured civil and minority rights. It defined a number of rights and freedoms that were to be recognised without discrimination on the basis of five grounds, namely race, national origin, colour, religion and sex.<sup>64</sup> Discrimination thus became unconstitutional. The individual was guaranteed equality before the law and the protection of the law.<sup>65</sup> Some of the deficiencies of the Act are that it applies only at federal level,<sup>66</sup> can be amended or repealed by Parliament, and does not form part of the Constitution.<sup>67</sup> It has been interpreted to mean more or less 'equality in the administration or application of the law by the law enforcement authorities and the ordinary Courts of the land'.<sup>68</sup> The meaning of equality was therefore restricted to equality of process or formal equality.<sup>69</sup> No provision was made for affirmative action.

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62 Chabursky 'Employment Equity Act' 323-4. For example: (a) affirmative action measures to increase the representation of women in the public service by the federal Treasury Board were implemented in 1975; (b) aboriginal peoples were trained for jobs in the federal departments of the territories in 1975; (c) a voluntary federal contracts programme to increase the number of women in the employment of federal contractors in 1975; (d) the Canadian Employment and Immigration Department started to persuade employers to undertake voluntary affirmative action programmes in 1979 (with wage subsidies or training to upgrade the qualifications of disadvantaged workers); (e) internal affirmative action pilot projects by the Treasury Board; (f) a full-scale affirmative action programme by the Treasury Board for women, aboriginal peoples and the disabled in 1983, and visible minorities in 1985.

63 The Charter of Rights and Freedoms' predecessor (see par 3.6 below). Similarly, the provinces adopted human rights codes (Abu-Laban & Gabriel *Selling Diversity* 13; McLachlin 'Most Difficult Right' 24; Kallen *Ethnicity* 6). This was well before the US Civil Rights Act of 1965.

64 Section 1(a) of the Bill of Rights.

65 Section 1(b) of the Bill of Rights.

66 It therefore did not reach the provinces.

67 Blanpain *International Encyclopedia* 9-12; Henry & Tator 'Multiculturalism, the Charter and Employment Equity' 99.

68 See Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 18-9; Henry & Tator 'Multiculturalism, the Charter and Employment Equity' 100.

69 In *Canada (AG) v Lavell (Lavell)* [1974] SCR 1349, 38 DLR (3d) 481 the Supreme Court confirmed that a strict, formal notion of equality was adhered to (see chapter 2 par 3.1.2 above for a discussion of the notion of formal equality).

## 3.5 Canadian Human Rights Act of 1978

### 3.5.1 Introduction

Eighteen years later, the Canadian Human Rights Act (hereafter the 'Human Rights Act') provided for substantive equality (different from the Bill of Rights).<sup>70</sup>

### 3.5.2 Non-discrimination

The Human Rights Act confirmed discrimination to be unconstitutional. It prohibits unfair discrimination on a more comprehensive list (than the Bill of Rights) of 12 grounds:<sup>71</sup>

*'[A]ll individuals should have an equal opportunity with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin,<sup>72</sup> colour, religion, age, sex, sexual orientation, family status, disability<sup>73</sup> or conviction of an offence for which a pardon has been granted' (own emphasis).*<sup>74</sup>

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70 See chapter 2 par 3.1.3 above for a discussion on the notion of substantive equality.

71 Section 2 of the Human Rights Act. 'Discrimination' as such was, however, not defined (Henry & Tator 'Multiculturalism, the Charter and Employment Equity' 100).

72 Citizenship and nationality are not listed as grounds of non-discrimination. During the debates on the Bill of Rights, it was argued that Canadian citizenship should not be required for employment: if people are admitted in Canada as potential citizens, it was argued, it could not be justified not to protect their right to employment (Submissions Bill C-25 Canadian Human Rights Act 6).

73 One of the world's first to include disability (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 47).

74 The Human Rights Act was amended in 1983 to include marital status and family status as further grounds of non-discrimination. Although the US Civil Rights Act, Title VII and the Canadian Human Rights Act cover race/aboriginal peoples/visible minorities, gender, national origin, religion and age, the last-mentioned covers a slightly wider range of activities and classes than the first. Also, a higher percentage of Canadian provinces than US states cover sexual orientation, and most Canadian jurisdictions protect people from discrimination on the basis of political beliefs and membership organisation, protection which is not extended to employees and job applicants in the US (with the exception of union membership) (Block & Roberts 'Comparison of Labour Standards' 292).

The Human Rights Act also prohibits individual acts of unfair discrimination in employment and discriminatory employment policies and practices.<sup>75</sup>

### 3.5.3 Affirmative action

Over and above the right to non-discrimination, the Human Rights Act permits organisations and enterprises to engage in affirmative action measures, but only on a voluntary basis – these are therefore not mandatory.<sup>76</sup> It holds that affirmative action measures must be designed to prevent or eliminate disadvantage in respect of four categories of people, namely<sup>77</sup>

‘any group or individuals of women, visible minorities, native people and the handicapped’,

and states that such affirmative action measures are not discriminatory. Section 16(2) reads as follows:

‘It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to *prevent disadvantages that are likely to be suffered by, 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, services, facilities, accommodation or employment in relation to that group*’ (own emphasis).<sup>78</sup>

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75 Sections 7; 8; 10 of the Human Rights Act. Exceptions are practices based on bona fide occupational requirements (s 15(1a)), practices that are reasonable as prescribed by guidelines issued by the Human Rights Commission (s 15(1e)), or where, in the case of discriminatory practices in *inter alia* employment, there is a bona fide justification (s 15(1g)). For any practice based on a bona fide occupational requirement, or for any practice which is excused by a bona fide justification, it must be established that accommodation of the needs of an individual, or a class of individuals, affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and costs (s 15(2)).

76 Section 16(1) of the Human Rights Act.

77 *Ibid.*

78 In contrast to Canada’s explicit recognition of affirmative action, it has been said that, because of the fact that affirmative action is not expressly recognised in the US Civil Rights Act or the US Constitution, affirmative action in the US has merely been ‘tolerated’ and that the resulting jurisprudence should be viewed with caution in Canada (Vizkelety 2 293). In this regard, it has also

The Act thus specifies the areas of disadvantage which may be targeted by affirmative action, and how such action should be addressed.

### **3.5.4 Canadian Human Rights Commission and Tribunal**

#### **3.5.4.1 Introduction**

The Human Rights Act established the Canadian Human Rights Commission to enforce the Act.<sup>79</sup> The Human Rights Commission may receive complaints by any individual, or group of individuals, having reasonable grounds for believing that a person is engaging in, or has engaged in, a discriminatory practice.<sup>80</sup> It may make general recommendations concerning desirable objectives for special programmes<sup>81</sup> and may give advice and assistance with respect to the adoption or carrying out of a special programme.<sup>82</sup>

The Human Rights Act was later amended to establish the Canadian Human Rights Tribunal (hereafter the 'Tribunal'), which may institute inquiries into a complaint if it is satisfied that an inquiry is warranted.<sup>83</sup> The Tribunal is allowed to order a special affirmative action programme where this is necessary to prevent discriminatory practices from occurring in the future.<sup>84</sup> In this regard, section 41(2) empowers the Tribunal to direct an employer to<sup>85</sup>

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been stated that the US has demonstrated a 'hesitant' approach to affirmative action (ILO Report Outlawing Discrimination 44).

79 Section 26 of the Human Rights Act. See Mason, Geddie & Nowakowska *Canadian Master Labour Guide* 406-10 for a general discussion of the Human Rights Commission.

80 Section 40 of the Human Rights Act.

81 Section 16(2)(a) of the Human Rights Act. In this regard, see, for example, *Canadian National Railway* (1987), 40 DLR (4<sup>th</sup>) 193, 8 CHRR D/4210 (SCC) discussed in par 3.5.4.2(b)(i) below.

82 Section 16(2)(b) of the Human Rights Act.

83 Sections 48; 49 of the Human Rights Act.

84 Section 53(2) of the Human Rights Act.

85 In 1995, the Human Rights Act was amended to provide that the Tribunal cannot however order an employer to adopt an affirmative action plan that involves 'numerical hiring' or 'promotion quotas with deadlines' (s 50) (and this while all the provinces' legislation made provision for this). This

'cease the discriminatory practice and, in order to prevent the same or similar practice from occurring in the future, take *measures, including ... adoption of a special program, plan or arrangement* referred to in subsection 16(1) ... in consultation with the Commission on the general purposes of those measures' (own emphasis).

An order of the Tribunal may be given effect to by registering it in an appropriate superior court, thereby giving it the standing of a judgment and making it enforceable as such.<sup>86</sup> In some instances, the Tribunal may make a recommendation, leaving it to the Human Rights Commission to make an order.<sup>87</sup> Both the Commission and the Tribunal must submit, to Parliament, annual reports on their activities.<sup>88</sup> It will be seen below that the Human Rights Commission and the Tribunal initially used their powers, but that this was not so much the case in later years.

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amendment was made on the assumption that employers would put in place equivalent measures under their own employment equity plans under the CEEA (see par 3.7 below). In 2000, the Federal Review Panel recommended that the amendment be repealed to allow the Tribunal to make such orders (England, Christie & Christie *Employment Law in Canada* par 5.194).

86 Section 57 of the Human Rights Act.

87 Blanpain *International Encyclopedia* 201.

88 Section 61 of the Human Rights Act. The CEEA was amended in 1996 to confer on the Human Rights Commission the mandate of verifying that the CEEA is being applied by employers (see par 3.7.3 below). To this end, the Human Rights Commission conducts audits.

### 3.5.4.2 Case law under the Human Rights Act

#### (a) Introduction

In the analysis of case law<sup>89</sup> that follows (as well as in subsequent discussions), the focus is on Tribunal and federal Supreme Court<sup>90</sup> decisions which have interpreted the concepts of discrimination and affirmative action, and any reference hereafter to 'Supreme Court' or 'court' refers to the Canadian Supreme Court. Provincial supreme courts and other courts will be mentioned by name. The federal context is therefore focused on.<sup>91</sup>

The focus is on majority decisions,<sup>92</sup> but minority or dissenting views of particular importance will be referred to. Generally, cases have been brought before the court by women's organisations and groupings of aboriginal peoples complaining of their exclusion from affirmative action programmes. Cases have generally not been brought by non-

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89 As in previous chapters, the facts of cases will only be related cryptically and only where this contributes to a better understanding of the issue.

90 The Supreme Court of Canada also functions as a constitutional court (Reynolds & Flores *Foreign Law* 5). The Supreme Court has final authority with respect to the legal interpretation of the federal Constitution and other federal laws. The federal standard in Canada usually only applies to federal government employees and those industries that can reasonably be thought of as involved with inter-provincial commerce. Except for employees in these industries, the provincial standards prevail (Block & Roberts 'Comparison of Labour Standards' 278). The situation is therefore different from that in the US where federal legislation prevails, unless the state statute raises the standard (see chapter 5 par 4.1 above). The role of the Supreme Court of Canada is to interpret federal and provincial laws consistently across Canada.

91 The provinces have wide-ranging powers and often have their own employment equity legislation. The provinces have their own Supreme Courts (Reynolds & Flores *Foreign Law* 5). Note, however, that federal, provincial and territorial human rights codes are similar (though only the provinces of Quebec and Saskatchewan have adopted the federal proactive model of affirmative action in their legislation, whereas others allow for voluntary affirmative action (England *Individual Employment Law* 204; England, Christie & Christie *Employment Law in Canada* par 5.211)). Also, some provinces extend their laws to protect groups which are not protected by federal legislation on the ground of, for example, sexual orientation. The Charter applies to all human rights codes (Report under International Covenant on Civil and Political Rights 60).

92 Majority and minority decisions are not found as often in Canada as in the US and South Africa. The US's lack of a united voice has often resulted in no single set of standards being evolved (Peirce 'Progressive Interpretation of Subsection 15(2)' 269). The US Supreme Court is a political instrument, with its judges appointed by politicians. In this respect, it thus differs from the Canadian Supreme Court and the South African Constitutional Court, which are independent judicial instruments with politicians having no say in appointments (see chapter 5 par 4.1.3.1 above).

designated group members, as has been found in South Africa<sup>93</sup> and the US.<sup>94</sup>

(b) Affirmative action as a remedy

(i) Canadian National Railway case

The case of *Canadian National Railway v Canada Co (Human Rights Commission)*<sup>95</sup> confirmed the court's broad and purposive view of affirmative action as a remedy for systemic discrimination.<sup>96</sup> In this instance, the court confirmed, for the first time, a comprehensive quota as a remedy for systemic discrimination.<sup>97</sup> It upheld the Tribunal's order that the Canadian National Railway Company had to increase the proportion of women working in non-traditional occupations in a certain region until such time as they constituted 13 percent of the railway's employees (based on the estimated availability of qualified women in the local labour market).<sup>98</sup> One in every four non-traditional vacancies

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93 See chapter 4 par 2.1.1 above.

94 See chapter 5 par 4.1.3 above.

95 [1987] 1 SCR 1114, 40 DLR (4<sup>th</sup>) 193.

96 Tarnopolsky & Pentney *Discrimination and the Law* par 4.12(a); Chabursky 'Employment Equity Act' 309; Lepofsky 'Employment Equity' 13. Canada differs from the US where: (a) affirmative action has not been recognised expressly as a remedy to overcome systemic discrimination; and (b) discrimination must be intentional.

97 In *Simpsons-Sears v Ontario (Human Rights Commission)* (1985), 2 SCR 536, 23 DLR (4<sup>th</sup>) 321 (SCC) systemic discrimination was for the first time directly recognised by the Canadian Supreme Court. The concept 'systemic discrimination' started taking root in Canada in the late 1970s. Chabursky 'Employment Equity Act' 318 describes systemic discrimination in the workplace as 'barriers that may be latent in traditional practices or informal operating procedures relied upon in the course of training, hiring, or promoting employees'. A broader view of systemic discrimination would encompass structural features of society, such as societal and cultural attitudes, values and expectations that arise as a result of the socialisation process in public education and family settings. These various factors 'combine' and 'interconnect' to create general, pervasive societal patterns and institutions which restrict the opportunities of some minority groups – systemic discrimination is based on sources of exclusion that form part of an ongoing system (*op cit* 318-9). The author emphasises that appreciating the systemic nature of discrimination has given rise to new methods of tackling discrimination – that is, affirmative action (*op cit* 321).

98 At 1140-1. Over and above these temporary measures, the Tribunal has also ordered some permanent measures: (a) restricting the use of certain mechanical aptitude tests; (b) abandoning the physical-strength tests for women; (c) discontinuing the welding-experience requirement for all entry-level positions; (d) increasing the dissemination of information to the general public; (e) improving the procedures involved in receiving and interviewing job candidates.

had to be filled by women, and this had to be achieved on a quarterly basis.

In addition, the company was directed to launch an information and publicity campaign to recruit women in non-traditional occupations, and to report periodically on its progress to the Tribunal. Although the Federal Court of Appeal<sup>99</sup> quashed the remedial order on the basis that section 41 of the Human Rights Act allows exclusively compensating remedies in favour of identifiable individual victims of unlawful discrimination – and not group remedies based on systemic discrimination – the court held that, since the policy goal of the Act was to eliminate the effects of discrimination, including ‘adverse-effect’ or ‘systemic’ discrimination, affirmative action measures designed to break the cycle of systemic discrimination (as opposed to providing compensation for past discrimination) were ‘implicitly’ within the purview of the Tribunal’s remedial authority under section 14(2)(a).<sup>100</sup>

It held that ordering an employer to implement a hiring quota as a remedy can eliminate discrimination in three ways: (a) it overcomes the difficulty of proving illicit, discriminatory intent on the employer’s part; (b) it undermines stereotypical attitudes among workers and supervisors if members of designated groups are seen to succeed on the job; and (c) it creates a ‘critical mass’<sup>101</sup> of members of designated groups in the workplace, which will encourage other members of designated groups to apply for jobs and pursue their careers with the employer in question.<sup>102</sup> Female under-representation in blue-collar positions on the railway (which was borne out by statistical evidence) was

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99 [1987] 1 SCR, 114; revg [1985] 1 FC 96 (CA), affg (1984), 5 CHRR D/2327 (Can HR Trib)).

100 At 1141-2.

101 This concept has been mooted in an endeavour to ensure that a substantial increase in the presence of women and other disadvantaged groups in formerly homogeneous workplaces will act as a countervailing force which will make it impossible for the system to ignore and to exclude these groups, or at least, not to the same extent as when these groups were completely absent or too few in number to matter (Vizkelety 2 302).

102 At 1142.

held to constitute indirect discrimination and to be a sufficient basis for a remedy. It was accordingly concluded:<sup>103</sup>

'An employment equity program ... is designed to *break a continuing cycle of systemic discrimination*. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. *Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears*' (own emphasis).

### *Evaluation of Canadian National Railway case*

The *Canadian National Railway* case has been viewed as being very important in establishing the policy goals underlying the remedial provisions in the Human Rights Act and, therefore, the spirit in which all tribunals are expected to apply their remedial authority.<sup>104</sup> Nonetheless, after this case, there were relatively few cases in which affirmative action was ordered as a remedy by the Tribunal. Only in three more instances were such orders made. These are discussed below.

#### (ii) *National Capital Alliance, Hebert and Knuff cases*

In *National Capital Alliance on Race Relations v The Queen*,<sup>105</sup> the Tribunal found extensive systemic discrimination against visible minorities in the public service which prevented them from obtaining senior management jobs. One of the most comprehensive affirmative action remedies to emerge in Canadian jurisprudence, was ordered.<sup>106</sup>

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103 At 1143. This quotation is often used in South African case law and academic writings (see chapter 3 par 3.5.1.4(a); chapter 4 par 2.1.3.3(b)(ii) above).

104 English, Christie & Christie *Employment Law in Canada* par 5.193.

105 (1997) 97 CLLC 230-015 (Can HRT).

106 It included: (a) setting specified numerical goals for the appointment of visible minorities to designated jobs; (b) training for managers in the recruitment and performance appraisal of visible minorities; (c) conducting sensitivity workshops throughout the organisation; (d) setting appropriate performance standards for visible minorities; (e) clarifying qualifications for promotion to senior management jobs; (f) ensuring visible minority representation on selection boards; (g) utilising

In the second case, *Hebert v M & G Millwright Ltd*,<sup>107</sup> an employer who refused to employ females was ordered to: (a) cooperate with officials of the Ontario Human Rights Commission in formulating an affirmative action plan in order to hire and promote women in non-traditional jobs; (b) regularly report on the number of women who had applied for these jobs and on the reasons why their applications may have failed; and (c) specify in all its job advertisements that women were encouraged to apply.<sup>108</sup>

In the third case, *Knuff v Hi-Lo Motor Inn Ltd*,<sup>109</sup> an employer who refused to employ men as housekeepers was ordered to do so within six months of the decision and to retain such an individual for at least a period of three months.

(c) Disadvantage

(i) *Athabasca case*

In the first case on affirmative action to reach the Supreme Court, *Athabasca Tribal Council v Amoco Canada Petroleum Co Ltd*<sup>110</sup> (*Athabasca*), the Athabasca Tribal Council supported a certain oil project, but on condition that only members of the Indian bands that made up the council be given preference in related employment and business opportunities. The court accepted a programme for native people under the Human Rights Act as being necessary<sup>111</sup>

'so that they may be in a competitive position to obtain employment without regard to the handicaps [they have] inherited'.

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outreach recruitment programmes to attract visible minorities; (h) implementing a mentor system for visible minorities; (i) providing managerial training for visible minorities; and (j) appointing a person to administer the overall affirmative action programme.

107 (1993), 23 CHRR D/63 (Ont Bd Inq).

108 At D/67.

109 (1993), 19 CHRR D/379 (Sask Bd Inq).

110 (1981) 124 DLR (3<sup>rd</sup>) 1 (SCC).

111 At 9-10.

The plan was thus seen as a way to 'level the playing field'.<sup>112</sup> The court required no external evidence of factual discrimination against the group as such. Rather, it appears that judicial notice was taken of the disadvantage suffered by the group.<sup>113</sup> The court distinguished the American *Bakke* and *Weber* cases from the case at issue and found them of no assistance, as they dealt with a situation fundamentally different from that facing the Athabaskan Indians.<sup>114</sup> It held that neither the *Bakke* nor the *Weber* case dealt with the broad spectrum of measures that could be taken in pursuance of an affirmative action plan, but merely focused on race alone as the basis for admission to a certain quota. The court pointed out that the context in which US affirmative action is considered is not that of achieving equality by examination and elimination of barriers to disadvantaged groups, but rather, once faced with evidence of under-representation, of permitting an affirmative action programme that will not affect white workers.<sup>115</sup> It was held that the individual-based approach of the US Supreme Court was in clear contrast to Canada's recognition and accommodation of group-based rights, and to Canada's purposive approach in recognising affirmative action as a remedy to overcome systemic discrimination.<sup>116</sup> The court could not see how a programme that was designed to enable Indians to compete on equal terms with other members of the community could be construed as discriminating against other inhabitants.<sup>117</sup>

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112 Ray-Ellis *Federal Equity Manual* 3-6.

113 Abella Report 15.

114 At 10.

115 *Ibid.* See also ILO Report Outlawing Discrimination 43.

116 *Ibid.*

117 *Ibid.* However, as a result of the fact that the relevant board was required to give approval for the plan, which it was not authorised to do in terms of the relevant legislation, the plan was not approved by the court.

### *Evaluation of Athabasca case*

The concepts 'disadvantage' and 'group membership' therefore went hand in hand right from the first case which interpreted affirmative action in the Canadian context.

## **3.6 Canadian Charter of Rights and Freedoms of 1982**

### **3.6.1 Introduction**

The Constitution Act<sup>118</sup> was amended in 1982 to include a substantial Charter of Rights and Freedoms<sup>119</sup> (hereafter the 'Charter'), which basically codified fundamental rights.<sup>120</sup>

Section 15 of the Charter provides for a broad concept of equality: it prohibits discrimination *and* provides for affirmative action measures.<sup>121</sup> It therefore confirms both a formal<sup>122</sup> (elimination of unfair discrimination) and substantive<sup>123</sup> notion of equality (affirmative action measures). The central objective of the section is to remedy inequality between groups as well as individuals.<sup>124</sup> Section 15 reads as follows:

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118 Earlier called the British North America Act (see par 3.2 above).

119 Part I, ss 1 to 34. Section 33(1) of the Charter gives provincial legislatures the power to override (*inter alia*) s 15 (the equality clause) (see par 3.6.2 below) by expressly declaring that a provincial statute operates, notwithstanding the provision of the Charter (see, generally, Monahan *The Charter, Federalism and the Supreme Court of Canada* 165-203).

120 The Charter is narrower in scope than the Human Rights Act, in that it is limited to discrimination caused by the application or operation of law, whereas the Human Rights Act also applies to private activities; it is wider in that listed and analogous grounds of discrimination are forbidden, whereas the Human Rights Act contains a limited number of grounds of non-discrimination (see pars 3.5 above; 3.6.2 below) (Whyte, Lederman & Bur *Canadian Constitutional Law* 25-13).

121 Section 15 only came into effect three years after the section came into force – that is, in 1985 – in order to enable federal and provincial governments to 'get their houses in order' (s 32(1)).

122 Section 15(1) of the Charter. See the discussion in chapter 2 par 3.1.2 above for the notion of formal equality.

123 Section 15(2) of the Charter. See, again, the discussion in chapter 2 par 3.1.3 above for the notion of substantive equality.

124 Kallen *Ethnicity* 279. The text of the Charter is designed to advance collective interests to a greater extent than found in US constitutional law (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 48) (see chapter 5 par 4.1.3 above).

'(1) Every individual is equal *before and under*<sup>125</sup> *the law* and has the right to the *equal protection*<sup>126</sup> *and equal benefit*<sup>127</sup> 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.<sup>128</sup>

(2) Subsection (1) does not preclude *any law, program or activity*<sup>129</sup> *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*<sup>130</sup> (own emphasis).

In addition to authorising affirmative action in section 15(2), the Charter provides both for federal and provincial government commitment to promoting 'equal opportunities'

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- 125 The inclusion of the words 'under the law' was intended to overcome the formalistic, narrow interpretation of only 'equality *before* the law' as used in the Bill of Rights (see par 3.4 above). In *Canada (AG) v Lavell* (1973) [1974] SCR 1349, 38 DLR (3d), the previous wording had prevented Indian women from succeeding in their challenge directed at the sexist membership provisions of the Indian Act of 1985, in terms of which Indian women could not pass status to their children owing to the fact that they had married non-Indian men. The court argued that Indian women were not denied equality 'before' the law, because all Indian women were treated alike and all Indian men were treated alike. It held that Indian women may not have been equal 'under' the law, but that they were equal 'before' the law (Greschner 'Canadian Equality Rights' 310; 313; Whyte, Lederman & Bur *Canadian Constitutional Law* 25-9; 25-10).
- 126 The reference to 'equal protection' echoes the Fourteenth Amendment to the US Constitution (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 247).
- 127 The inclusion of the words 'equal benefit' was intended to overcome the ruling in *Bliss v Canada (AG)* [1979] 1 SCR 183, 92 DLR (3d) 417 where it was held that 'equal protection' did not cover 'benefits' such as unemployment insurance benefits for pregnant women (Greschner 'Canadian Equality Rights' 310; 314; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 247; Whyte, Lederman & Bur *Canadian Constitutional Law* 25-10).
- 128 Section 15(1) is different from the relevant provisions of the South African Constitution, where the two aspects of equality, namely (a) equality 'before' the law and 'equal protection' and 'benefit' of the law (s 9(1)), and (b) the prohibition on discrimination (s 9(3)) are contained in two separate subsections (Kentridge 'Equality' 14-7) (see chapter 3 pars 3.5.1.3; 3.5.1.4(a) above). Section 9(3) however includes a more expanded list covering, over and above the nine grounds of s 15(1) of the Charter, gender, marital status, pregnancy, sexual orientation, conscience, belief, culture, language and birth (a total of 18 grounds).
- 129 Wider than s 9(2) of the South African Constitution, which uses the wording 'legislative and other measures' (chapter 3 pars 3.5.1.4; 3.5.1.4(a) above). In addition to s 15(2), s 6(4) of the Charter authorises affirmative action in the provinces. They may develop laws, programmes or activities intended to ameliorate the conditions of disadvantaged individuals who are socially or economically disadvantaged and whose employment rate is below the national average.
- 130 Different from s 9(2) of the South African Constitution (see chapter 3 par 3.5.1.4 above), in that it provides merely for 'persons or categories of persons that have been disadvantaged by unfair discrimination' generally, without listing any 'causes' of disadvantage.

for the wellbeing of Canadians and to furthering economic development to reduce disparity in opportunities.<sup>131</sup> The Charter also separately protects the rights of aboriginal people in Canada.<sup>132</sup> Lastly, it protects the diversity of the Canadian cultural heritage<sup>133</sup> and reiterates gender equality.<sup>134</sup>

It seems that the Charter acknowledges, accommodates and values differences rather than ignoring or denying them.<sup>135</sup> Canada is thus described as a 'mosaic',<sup>136</sup> dissimilar to the 'melting pot'<sup>137</sup> of the US. Essentially, Canada's approach is to integrate immigrants by encouraging newcomers to the process to maintain their cultural heritage, as opposed to assimilating or extinguishing migrant cultures as the price of acceptance in the US.<sup>138</sup> Put differently, whereas Canadian law permits and encourages diversity,<sup>139</sup>

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131 Section 36(1)(a); 36(1)(c) of the Charter. This section thus reiterates Canada's commitment to these issues.

132 Section 35 of the Charter. Section 23 of the Charter recognises existing aboriginal and treaty rights of land claims agreements and affirms these (see also Bakan et al *Canadian Constitutional Law* 25).

133 Section 27 of the Charter. This section builds on the federal policy of multiculturalism which was in place since 1971 (Henry & Tator 'Multiculturalism, the Charter and Employment Equity' 89; Ujimoto 'Ethnic Identity and Citizenship' 255; 278; Abu-Laban & Gabriel *Selling Diversity* 105). Subsequently, the Multiculturalism Act of 1988 was adopted to give further legal weight to the concept of multiculturalism. This Act *inter alia* promotes the full and equal participation of individuals while acknowledging the legitimacy of those differences that have contributed to the evolution of Canadian society (s 3(1)(c)) (see Fleras & Elliot *Engaging Diversity* 14-8 for a definition of multiculturalism). See Fleras & Elliot *Engaging Diversity* 67; Henry & Tator 'Multiculturalism, the Charter and Employment Equity' 92-8; Ujimoto 'Ethnic Identity and Citizenship' 278; Abu-Laban & Gabriel *Selling Diversity* 109ff for criticism on this Act. In particular, it has been argued that multiculturalism is limited in dealing with class and gender inequalities among ethnic minorities (Abu-Laban & Gabriel *Selling Diversity* 124).

134 Section 28 holds that the rights and freedoms in the Charter are guaranteed equally to male and female persons. This section thus reiterates Canada's commitment to these issues.

135 Abella Report 13; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 6.

136 Day *Multiculturalism and Canadian Diversity* 146ff; Fleras & Elliot *Engaging Diversity* 60; 63; Troper 'Immigrant City' 345; Weinfeld & Wilkinson 'Immigration and Diversity' 56ff; Ujimoto 'Ethnic Identity and Citizenship' 271; Breton 'Intergroup Competition' 302-3.

137 Fleras & Elliot *Engaging Diversity* 60 (see chapter 5 par 4.3.2 above).

138 ILO Working Paper International Migration 12. Canada has thus been called the world's first 'international nation'.

139 See, generally, Fleras & Elliot *Engaging Diversity* 14-8; Abu-Laban & Gabriel *Selling Diversity* 153; chapter 1 fn 18 for definitions of diversity. It has been held that managing diversity measures is to construct diversity of any kind – gender, race, disability, age, sexuality – as a means to enhance mainly business competitiveness. This model has been imported from the US for workforces to be

America's legal values cherish 'sameness'.<sup>140</sup>

### 3.6.2 Interpretation

Right from the start, the Supreme Court followed a purposive approach in interpreting the Charter. In *Law Society of Upper Canada v Shapinker*<sup>141</sup> (the first Charter case to reach the Supreme Court), the Charter was viewed as a<sup>142</sup>

'yardstick of reconciliation between the individual and the community and their respective rights'.

It was pointed out that a narrow and technical interpretation of the Charter could 'stunt the growth of the law and ... the community it serves'.<sup>143</sup> Another early case, *Hunter v Southam*,<sup>144</sup> similarly held that the Charter must 'be capable of growth and development over time to meet new social, political, and historical realities often unimagined by its framers' and that the Charter should not be read as 'a last will and testament ...'.<sup>145</sup> The court held that the original intent of the drafters would not be conclusive in its interpretation.<sup>146</sup> There were two reasons for this: (a) statements of intent of particular individuals are an unreliable guide for discerning the intent of many others who actively took part in drafting the Charter; and (b) adopting a strict interpretivist approach would freeze

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constructed in terms of a comparative advantage, a bridge to new markets (at home and globally) and as a source of product innovation. It effectively sidelines issues of systemic discrimination and inequality that employment equity is intended to address (*Abu-Laban & Gabriel Selling Diversity* 169; 173).

140 Abella 'Seeking Equality' 7; 21; Blanpain *International Encyclopedia* 33-37; Greschner 'Canadian Equality Rights' 304; ILO Working Paper International Migration 11-2. Though recently the US has adopted diversity as a compelling interest in the educational context (see chapter 5 pars 4.1.3.5; *Evaluation of disadvantage* above).

141 [1984] 1 SCR 357, 9 DLR (4<sup>th</sup>) 161.

142 At 366.

143 *Ibid.*

144 [1984] 2 SCR 145, 11 DLR (4<sup>th</sup>) 641.

145 At 649. Similarly, in *Manitoba (AG) v Metropolitan Stores (MTS) Ltd* [1987] 1 SCR 110, 38 DLR (4<sup>th</sup>) 321 at 124 it was held that the rights and freedoms of the Charter were not 'frozen' in content and had to 'remain susceptible to evolve in the future'.

146 At 649-50 (see Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 52).

the meaning of the Charter at a particular time, with little or no possibility of growth, development and adjustment to changing societal needs.<sup>147</sup>

Having rejected the 'original intent' approach, the court adopted a *purposive* approach – a complex, value-laden investigation that draws upon a range of sources in an innovative spirit.<sup>148</sup> It requires reflection upon the purpose of, and rationale for, the right at issue in the light of the overall structure of the Charter, Canada's legal and political tradition, the country's history, and the changing needs and demands of modern society.<sup>149</sup>

The purposive approach was confirmed and elaborated on in *R v Big M Drug Mart*.<sup>150</sup>

[t]he purpose of the right or freedom ... is to be sought by reference to the *character and the larger objects of the Charter itself*, to the language chosen to articulate the *specific* right or freedom, to the *historical origins* of the concepts enshrined, and where applicable, to the meaning and purpose of the *other* specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a *generous* rather than a legalistic one, aimed at fulfilling the *purpose* of the guarantee and *securing for individuals the full benefit* of the Charter's protection. At the same time it is important *not to overshoot the actual purpose* of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ... be placed in its *proper linguistic, philosophic and historical contexts*' (own emphasis).

With the purposive approach to interpretation in place, the interpretation of the right to equality nevertheless remained problematic. In *Law*<sup>151</sup> it was pointed out that section 15

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147 *Ibid.* Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 50 state that, even if there were concrete evidence to help in determining the original intent of a right, it would be wrong to stick to that meaning without question, for constitutions are deliberately phrased in general, open-ended terms in order to let them adapt to changing circumstances and needs over time. The authors find support for this view in Dworkin 1 134 who holds that constitutions are meant only to set out concepts, and thus their content necessarily varies over time and place.

148 At 649.

149 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 52-3; Kallen *Ethnicity* 273-4. This is in contrast to the US's rigid and narrow approach to the Fourteenth Amendment (Vizkeley 2 293 fn 240), but very similar to South Africa's approach (see chapter 3 pars 3.5.1.2; 3.5.1.3(a)(i) above).

150 [1985] 1 SCR 295 at 144, 18 DLR (4<sup>th</sup>) 321.

151 [1999] 1 SCR 497, 10 DLR (4<sup>th</sup>) 1 (see par 3.6.3.1(b)(i)B below for a complete discussion of the *Law* case).

(not defined in the Charter) was conceptually the most difficult provision of the Charter because of the abstract nature of the words 'equality' and 'discrimination' and because of the similarly abstract nature of the words used to explain them.<sup>152</sup> Furthermore, part of the difficulty stemmed from the 'exalted status' of equality:<sup>153</sup>

'The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature *abstract and subject to differing articulations*. The challenge for the judiciary in interpreting and applying s 15 of the Charter is to *transform ideals and aspirations into practice* in a manner which is *meaningful to Canadian society* and which accords with the *purpose* of the provision' (own emphasis).

In interpreting the rights of the Charter, the court also made reference to international law, such as ILO Convention 111,<sup>154</sup> the Convention on the Elimination of All Forms of Racial Discrimination<sup>155</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>156</sup> It was held that the use of international norms was a reflection of the fact that the rights and freedoms guaranteed by the Charter were specific emanations of internationally recognised human rights.<sup>157</sup> While international treaties were not directly enforceable in Canadian Courts, the Supreme Court did see international commitments as valid consideration and held that the Charter should be interpreted, where possible, in a manner consistent with Canada's international obligations.<sup>158</sup> Lastly, while American jurisprudence had been used in some instances to give meaning to the Charter, the Supreme Court of Canada had frequently stated that, given the differences between

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152 At 507.

153 *Ibid.* See also Whyte, Lederman & Bur *Canadian Constitutional Law* 25-6 who hold that the concept of equality lacks precise definition.

154 See chapter 2 par 2.1.3.4 above.

155 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 55. This Convention has been in force in Canada since 13 November 1970 (see chapter 2 par 2.1.2.4 above).

156 *Ibid.* This Convention has been in force in Canada since 10 January 1982 (see chapter 2 par 2.1.2.4 above).

157 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 55.

158 See *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1056-7, 59 DLR (4<sup>th</sup>) 416.

Canadian and American political and legal traditions, it was certainly not determinative.<sup>159</sup> In particular, in the area of equality, the Supreme Court of Canada had embarked on jurisprudence that was quite distinctive from that of the US (as will become clear below).

### 3.6.3 *Non-discrimination*

The Canadian law of discrimination will be set out in a fair amount of detail, as the concept of discrimination has been incorporated into the affirmative action context, which, as will be seen below, is different from the South African and US positions.<sup>160</sup> Section 15(1) of the Charter confers the right of non-discrimination on 'every individual'.

The words 'without discrimination' in section 15(1) were interpreted in *Andrews v Law Society of British Columbia*<sup>161</sup> (*Andrews*) (the first equality case to reach the Supreme Court of Canada) to be<sup>162</sup>

'a form of *qualifier* built into section 15 itself and to limit those distinctions which are forbidden ... to those distinctions which involve *prejudice or disadvantage*' (own emphasis).

Discrimination is then<sup>163</sup>

'... a distinction, whether intentional or not, but based on the 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*

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159 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 49; Monahan *The Charter, Federalism and the Supreme Court of Canada* 74-96 (see also fn 149 above). It has been held that the analysis and restrictions by the US Supreme Court were 'shockingly conservative' and inappropriate for Canada (Peirce 'Progressive Interpretation of Subsection 15(2)' 271-2). Accordingly, it has been recommended that the US test – a construct of the judiciary – should be avoided in Canada by restricting the judiciary to a carefully limited review of affirmative action programmes under s 15(2) of the Charter (Peirce 'Progressive Interpretation of Subsection 15(2)' 273; Whyte, Lederman & Bur *Canadian Constitutional Law* 25-9).

160 See par 3.6.3.1 below.

161 [1989] 1 SCR 143, 56 DLR (4<sup>th</sup>) 1 (see par 3.6.3.1(a) below for the facts of the case).

162 At 181.

163 At 174-5.

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*access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed* (own emphasis).

Thus, the court indicated that, in deciding whether discrimination had occurred, it would look not only at the legislature's *purpose*, for example whether it had acted out of prejudice against a group or on the basis of unjustified stereotyping of group members' capacity, but also at the *impact* of the law on a group claiming discrimination.<sup>164</sup> The unfairness of the discrimination thus had to be measured by the *impact* of the law or its *effects*, irrespective of intent. The court stressed that the essence of equality was the 'accommodation of differences' for which, it was noted, it would frequently be necessary to make distinctions.<sup>165</sup> The 'effect' of imposing burdens, obligations or disadvantages on individuals or groups, or of 'withholding or limiting access to opportunities, benefits and advantages' available to other members of society, was decisive. The right to equality was therefore a<sup>166</sup>

'*comparative* concept, the condition of which may only be attained or discerned by comparison with the *condition of others in the social and political setting* in which the question arises' (own emphasis).

The court combined equality with discrimination, concluding that<sup>167</sup>

'[a] complainant under section 15(1) must show *not only* that he or she is not receiving *equal treatment* before and under the law or that the law has a *differential impact* on him or her in the protection or benefit accorded by the law but, *in addition*, must show that the legislative impact of the law is *discriminatory*' (own emphasis).

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164 At 168.

165 At 169.

166 At 164.

167 At 182.

However, the enquiry did not stop here. If discrimination were found, the discrimination might be justifiable under section 1 of the Charter.<sup>168</sup> A two-stage approach of interpretation and justification was thus followed. This approach, it indicated, drew a sharp line between the two stages, namely establishing the unfairness of the discrimination and the possible (onerous) justification of same under section 1.<sup>169</sup>

With regard to the first stage, the court in *Andrews* stated that the meaning of the right or freedom at issue had to be interpreted to determine whether the matter complained of constituted an infringement. The burden of proving discrimination was on the claimant (as in the US, but different from the position in South Africa where discrimination on a listed ground is presumed to be unfair, while discrimination on an unlisted ground must be proven to be unfair).<sup>170</sup>

With regard to section 15, a restrictive approach had been followed. The court held that section 15 could be invoked *only* by those discriminated against on the basis of the enumerated<sup>171</sup> or analogous<sup>172</sup> grounds. And, both the enumerated grounds and 'other possible grounds' had to be interpreted in a broad and generous manner for the 'unremitting protection' of equality rights.<sup>173</sup> By narrowing the range of section 15 distinctions that might constitute discrimination to only those on the enumerated and analogous grounds, the court ensured that any issues of reasonableness or fairness would be excluded from section 15, and would be dealt with entirely under section 1, which

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168 Similar to the position in South African law (see chapter 3 par 3.5.1.3(c) above).

169 At 177-86. Some lower court cases, including the British Columbia Court of Appeal's decision in *Andrews*, had dealt with the justification for differential treatment within s 15 itself. This seems to put the onus on the claimant to show that the differential treatment was not justified. The Supreme Court rejected this approach and emphasised that the justification for an infringement under s 1 should be on government (at 176) (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 252-3).

170 Bevan 'Employment Equity' 451 (see chapter 3 par 3.5.1.3(b) above). As no intent is required, both in terms of Canadian and South African law, that burden is more easily met.

171 Although this term is commonly used in Canadian literature, it is strictly speaking not correct as the grounds are not numbered (Hogg 1 1155).

172 The court expected this concept to evolve and grow over time in response to 'new evidence' of disadvantage (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 251; 253; Whyte, Lederman & Bur *Canadian Constitutional Law* 25-13) (see pars 3.6.3.1(i)B; 3.6.3.1(i)C below).

173 At 175.

constituted the second phase of the enquiry.<sup>174</sup>

A claimant could demonstrate that the right to equality had been infringed either by looking at the government's *purpose* or at the *effects* of its actions.<sup>175</sup> The court emphasised that the purpose behind section 15 was to protect only 'vulnerable' groups from discrimination.<sup>176</sup> This meant that section 15 could not be used to challenge *every* differential treatment created by the law. Put differently, a distinction was made between 'mere differentiation' and discrimination, similar to the position in South African law.<sup>177</sup>

To sum up, to succeed in a section 15 challenge, a complainant must show that: (a) there has been a denial of one of the four equality provisions of section 15, namely equality *before or under the law or equal benefit or protection of the law*; and that (b) the differential treatment is *discriminatory* on the basis of a personal characteristic constituting an enumerated or analogous ground.

### 3.6.3.1 Enumerated and analogous grounds of non-discrimination

In Canadian law, discrimination can be either direct or indirect, which is similar to the position in South African and American law.<sup>178</sup> Section 15(1) lists nine grounds of non-discrimination in a non-exhaustive way. This implies that further 'analogous' or 'unlisted' grounds may exist,<sup>179</sup> which is also similar to the South African position.<sup>180</sup>

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174 Hogg 2 52-18 (see par 3.6.4 below).

175 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 50.

176 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 51. The court's conceptualisation of s 15 was important in that it rejected the formalism of the 'similarly situated' test adopted earlier under the Human Rights Act. This test was criticised for its inability to achieve equality because it did not challenge the status quo. Under similarly situated test, the disadvantaged can only obtain the social interests the advantaged have enjoyed to the extent that these are the same as, or are perceived to be the same as those of the advantaged, whose characteristics have historically defined the criteria for entitlement. Further, the test did not contribute to the reorganisation of social institutions to meet the needs of the disadvantaged to the extent that their needs are different from the advantaged, because the advantaged have no comparable (Orton 'Section 15 and Benefits Programs' 290).

177 Chabursky 'Employment Equity Act' 313-7 (see chapter 3 par 3.5.1.3(a) above).

178 Blanpain *International Encyclopedia* 198A-198B (see chapter 3 par 3.5.1.3; chapter 5 fn 227above).

179 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 248; Greschner 'Canadian Equality Rights' 310; Hogg 1 1154; Orton 'Section 15 and Benefits Programs' 291. It has been held that s

(a) *Andrews case*

The case of *Andrews*<sup>181</sup> confirmed this interpretation. The enumerated grounds were held *not* to be 'exclusive', and the limits on the grounds for discrimination were said to be awaiting definition.<sup>182</sup> While the enumerated grounds were described as<sup>183</sup>

'the *most common* and probably the *most socially destructive and historically practised* bases of discrimination' (own emphasis),

no attempt was made to define 'analogous grounds'.

(b) *Corbiere case*

But, subsequently, in *Corbiere v Canada*<sup>184</sup> (*Corbiere*) the court gave a comprehensive exposition of analogous grounds. These are<sup>185</sup>

'characteristics which we *cannot change* or that the *government has no legitimate interest in expecting us to change* to receive equal treatment under the law. To put it another way, s 15 targets the denial of equal treatment on grounds that are *actually immutable*, like race, or *constructively*

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15 was deliberately left open-ended to remain 'in tune' with understandings of harm and to permit equality rights to respond to the changing appreciation of discrimination (Greschner 'Canadian Equality Rights' 310).

180 Where s 9(3) of the Constitution provides for a non-exhaustive list of grounds of non-discrimination (see chapter 3 par 3.5.1.3(a)(i) above).

181 [1989] 1 SCR 143, 56 DLR (4<sup>th</sup>) 1.

182 At 175.

183 *Ibid.*

184 [1999] 2 SCR 203, 173 DLR (4<sup>th</sup>) 2 SCR 254. The case involved a s 15 claim by Indian band members, who were denied the right to vote in their band's elections if they were not living on their band's reserves. The 'residence' or the 'off-reserve status' of band members was found to be an analogous ground for aboriginal people (but not for non-aboriginal people) in the light of the unique and complex situation of aboriginal peoples (at par 15).

185 At par 13.

*immutable*,<sup>186</sup> like religion. *Other factors* identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a *discrete and insular* minority or a group that has been *historically discriminated* against, may be seen to *flow from* the central concept of immutable or constructively immutable personal characteristics, which too often have served as *illegitimate and demeaning* proxies for merit-based decision making' (own emphasis).

The court emphasised that analogous grounds, once identified and accepted by the courts, would serve as 'jurisprudential markers' for suspect distinctions associated with stereotypical, discriminatory decision making.<sup>187</sup>

(i) Citizenship as an analogous ground

Citizenship, as seen above, is not listed as one of the nine grounds of discrimination in section 15(1) of the Charter. It has, however, been interpreted to be an analogous ground in case law, albeit on a variety of bases. Three cases – *Andrews*,<sup>188</sup> *Law*<sup>189</sup> and *Lavoie v Canada (Lavoie)*<sup>190</sup> – gave effect to this interpretation.

A *Andrews* case

In this instance, the applicant, Andrews, a British citizen and a permanent resident of Canada (who was not yet eligible for citizenship, but otherwise qualified for admission to the legal profession in the province of British Columbia), was refused a job in the public service. The applicant requested a declaration that the citizenship requirement for public service employment violated section 15.

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186 The concept 'constructive immutability' has been held to explain analogous grounds such as citizenship and aboriginal residence that can be changed by individuals, albeit with difficulty (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 264).

187 At pars 7; 11.

188 [1989] 1 SCR 143, 56 DLR (4<sup>th</sup>) 1 (see also par 3.6.3.1(a) above).

189 [1999] 1 SCR 497, 10 DLR (4<sup>th</sup>) 1.

190 (2002) 22 Carswell Nat 406, 2002, Carswell Nat 407, 284 NR 1 (SCC).

Although there was not much discussion in *Andrews* on why citizenship was found to be an analogous ground, some pointers were given. A majority decided that the British Columbia law requiring that a person be a Canadian citizen for admission

to the bar of the province was in breach of section 15(1). Wilson J (for the majority) held that non-citizens were<sup>191</sup>

*'... a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated'* (own emphasis).

She imported the American concept of 'discrete and insular minority' into Canadian jurisprudence.<sup>192</sup>

*'The rights guaranteed in s 15(1) apply to all persons whether citizens or not. A rule that bars an entire class of persons from certain forms of employment, solely on the ground of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, ... infringe section 15 equality rights. Non-citizens, lawfully permanent residents of Canada, are – in the words of the US Supreme Court in *United States v Carolene Products Co* ... a good example of a "discrete and insular minority" who come within the protection of s 15'* (own emphasis).

She further emphasised that<sup>193</sup>

*'[t]he range of discrete and insular minorities has changed and will continue to change with changing political and social circumstances ... It can be anticipated that the discrete and insular minorities of tomorrow will include groups not recognised as such today'* (own emphasis).

She stressed that the determination of an analogous ground must not only be made in the context of the law that was subject to challenge, but also (and rather) in the context of the place of the group in the 'entire social, political and legal fabric of society'.<sup>194</sup>

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191 At 152.

192 At 151-2 (as suggested by McIntyre J, at 183). This term comes from the jurisprudence relating to the interpretation of the US Fourteenth Amendment's equal protection clause (see chapter 5 fn 161 above). It has been opined that the use of American jurisprudence in this context was unusual, as the Canadian Supreme Court has generally been reluctant to adopt US approaches to equality issues (Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 49 n16; 263).

193 At 152-3.

194 At 152. Later on, in *R v Turpin (Turpin)* ([1989] 1 SCR 1296, 48 CCC (3d) 8), Wilson J held that the use of the 'discrete and insular minority' categorisation as used in *Andrews* was not an end in itself,

Moving on to the justification stage in *Andrews*, she held that the breach of section 15 could *not* be justified by section 1, because there were 'other ways' to address the Law Society's (justifiable) concerns about a lawyer's competence and familiarity with Canadian institutions than through a citizenship requirement.<sup>195</sup> It was suggested that, for example, a Canadian law degree could be required or the competency of a person could be tested.<sup>196</sup> McIntyre J (dissenting in part) similarly maintained that citizenship imposed a burden in the form of a delay on permanent residents who had acquired some or all of their legal training abroad and was therefore discriminatory. La Forest J, in his reasons, explained citizenship to be<sup>197</sup>

'... a *personal characteristic* which shares many similarities with those enumerated in s 15. The characteristic of citizenship is one *typically not within the control of the individual* and, in this sense, is *immutable*. Citizenship is, at least *temporarily*, a *characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs*' (own emphasis).

Moreover, he found, non-citizens were an example 'without parallel' of a group of people who were relatively powerless politically, and whose interests were likely to be compromised by legislative decisions.<sup>198</sup> He added:<sup>199</sup>

'History reveals that Canada did not for many years resist the temptation of enacting legislation the animating rationale which was to limit the number of persons entering into certain employment.

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but merely 'one of the analytical tools' of assistance in determining whether the interest advanced by a particular claimant was the kind of interest s 15 of the Charter was designed to protect (at 1333). In the latter case, she described the purpose of s 15 as 'remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society'. The indicia for such discrimination were found to be 'stereotyping, historical disadvantage or vulnerability to political and social prejudice'.

195 At 156-7.

196 *Ibid.*

197 *Ibid* (see chapter 3 par 3.5.1.3(a)(i)A above where the South African Constitutional Court used this wording in the case of *Larbi-Odam*).

198 At 195.

199 *Ibid.*

Discrimination on the basis of nationality has from early times been an *inseparable companion of discrimination* on the basis of *race and national or ethnic origin*, which are listed in s 15' (own emphasis).

Thus, for La Forest J, it was not enough that citizenship was a 'personal characteristic': it was important that the characteristic be 'immutable', meaning that it could not be changed.<sup>200</sup> Of course, citizenship can be changed, but it has been explained that the judge meant that the change was not wholly within the control of the individual, who had to wait for a certain period of time.<sup>201</sup> In addition, other statutory conditions, over and above the individual's voluntary choice of Canadian residence, might have to be complied with.<sup>202</sup>

Importantly, however, La Forest J did hold that there was no question that citizenship might, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives, as citizenship served an important symbolic function as a badge identifying people as members of the Canadian polity.<sup>203</sup> But, he concluded, it was 'generally irrelevant' to the legitimate work of government in all but a limited number of areas.<sup>204</sup>

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200 Hogg 1 1168.

201 *Ibid.*

202 *Ibid.*

203 At 196.

204 *Ibid.* Subsequent to the *Andrews* case, divided approaches were found on the possible justification of discrimination. See, for example, *Egan v Canada* [1995] 2 SCR 513, 124 DLR (4<sup>th</sup>) 609 (*Egan*); *Miron v Trudel* [1995] 2 SCR 418, 124 DLR (4<sup>th</sup>) 693 (*Miron*); *Thibaudeau v Canada* [1995] 2 SCR 627, 124 DLR (4<sup>th</sup>) 449 (*Thibaudeau*). While some judges used the 'internal relevance' approach to justify discrimination within s 15(1) itself, others used the *Andrews* approach of justifying it under s 1, while L' Heures-Dubé J adopted her own distinctive approach. The 'internal relevance' approach holds that there is no discrimination under s 15 if the distinction drawn between two groups by legislation is relevant 'to the functional values underlying the legislation,' even though the distinction is made on the basis of an enumerated or analogous ground. Support for this approach was drawn from earlier cases (such as *Conway v R* [1993] 2 SCR 872, 105 DLR (4<sup>th</sup>) 210; *R v Hess* [1990] 2 SCR 906, 59 CCC (3d) 161); *Andrews* itself where the court held that not all distinctions constituted discrimination. Only where a distinction was relevant to 'some objective physical or biological reality, or fundamental value', could a distinction be potentially discriminatory (*Miron* at 4346). *Miron* and *Egan* endeavoured to import some elements of justification back into s 15, but these were minority positions (Hogg 2 52-29). Only in 1999, in *Law* [1999] 1 SCR 497, 10 DLR (4<sup>th</sup>) 1, did the court again adopt a united approach (see par 3.6.3.1(i)B below).

B *Law case*<sup>205</sup>

*Law* added the element of dignity to the discrimination enquiry, over and above the requirements set out in *Andrews supra*.<sup>206</sup> The unanimous court basically held that a section 15 violation must show proof of: (a) discrimination on an enumerated or analogous ground; and (b) 'substantive' discrimination that in fact violated human dignity. Iacobucci J (for the court) set out the test for determining whether differential treatment actually discriminated:<sup>207</sup>

'Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from a claimant in a manner which reflects the *stereotypical application* of the presumed group or *personal characteristic*, or which otherwise has the *effect of perpetuating or promoting* the view that the individual is *less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration*' (own emphasis).

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205 [1999] 1 SCR 497, 10 DLR (4<sup>th</sup>) 1. The case did not involve citizenship as a ground of non-discrimination, but 'age'. The principles laid down in the case have however been applied in subsequent cases to justify citizenship as an analogous ground and will, because of this, be investigated. In *Law*, a 30-year-old widow complained that she had been discriminated against on the basis of age as she could not qualify for a survivor's pension benefit from her husband's pension fund until she reached the age of 65. Benefits were only payable to surviving spouses who had dependent children, or who were either disabled or 45 years of age or older. It was held that, in general terms, the purpose of s 15(1) was to prevent the violation of 'essential human dignity and freedom' through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all people enjoyed equal recognition at law as human beings, or as members of Canadian society, 'equally capable and equally deserving of concern, respect and consideration'. The additional requirement of violating human dignity proved to be determinative in *Law*. The differential treatment of younger people was found not to amount to *substantive discrimination* because it did not reflect the notion that younger people were less capable or less deserving of concern, respect and consideration (at par 102). The differential treatment also did not perpetuate the view that younger people were less capable or less worthy of recognition as human beings or as members of Canadian society. It was found that the law did not stereotype, exclude or devalue adults under the age of 45 years, but by distinctions corresponding to the '*actual situation of the individual it affects*' (own emphasis) (*ibid*). The court held that adults under the age of 45 years had not been consistently and routinely subjected to the sort of discrimination faced by discrete and insular minorities (at par 95). It also held that the legislature was entitled to rely on 'informed statistical generalisations', rather than stereotypes, that younger people could more easily replace their deceased partner's income and that they should not receive the survivor's pension until the age of 65 years (at par 102).

206 See par 3.6.3.1(a) above.

207 At par 88.

Importantly, the court indicated that certain ‘contextual factors’ must be considered in determining whether a distinction did in fact violate human dignity. These factors were held to be open-ended, but had to include at least the following: (a) pre-existing disadvantage; (b) correspondence between the grounds and the claimant’s actual<sup>208</sup> needs, capacities and circumstances; (c) ameliorative purposes or effects; and (d) the nature and scope of the interest affected by the impugned law.<sup>209</sup>

### *Evaluation of Law case*

Wide-ranging criticism has been levelled at the case. First, incorporating dignity into the discrimination enquiry has been criticised as being vague, confusing and burdensome to complainants.<sup>210</sup> And, even though some contextual factors were provided to assist in the task of determining whether a distinction impaired dignity, it has been held that the factors are not very helpful, as the concept of dignity is inherently vague and unpredictable in its application.<sup>211</sup> Secondly, it is an (a) unduly complex test; (b) that may well be indeterminate in its result and easily manipulable; and (c) aspects of the test under section 1 of the Charter have been merged into section 15(1).<sup>212</sup>

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208 In contrast to ‘assumed’ needs, which may lead to a ‘rough’ form of justice (Drumbl & Craig ‘Affirmative Action’ 99).

209 At par 88.

210 Hogg 2 52-26; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 260.

211 Hogg 2 52-26 (see fn 212 below for a further discussion of Hogg’s criticism of the *Law* case).

212 Sterling ‘*Lovelace v Ontario*’ 59-60; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 260. Hogg 2 52-26 holds that the addition of dignity to the discrimination test was a reversion to the idea that was rejected in *Andrews*, namely that s 15 should be restricted to unreasonable or unfair distinctions, although distinctions that impaired dignity were presumably much the same as unreasonable or unfair distinctions. He stresses that it was pointed out in *Andrews* that, by importing this kind of evaluative step into s 15, the relationship between s 15 and s 1 of the Charter was confused, and that s 1 was left with little work to do. Moreover, any increase in the elements of s 15 had the undesirable effect of increasing the burden of proof on the claimant, who had the burden of proving each element of s 15. Although this was acknowledged in *Law*, the court only held that, in some instances, it would not be necessary for the claimant ‘to adduce evidence’, because it would be ‘evident on the basis of judicial notice and logical reasoning’ that dignity had been impaired. Hogg points out that the fact remains that a failure to prove that dignity was impaired caused the claimant to lose the case. The author expresses his preference for the *Andrews* test as being simpler and less burdensome, for the claimant need establish only a distinction based

Thirdly, in terms of an application of the *Law* test to affirmative action programmes, it has been mooted that a plain reading would suggest that many affirmative action programmes could be challenged under section 15(1).<sup>213</sup> This is because such programmes usually provide for differential treatment on an enumerated or analogous ground. Fourthly, the *Law* decision suggests that exclusion from a benefit itself can be demeaning, but this does not appreciate the fact that affirmative action programmes can exclude groups without necessarily affronting the dignity of those groups.<sup>214</sup> Fifthly, the approach has been criticised on the basis of the fact that, although disadvantage and stereotyping based on societal attitudes were observed in respect of the appellants in the *Law* case, the court nevertheless did not find relative disadvantage. The observance of disadvantage therefore did not have any impact on the findings.<sup>215</sup> Sixthly, the approach in *Law* has been held to be too 'abstract and general' to demarcate the 'specific province' of section 15.<sup>216</sup> This is because dignity underlies *all* human rights and is not unique to section 15, nor is it even especially characteristic of equality rights.<sup>217</sup> The *generality* of the dignity language, it has been argued, does not offer much guidance in resolving equality litigation or in instructing legislators in designing public policy – 'it merely changes the labels, rather than clarifying the issues'.<sup>218</sup> It has been held that human dignity is a way of expressing a set of moral problems, rather than a technique for resolving them.<sup>219</sup> In this regard, two broad arguments are made: (a) the language of dignity fails to provide an

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on an enumerated or analogous ground in order to show a breach of s 15. Then, government must justify same in terms of s 1. This enquiry would then take place in terms of the test laid down in *R v Oakes* [1986] 1 SCR 103, which requires that a 'benign object' for the law must be established (in other words, one which does not impair dignity). Failure by government to establish this, will cause it to lose the case.

213 Sterling '*Lovelace v Ontario*' 60.

214 *Ibid.*

215 *Op cit* 62.

216 Greschner 'Canadian Equality Rights' 316.

217 *Op cit* 316-7. For example, dignity also underlies the rights to liberty and security (s 7 of the Charter).

218 *Ibid.*

219 *Op cit.* For example, the concept of dignity has the same broad scope and contested meanings as the concept it seeks to explain, namely equality.

appropriate guide for public policy and is often deployed as ‘a tool to shut down legitimate public policy debate’;<sup>220</sup> and (b) by putting dignity at the centre of the section 15 inquiry, the focus is taken away from discrimination and patterns of exclusion that section 15 was specifically intended to address.<sup>221</sup> Nevertheless, it has been conceded that the approach in *Law* did not erase the language of discrimination and its history, as it linked dignity to ‘the imposition of disadvantage, stereotyping or political or social prejudice’, which are the contextual effects that determine the presence of discrimination.<sup>222</sup> Moreover, discrimination took centre stage in the last step of the court’s analytical framework for determining whether a law violated section 15.<sup>223</sup> Also, in assessing the discrimination, the court must consider the four contextual factors which look into the larger context within which an impugned law operates, the effects of laws on people’s lives and the historical practices of exclusion. These factors, it has been argued, are doing the ‘real work’, and not the abstract concept of dignity. These factors require an examination of context and of the effects of a law or policy, as each factor is designed to uncover ways in which a group is being treated as ‘second-class’ in society.<sup>224</sup>

### C *Lavoie* case

*Lavoie*<sup>225</sup> confirmed the *Law* approach. The plaintiffs (three non-citizen women) claimed that the requirement of citizenship in the context of jobs under the federal Public Service Employment Act<sup>226</sup> was an analogous and discriminatory ground.

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220 *Ibid.*

221 *Ibid.* The author fears that particularly women may be expected to *assimilate* in order to enjoy the benefits of full membership in society if equality is interpreted with dignity – and not discrimination – at its core.

222 At pars 52; 83 (see Greschner ‘Canadian Equality Rights’ 318).

223 These steps are: (a) the impugned law must draw a distinction on an enumerated or analogous ground; and (b) the distinction must constitute substantive discrimination (see par 3.6.3.1(a) above).

224 Greschner ‘Canadian Equality Rights’ 318-20.

225 (2002) 22 CarswellNat 406, 2002, CarswellNat 407, 284 NR 1 (SCC).

226 Of 1985.

Bastarache J (for the majority) closely followed the test as set out in *Lawand* and held that a purposive approach to section 15 required a violation of human dignity. Substantive discrimination was found based on the fact that the law authorising preferential treatment fostered the prejudicial stereotype (and not individual merit or capacity) that non-citizens (an already disadvantaged group) were less loyal and less committed to the country.<sup>227</sup> It was held that the Public Service Employment Act affected employment – an important interest<sup>228</sup> – and was not designed to ameliorate the situation of a disadvantaged group of people. It was pointed out that the only actual difference between citizens and non-citizens was a ‘legal distinction’ created by Parliament and that, in all relevant respects – sociological, economic, moral, intellectual – non-citizens were equally vital members of Canadian society and deserved equal concern and respect.<sup>229</sup> The court confirmed that citizenship was a personal characteristic and an analogous ground in terms of section 15(1). But, the violation was justified under section 1 of the Charter.<sup>230</sup> This was on the basis that the citizenship requirement was a legitimate means of fostering unity and shared civic purpose among a population with cultural and linguistic differences.<sup>231</sup> The court made it clear that, in a country as open and diverse as Canada, it made sense to<sup>232</sup>

‘enact a policy that *integrates* its population ...’ (own emphasis).

It held that, in an era of increased movement across borders, citizenship still provided immigrants with a basic sense of identity and belonging.<sup>233</sup> Preferential treatment of citizens in the public service was therefore constitutionally permissible.

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227 At par 52.

228 At par 45. Employment was held to be ‘a fundamental aspect of a person’s life, impacting on his livelihood, self-worth, and human dignity’ and, therefore, should enjoy constitutional protection.

229 *Ibid.*

230 At par 58.

231 *Ibid.*

232 *Ibid.*

233 *Ibid.*

Three other judges agreed that the Act violated section 15, but on different grounds. They emphasised that the law violated human dignity by forcing individuals who wished to be public servants to become citizens. Two more judges (in separate opinions) held that, although the law imposed differential treatment on the analogous ground of non-citizenship, human dignity was not violated, as non-citizens were only excluded from civil service jobs and not from their chosen professions.<sup>234</sup>

### *Evaluation of citizenship as an analogous ground*

It is clear that the court has been prepared to find citizenship to be an analogous ground of non-discrimination in terms of section 15 (1) of the Charter. This is based on the following: that non-citizens are a discrete and insular minority, generally lacking in political power and, as such, vulnerable to having their interests overlooked and their rights to equal concern and respect violated; that failure to regard citizenship as such as a ground fosters the prejudicial stereotype that non-citizens are less loyal and less committed to the country; and that it is important to integrate immigrants into Canadian society. It was stressed that, in coming to such a conclusion, the context of non-citizens in the 'entire social, political and legal fabric of society' had to be taken into consideration. Such a finding may, however, be justified under section 1 of the Charter.

It has been remarked that the general tendency of the court has been to cast multiculturalism in a supporting role in respect of the value of equality.<sup>235</sup>

### *3.6.4 Justifying discrimination*

As was seen above, once it has been proven that a right has been infringed, the Charter recognises that rights are not absolute and that there are situations where the interests of society at large, or the rights of other individuals, will require that the claimant's

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234 They also noted that many countries drew distinctions on the basis of citizenship, but did not attach any weight to this fact. The court did not follow the 'political sensitivity' arguments as in the US (see chapter 5 par 4.3.4.2(d) above) and South Africa (see chapter 3 par 3.5.1.3(a)(i)B above).

235 Tarnopolsky & Pentney *Discrimination and the Law* par 16-106.

right be limited.<sup>236</sup> In other words, once discrimination has been established, it can still be justified in terms of section 1 of the Charter<sup>237</sup>

‘subject *only* to such *reasonable limits prescribed by law*<sup>238</sup> as can be demonstrably justified in a free and democratic<sup>239</sup> society’ (own emphasis).

This then forms the second stage of a rights case.

### **3.6.5 Affirmative action**

#### **3.6.5.1 Introduction**

The affirmative action clause of the Charter – section 15(2) – was inserted in reaction to the controversy arising from the *Bakke* case in the US.<sup>240</sup> It was also intended to ensure that legislatures would not be discouraged from taking affirmative action measures to enhance equality.<sup>241</sup> Moreover, by giving constitutional protection to

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236 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 48; 50; Blanpain *International Encyclopedia* 207-209; Vizkelety 2 292. In this regard, the Charter follows international law (as does South Africa), in that it acknowledges that rights can be limited.

237 No limiting provision similar to s 1 of the Charter exists in US law. The American Constitution differs from both the Canadian and the South African Constitutions, as it sets out rights as if they were absolute. As a result, varying standards of scrutiny have been developed which restrict or limit the equality guarantee within the concept of equality protection itself (Whyte, Lederman & Bur *Canadian Constitutional Law* 25-14) (see chapter 5 fn 156 above). Section 36 of the South African Constitution contains a similar clause to s 1 of the Charter (see chapter 3 par 3.5.1.3(c) above). The similarities and differences between these two sections have been pointed out in fns 238; 239 below.

238 Which is slightly different from s 36 of the South African Constitution, which provides for ‘law of general application’ (see chapter 3 par 3.5.1.3(c) above).

239 Which is different from s 36 of the South African Constitution, which provides for the limitation to be ‘reasonable and justifiable in an open and democratic society based on *human dignity, equality and freedom ...*’, as well as further detailed factors which should be taken into account in the enquiry (see chapter 3 par 3.5.1.3(c) above).

240 *Bakke* 98 S Ct 2733 (1978) (see chapter 5 par 4.1.3.2(a) above) (Chabursky ‘Employment Equity Act’ 324) (see also *Lovelace v Ontario* [2000] SCR 950; 188 DLR (4<sup>th</sup>) 193 (*Lovelace*) at par 51 which confirmed this).

241 Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 247.

affirmative action, Canada has escaped litigation on the issue of reverse discrimination, litigation which was, and still is, prevalent in the US.<sup>242</sup> The section authorises affirmative action for both individuals and groups.

### 3.6.5.2 Disadvantage

#### (a) Enumerated and analogous 'origins' of, or 'reasons' for, disadvantage

Section 15(2) requires an affirmative action programme to have as its objective the amelioration of conditions of disadvantage. Although the concept 'disadvantage' is not defined in the Charter, section 15(2) itself provides some guidance with regard to identifying and interpreting it. It provides nine different 'origins' of, or 'reasons' for, disadvantage – similar to the grounds of non-discrimination listed in section 15(1) – namely race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Since the list is non-exhaustive, further unlisted or 'analogous' 'origins' or 'reasons' in respect of disadvantage may exist.<sup>243</sup>

#### (b) The test for disadvantage

Academics have mooted that the test for disadvantage under section 15(2) is a 'subjective' one.<sup>244</sup> This is so because the sole indication of the legislature's intent is that

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242 Bevan 'Employment Equity' 465; Chabursky 'Employment Equity' 324; 325; ILO Report Outlawing Discrimination 19; Lepofsky 'Employment Equity' 9-10; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 48. The notion that affirmative action constitutes reverse discrimination was, in any event, rejected by the Supreme Court in *Athabasca* (1981) 124 DLR 93<sup>d</sup> 1 SCC (see par 3.5.4.2(c)(i) above).

243 This interpretation is similar to that of section 15(1) (Peirce 'Progressive Interpretation of Subsection 15(2)' 288; Juriansz 1 483).

244 Peirce 'Progressive Interpretation of Subsection 15(2)' 288. This approach, it has been suggested, will maintain consistency with the subjective test of establishing the ameliorative object of the affirmative action programme which considers whether the individual or group whose condition is to be ameliorated, is disadvantaged. (It has been held that using an *objective test* will not usually result in a different outcome, as the inquiry will rarely be a searching one.) The disadvantage need not be caused by a listed or analogous ground, it need not consist of discrimination, and there need be no connection between the cause of the disadvantage and the ameliorative means of the programme (*op cit* 195). This approach was, however, not followed by the Supreme Court (see

an ameliorative programme must be designed for a 'particular' group, or individuals.<sup>245</sup> Despite the fact that this type of analysis is tautological and deprives the disadvantage requirement of any independent content, it has been pointed out that the issue of precisely who is intended to benefit may in fact be complicated.<sup>246</sup> This is so because legislators will not likely offer a clearly articulated statement recognising the disadvantage of a group or individual. Nevertheless, of assistance in this regard is that, in interpreting 'disadvantage', the Supreme Court has identified 'political, social and legal disadvantage and vulnerability' in the context of section 15(2).<sup>247</sup> The crux of 'disadvantage' under section 15(2) has thus been held to be whether the group or individual is<sup>248</sup>

*'commonly, traditionally or historically disadvantaged'* (own emphasis).

It has further been suggested that the test for disadvantage should not require high standards of proof and should generally be satisfied by judicial notice of the disadvantage of the particular group or individual.<sup>249</sup> However, where the disadvantage of a group is truly contentious as a social fact, that group's alleged disadvantage should not be accepted as a legal fact.<sup>250</sup>

Some commentators have, however, argued for additional factors to the test of disadvantage. For example, Black<sup>251</sup> holds that 'mere membership' of an independently

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*Lovelace* ([2000] 1 SCR 950; 188 DLR (4<sup>th</sup>) 193) (discussed in par 3.6.5.3(c) below); *Apsit v Manitoba Human Rights Commission* [1988] 1 WAR 629 (Man QB) at D/4462 (discussed in par 3.6.5.3(b) below)).

245 Although this is seldom explicitly stated in the affirmative action programme.

246 Peirce 'Progressive Interpretation of Subsection 15(2)' 288.

247 See *McKinney v University of Guelph* (1991) 76 DLR (4<sup>th</sup>) 545 at 609; *Andrews* (1989) 56 DLR (4<sup>th</sup>) 1; *Turpin* [1989] 1 SCR 1296; *R v Swain* [1991] 1 SCR 933, 3 CAR (2d) 1.

248 Peirce 'Progressive Interpretation of Subsection 15(2)' 288; 295.

249 *Op cit* 290. This approach was followed in *Athabasca* (1981) 124 DLR (3<sup>rd</sup>) 1 (SCC) under the Human Rights Act (see par 3.5.4.2(c)(i) above).

250 *Op cit* 290 fn 67.

251 'Affirmative Action for Persons with Disabilities' (Manitoba Human Rights Commission, 1989) [unpublished] as cited in Gibson *Law of the Charter* 309. As an expert witness in *Manitoba Rice Farmers Assoc v Human Rights Commission (Man)* (1985), 37 Man R (2d) 50 at 99, Black argues that affirmative action programmes should be carefully tailored not to include undeserving

disadvantaged group should not be sufficient to satisfy the requirement of being disadvantaged. Peirce differs and holds that, because section 15(2) recognises individual- as well as group-based remedies, combined with the fact that systemic discrimination requires systemic remedies, entirely group-based remedies with no individualised assessment of disadvantage will not contravene section 15(2).<sup>252</sup> Juriansz<sup>253</sup> argues that the design of affirmative action programmes in the early 1990s tended not to have the sophistication to take individual characteristics and histories into account, but that there is no legal reason why this could not be done at present. Peirce,<sup>254</sup> again, differs from Juriansz and argues that, by reading additional criteria into the concept of disadvantage, this narrows down the scope of protection offered by section 15(2).

The question of whether affirmative action is restricted to those groups or individuals who have been disadvantaged *only* 'because of' the grounds listed in s 15(2) has been explained as follows:<sup>255</sup>

'Requiring evidence that the "conditions of disadvantage" are *because of* the grounds would greatly narrow the ambit of subsection 15(2)' (own emphasis).

It was therefore acknowledged that section 15(2) merely includes groups or individuals that are disadvantaged 'because of' the listed grounds, but that the application of section 15(2) is in no way restricted to those groups or individuals.<sup>256</sup>

'The problem with this argument is that it renders the pointed use of "*because of*" in section 15(2) meaningless. The better view is that even the *other groups* must be disadvantaged "because of" the unlisted grounds that identifies them.

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beneficiaries. In this case, the existence of the disadvantage of native people was not recognised (in contrast to *Athabasca* (1981) 124 DLR (3<sup>rd</sup>) 1 (SCC) (see par 3.5.4.2(c) above) and it was required that it be demonstrated by the Human Rights Commission. This view is not in line with systemic discrimination.

252 'Progressive Interpretation of Subsection 15(2)' 291.

253 2 354.

254 'Progressive Interpretation of Subsection 15(2)' 292 (see also par *Evaluation of Apsit case* below).

255 Juriansz 1 483.

256 Juriansz 2 374.

Thus while the test of the *content* of the law, program or activity is *subjective*, the *existence of conditions of disadvantage, and the connection between the disadvantage and the named grounds, must have an objective existence*' (own emphasis).

Peirce holds that the words 'because of' do not require any special meaning, as they require that one must only show that the group is disadvantaged as a group: that is that it is disadvantaged in a manner related to its personal characteristics.<sup>257</sup>

### 3.6.5.3 Case law under the Charter

#### (a) Introduction

Section 15(2) has been applied sparingly and conservatively during the twenty years since it came into operation.<sup>258</sup>

#### (b) *Apsit* case

In *Apsit v Manitoba Human Rights Commission*<sup>259</sup> (*Apsit*), the Manitoba Court of Queen's Bench considered a challenge by an association of wild rice growers directed at a voluntary affirmative action programme of the Department of Natural Resources which granted preferential treatment to native people of Manitoba with respect to licences for wild-rice harvesting. It held that affirmative action had to be respected as a form of remedial relief and that section 15(2) should be applied in such a way as to achieve equality and to seek the promotion of equality through affirmative action programmes.<sup>260</sup>

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257 'Progressive Interpretation of Subsection 15(2)' 291-2. It has been pointed out that the words 'because of' mean that the disadvantage to be ameliorated must 'result from' discrimination (*op cit* 292). Peirce argues that to import the concept of discrimination into the test for disadvantage would potentially create a very onerous criterion.

258 Tarnopolsky & Pentney *Discrimination and the Law* par 4-164.4; Bastarache 'Affirmative Action' 505; Drumbl & Craig 'Affirmative Action' 81; 90-1; ILO Report Outlawing Discrimination 19; 21.

259 [1988] 1 WAR 629 (Man QB).

260 At 101. This confirms a substantive notion of equality where affirmative action is viewed not as an exception to equality, but as a 'clarification' of s 15(1) (Hogg 2 52-46). Section 15(2) is therefore

Importantly, it was held that there must be a ‘real nexus’ between the object of the affirmative action programme as declared by the government in both its ‘form and implementation’.<sup>261</sup> It was not sufficient to declare the object of a programme to be the assistance of a disadvantaged group if, in fact, the ameliorative remedy was not directed towards the specific ‘cause of the disadvantage’. There had to be a ‘unity’ or ‘inter-relationship’ amongst the elements in the programme.<sup>262</sup> In other words, the programme in its form and implementation had to be ‘rationally related’ to the ‘cause of the disadvantage’. Nor was it just ‘any’ cause of disadvantage that was required, but a cause associated with past discrimination. The court found that there was ‘most convincing’ evidence that the target group – native people of Manitoba – were disadvantaged.<sup>263</sup>

But:<sup>264</sup>

‘The disadvantage of the target group did not arise from inability to obtain wild rice licences or discrimination in the granting of wild rice permits or licences, *but rather the disadvantage lay in the target group’s lack of resources to take advantage of the opportunities available in the industry.*

Prior to the implementation of the program there was no restriction on who could apply for a licence or permit. There was no discrimination’ (own emphasis).

Thus, the focus was on establishing the remedial relationship between the ‘cause of disadvantage’ and the affirmative action programme as such.<sup>265</sup> This implied that government must, prior to the implementation of an affirmative action programme, categorise individuals and groups as disadvantaged, and that evidence of the ‘cause’ of disadvantage, or past discrimination, must be shown if required by a court.<sup>266</sup>

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there out of an abundance of caution in order to clarify that the purpose of s 15(1) is to promote equality in a substantive and not merely a formal sense.

261 At 101-2 (see Hogg 2 52-46).

262 *Ibid.*

263 At 102.

264 *Ibid.*

265 Bevan ‘Employment Equity’ 462.

266 *Ibid.*

### *Evaluation of Apsit case*

The requirement set by *Apsit* to prove past discrimination has been criticised as a standard too high, and for two reasons.<sup>267</sup> First, the disadvantage suffered by groups such as aboriginal peoples is a result of a 'complex web' of subordination and segregation created over centuries, and is almost impossible to prove.<sup>268</sup>

'It would be a formidable task to attempt to unravel, particularly in the *context of a trial*, the multiple causes of the disadvantages suffered by Aboriginal peoples. Consequently, to have the legitimacy of affirmative action measures hinge upon the *government's ability to present such proof, is to seriously reduce the effectiveness of section 15(2)*. Furthermore, disadvantaged groups are usually *not a party to challenges* of this nature involving allegations of reverse discrimination, and, therefore, it is appropriate to question whether *any of the parties involved would have the necessary intent in showing past discrimination*' (own emphasis).

It has been held that it is probably for reasons such as these that section 15(2) specifically avoids any reference to the term 'discrimination'. It has been pointed out that the term was in fact deleted from earlier drafts of the Charter and was replaced by the word 'disadvantage'. Vizkeley holds it to be regrettable that the court in *Apsit* should have ignored the wording of section 15(2) and interpreted it as if it included the terms 'cause of disadvantage' or 'discrimination', which it clearly does not.<sup>269</sup> It was also regrettable that the Manitoba Court of Queen's Bench should have adopted a test which so closely resembled that of the US Supreme Court in *Croson*,<sup>270</sup> where the use of affirmative action was restricted, and this while the two countries adhered to such different conceptions of equality.

Secondly, the *Apsit* test would discourage voluntary affirmative action

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267 Vizkeley 2 308-9.

268 *Op cit* 308.

269 *Ibid.*

270 488 US 469 (1989) (see chapter 5 par 4.1.3.4(c) above).

programmes.<sup>271</sup> Institutions wishing to establish such measures would hesitate to do so if they believed that they might be challenged by litigation and be forced to meet a heavy burden of proof in justifying their programmes.

Similarly, Peirce<sup>272</sup> argues that, by reading additional criteria into the concept of disadvantage, this: (a) narrows down the scope of protection offered by s 15(2); and (b) focuses on the relationship between the disadvantage of the group covered and the means used to ameliorate that disadvantage. He holds that there is little hope that anyone can accurately determine the ‘specific’ cause of a group’s disadvantage.<sup>273</sup> He further holds that, by using something as ‘amorphous, complex and indeterminate’ as the *cause* of a group’s disadvantage as a *key* criterion for evaluating the form of amelioration, almost any affirmative action programme will be open to challenge.<sup>274</sup>

(c) *Lovelace* case

*Lovelace*<sup>275</sup> is, to date, only the second case on section 15(2) to have reached the Supreme Court. The case entailed a programme for the distribution of casino profits to aboriginal communities of Ontario, registered as bands under the Indian Act. Certain non-registered aboriginal peoples (the appellants) – not included in the casino project – challenged their exclusion and alleged that their right to equal treatment under section 15(1) had been violated.

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271 Vizkelety 2 308. The author points out that those who are interested in establishing voluntary affirmative action programmes are not likely to admit past discrimination, and that voluntary programmes are not aimed at correcting ‘specific’ and ‘identifiable’ acts of discrimination on the part of the entity proposing the programme. Rather, such measures are generally framed as an attempt to lessen the ‘effects’ of disadvantage to the extent that they may be felt within the institution, but the causes of the disadvantage may be varied and may be ‘external’ (societal discrimination) to the activities of the specific institution. In this respect, it seems counterproductive to burden voluntary programmes with limitations such as the need to show a ‘nexus’ between the cause of the disadvantage and the scope of the remedial action that is being proposed. Indeed, the author holds, the *Apsit* test fails to provide the flexibility and the support that is necessary to give incentive to the development of voluntary affirmative action plans.

272 ‘Progressive Interpretation of Subsection 15(2)’ 292 (see also par 3.6.5.2(b) above).

273 *Ibid.*

274 *Op cit* 293.

275 [2000] 1 SCR 950; 188 DLR (4<sup>th</sup>) 193.

The Supreme Court unanimously upheld the programme and found that it did not violate section 15(1). The court built on the section 15(1) test as set out in *Laws* supra in assessing discrimination and imported this into the affirmative action context – it held it to be ‘directly applicable’ to affirmative action programmes ‘described by the language of section 15(2)’.<sup>276</sup>

The *Lawtest*<sup>277</sup> follows a two-stage approach which entails: (a) differential treatment between the claimant and others in purpose or effect on an enumerated or analogous ground; and (b) substantive discrimination that violates the human dignity of the affected group/s. In assessing the alleged discrimination, four contextual factors must be considered: (a) pre-existing disadvantage, stereotyping, prejudice or vulnerability; (b) the correspondence, or lack thereof, between the ground/s on which the claim is based and the actual need, capacity or circumstances of the claimant or others; (c) the ameliorative purpose or effects of the impugned law, programme or activity upon a more disadvantaged person or group in society; and (d) the nature and scope of the interest affected by the impugned government activity.

The court explicitly rejected the proposition by (all) the parties that the section 15(1) test be amended and made easier for a test under section 15(2). With regard to the first step of the two-stage approach, the court found that there was differential treatment between registered and unregistered Indian bands. It assumed, but did not decide, that the differential treatment was based on an enumerated or analogous ground such as race or ethnic origin.<sup>278</sup> With regard to the second step, the court found no discrimination.<sup>279</sup> In applying the four contextual factors in coming to a decision on whether the appellants’ dignity had been violated, the court found with regard to the first factor that existing disadvantage, stereotyping, prejudice and vulnerability existed for *both* the appellants and the beneficiaries of the casino programme, as both were ‘*demonstrably* disadvantaged’

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276 At pars 43 to 50.

277 Set out in par 3.6.3.1(b)(i)B above, but repeated here for ease of reference (see par *Evaluation of Law* case above for criticism of this test).

278 At pars 66 to 67.

279 At pars 69 to 73.

(own emphasis).<sup>280</sup> It stated that it was not necessary to provide evidence of ‘relative’ disadvantage.<sup>281</sup>

[T]he issue is not whether the bands are *more or less* disadvantaged than the applicants [appellants] but whether benefiting *only* the bands reflects the *true purpose* of the [casino] project and is consistent with the goal of s 15(2)’ (own emphasis).

Consequently, the court held that ‘pitting’ one aboriginal group against another in a ‘perverse competition’ over which was the ‘more needy’ did not accord with the purpose and spirit of section 15.<sup>282</sup> It was therefore not necessary that the ‘most disadvantaged’ groups *only* be targeted under affirmative action programmes.<sup>283</sup>

With regard to the second contextual factor, the court investigated the correspondence of the needs, capacities and circumstances of the groups excluded from the casino programme. It found valid, different circumstances between the included and excluded groups that justified the exclusion of the appellants.<sup>284</sup>

In analysing the third contextual factor, the court rejected the finding in *Law* in part and indicated that it would focus on the ameliorative effect of the programme on the *included group*, instead of on the excluded group/s. The court thus, in effect, modified the third factor for the affirmative action context by *removing any comparative analysis of*

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280 At par 80.

281 At par 46.

282 At par 46. This interpretation has been criticised on the basis that, if the question is now simply to ask whether the excluded group has been disadvantaged relative to society at large, it is unlikely to carry weight in the ultimate determination of discrimination in the affirmative action context. This is because affirmative action programmes typically target only a few disadvantaged groups and will exclude the majority of disadvantaged groups (Sterling ‘*Lovelace v Ontario*’ 62).

283 It seems that the court acknowledged the concept of ‘degrees’ of disadvantage, but did not attach real weight to this.

284 It was acknowledged that this contextual factor was similar to the ‘rational connection’ approach as found in earlier lower court cases (at pars 74-83) (see, for example, *Apsit* [1988] 1 WWR 629 (Man QB) (discussed in par 3.6.5.3(b) above); *R v Willocks* (1995), 22 OR (3d) 552 (Gen Div). It was pointed out, however, that the problem with this approach was that it might render the s 1 test redundant, as it would be almost impossible for an affirmative action programme that had been found not to be rational, to meet the s 1 test (Sterling ‘*Lovelace v Ontario*’ 65).

disadvantage between the excluded and included groups.<sup>285</sup> The result of this change is that this contextual factor in the affirmative action context will invariably suggest non-discrimination, because affirmative action programmes are inevitably ameliorative.<sup>286</sup>

With regard to the fourth, and last, contextual factor, the court analysed the nature of the interest affected. It held that the essence of differential treatment could not be fully appreciated without evaluating the economic, constitutional and societal significance of the interest/s adversely affected.<sup>287</sup> The court also considered the issue of a lack of recognition of the appellants as self-governing communities (as argued by the appellants). It, however, held that this was 'remote' in this instance.<sup>288</sup>

### *Evaluation of Lovelace case*

As a result of the application of the *Law* test to affirmative action, all the weaknesses of this test have become part of the affirmative action context.<sup>289</sup> The rather complex test for discrimination will complicate affirmative action programmes generally.

## **3.7 Employment Equity Act of 1985**

### **3.7.1 Introduction**

Despite the fact that human rights legislation on anti-discrimination and voluntary affirmative action were in place, it became clear in time that the problems and complexities of systemic discrimination in Canadian workplaces experienced by minorities, women, disabled people and aboriginal peoples could not be dealt with effectively in terms of such

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285 Sterling '*Lovelace v Ontario*' 65.

286 *Op cit* 64. Put differently, the application of this factor where the excluded group is disadvantaged in the non-affirmative action context is likely to lead to discrimination, whereas, in the affirmative action context, it is not.

287 At pars 88 to 89, basically following *Egan* ([1995] 2 SCR 513, 124 DLR (4<sup>th</sup>) 609).

288 At par 89.

289 Sterling '*Lovelace v Ontario*' 60.

legislation.<sup>290</sup> Thus the need for policy initiatives to ameliorate the economic status of these groups was investigated by the Abella Commission,<sup>291</sup> eventually leading to the Abella Report being published and to the adoption of the Employment Equity Act.<sup>292</sup>

### 3.7.2 *Abella Report*

The Abella Commission was mandated to examine employment opportunities for women, native people, disabled people and visible minorities, members of which represented about 60 percent of Canada's population at that stage.<sup>293</sup>

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290 ILO Report Affirmative Action 8; Jain 1 595; Hucker 1 136. Advocacy groups were instrumental in putting the issue of employment equity on the public agenda (Abu-Laban & Gabriel *Selling Diversity* 134). In this regard, in 1967, the federal government established the Royal Commission on the Status of Women in response to women's activism. Its mandate was to investigate 'the status of women in Canada ... to ensure for women equal opportunities with men in all aspects of Canadian society' (Report Royal Commission on the Status of Women ix). Recommendations were made that special steps be taken in federal government departments to: (a) increase the number of women appointed to occupations and professions not traditionally female; (b) alter recruitment literature and recruiting programmes to ensure that it was abundantly clear that women were wanted in all occupations and professions; and (c) obtain applications from qualified women when appointments to senior levels were made (*op cit* 400). These recommendations and others formed a 'blueprint' for government to address women's disadvantage in society, and, particularly, furthered the agenda for affirmative action for women. The Canadian Ethnocultural Council (supported by federal government), in similar vein, represented visible and other minority groups (Abu-Laban & Gabriel *Selling Diversity* 136). In later years, a Parliamentary Special Committee on the Participation of Visible Minorities in Canadian Society recognised the inadequacies of voluntary affirmative action programmes and called on federal government to promote the hiring of visible minorities in the private sector (ILO Report Equality Now 35).

291 The Royal Commission on Equality in Employment and of the Parliament of Canada's Standing Committee on Justice and Legal Affairs (1984) (hereafter the 'Abella Commission') was commissioned by the federal government with Judge RS Abella as commissioner.

292 See par 3.7.3 below.

293 Abella Report ii; 17. In a minute of the Privy Council dated 24 June 1983 (referred to in the Abella Report (i)), it was held that demographic trends at that stage indicated that the majority of new entrants into the Canadian labour force were women and that a need existed for further government action to encourage, in *all* sectors of economic activity, the hiring, training and promotion of women, native people, disabled people and visible minorities. It was acknowledged that the enforcement approach to human rights under the Constitution Act and the Human Rights Act was individual-based and was limited to intentional discrimination. Thus it could not deal with the pervasiveness and subtlety of systemic discrimination, which is group-based (Abella Report 8). The traditional model of a human rights commission was also inadequate to respond to the magnitude of the problem (*ibid*). The designated groups were thus, to a large extent, predetermined but could, theoretically, be changed by the findings of the Abella Commission.

The Abella Report viewed employment equity<sup>294</sup> as a strategy designed to obliterate the present and the residual effects of employment discrimination and to open, equitably, the competition for employment opportunities to those arbitrarily excluded.<sup>295</sup> Government intervention was seen as essential, as the elimination of all forms of discrimination required, as the Abella Report put it, 'more' rather than 'less' law.<sup>296</sup> 'Equal opportunity' was needed to achieve fairness in the process, and 'employment equity' to achieve justice in the outcome.<sup>297</sup>

### **3.7.3 Employment Equity Act**

#### **3.7.3.1 Introduction**

The Abella Report formed the basis for the Employment Equity Act (CEEA), which was passed in 1986.<sup>298</sup> In addition, various international instruments were taken into account in drafting the CEEA.<sup>299</sup> Section 2 of the CEEA provides that

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294 As termed by the Abella Report. It gives the main reason for using the term 'employment equity' as being to avoid intellectual resistance and confusion with the idea of quotas in the US – this term is therefore distinctively Canadian (Abella Report 6-7; Tarnopolsky & Pentney *Discrimination and the Law* par 4-143).

295 At 254.

296 *Ibid.* The Abella Report maintained that voluntary measures were an unsatisfactory response to the pervasiveness of systemic discrimination and recommended a mandatory programme – a 'massive' policy response to systemic discrimination was pleaded for.

297 *Ibid.* See also Federal Equity Manual 3-1.

298 Bevan 'Employment Equity' 443. Over and above the Abella Report, other reports documenting discrimination against women in the federal public service, the disabled and aboriginal peoples were also tabled during this time (Jain 2 355) (see fn 290 above).

299 These included the Covenant on Civil and Political Rights (see chapter 2 par 2.1.2.4 above), the International Covenant on the Rights of Indigenous Peoples (adopted by the Third General Assembly World Council of Indigenous Peoples in May 1981) and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted by the UN on 18 December 1992).

‘the purpose of the Act is to achieve equality in the workplace so that *no person*<sup>300</sup> shall be denied employment opportunities or benefits for reasons unrelated to *ability* and, in the fulfilment of that goal, to *correct the conditions of disadvantage* in employment experienced by *women, aboriginal peoples, persons with disability and members of visible minorities* by giving effect to the principle that employment equity means more than treating persons in the same way but also requires *special measures and the accommodation of differences*’ (own emphasis).

The CEEA applies to the public and private sectors that are federally regulated, to organisations with 100 or more employees, and to all federal government departments, including the Canadian armed forces and the Royal Canadian Mounted Police.<sup>301</sup>

The focus of the CEEA is on detailed reporting<sup>302</sup> of employment data by enterprises and not on enforcement procedures, although fines<sup>303</sup> may be incurred for non-compliance. Copies of reports by employers must be submitted to the Minister of Employment and Immigration, who must file these with the Human Rights Commission, which can initiate an investigation if there are reasonable grounds to believe that systemic discrimination is indicated by the data in the reports.<sup>304</sup> The Human Rights Commission is responsible for enforcing the Act.<sup>305</sup>

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300 The scope of the CEEA is therefore wide. Note, however, that the Employment Equity Regulations exclude certain ‘employees’ from the employer’s employment equity analysis, namely ‘temporary’ and ‘casual’ employees and people on ‘short-term’ engagements of less than three months in duration.

301 Section 4 of the CEEA. The CEEA was amended to include the federal public service in 1996.

302 Sections 18-21 of the CEEA. Employers must consult employees and must report to government annually about the details of their work force (s 18(1)). Reports must include: (a) the sector; the location of the employer and its employees; (b) the number of employees who are members of designated groups; (c) occupational groups; (d) the degree of representation of designated groups in each occupational group; (e) salary ranges; (f) the number of employees hired, promoted and terminated.

303 Section 36 of the CEEA.

304 Section 18(10) of the CEEA.

305 Section 22 of the CEEA. The Human Rights Commission’s compliance officers may conduct audits of employers, including on-the-spot audits. An employer may appeal the Commission’s decision to the Employment Equity Tribunal for adjudication (ss 27-29). The Tribunal may quash the directive, uphold it, vary it, or substitute ‘any other order it considers appropriate and reasonable in the circumstances to remedy the non-compliance’ (s 30(1)). The Tribunal may, however, not impose a remedy that would: (a) cause undue hardship; (b) compel an employer to hire or promote an ‘unqualified’ person; (c) compel an employer to create new positions; (d) compel a public service employer to ignore ‘merit’ in hiring and promotion; (e) fail to take into account the factors set out in s 10(2) of the CEEA (see par 3.7.3.3(b) below); and (f) impose a quota on an employer (ss 33(1);

### 3.7.3.2 *Non-discrimination*

The CEEA has a dual purpose. On the one hand, it aims to prevent employers from discriminating against an individual on the basis of a characteristic that is unrelated to that individual's ability to do the job.<sup>306</sup> This constitutes formal equality.<sup>307</sup>

### 3.7.3.3 *Affirmative action*

#### (a) Nature

On the other hand, the CEEA provides for mandatory affirmative action measures in the workplace, or substantive equality.<sup>308</sup> 'Equality' as such is however not defined in the CEEA. The goal of employment equity is set out to be to<sup>309</sup>

'... 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,<sup>310</sup> or

(i) in 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' (own emphasis).

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33(2)). A quota is defined as 'a requirement to hire or promote a fixed and arbitrary number of persons during a given period' (s 33(2)). This means that non-arbitrary' quotas are permissible, but that 'arbitrary' ones are not. Normally, 'arbitrary' means a decision that must, as a matter of objective fact, advance the legitimate goals of the statute in question, rather than some extraneous goal, and must take into account all of the relevant evidence and ignore all irrelevant matters (England, Christie & Christie *Employment Law in Canada* par 5.208).

306 Section 2 of the CEEA (see par 3.7.3 above).

307 See chapter 2 par 3.1.2 above for the notion of formal equality.

308 See chapter 2 par 3.1.3 above for a discussion of the notion of substantive equality.

309 Section 5(b) of the CEEA.

310 Defined in s 3 of the CEEA as 'all persons in Canada of working age who are willing and able to work' (see par 4.3.3 below for a discussion of this section).

The goal is thus a degree of representation for members of the designated groups, fairly similar to that in South Africa.<sup>311</sup> The CEEA is expected to bring about an improvement in the numerical representation of members of the designated groups. For example, over time an organisation's work force must reflect the labour markets from which it recruits, and, ultimately, the diversity of Canadian society.<sup>312</sup> It has, however, been held that diversity is not a substitute for employment equity in Canada.<sup>313</sup>

(b) Content and process

The CEEA basically places four duties relating to affirmative action on employers. First, an employer must collect information and conduct an analysis to establish the degree of under-representation of people in designated groups in each occupational group.<sup>314</sup> Secondly, an employer must conduct a review of its employment systems, policies and practices to identify employment barriers against people in designated groups that result from those systems, policies and practices.<sup>315</sup> Thirdly, the employment equity plan of the

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311 See chapter 3 pars 3.5.2.3(c)(i); 3.5.2.3(c)(ii) above. Four criteria have been established in practice against which an equitable workforce may be measured. These include: (a) unemployment; (b) occupational representation; (c) income; and (d) participation in the work force (ILO Report Affirmative Action 10).

312 *Ibid* (see also par 3.7.3.3(a) above).

313 Agócs and Burr 'Managing Diversity' 43. Diversity initiatives are directed at and are open to all employees (Ray-Ellis *Federal Equity Manual* 3-9). Diversity is seen as a 'privatized, voluntary' response to diversity in the workplace, touted by some in the business community as being 'superior' to legislated employment equity measures (Abu-Laban & Gabriel *Selling Diversity* 130). The situation is different in the US where the case of *Grutter* (123 S Ct 2325 (2003)) was held to illustrate that affirmative action on the basis of 'diversity' constituted the most recent basis to uphold an affirmative action programme (see chapter 5 par 4.1.3.5(b) above).

314 Section 9(1) of the CEEA. 'Under-representation' means that there is proportionally less of a particular group in a workplace as compared with that group's representation in the local population (Chabursky 'Employment Equity' 339). Under-representation is established by using Statistics Canada's data on external labour market composition (as part of its Employment Equity Data Program) specifically for the purpose of assisting employers to comply with their obligations under the CEEA (England, Christie & Christie *Employment Law of Canada* par 5.200). The Federal Equity Guidelines however use the concept of 'significant' under-representation, a percentage gap of 20 percent. The Guidelines further indicate that, in a situation where the representation in the employer's work force is higher than the external work force, the employer does not have to proceed further with employment equity and should focus on areas of 'truly serious' under-representation (Ray-Ellis *Federal Equity Manual* 5-440).

315 Section 9(2) of the CEEA (see fn 327 below).

employer must specify positive policies and practices to correct under-representation of people identified by the analysis.<sup>316</sup> Short-term and numerical goals and measures must be established to increase representation of groups in each occupational group where under-representation has been identified.<sup>317</sup> In establishing its 'short-term' hiring and promotion goals, an employer must consider: (a) the degree of under-representation of designated groups; (b) the market supply of qualified labour; (c) the anticipated expansion or contraction in the work force; (d) the anticipated labour turnover rates during the period the system will remain operational; and (e) any other factor 'as may be described'.<sup>318</sup>

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316 Section 10(1)(a) of the CEEA. The CEEA only provides the general principles regarding acceptability of an affirmative action plan, leaving it to individual employers to work out the details of such plans with the assistance of specialists from the Human Rights Commission (England, Christie & Christie *Employment Law in Canada* par 5.185). Although employers are free to formulate an affirmative action plan, involving officers of the Human Rights Commission has the advantage of increasing the probability that it will be treated as a defence to a complaint of discrimination (*ibid*). As to the design of an affirmative action plan, in Ontario, for example, the provincial Human Rights Commission will approve an affirmative action plan if it meets the following criteria as set out by the Guidelines on Special Programs Toronto Ontario Human Rights Commission 1991 3 (Ontario Human Rights Code s 14(2)): (a) the plan must be designed to assist disadvantaged persons or groups (examples of acceptable forms of assistance include the provision of special training opportunities, job-mentoring systems and targeting non-traditional jobs for designated groups); (b) the plan must 'clearly' identify the designated groups who are to receive the preferential treatment; (c) the employer must adduce 'objective and, where possible, quantifiable, as opposed to impressionistic', evidence to demonstrate why the targeted beneficiaries are experiencing 'hardship or disadvantage', and how the proposed affirmative action measures will 'relieve' this hardship (statistical evidence of under-representation is one example of such evidence, as long as it is reliable and valid proof of discrimination) (the Guidelines provide details of the kind of labour force data that employers must collect to be able to meet this burden of proof); (d) the employer must prepare and implement a plan which specifies the targets it wants to achieve and the deadlines for achieving them; (e) there must be a mechanism for monitoring and evaluating the progress towards achieving the stated goals; and (f) the employer must consult with 'all persons and groups who may be affected' by the programme (consultation must also take place with non-unionised employees). Another implicit requirement for affirmative action plans is that they must be rational in that they must not disproportionately burden people from non-designated groups above the degree necessary to achieve an acceptable level of equality for the disadvantaged (England, Christie & Christie *Employment Law in Canada* par 5.186) (see, for example, *Ontario Human Rights Commission v Ontario* (1994), 117 DLR (4<sup>th</sup>) 297(Ont CA) at 303; 306; *Ontario (Human Rights Commission) v Ontario Teachers Federation* (no 4) (1994), 20 CHRR D/257 (Ont Bd Inq)). These factors require tribunals to weigh up the interests of designated and non-designated groups. At this stage, it is not clear at what point affirmative action plans will be struck down as disproportionately burdening non-designated groups (England, Christie & Christie *Employment Law in Canada* par 5.186).

317 Section 10(1)(d) of the CEEA. The term 'short-term' refers to any period of between one and three years' duration (Regulations s 1(3)). 'Longer -term' goals are also provided for, referring to any period in excess of three years (*ibid*).

318 Section 10(2) of the CEEA.

## (c) Beneficiaries of affirmative action

Section 2 of the CEEA followed the recommendation of the Abella Report and provided that ‘the conditions of disadvantage’ in employment experienced by the four ‘designated groups’, namely

*‘women, aboriginal peoples,<sup>319</sup> persons with disability and members of visible minorities’<sup>320</sup>*

must be corrected by way of special measures and the accommodation of differences. No hierarchy exists with regard to the designated groups.<sup>321</sup> However, it has been recommended that anyone hoping to coordinate its employment equity programme with legislation should include all four of the designated groups under the current CEEA.<sup>322</sup>

The CEEA provides definitions for the designated groups. These are based on the definitions used in the Canadian census, which provides information on three of the groups, and on a post-census survey, the Health and Activity Limitation Survey (HALS) of 1986, which provided information on people with disabilities.<sup>323</sup> ‘Aboriginal people’ are defined as<sup>324</sup>

*‘persons who are Indians, Inuit or Métis’.<sup>325</sup>*

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319 Section 7 of the CEEA provides that, where a private sector employer is engaged primarily in promoting or serving the interests of aboriginal peoples, the employer may give preference to these people, or employ *only* aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the Human Rights Act.

320 The position with regard to women and disabled people is the same as for the South African EEA.

321 See par 4.1.4 below where it is indicated that it has been found that employers implemented affirmative action for white women first.

322 Ray-Ellis *Federal Equity Manual* 4-6. It has been stated that an employer adopting employment equity voluntarily may benefit any group it desires (*ibid*), but this does not appear to be correct.

323 Report A Matter of Fairness 7. The definition for disability used in the HALS was developed in accordance with requirements of the World Health Organisation.

324 Section 3 of the CEEA. Some aboriginal reserves and settlements refused to participate in the 1986 census, which led to undercounting of these people. The 1991 census achieved a higher rate of participation.

325 See par 2.1 above for the meaning of ‘Inuit’, which was basically substituted for the term ‘Eskimos’. ‘Metis’ means people that are part European and part Indian, or, in terms of South African terminology, ‘coloureds’.

This term thus represents a combination of all people originally found in Canada when the British and French colonised the territory, as well as the group of people which resulted as a result of contact between the European colonists and the aboriginal people.

'Members of visible minorities' are defined as<sup>326</sup>

'persons, other than aboriginal peoples, who are non-Caucasian in race or non-white in colour'.

The term 'visible minorities' thus includes all people, except aboriginal peoples and whites.<sup>327</sup>

'Persons with disabilities' are defined as<sup>328</sup>

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

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

or

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

and includes persons whose functional limitations owing to their impairment have been accommodated in their current job or workplace' (own emphasis).

This definition is similar to that used in the South African EEA.<sup>329</sup>

(i) Identifying beneficiaries

The CEEA requires self-identification for all designated groups, except for women.<sup>330</sup> Federally, there is no requirement to collect information about women, as often this information already exists in employee records. Thus only those employees who

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326 Section 3 of the CEEA.

327 See pars 4.1.2.2(a)(iii)A; 4.1.4 below for criticism of this definition.

328 Section 3 of the CEEA.

329 See chapter 3 par 3.5.2.3(c)(iii) above.

330 The Equity Manual however states that the main alternative to self-identification is supervisory identification with employee verification. In terms of this method, a supervisor identifies employees as visible minorities or as aboriginal people (Ray-Ellis *Federal Equity Manual* 8-3).

voluntary identify themselves to an employer, or who agree to be identified by an employer, as aboriginal peoples, members of visible minorities or people with disabilities are to be counted as members of those designated groups for the purpose of implementing employment equity.<sup>331</sup>

However, no legal mechanism exists either for an employer or the Human Rights Commission to ensure that employees in fact identify themselves, or identify themselves correctly.<sup>332</sup> Self-identification may thus result in undercounting and in an incomplete database.<sup>333</sup>

In the third review of the CEEA, it was testified that there was an unwillingness by employees to complete a self-identification questionnaire.<sup>334</sup> But it was found that the rationale for self-identification was as valid then as it was when the original CEEA was passed in 1986. This was due to the fact that many people still feared discrimination in the workplace, for example people who believed that they might be stigmatised by virtue of having a mental illness.<sup>335</sup> It was held that the need to maintain individual privacy continued to be important.<sup>336</sup> The CEEA however allows an employer to refer doubts about under-representation arising from an unwillingness to self-identify to a compliance officer, who

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331 Section 9(2). It has been stressed that employees should understand the need for them to participate in employment equity and that employers should create a climate of trust so that employees will be willing to identify themselves (Chabursky 'Employment Equity Act' 331; Ray-Ellis *Federal Equity Manual* 8-2).

332 English *Individual Employment Law* 207; England, Christie & Christie *Employment Law of Canada* par 5.200; Mason, Geddie & Nowakowska *Canadian Master Labour Guide* 594. Presumably, an employer cannot interrogate an employee about his or her designated status, since this could be a breach of human rights statutes (England, Christie & Christie *Employment Law of Canada* par 5.200). It may be possible though for an employer to question an employee about his or her designated group status if an exception is made under the defence relating to a bona fide occupational requirement in respect of information gathered for affirmative action purposes.

333 Ray-Ellis *Federal Equity Manual* 9-2.

334 Employers maintained that, in part, this was due to the fact that employees wanted to be recognised for achieving success as a result of talent and performance, and not as a result of membership of a designated group (Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter VI 6).

335 *Ibid.*

336 It was pointed out that the census and the Participation and Activity Limitation Survey (PALS) of 2001 also used self-identification to establish overall labour force availability for the four designated groups and that a change in method would cause serious difficulties in making comparisons and setting benchmarks.

should take this into account while conducting an audit.<sup>337</sup>

It is stipulated in the CEEA that the work force survey questionnaire should ask every employee whether he or she is a member of a visible minority, a person with a disability or an aboriginal person.<sup>338</sup> The questionnaire must contain the definitions of the designated groups set out in section 3 of the CEEA, or a description of these groups that is consistent with the definitions, to assist the employee in responding to the questionnaire.<sup>339</sup> In terms of the Regulations to the CEEA, an employee must be informed that it is possible for a person to be a member of more than one designated group.<sup>340</sup> The Regulations require this to be indicated on the questionnaire as well.<sup>341</sup> Information contained in a questionnaire is confidential and may only be used for the purpose of meeting the employer's obligations under the Act.<sup>342</sup>

### 3.8 Federal Contractors Program

In addition to the CEEA, the Federal Contractors Program (FCP) was established in 1986. It applies to large- and medium-sized, provincially regulated employers who supply goods and services to federal government departments and agencies.<sup>343</sup> The FCP was established for enterprises with which government does business and that may not necessarily be subject to the CEEA, but which employ more than 100 employees and bid on contracts of Can\$ 200 000 or more. Companies have to agree, as part of the contract (similar to the OFCCP in the US), to sign a certificate of commitment to carry out an employment equity programme, including collecting and compiling information on the work

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337 Section 25(1.10(b)) of the CEEA.

338 Section 3(1) of the CEEA.

339 Section 3(2) of the CEEA.

340 Section 3(4) of the Regulations.

341 Section 3(6) of the Regulations.

342 Section 9(3) of the CEEA. The employer must update this data on a regular basis (Regulations s 5).

343 Treasury Board Directive No 802984; England, Christie & Christie *Employment Law in Canada* par 5.211. The FCP applies to more than 1 100 provincially regulated firms having in excess of 1 million employees (Jain 1 598).

force, establishing a system to track hiring, promotion, training and termination, adopting special measures to ensure that goals for designated groups are achieved, and developing an employment equity plan. The affirmative action measures of the FCP are thus mandatory. An affirmative action programme established under the FCP must be equivalent to those established under the CEEA, and for the same groups, namely women, aboriginal peoples, people with disabilities and members of visible minorities.

The monitoring mechanism of the FCP comprises compliance review procedures by federal government. Failure to comply with 'good faith effort' can lead to exclusion from bidding on federal government contracts. The Canada Employment and Immigration Commission periodically reviews representative samples of contractors to ensure compliance.<sup>344</sup> Generally, compliance with the FCP is not good.<sup>345</sup>

#### *Evaluation of legislative framework*

Employment equity legislation in Canada forms a branch of labour law. It focuses, first, on outlawing workplace discrimination based on race, colour, religion, sex, national origin, marital status, sex, age and disability. In this regard, the CEEA is the most comprehensive, protecting all of these. The CEEA protects people in federal, state and local government, whereas the Human Rights Act protects the private sector, but in a more limited way. Secondly, a duty is placed on employers to implement affirmative action measures for women, visible minorities, aboriginal peoples and people with disabilities. Detailed legislation specifies the purpose and scope of affirmative action,<sup>346</sup> in contrast to the position in the US where this is left to the courts.

In Canada, therefore, a combination of programmes has developed through legislation by including affirmative action – both as a remedy and as a proactive duty imposed on employers – and contract compliance programmes. In practice, affirmative action is found in three forms: (a) voluntary affirmative action taken by employers; (b) as a

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344 England, Christie & Christie *Employment Law in Canada* par 5.211.

345 *Ibid.*

346 Jain, Sloane & Horwitz *Employment Equity* 73.

remedy ordered by the courts, the Human Rights Commission or Tribunal or; (c) by a contractor or subcontractor of the government as part of the FCP regulations.

Although Canada's employment equity policy has basically been influenced by affirmative action in the US, from the start it set a course different from American-style affirmative action and developed its own unique Canadian regime.<sup>347</sup> In essence, the Canadian response to inequality has sought a much broader strategy than the US, in that its employment equity framework is designed not only to improve numerical representation through hiring, but also to provide fair employment systems and a supportive organisational culture for women, racial minorities, aboriginal peoples and people with disabilities.<sup>348</sup>

South Africa, in turn, has been influenced by the Canadian approach to employment equity and has followed the conceptual framework of the CEEA in its EEA. The latter – which gives effect to the equality clause in the Constitution – forms a branch of labour law and focuses on outlawing workplace discrimination based on an even more extensive list than that in the CEEA. The EEA protects people against discrimination in both public and private spheres and places a duty on employers with more than 50 employees to implement affirmative action measures for black people, women and people with disabilities.<sup>349</sup>

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347 Vizkelety 1 225; Bevan 'Employment Equity' 443; Jain & Verma 'Managing Workforce Diversity' 35; Peirce 'Progressive Interpretation of Subsection 15(2)' 265; Brodsky 'Constitutional Equality Rights' 241; Abu-Laban & Gabriel *Selling Diversity* 157; Tarnopolsky & Pentney *Discrimination and the Law* par 4.140.7. For example: as affirmative action programmes are designed to ameliorate inequality, the extent to which these programmes truly ameliorate adverse conditions turns largely on the definition of 'equality' adopted by the legislators and on its interpretation by the courts (Bevan 'Employment Equity' 448); whereas American jurisprudence adopts a compartmentalised approach to discrimination (with no constitutional protection for discrimination), the Canadian approach entails a purposive approach and comparative disadvantage, thereby eliminating the need to establish intent to discriminate (*ibid*); the term 'employment equity' was used to differentiate Canadian affirmative action from that of the US (Hucker 2 266; Chabursky 'Employment Equity' 326; 339; 360; Pothier 'Charter Challenges' 288; Bakan et al *Canadian Constitutional Law* 1212; Abella Report 6-7; ILO Report Outlawing Discrimination 21).

348 Agócs & Burr 'Managing Diversity' 35.

349 See chapter 3 par 3.5.2.3(c)(iii) above.

## 4 BENEFICIARIES OF AFFIRMATIVE ACTION

### 4.1 Past personal disadvantage or group membership

#### 4.1.1 Introduction

As the Abella Report formed the basis of the CEEA, it is important to scrutinise such report regarding the issue of past personal disadvantage or group membership as a prerequisite to benefit from affirmative action.

#### 4.1.2 *Abella Report*

##### 4.1.2.1 Introduction

The Abella Commission examined the labour force profiles of three of the four categories, namely women, aboriginal peoples and visible minorities, there being no comprehensive national data on disabled people at that stage.<sup>350</sup> It held that equality was, at the very least, freedom from adverse discrimination.<sup>351</sup> But what constituted adverse discrimination changed with time, with information, with experience and with insight. What a society tolerated 100, 50 or even 10 years ago might no longer be tolerable. Thus, equality was seen as 'a process of constant and flexible examination'.<sup>352</sup> It was pointed out that a 100 years ago the role of women was almost exclusively domestic, that 50 years ago some visible minorities did not have the right to vote, that 25 years ago native people lacked a policy voice, and that 10 years ago disabled people were kept dependent. Today, none of these exclusionary assumptions were acceptable. But, the goal of equality was also more than an 'evolutionary intolerance to adverse discrimination'.<sup>353</sup>

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350 Kallen *Ethnicity* 247.

351 Abella Report 1.

352 *Ibid.*

353 *Ibid.*

'It is to ensure, too, that the vestiges of those arbitrary restrictive assumptions do *not continue* to play a role in the society. If in this ongoing process we are not always sure what "equality" means, most of us have a good understanding of what is "fair". And what is happening today in Canada to *women, native people, disabled persons, and visible minorities is not fair*' (own emphasis).

It was emphasised that systemic discrimination existed for many people of the suggested designated groups, in that they had restricted employment opportunities, limited access to decision-making processes that critically affected them, little public visibility as contributing Canadians, and a circumscribed range of options generally.<sup>354</sup> Although this was held to be 'understandable' given history, culture, economics and even human nature, it was reiterated that it could not held to be 'fair' by any standard.

#### 4.1.2.2 *Affirmative action as a response to systemic discrimination*

The Abella Commission recognised that the 'impact' of behaviour was the essence of systemic discrimination.<sup>355</sup> It stressed that systemic discriminatory systems and practices that were customarily and often unwittingly adopted may have an unjustifiably negative effect on certain groups in society.<sup>356</sup>

The 'effect' of the system on the individual or group, rather than its attitudinal sources, determined whether or not a remedy was justified.<sup>357</sup> Remedial measures of a 'systemic kind' – the object of employment equity and affirmative action – were meant to improve the situation for individuals who, by virtue of 'belonging to' and 'being identified' with a particular group, found themselves unfairly and adversely affected by certain systems/patterns and/or practices.<sup>358</sup> Such patterns had two basic tenets, namely: (a) a disparately negative impact that flowed from the structure of systems designed for a homogenous society; and (b) a disparately negative impact that flowed from practices

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354 *Ibid.*

355 *Op cit* 9.

356 *Ibid.*

357 *Op cit* 2; 9.

358 *Op cit* 9.

based on stereotypical characteristics ascribed to an individual because of the characteristics ascribed to the group of which he or she was a member.<sup>359</sup> The former usually resulted in systems primarily designed for white, able men and the latter in practices assessed on white, able men's perceptions of everyone else.<sup>360</sup> In both instances, the institutionalised systems and practices resulted in<sup>361</sup>

*'arbitrary and extensive exclusion for people who, by reason of their group affiliation, are systematically denied a full opportunity to demonstrate their individual abilities'* (own emphasis).

The Abella Commission suggested that intervention to adjust such systems was both justified and essential to accommodate a more heterogenous workforce.<sup>362</sup> The purpose of such intervention was to open up competition to all who would have been eligible, but for the existence of the discrimination. The effect of the intervention would be the end of 'exclusivity' and the 'beginning of equality'.<sup>363</sup> Inclusivity or integration of people previously excluded was thus the main aim of affirmative action.

(a) Group membership

The Abella Commission found the suggested groups' evidence of their economic disadvantage to be valid.<sup>364</sup> It emphasised that it would be an unproductive exercise to unravel historical, discriminatory attitudes.<sup>365</sup> It was *nowtime*, it stated, to concentrate, not on the motives of the past, but on the 'best way to rectify their impact'.<sup>366</sup>

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359 *Op cit* 9-10.

360 *Op cit* 10.

361 *Ibid.*

362 *Ibid.*

363 *Ibid.*

364 *Op cit* 202-3.

365 *Op cit* 2. Although it was stated that it would be 'of interest' to establish why certain attitudes or practices were allowed to predominate, such an exercise was considered to be of little assistance in devising remedies to redress unfair realities.

366 *Ibid.*

One way, it was suggested, was to appeal to the Canadian collective sense of fairness.<sup>367</sup> If access were genuinely available in a way that allowed everyone who so wished the opportunity to fully develop his or her potential, Canadian society would, in fact, have achieved a 'kind of equality', namely equal freedom from discrimination.<sup>368</sup> Discrimination in this context meant practices or attitudes that had, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributes rather than actual characteristics. What was then impeding the full development of the potential was not the individual's capacity, but external barriers that artificially inhibited growth, independent of whether this discrimination was motivated by an intentional desire to obstruct someone's potential, or whether it was the accidental by-product of innocently motivated practices or systems.<sup>369</sup> If the barrier was affecting certain groups in a disproportionately negative way, this was a signal that the practices that had led to this adverse impact might be discriminatory.<sup>370</sup>

This, it was stated, was the reason why it was important to look at equality in another way, namely at the 'results' of a system. In these results, evidence of barriers which were inequitable and impeded individual opportunity might be found. The Abella Commission held that, while these results were by no means conclusive evidence of inequity, they were an 'effective signal' that 'further action' was necessary. In other words, they indicated that the system called for remedial attention.<sup>371</sup> It was however emphasised that equality in employment was not a concept that produced the same results for everyone.<sup>372</sup>

'It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential. Sometimes equality means treating people the same, despite their differences, and sometimes it

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367 *Ibid.*

368 *Ibid.*

369 *Ibid.*

370 *Ibid.*

371 *Op cit* 2-3.

372 *Op cit* 3. Although, previously, it was thought that equality only meant 'sameness' and that treating people as equals meant treating everyone the same, it was now known that, to treat everyone the same, might be to offend the notion of equality.

means treating them as equals by accommodating their differences. ... Ignoring differences may mean ignoring legitimate needs.'

It was recognised that it would not be fair to use differences between people as an 'excuse' to exclude them arbitrarily from equitable participation.<sup>373</sup> Equality meant nothing if it did not mean that people were of 'equal worth', regardless of differences in gender, race, ethnicity or disability.<sup>374</sup> Ignoring differences and refusing to accommodate them was a denial of access and opportunity – it was discrimination.<sup>375</sup> To reduce this discrimination, barrier-free environments had to be created and maintained.<sup>376</sup>

The Abella Commission examined section 15 of the Charter and came to the conclusion that 'equality' in terms of the Charter had thus been interpreted to encourage a 'comprehensive' or 'systemic', rather than a 'particularized', approach to the elimination of employment barriers.<sup>377</sup>

It was suggested that, for the purpose of approving an affirmative action programme under the Charter, the judicial enquiry, if any, would be into whether or not the group had been 'disadvantaged'.<sup>378</sup> Such an enquiry, in the employment context, would look for 'social indicators' of job discrimination or evidence that members of a particular group: (a) had higher unemployment rates; (b) had lower income levels; and (c) tended to be clustered in jobs with lower occupational status.<sup>379</sup>

The Abella Commission pointed out that an investigation into previous case law on affirmative action revealed that, in the only affirmative action case before the Charter was enacted, the Supreme Court in *Athabasca*<sup>380</sup> had required no external evidence on the

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373 *Op cit* 3.

374 *Ibid.* It was emphasised that the projected, mythical and attributed meaning of these differences could not be allowed to exclude full participation.

375 *Ibid.*

376 *Ibid.* Barriers with regard to both pre-employment conditions and existing conditions were to be eliminated (*op cit* 6).

377 *Op cit* 14. Though s 15(2) did not create a statutory obligation in respect of affirmative action programmes, it did in fact sanction them.

378 *Op cit* 15.

379 *Ibid.*

380 (1981) 124 DLR (3<sup>rd</sup>) 1 (SCC) (see par 3.5.4.2(c)(i) above for a discussion of the case).

factual discrimination suffered by the groups that were to be affirmed. Rather, it seemed that it had taken judicial notice of the disadvantage, upholding the validity of the programme. It had accepted that a programme for native people was necessary 'so that they may be in a competitive position to obtain employment without regard to the handicaps [they have] inherited'.<sup>381</sup>

It was speculated that the courts might be uncomfortable acting as the arbiters of disadvantage, since this could involve statistical and economic assessments more appropriately belonging to a political, policy-making branch of government.<sup>382</sup> The Abella Commission argued, however, that if the courts were ultimately left to decide what 'disadvantage' meant, it would be consistent with the spirit of section 15 of the Charter – with its clear allusion to systemic discrimination and its approval of systemic remedies – to assume as 'disadvantaged' all individuals who were members of a group 'found' to be disadvantaged.<sup>383</sup>

The group-based approach to disadvantage, and not past personal disadvantage, was therefore endorsed. The advantage of the former approach was held to be that<sup>384</sup>

'[t]he courts would be spared assessing the situation of *every individual* covered by an ameliorative program to determine whether he or she were entitled to be included in the class of "disadvantaged" persons. Every member of the disadvantaged group would be *assumed to have been disadvantaged and thereby entitled to the benefit* of the program' (own emphasis).

The Abella Commission acknowledged that people might be disadvantaged for a variety of reasons and might be disadvantaged in a variety of ways.<sup>385</sup> These could include 'economic, social, political and educational reasons'.<sup>386</sup> It found that, at the time of the

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381 Abella Report 15.

382 *Ibid.*, referring to the US case of *Bakke* 98 S Ct 2733 (1978) (see chapter 5 par 4.1.3.2(a) above).

383 *Ibid.*

384 *Ibid.*

385 *Op cit* 3; 19; 21.

386 *Op cit* 3. It was also acknowledged that not all disadvantages derived from discrimination. Those that did not, it was suggested, demanded their own particular policy responses.

investigation, Canadian society's disadvantaged people were disproportionately assumed by<sup>387</sup>

'women, native people, visible minorities and the disabled',

although these groups displayed a range of differences within and among themselves.<sup>388</sup> It held that, clearly, some distinctions had been made or overlooked in the past that had resulted in the disproportionate representation of these groups. It was now time to reverse the trends, to provide access and to open the door to equality.<sup>389</sup> Therefore, to create equality of opportunity, different things had to be done for different people. Impediments had to be systematically eradicated according to the 'actual' needs of groups, and not according to what it was thought their needs should be.<sup>390</sup> Similarly, individuals had to be given an opportunity to use their abilities according to their potential, and not according to what it was thought their potential should be.<sup>391</sup> The Abella Commission strongly emphasised that, unless arbitrary distinctions were rejected, the four designated groups would remain unjustifiably in perpetual 'slow motion'.<sup>392</sup> Although the Commission did not spell out whether disadvantage had to have been suffered in Canada, an inference to this effect seems apposite and reasonable against the background set out in the Abella Report.

The Abella Commission suggested that, for *all* designated groups, equality meant an effective communications network, a commitment by educators, employers and government to revise practices that unfairly impeded the employment opportunities of these groups, an end to patronising, and reducing stereotyping.<sup>393</sup> Over and above these, it recognised, and distinguished between, the different unique needs of the four designated

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387 *Op cit* 3.

388 *Op cit* 3; 19.

389 *Op cit* 4.

390 *Ibid.*

391 *Ibid.* This process was an exercise in redistributive justice – its object was to prevent the denial of access to society's benefits because the distinctions were invalid.

392 *Op cit* 5. Although it was conceded that 'absolute' equality might be unattainable, it was held that a struggle for it was 'worthy' and could lead to reducing inequality.

393 *Ibid.*

groups as set out below.

(i) Women

It was pointed out that, for women, equality in employment mainly meant a 'revised approach' to the role women played in the work force. It implied taking them seriously as employees and not assuming that their main interests lay outside the workplace.<sup>394</sup> At the same time: (a) the changing role of women in family care should be acknowledged and accommodated (to this extent, both females and their male partners must be assisted to function effectively, both as workers and as parents); and (b) education and training must be provided to allow women the opportunity to compete for the widest possible range of job options. Practically, this meant: (a) the active recruitment of women into the fullest range of jobs; (b) equal pay for work of equal value; (c) fair consideration for promotion to more senior positions; (d) participation in decision making regarding corporate policy; (e) accessible child care of adequate quality; (f) paid parental leave for both parents; and (g) equal pension and other benefits.<sup>395</sup>

The Abella Commission recognised that the perception of what mothers and women normally did (or, more accurately, what the majority of them used to do, but now no longer do) was at the heart of the problem.<sup>396</sup>

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394 *Op cit 4.*

395 *Ibid.*

396 *Op cit 32.*

(ii) Native people

For native people, five needs were identified: (a) effective and relevant education and training; (b) accommodation in respect of cultural and geographic realities; (c) a primary voice in the design of education, training and funding programmes for their benefit; (d) meaningful support systems; and (e) the delivery of services through native-run institutions.<sup>397</sup> The Abella Commission acknowledged that native women had been doubly disadvantaged – as women and as native people<sup>398</sup> – but did not make any specific recommendation as to how to address this in practice.

(iii) Visible minorities

For visible minorities, three needs were identified: (a) adequate language training; (b) mechanisms for fairly assessing the qualifications, experience, credentials and education of foreigners; and (c) regard for whether employers were unreasonably making Canadian experience a job requirement.<sup>399</sup> It was recommended that standardised testing and the elimination of the requirements in respect of Canadian citizenship in most jobs and professions would do much to reduce barriers.<sup>400</sup> Information and counselling programmes designed to teach and assist visible minorities to adjust to Canadian culture were seen to be essential.<sup>401</sup> It was recommended that, wherever reasonably possible, the cultural and religious differences of minorities should be accommodated – visible minorities should therefore be encouraged to ‘integrate’ and not to ‘assimilate’ in Canadian society.<sup>402</sup>

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397 *Op cit* 4.

398 *Op cit* 5.

399 *Op cit* 4; 49. It was held to be unfair that, having been selected as immigrants to Canada (many on the strength of their qualifications), significant impediments as regards the practising of their professions should be put in the way of immigrants. It was cautioned that professional organisations should not insulate these people.

400 *Op cit* 50.

401 *Op cit* 50-1.

402 *Op cit* 4-5, 47 (which differs from the approach in the US (see par 4.1.2.2(a)(iii) above)).

## A Definition of visible minorities

Visible minorities were basically defined as 'non-whites'.<sup>403</sup> Although it was conceded that it was possible to define this designated group by country of origin or some other criteria, it was argued that it was 'reasonable' to approach this categorisation from the point of view of what problem was meant to be addressed.<sup>404</sup> This was explained as follows:<sup>405</sup>

'The issue was to attempt to ascertain the extent to which people who were visibly non-white and were excluded thereby from opportunities available to whites.'

The Abella Commission conceded that this was not a 'definitive approach' as: (a) the *degree* to which different non-whites suffered employment and economic disadvantage varied significantly by group and by region; and (b) to combine all non-whites as visible minorities for the purpose of devising systems to improve their equitable participation, without making distinctions to assist those groups in particular need, might deflect attention from where the problems were the most significant. It stated that, in devising ameliorative programmes, the emphasis should accordingly be on concentrating efforts on those minorities in those regions where the need had been 'demonstrated'.<sup>406</sup>

In this regard, it was recommended that the Canadian census should collect as much detail as possible on group affiliation, including data on race, in order that detailed information on visible minorities might be obtained in the longer term.<sup>407</sup> At the time of the Abella Commission, data available from Statistics Canada was not sufficiently refined, by race or region, as to occupational segregation, income levels, job promotions or other indicators of disadvantage to make determinative judgements as to which visible minorities

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403 *Op cit* 46 (see par 4.1.4 below for criticism of this definition).

404 *Op cit* 6.

405 *Op cit* 46.

406 *Ibid.*

407 *Ibid.* And that a proper definition be formulated in time, not only on the basis of better data, but also on the basis of consultations with relevant minorities.

appeared not to be in need of employment equity programmes.<sup>408</sup>

(iv) Disabled people

The Abella Commission recommended that, in accommodating differences in respect of disabled people, there had to be 'as full accommodation as possible and the widest range of human and technical supports'.<sup>409</sup> Six specific needs in respect of this group were identified: (a) workplaces must be physically accessible in all respects; (b) flexible working arrangements must be made for those unable to work long hours; (c) attendants and technical aids should be available to those needing them; (d) tax adjustments must be made available to both employers and disabled employees; (e) pension and benefit schemes must be adjusted to encourage disabled people to join the work force; and (f) transportation systems must be adequate to permit access to the workplace.<sup>410</sup>

*Evaluation of Abella Report on disadvantage*

The Abella Commission made it very clear that *membership* of a disadvantaged group was sufficient in order to benefit from affirmative action. Individual disadvantage was to be *assumed* in favour of members of the disadvantaged groups, similar to the South African position.<sup>411</sup> However, it went further by recommending that specific actions be taken according to the specific needs of the four designated groups. The thorough investigation undertaken by the Abella Commission is in contrast to the US situation where no investigation took place. As a result, in the US, the interpretation of affirmative action has varied over time, people not intended to benefit have in fact benefited, and the groups have

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408 *Op cit* 49. In time, however, Statistics Canada provided better data which made better determination of numbers possible.

409 *Op cit* 5; 38-46.

410 *Op cit* 5. It was recommended that individuals be encouraged to review their own self-imposed inhibitions as well.

411 See chapter 3 par 3.5.1.5; chapter 4 par 2.1.3.2 above.

multiplied.

### **4.1.3 Employment Equity Act**

In contrast to the recommendations of the Abella Report, the CEEA does not make it clear that group membership will suffice in order to benefit from affirmative action. Notwithstanding this, no one has to date challenged the conclusion of the Abella Report that the designated groups are in fact disadvantaged.<sup>412</sup> In other words, no case law exists where it has been argued that a member of a designated group has not been disadvantaged, or that past personal disadvantage is a requirement in order to benefit from affirmative action.

It is possible that this is due to the fact that the Abella Report was clear enough on the concept of substantive equality – a group-based approach – that no employer or member of a non-designated group has endeavoured to make out an argument that past personal disadvantage is required to benefit from affirmative action. This situation therefore differs from both the South African and US situations where opportunistic litigants from non-designated groups have indeed brought such cases.<sup>413</sup>

### **4.1.4 Deficiencies of categorisation**

Criticism similar to that found in South Africa<sup>414</sup> and the US<sup>415</sup> – although not to the same extent – has been levelled at affirmative action categories as used by the CEEA. Both general and specific criticisms are found. The general criticism will be dealt with first.

As early as the drafting of the Abella Report, concern was expressed about the selection of the specific designated groups. First, comments ranged from statements that the selection was ‘insulting’ to statements that it was ‘inappropriate’, even while

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412 Ray-Ellis *Federal Equity Manual* 3-5.

413 See chapter 4 pars 2.1.3.1; 2.1.3.2; 2.1.3.3; chapter 5 pars 4.1.3.2; 4.1.3.3; 4.1.3.4 above.

414 See chapter 4 par 2.1.4 above.

415 See chapter 5 par 4.1.4 above (see also chapter 1 par 2.2.3 above for deficiencies generally).

acknowledging the political rationale underlying such selection.<sup>416</sup> Moreover, it was argued that the economic histories, the social and cultural contexts, the concerns of the groups, and the particular solutions required by each group were 'essentially different'.<sup>417</sup> Thus, it was argued, the unique significance of each group would be minimised if it were to be combined with the other three groups. Also, this implied that the various designated groups would be competing for opportunities with the other groups, rather than with the general community.<sup>418</sup>

Secondly, it was argued that the definitions used to describe the designated groups, and the methods employed to calculate their numbers, were ambiguous, complex and, in the case of visible minorities, quite controversial.<sup>419</sup> With regard to the last-mentioned, nine visible minority groups were included originally, namely Chinese, South Asian, black, Arab/West Asian, Filipino, Southeast Asian, Japanese, Korean and 'other'. One more group – Latin-Americans – was added in 1988. In contrast to the position in the US,<sup>420</sup> the designated groups have thus stayed substantially the same since the coming into effect of the CEEA.

Related to the issue of definitions as such is the fact that the category of visible minorities does not appear to be valid today, as, for example, the inter-ethnic marriage rate

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416 Abella Report 23.

417 *Op cit* 23-4. An exposition of the concerns of the various designated groups was set out in the Abella Report 23- 51. It was however acknowledged that a number of employment barriers were common to all groups. These were: (a) insufficient or inappropriate education and training facilities; (b) inadequate information systems about training and employment opportunities; (c) limited financial and personal support systems; (d) short-sighted or insensitive government employment counsellors; (e) restrictive recruitment, hiring and promotion practices by employers; and (f) discriminatory assumptions.

418 *Op cit* 23.

419 Jain 3 405-6. For the federal public service, availability is determined on the basis of figures for citizens only, since the Public Service Employment Act provides for preference for Canadian citizens. This is problematic for visible minorities who are permanent residents and who are thus excluded from the availability analysis. See also Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapters I 6; VI 9 where it was recommended that the labour force benchmarks applied to the federally regulated private sector be applied equally to all employers, including federal departments and agencies covered under the CEEA. This was based on the argument that it would be problematic to meet federal public service labour needs in future given the ageing labour force and labour shortages in Canada.

420 See chapter 5 par 3.8 above.

for Japanese Canadians is now more than 80 percent.<sup>421</sup> This is most probably also the case for some of the other visible minorities.

Concerns have also been raised with regard to the definition of people with disabilities. For example, during the first review of the CCEA, concerns were expressed that some of the definitions relying on Statistics Canada's census methodology and on HALS differed from those used by employers in their surveys.<sup>422</sup> During the third review of the CEEA, it was recommended that a way be found to ensure that labour force statistics for people with disabilities were equivalent to those for the other three designated groups.<sup>423</sup> It was recommended that the 2006 census contain questions that would ensure that adequate availability data regarding people with disabilities was collected for employment equity purposes, or, if this were not possible, that a separate survey of people with disabilities be conducted in 2006, and in conjunction with every census thereafter.

Thirdly, it was argued, the method of self-identification by members of designated groups led to undercounting of members. This was encountered in the early 1990s in the federal public service where 1,5 times as many visible minority employees, and 2,4 times as many disabled employees, were found as had identified themselves.<sup>424</sup> Although authorities stated during the third review of the CEEA that employers' frustration was understood when employees who had been accommodated within the workplace did not identify themselves, it was held that there was no viable alternative to self-identification. Instead, more effective communication strategies and educational programmes were encouraged to make employees feel at ease with the identification process and to reassure them that the information was both important and confidential.<sup>425</sup> Self-identification as a means of collecting data about the representation of designated groups was acknowledged to be 'imperfect', but it was believed that no immediate alternative was

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421 Ujimoto 'Ethnic Identity and Citizenship' 278-9.

422 Report A Matter of Fairness 1992 7-8; Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapters I 6; VI 9; ILO Report Outlawing Discrimination 36.

423 Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter VI 9.

424 Report A Matter of Fairness 9 (this was for women in public service).

425 *Ibid.*

necessary. It has been mooted that a campaign to create broader public awareness and understanding of employment equity might be one means of overcoming the reluctance of some of the designated groups to self-identify.<sup>426</sup> It was however held that it was time that work began to 'supplement' a strict numerical-based approach to measuring progress in achieving employment equity in the workplace.<sup>427</sup> Qualitative measures which reflected the 'true nature' of employment equity as something existing apart from legislation, such as the type and level of employer-sponsored training or the amount of consultation between employers and employees', were recommended.<sup>428</sup> Federal government and agencies administering employment equity and compliance were requested to give an indication of how they perceived and measured success.<sup>429</sup>

The particular criticism will now be considered. First, it was stated, the categories were over-inclusive in that, within a designated group, some people might not have been disadvantaged, but might still benefit from employment equity measures. In this regard, critics argues that it was problematic to determine the extent of disadvantage for different group members.<sup>430</sup> Secondly, related to this issue is the fact that Canada's experience has shown that employment equity often benefits the better-off people within the categories, and not the most needy.<sup>431</sup> As early as 1992, it was argued that mainly middle-class white women had benefited from affirmative action, while employment equity programmes were unaccessible to women who were poor and disabled.<sup>432</sup> Disabled women had no access to employment equity, as they lacked an education.<sup>433</sup> In somewhat similar vein, commentators observed that people who had maximum access to employment equity

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426 Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter II 2.

427 *Op cit* chapter VII 6.

428 *Ibid.*

429 *Op cit* chapter VI 7.

430 Kallen *Ethnicity* 244.

431 Thomas 'Employment Equity in South Africa' 249.

432 ILO Report Equal Opportunity for Women 35.

433 *Ibid.* During the first review of the CEEA, all representatives of the designated groups argued for the need for appropriate training for members of the designated groups, and for education equity (Report A Matter of Fairness 33).

programmes were those who in any event met the basic educational requirements.<sup>434</sup> Although bridging programmes provided some training or accessibility, these did not recognise the basic differences of the different designated groups.<sup>435</sup>

Nonetheless, it was found that employers had implemented affirmative action for white women first, as this appeared to be 'easier'.<sup>436</sup> Women may therefore be said to have benefited owing to their educational attainment and to their position in society at that stage. In this regard, it was suggested that the CEEA should make it clear that affirmative action programmes must apply equally to all designated group members, and not be phased in differentially for one group in advance of another.<sup>437</sup>

Another somewhat similar observation was that enterprises were concentrating their employment equity efforts on the largest, most visible and most powerful groups, namely women and visible minorities.<sup>438</sup> Accordingly, people with disabilities and native people had experienced the least progress under the CEEA.<sup>439</sup>

The above demonstrates that disadvantaged people in the various groups display degrees of disadvantage, similar to what has been found in South Africa<sup>440</sup> and the US.<sup>441</sup> For example, the term 'visible minorities' has been criticised because it does not distinguish *between* the different subgroups *within* the group. Language skills and education, for example, vary widely within a single visible minority subgroup, such as

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434 ILO Report Equal Opportunity for Women 36.

435 *Ibid.* It was argued that employment equity was designed for the comfort of the majority.

436 Poole & Rebick 'Not Another Hundred Years' 349.

437 *Ibid*; Kallen *Ethnicity* 241.

438 ILO Working Paper International Migration 38; 42-3.

439 Report New Employment Equity Act and Regulations strengthen Canadian Workplace Introduction 1; chapter 1 4-6. During the third review of the CEEA in 1996, it was recommended that: (a) workplace strategies for people with disabilities and aboriginal people should be developed in partnership with employers covered under the CEEA, disability organisations, aboriginal organisations and other interested stakeholders in the community; (b) funding be secured to create entry-level employment opportunities; (c) partnering arrangements be made with voluntary-sector organisations to support the hiring and development of aboriginal and disabled people; and (d) support systems to facilitate physical and cultural accommodations in the workplace be developed. Pleas were made to counter the high turnover rate of aboriginal people by way of mentorship programmes, cultural accommodations and support systems in the workplace.

440 See chapter 4 par 2.1.4 above.

441 See chapter 5 par 4.1.4 above.

Chinese Canadians, depending on the time when they immigrated to Canada, on what country they came from, on their age on arrival, and on their gender.<sup>442</sup> In other words, the collective term hides or 'masks' differences within its scope.<sup>443</sup>

Thirdly, criticism of the general under-inclusiveness of the designated groups has been raised by Chabursky.<sup>444</sup> The author maintains that, given the logic of the 'numbers approach',<sup>445</sup> it is not justified in a vision of a discrimination-free society that only four designated groups have been selected to benefit.<sup>446</sup>

'Given the logic of statistical parity, why should other ethnic groups, short persons, or persons of particular religious demonstrations not be apportioned a share of the workplace?'

While it may be helpful to consider the 'degree of representation' of the designated groups for the purpose of identifying problem areas, it does not necessarily follow that the groups whose statistics point to discriminatory attitudes, practices and policies are the 'only ones' suffering from discrimination.<sup>447</sup> Similarly, it should not be assumed that a remedy designed to increase the representativeness of those groups will also bring relief

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442 Ray-Ellis *Federal Equity Manual* 10-8; *Labour and Employment Law* 930; <http://www.statcan.ca/english/ads/11-008-XIE/vism.html> 1.

443 Ray-Ellis *Federal Equity Manual* 10-8; *Labour and Employment Law* 930; <http://www.statcan.ca/english/ads/11-008-XIE/vism.html> 1.

444 Chabursky 'Employment Equity' 344.

445 *Ibid.* Hiring quotas to alleviate under-representation is called the 'numbers approach', because the focus is on altering the numerical representation of the designated groups in the workplace. Under this approach, employers will be said to have achieved 'statistical parity' when the designated groups are proportionally represented in the workplace (*op cit* 339). The author criticises the association between representativeness and discrimination as being 'qualitatively different' from the treatment of statistics as a 'signal' of systemic discrimination. Rendering representativeness a specific goal for achievement under the CEEA fosters the belief that representativeness is the 'solution' to systemic discrimination. Such a belief causes one to focus attention on measures that increase representation of the designated groups, and gives less attention to the elimination of discriminatory practices in employment (*op cit* 343). Approaching employment equity as a matter of representativeness tends to foster the belief that there is a 'correct proportion' for each designated group (*op cit* 344). The workplace should then be divided into 'pieces of pie' allotted to each designated group according to their proportion in the local population. It follows that each group's 'piece of pie' can be numerically determined so that an employer will have a standard by which to measure the progress and success of an employment equity plan.

446 *Op cit* 344.

447 *Ibid.*

to other groups and individuals from the effects of discrimination.<sup>448</sup>

A last, significant criticism of under-inclusiveness relates to male employment in traditionally female-dominated jobs.<sup>449</sup> It has been held that a shortcoming of the CEEA's goal of correcting the representation of the designated groups is that it overlooks the fact that segregated labour markets also imply that some occupations are dominated by one of the designated groups, namely women. It has been shown that a significant number of occupations are female-dominated in Canada. These include nursing, secretarial work, child care and home-support work. It has been held that it is not fair to address under-representation of women in male-dominated jobs while not addressing under-representation of men in women-dominated jobs whose economic importance is increasing.<sup>450</sup> In this regard, it has been argued that policy makers should endeavour to identify under-representation at firm level and make recommendations accordingly, rather than setting goals in respect of predetermined groups.<sup>451</sup>

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448 *Op cit* 345. When it is considered that the 'numbers approach' essentially substitutes the goal of a representative work force as a proxy for the goal of eliminating discriminatory barriers to employment opportunity, then this seems particularly disturbing. It has been stated that caution should be exercised regarding any scheme that purports to solve employment discrimination through the implementation of numerical solutions:

'The danger in the numbers approach is that a representative workforce could be *confused* with or taken to be *synonymous* with the *elimination of employment discrimination*. A common adage holds that treating a symptom is not necessarily a cure for the ailment. Similarly, measures designed to achieve a *representative workforce are not necessarily a remedy for employment discrimination*. Indeed, most of those measurers focus upon increasing the representation of minorities in the workplace *instead* of considering or dealing with the *causes* of employment discrimination' (own emphasis).

The author holds that it is conceivable that, through the use of quotas, an employer will be able to achieve the objective of the CEEA and be considered to have attained the goal of employment equity, without having made significant inroads into persistent restrictive practices. In fact, she points out, this approach tends to dominate the CEEA's scheme and has all but 'eclipsed' measures designed to eliminate the employment practices that cause the imbalance in the first place. The degree of attention that is given in the CEEA to the achievement of representativeness is in fact much larger than the elimination of systemic discriminatory barriers (*op cit* 343). She holds that the focus of employment equity should rather be stated in terms of a more 'integrated workplace'.

449 Echevarria & Huq 'Redesigning Employment Equity' 54-63.

450 *Op cit* 54; 61. The authors point out that the Canadian economy has been moving from manufacturing to services, and that, accordingly, jobs are moving out from what have traditionally been male strongholds.

451 *Op cit* 63.

Further specific criticism on under-inclusiveness of the categories entailed, during the first review of the CEEA, that the designated groups should be extended to include: (a) immigrants; (b) people who experienced language and cultural barriers to employment and problems with foreign accreditation; (c) older employees; and (d) people who had been disadvantaged because of national or ethnic origin, religion and sexual orientation.<sup>452</sup> But, it was decided that much remained to be done in attaining employment equity for those groups already covered by the CEEA. It was recommended that the designated groups remain unchanged, but that Statistics Canada consult with the Canadian Labour Force Development Board to develop definitions of the designated groups acceptable to all parties.<sup>453</sup> In fairly similar vein it was argued, during the third review of the CEEA, that the designated groups should be extended to include: (a) immigrants; (b) people who experienced language and cultural barriers to employment and problems with foreign accreditation; (c) older employees; (d) younger employees; and (e) people who had been disadvantaged because of national or ethnic origin, religion and sexual orientation.<sup>454</sup> Again, none of these proposals were accepted.

The proposals for changing the designated groups made during the third review of the CEEA were however conflicting. With regard to visible minorities, some argued for the breaking down of these into various subgroups, but others supported retaining the then current definition and were opposed to any statutory break-down which might create

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452 Report A Matter of Fairness 7. With regard to age, it was held that statistics on the degree of under-representation of older people were not available and that the 'age' at which one became 'older' was unclear. In addition, it was not clear that older workers had a history of systemic discrimination. No arguments were presented with regard to the other suggested groups.

453 *Op cit* 7-8.

454 It was held that, based on the four criteria of unemployment rates, participation rate, earnings and occupational concentration as indicators of workplace disadvantage, older workers were not a disadvantaged group in the labour market. While it was conceded that some older workers did experience long spells of unemployment and hence had low earnings, as a whole, this group tended to display below-average rates of unemployment and above-average earnings when compared with other age groups (Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter IV 4). It was noted that the perceived disadvantage of youths was largely attributable to problems encountered by them as they made the transition from school to work. Eventually, however, youths would become adult workers and, in doing so, would achieve higher earnings and greater job stability (*ibid*). It was held that, with regard to the other groups, little information was available on these workers. Nevertheless, the collection and analysis of information on all potentially disadvantaged groups of workers in the Canadian labour force was supported (*ibid*). No arguments were presented with regard to the other suggested groups.

additional 'hierarchies' of disadvantage.<sup>455</sup> Although it was admitted that the definitions of the CEEA took a 'broad-brush' approach that might not easily accommodate the distinctions that some of the groups would like to see, it was stated that a redefinition and splitting of the groups into subgroups would not be useful.<sup>456</sup> At the same time, it was held that better data collection and analysis of the subgroups could provide a better basis for identifying barriers and enabling the CEEA to work in the interest of all the designated groups.<sup>457</sup>

With regard to the definition of people with disabilities, the third review of the CEEA followed a different approach. It was argued that the CEEA inappropriately linked 'disability' to 'disadvantage', given that many working people with disabilities did not consider themselves disadvantaged in employment, and, therefore, did not self-identify in work force surveys.<sup>458</sup> As a result, employer statistics are under-representative of the number of people with disabilities. It was recommended that the definition of disability should be decoupled from 'disadvantage' and 'accommodation' and be amended to be in line with the HALS of 1991 and the PALS.<sup>459</sup> This has not been done so far.

Particular problems with the definition of aboriginal peoples were also raised during the third review of the CEEA. Some aboriginal and Métis organisations opined that it was unclear how the definition worked, in particular its limits in respect of First-Nation aboriginal people. The Métis National Council complained that there was no means of validating people who claimed to be Métis. In consequence, individuals could claim Métis status for employment equity purposes, particularly when seeking employment in the public service. As a result of the absence of a verification mechanism, some people would qualify for employment equity without qualifying as Métis in the eyes of the organisations of Métis

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455 *Op cit* chapter VI 1. The latter argument was based on the view that existing regional or local flexibility in the development and implementation of employment equity measures allowed employers to take sub-group labour market availability into account.

456 *Op cit* chapter VI 2.

457 *Ibid.*

458 *Ibid.*

459 *Op cit* chapter VI 3.

people. In their view, the number of Métis in the public service might therefore be inflated.<sup>460</sup> A more specific definition that identified sub-groups of aboriginal people and which would allow the CEEA to serve its purposes better was mooted.<sup>461</sup> It seems that nothing came of this.

Fourthly, specific criticism was levelled at the category of 'visible minorities'.<sup>462</sup> The category, it was said, was under-inclusive. For example, as a result of the particular definition of visible minorities, third-generation Japanese Canadians were included, while recent white immigrants from, say, Greece were excluded.<sup>463</sup> Therefore, not all ethnic minorities and immigrant workers were visible minorities.<sup>464</sup> Moreover, this category was interpreted to mean that it focused on the difference from the majority colour and race, and not on cultural and language differences.<sup>465</sup> In addition, the definition did not distinguish between different groups within the scope of the category.

'Race' as a distinguishing factor for identifying a designated group was also criticised. It was held that social scientists need not, and, indeed, should not, transform the idea of 'race' into an analytical category and use 'race' as a concept as such.<sup>466</sup> The main reason for this argument was, first, that the idea of 'race' was used to effect a reification within sociological analysis in so far as the outcome of an often complex social process was explained as the consequence of something named 'race' rather than of the social process itself. Secondly, as a result of cultural interplay between academic and common-sense discourses, the use of 'race' as an analytical tool incorporated a notion central to the evolution of racism into the discourse of anti-racism, thereby sustaining the conditions of the reproduction of racism within the discourse on and practice of anti-racism. It was held that the use of 'race' as an analytical concept was currently only within the black/white

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460 *Op cit* chapter VI 2.

461 *Op cit* chapter VI 1.

462 Note that the CCEA does not provide for 'ethnic minorities' as such.

463 Ray-Ellis *Federal Equity Manual* 10-7.

464 ILO Working Paper International Migration 3.

465 Ray-Ellis *Federal Equity Manual* 10-8. Even today, it appears that there is no consensus on a precise definition of the term 'visible minorities' (Jain 3 406 fn 67).

466 Ujimoto 'Ethnic Identity and Citizenship' 260-1.

dichotomy, and did not capture the essential processes involved.<sup>467</sup>

Instead, poverty or 'social condition' was mooted to establish disadvantage.<sup>468</sup> The connection between poverty, race, gender and disability was indicated as follows: poverty is so closely associated with being female, aboriginal, a minority or disabled that it must be understood as a manifestation of long-standing discrimination against these groups.<sup>469</sup> For aboriginal peoples, in particular, it was suggested that redistribution of economic resources needed to be considered to ameliorate the situation of 'created dependency' which had resulted from colonialistic and paternalistic social policies and laws dealing with them.<sup>470</sup>

A last deficiency of categorisation was that multiple disadvantage was not currently recognised by the CEEA. In practice, however, this has been acknowledged for being both female and a member of another designated group.<sup>471</sup> In this regard, during the third review of the CEEA it was held that the fact that the CEEA failed to explicitly recognise double or triple disadvantage suppressed recognition of multiple disadvantage.<sup>472</sup> Accordingly, this led to an incomplete and misleading picture of the level of representation and of the nature of disadvantage in respect of certain groups.<sup>473</sup> If it were possible to identify the areas of greatest need, then measures could be 'fine-tuned' to address those areas specifically. It was recommended that a means be developed to separately identify individuals who were members of more than one designated group and to provide a comparative analysis of their disadvantages in employment that might result from belonging to more than one

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467 See Ujimoto 'Ethnic Identity and Citizenship' 261ff for an overview of how race has been used in the past as a simple way of categorising groups of people that were statistically identifiable, but in respect of characteristics bearing no relationship to culture, personality or social behaviour. As a result, its meaning was unclear and various different connotations were given to the term 'race'.

468 Brodsky 'Constitutional Equality Rights' 253.

469 *Ibid.*

470 Kallen *Ethnicity* 283.

471 Ray-Ellis *Federal Equity Manual* 10-18; 10-21; Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter VI 2.

472 Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter II 2.

473 *Op cit* chapter VI 4. It appears that some data was collected in the 2001 census and the 2001 PALS study which might show the impact on the employment situation of an individual who belongs to more than one designated group, but this data is not yet available.

designated group.<sup>474</sup> However, it does not appear that anything has been done as yet to strengthen the position of multiple-disadvantaged members.

## **4.2 The concepts 'unqualified' and 'merit'**

### **4.2.1 Introduction**

The purpose in this part is to analyse the Canadian position with regard to the concepts 'qualified', 'unqualified' and 'merit' as used in affirmative action. Canadian legislation and guidelines with specific reference to these concepts will be considered. Selected academic opinion will also be considered.

The Abella Commission stated that individuals in the designated groups were not inherently unable to achieve equality on their own, but that the obstacles in their way were so formidable and self-perpetuating that they could not be overcome without intervention.<sup>475</sup> But fear has been expressed that employment equity programmes will require employers to depart from the traditional merit approach for hiring,<sup>476</sup> although, in contrast to the US, the debate and literature on the issue of meritocracy are much less. It has been claimed that, with employment equity, extraneous factors will enter into the employment situation which may require a lowering in standards in the sense that employers will have to hire people who are not necessarily the 'best' qualified for the job, or who are not qualified 'at all'.

### **4.2.2 Legislation**

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474 *Op cit* chapter VI 5. For disabled people, it has been held that people who belong to more than one of the designated groups face 'proportionately more' discrimination, but that quantitative data is then insufficient to clearly indicate in which combinations the disadvantage is the greatest (Report Standing Committee 4; 11). Consequently, the Parliamentary Coordinating Committee on Employment Equity Data undertook to examine how the data could be aggregated from current statistics to meet the needs identified.

475 Abella Report 254.

476 Lepofsky 'Employment Equity' 7; Kallen *Ethnicity* 246.

The CEEA however makes it clear that it is not expected of an employer to appoint or promote an 'unqualified' person.<sup>477</sup> It expressly incorporates the notion of proportionality<sup>478</sup> by not requiring employers to take affirmative action measures to implement employment equity where: (a) the taking of those measures would cause undue hardship to the employer;<sup>479</sup> (b) *unqualified* persons would be hired or promoted;<sup>480</sup> (c) persons in the public sector would be hired or promoted without basing such hiring or promotion on selection according to merit as required by the Public Service Employment Act;<sup>481</sup> (d) new positions would have to be created in an employer's work force;<sup>482</sup> and (e) seniority rights in implementing lay-offs and recalls would be overridden.<sup>483</sup>

Furthermore, the CEEA emphasises education and training designed to assist the designated groups in the attainment of skills and professional qualifications which will provide them with legitimate qualifications for jobs.<sup>484</sup>

### 4.2.3 Guidelines

The Federal Equity Manual provides guidelines for employers in applying the CEEA. These guidelines endeavour to allay fears that employment equity is in conflict with the merit principle. They indicate (rather unconvincingly) that employment equity in fact 'supports' the merit principle. This, it states, is based on the fact that designated group members have been excluded from opportunities in the past for reasons unrelated to their abilities or

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477 Section 6(b) of the CEEA.

478 England, Christie & Christie *Employment Law in Canada* par 5.199.

479 Section 6(a) of the CEEA.

480 Section 6(b) of the CEEA. Similarly, the Human Rights Commission or Tribunal may not in terms of s 33(1)(b) make an order which would require an employer to hire or promote 'unqualified' people.

481 Section 6(c) of the CEEA. The Human Rights Commission or Tribunal may not in terms of s 33(1)(c) make an order with respect to the public sector which would require an employer to hire or promote people without basing these on merit.

482 Section 6(d) of the CEEA.

483 Section 405(e) of the Guidelines (see par 4.2.3 below).

484 Kallen *Ethnicity* 246; Report New Employment Equity Act and Regulations strengthen Canadian Workplace chapter VI Introduction 2; Conclusion 1. This is within the area of the provinces.

qualifications.<sup>485</sup> Therefore, employment equity now seeks to enforce the merit principle by ensuring that all people's qualifications are recognised and to ensure that irrelevant factors such as race and gender are not taken into account.<sup>486</sup> It states that to allow intentional or unintentional employment barriers to persist is simply at odds with the merit principle. In support of this, the Guidelines emphasise that employment equity requires *goals*, which are set by employers themselves according to a time frame they themselves have established, and that these goals are for 'qualified' people only (in contrast to *quotas* which are basically imposed, inflexible numbers).<sup>487</sup>

#### 4.2.4 Academic opinion

Academic opinion on the use of the merit principle varies. For example, Lepofsky endeavours to neutralise the criticism of affirmative action as detracting from the merit principle. He argues that such criticism of employment equity, based on the alleged departure from the merit principle, is itself unfair because the merit principle is not consistent, irrespective of whether or not an employer has an employment equity plan.<sup>488</sup> The idea that employers always hire the best candidate, or that employers always hire 'qualified' people is, he argues, fictitious.<sup>489</sup> Most people who have competed for jobs can, he states, attest to the fact that many extraneous factors enter into hiring and promotion decisions which have little to do with merit.<sup>490</sup>

It has been held that employers have made hiring and promotional decisions by

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485 Ray-Ellis *Federal Equity Manual* 3-6.

486 *Ibid.*

487 *Op cit* 3-7.

488 Lepofsky 'Employment Equity' 7.

489 *Op cit* 8.

490 *Op cit* 8-9. If the merit principle were currently in operation, there would, he suggests, be considerably better representation of women, minorities, the disabled and native peoples, as there could be no basis for suggesting that the designated groups were systematically less competent than white, able-bodied men. Yet, current hiring practices had led to the systemic under-representation of these group members. This suggests that something other than 'pure merit' governed job decisions in the past.

opting for racial preferences over skills and for discriminatory biases over merit.<sup>491</sup> This happened particularly before the 1970s and 1980s when there were no effective anti-discrimination laws to protect the rights and dignity of women and visible minority workers in the workplace.<sup>492</sup>

The concepts 'merit', 'qualified' or 'best qualified', even if sincerely utilised by employers, can themselves be problematic. While, on the face of it, they appear to be neutral and non-discriminatory, these concepts can be a disguise for subtle or even unconscious attitudes and preferences which produce discriminatory results.<sup>493</sup> For example, a disabled person might be well qualified for a particular job, but may never get an interview because his or her résumé is lacking as regards experience. However, the lack of experience may have been caused by patterns of discrimination in the past which have prevented the individual from obtaining that very experience. Further, the person's innate talents may never be revealed during an interview because of the arbitrary pre-screening of curricula vitae in the hiring process. In other words, the concept 'best qualified' may become an illusion.<sup>494</sup>

Although it has been held to be ideal that all individuals should be hired and promoted on the basis of merit and that the best person should get the job, it has been recognised by some academics that the merit system has not worked adequately for some groups in Canada.<sup>495</sup>

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491 Report Standing Committee, Annexure G 2.

492 *Ibid.*

493 Lepofsky 'Employment Equity' 8 (see also chapter 5 par 4.2.4.3 above where the same point is made in the US context).

494 *Ibid.* The author argues that it is likely that employment equity initiatives will lead to greater efficiency and profitability, rather than the reverse, and for two reasons. First, employment systems reviews may identify work practices which not only constitute barriers to the full participation of designated groups, but which are themselves unnecessary and counterproductive. Many business practices continue because they represent 'the way we have always done things here'. A fresh look at employment systems and processes, spurred on by employment equity, may lead to the identification and removal of these, as well as to their replacement with more productive ones. Secondly, outreach recruitment initiatives can lead to an employer identifying new applicants who may be more qualified than the usual pool of applicants. Put simply, employment equity may lead employers to tap into pools of potential employees who have traditionally been disregarded, and who can offer much in the workplace.

495 England *Individual Employment Law* 201.

In practice it is possible that 'unqualified' people may be appointed or promoted on the basis of employment equity.<sup>496</sup> As affirmative action shifted the emphasis from individual rights to an emphasis on collective entitlement, it also brought about a shift from the individual merit principle to a 'modified' merit principle which takes into account the differential nature and impact of collective and broader cultural considerations.<sup>497</sup>

England<sup>498</sup> also recognises that affirmative action measures may result in reduced standards. This is because different versions of affirmative action exist. The author identifies five different varieties of affirmative action practised in Canada: (a) at its weakest, affirmative action means those measures designed to attract applications from members of designated groups and make them 'feel comfortable' during the recruiting and promotion process; (b) a somewhat stronger form of affirmative action requires an employer to restructure the business to make the work environment 'more friendly' to the particular needs of the designated groups; (c) an even stronger form of affirmative action requires giving preference to a member of a designated group whose personal merit, reflected in his or her qualifications, experience and other skills and abilities, is 'roughly equal' to that of the non-designated person; (d) a still stronger form of affirmative action requires giving preference to a member of a designated group who meets the minimum standard of performance set for the job, even though members of non-designated groups may have greater merit; and (e) the strongest form of affirmative action requires 'reducing' the standard of acceptable performance set for the job in order to ensure that a member of a designated group can qualify when otherwise he or she would not, notwithstanding members from non-designated groups with greater merit being available.<sup>499</sup>

The last three types of measures of affirmative action are often found together with quota systems in terms of which an employer is expected to meet a specific target for hiring and promoting members of designated groups within a specified period of time. These affirmative action measures have in fact attracted widespread public concern, but the main

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496 Kallen *Ethnicity* 237.

497 *Ibid.*

498 England *Individual Employment Law* 201; England, Christie & Christie *Employment Law in Canada* par 5.183.

499 England *Individual Employment Law* 201.

focus of this debate is on whether these types of affirmative action are justifiable where employers are compelled to implement such measures by legislation.<sup>500</sup> Generally, it has been stated that the Canadian public currently opposes affirmative action that gives preference to members of designated groups who are less meritorious than members of non-designated groups.<sup>501</sup>

It appears, in any event, that the CEEA's approach of not requiring employers to hire or promote 'unqualified' people is not realistic, particularly if one considers two of the designated groups concerned, namely native peoples and disabled people. Members of these groups generally do not possess the necessary qualifications and/or experience at this stage – and that almost 20 years after employment equity has been implemented in the workplace. Aboriginal peoples seem to have experienced a backlog in education similar to that of blacks in South Africa.<sup>502</sup> Recent statistics indicate that only 3 percent of aboriginal peoples have a bachelor's degree or higher, while 13 percent of the total population have the same level of schooling.<sup>503</sup> However, 62 percent of aboriginal peoples have grade 13 or lower, compared with 49 percent of the total Canadian population.<sup>504</sup>

Representatives of native peoples have often stressed the need for education equity as a prerequisite for employment equity, including community-based and community-controlled educational institutions, skills training programmes and employment-readiness training.<sup>505</sup> In addition, aboriginal peoples face language barriers: for many, English and French are second languages. The requirement of ability in one of these languages for a

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500 *Ibid.* Generally, it has been considered acceptable for employers to voluntarily implement affirmative action measures if they value them as being beneficial to their businesses. Such measures may then increase the efficiency of Canadian businesses that have to compete for business internationally, as well as of those that operate domestically in the increasingly multicultural Canadian society.

501 *Op cit* 202; England, Christie & Christie *Employment Law in Canada* par 5.183.

502 This is in contrast to visible minorities and women, who have fairly high educational qualifications (see pp 414-5below).

503 Ray-Ellis *Federal Equity Manual* 10-15.

504 This must be seen against the background of the residential schools policy of the Canadian government at church-run institutions (Troper 'Immigrant City' 56-93).

505 Ray-Ellis *Federal Equity Manual* 10-15.

particular job may thus operate as a systemic barrier for members of this group.<sup>506</sup>

Overall, aboriginal peoples face unique problems because of the size and location of many of their communities in the reserves.<sup>507</sup> In addition, there is limited access to training, apprenticeship programmes, employment opportunities and acceptance in the workplace – even if they are able to obtain employment.<sup>508</sup> The requirement of ‘qualified’ aboriginal peoples therefore appears not to be realistic, even almost 20 years after implementation of the CEEA.

With regard to disabled people’s educational attainment and language abilities, recent statistics indicate that only 7 percent of such people have a bachelor’s degree or higher, while 14 percent of the total population have the same level of schooling. However, 20 percent of disabled people have grade 8 or lower, compared with 10 percent of the total Canadian population.<sup>509</sup>

Visible minorities, unlike native people and people with disabilities, generally have fairly high educational qualifications, but they experience problems particular to their situation. With regard to educational attainment and language abilities, recent statistics indicate that visible minorities have higher levels of education than the general population.<sup>510</sup> While 19 percent of visible minorities have a bachelor’s degree or higher, only 13 percent of the total population have the same level of schooling.<sup>511</sup> However, a major concern among some visible minority sub-groups is that employers do not recognise education and qualifications obtained outside of Canada.<sup>512</sup> As language ability is necessary for access to jobs other than unskilled or low-paid jobs, and to education itself, language ability is also an issue for immigrants who have come to Canada without English

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506 *Op cit* 10-16.

507 *Ibid.*

508 *Ibid.*

509 Self-identification is particularly important to disabled people with non-visible disabilities. They may, however, agree to be identified for reporting purposes (*op cit* 10-18).

510 Ray-Ellis *Federal Equity Manual* 10-12; Weinfeld & Wilkinson ‘Immigration and Diversity’ 66.

511 Ray-Ellis *Federal Equity Manual* 10-12.

512 *Ibid.*; Weinfeld & Wilkinson ‘Immigration and Diversity’ 66-9; ILO Working Paper International Migration 65-7.

or French language skills.<sup>513</sup> Generally, in this regard, while Asians appear to be advantaged with regard to all measures in education, blacks have mixed attainments.<sup>514</sup>

Like visible minorities, women generally have high educational qualifications, but experience problems particular to their situation. Recent statistics indicate that women and men have similar levels of schooling: while 12 percent of women have a bachelor's degree or higher, 14 percent of men have such a degree.<sup>515</sup> Women, however, continue to earn significantly less than men, despite high educational attainment.<sup>516</sup> Also, more women than men are unemployed and are employed as part-time workers.<sup>517</sup>

With regard to standards set for workers, it has been noted that these are often based on the experiences of the socially privileged group.<sup>518</sup> The argument that preferential hiring is an affront to the merit principle is then viewed as spurious, as the 'historically privileged' have developed the criteria to determine the merit principle, which will then be skewed to represent characteristics that such a group finds meritorious.<sup>519</sup>

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513 Ray-Ellis *Federal Equity Manual* 10-12; ILO Working Paper International Migration 63-5. Increasing pressure is being placed on employers to assess the value of non-Canadian qualifications and to provide language training. See also par 4.1.2.2(a)(iii) above in regard to the Abella Report, which indicated at that stage that, for foreigners, mechanisms to fairly assess the qualifications, experience, credentials and education, and regard for whether employers were unreasonably making Canadian experience a job requirement, were essential. It was recommended that standardised testing should be done away with and that requirements for Canadian citizenship in most jobs and professions should be eliminated.

514 Weinfeld & Wilkinson 'Immigration and Diversity' 67.

515 Ray-Ellis *Federal Equity Manual* 10-21.

516 *Ibid.*

517 *Ibid.*

518 This is similar to the criticism found in the US situation (see chapter 5 par 4.2.4.3 above).

519 ILO Report Outlawing Discrimination 21.

### *Evaluation of the concepts 'unqualified' and 'merit'*

In contrast to the US, which endorses the individual merit principle,<sup>520</sup> Canada has accepted a modified version of the merit principle in the context of affirmative action. This is similar to that found in South Africa.<sup>521</sup> Canada has further emphasised education and training designed to assist the designated groups in the attainment of skills and professional qualifications which will provide them with legitimate qualifications for jobs. This, again, is similar to the situation in South Africa.<sup>522</sup> It has been said that, in this way, some of the main problems experienced by the US, specifically the filling of educational and occupational quotas with unqualified, or underqualified, minority members, have been avoided.<sup>523</sup>

## **4.3 Citizenship**

### **4.3.1 Introduction**

The CEEA does not require citizenship in order to benefit from affirmative action. The aim in this part will be to show that citizenship is currently not an issue in the workplace, and that this is attributable to: (a) immigrants being aggressively encouraged to come to Canada; and (b) though initially excluded from Canadian society and denied citizenship, subsequent efforts were made to 'integrate' them. In this regard, Canadian citizenship was granted to all people resident in Canada in the late 1940s (unlike South Africa which attended to this only in the early 1990s), and minorities were included as a designated group under the CEEA in the mid-1980s.

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520 See chapter 5 pars 4.2.1; 4.2.2; 4.2.3 above.

521 See chapter 4 par 2.2 above for the South African situation.

522 See chapter 3 par 3.5.2.3(c) above.

523 Kallen *Ethnicity* 246.

### 4.3.2 Large-scale immigration

Canada has a long-standing and continuing immigration tradition (similar to that of the US,<sup>524</sup> but dissimilar to the South African situation) stimulated by the perception that its population is too small and that the country's economy needs to be strengthened.<sup>525</sup>

Since the late 1800s, an aggressive policy of immigration has been followed, though discriminating on the ground of race.<sup>526</sup> White immigrant workers from mainly Western Europe and the US have made up for deficiencies in skilled and unskilled jobs.<sup>527</sup> Preference has been given to British subjects and US citizens,<sup>528</sup> and to agriculturists.<sup>529</sup> Immigrants from Asia and Africa have been restricted, except where required for some of Canada's public works projects.<sup>530</sup> The use of a 'head-tax' from 1866 to 1923 severely restricted immigration generally, and particularly for Chinese people.<sup>531</sup>

However, after World War II, racism and European ethnocentrism were discredited.<sup>532</sup> Canada began receiving immigrants from areas other than the traditional European and American source countries.<sup>533</sup> But, only in the 1960s were non-white

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524 See chapter 5 par 4.3.2 above.

525 ILO Working Paper International Migration 10; Day *Multiculturalism and Canadian Diversity* 166; Weinfeld & Wilkinson 'Immigration and Diversity' 58; Abu-Laban & Gabriel *Selling Diversity* 38.

526 Galloway Immigration Law 10-3; Troper 'Immigrant City' 336.

527 Blanpain *International Encyclopedia* 33-37.

528 Abu-Laban & Gabriel *Selling Diversity* 41.

529 ILO Working Paper International Migration 4; Troper 'Immigrant City' 336; Weinfeld & Wilkinson 'Immigration and Diversity' 57; Abu-Laban & Gabriel *Selling Diversity* 41; 54. Only a small number of farmers from Eastern and Southern Europe were admitted.

530 Troper 'Immigrant City' 336; Weinfeld & Wilkinson 'Immigration and Diversity' 57; Ujimoto 'Ethnic Identity and Citizenship' 265; Abu-Laban & Gabriel *Selling Diversity* 38; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-3 to 1-4.

531 James 'Past Injustices' 56-9; Weinfeld & Wilkinson 'Immigration and Diversity' 57-8; Ujimoto 'Ethnic Identity and Citizenship' 265; Abu-Laban & Gabriel *Selling Diversity* 38; Tarnopolsky & Pentney *Discrimination and the Law* pars 1-3 to 1-4. The subsequent ban on Chinese immigration led to men (who were already in Canada) being permanently separated from their wives and families.

532 Weinfeld & Wilkinson 'Immigration and Diversity' 60.

533 ILO Working Paper International Migration 4.

immigrants accepted more freely.<sup>534</sup> In 1967 non-discriminatory and objective selection criteria for immigrants were established.<sup>535</sup> Consequently, the number of ethnic minority immigrants increased greatly.<sup>536</sup> In the period 1981 to 1986, most immigrants came from Asia.<sup>537</sup> In 1989, the 10 major source countries for immigrants included Hong Kong, Poland, the Philippines, Vietnam, India, Great Britain, Portugal, the US, Lebanon and China.<sup>538</sup>

A variety of people from different countries of origin is thus found in Canada. A majority of immigrants found today in Canada come from Africa, the Middle East and Asia.<sup>539</sup> And, immigrant landings from what could be visible minority source countries constitute almost half of the total number of immigrants.<sup>540</sup>

Immigration to Canada is based on the idea of permanence, namely that the immigrant will stay for good.<sup>541</sup> Moreover, Canada has one of the highest rates of naturalisation in the world.<sup>542</sup> Notwithstanding this, non-Europeans, however, have traditionally been viewed as 'foreigners' and have been subjected to differential treatment.<sup>543</sup> And, immigrant and ethnic minority workers generally have been discriminated against on the grounds of race, colour, national or ethnic origin, and citizenship.<sup>544</sup>

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534 *Ibid.*

535 ILO Working Paper International Migration 4; Weinfeld & Wilkinson 'Immigration and Diversity' 60; Abu-Laban & Gabriel *Selling Diversity* 47; 55. Race, colour and religion were specifically mentioned as grounds for not discriminating against persons.

536 Report Standing Committee, Appendix G 1.

537 Abu-Laban & Gabriel *Selling Diversity* 54.

538 ILO Working Paper International Migration 4; Weinfeld & Wilkinson 'Immigration and Diversity' 62.

539 ILO Working Paper International Migration 3.

540 *Ibid.*

541 ILO Working Paper International Migration 6. Many programmes exist to facilitate the settlement and integration of immigrants.

542 Weinfeld & Wilkinson 'Immigration and Diversity' 73. Members of the designated group, 'visible minorities', may or may not be citizens of Canada, depending on the time they have spent in Canada and on whether or not they have applied for citizenship. The designated groups, women and disabled people, may of course also contain immigrants. Three of the four designated groups, with aboriginal peoples being the exception, may thus contain immigrants.

543 ILO Report Outlawing Discrimination 1; Report Standing Committee, Appendix G 2.

544 ILO Report Outlawing Discrimination 1.

This discrimination was recognised by the Abella Commission. It found that institutionalised systems and practices had resulted in arbitrary and 'extensive exclusion' of minorities.<sup>545</sup> As a consequence, the group, 'visible minorities', was included as a designated group under the CEEA, with the main aim being to do away with 'exclusionary assumptions' and to end 'exclusivity'.<sup>546</sup> It was thus hoped to integrate these people into Canadian society by way of *inter alia* affirmative action measures.

### *Evaluation of large-scale immigration*

Immigration and immigration policy have greatly influenced racial and ethnic diversity in Canada.<sup>547</sup> As seen above, 'visible minorities' have resulted from immigration over centuries. The Abella Commission recognised the large-scale exclusion of these people from Canadian society and recommended that such groups be 'integrated' into Canadian society. They were consequently included as a designated group under the CEEA and became eligible for affirmative action.

### **4.3.3 Canadian citizenship**

As was pointed out above, it was only as from 1947 that the concept of Canadian citizenship took root and that such citizenship was granted to people living in Canada.<sup>548</sup> Both foreign- and native-born residents obtained citizenship.<sup>549</sup> This paved the way for human rights initiatives for immigrants in Canada,<sup>550</sup> in contrast to the past when immigrants of colour were exploited and excluded from citizenship.<sup>551</sup> It is submitted that,

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545 Abella Report 10.

546 *Ibid.*

547 Weinfeld & Wilkinson 'Immigration and Diversity' 56; 62; Ujimoto 'Ethnic Identity and Citizenship' 260ff.

548 See par 3.3.2 above.

549 Fleras & Elliot *Engaging Diversity* 61; Troper 'Immigrant City' 342.

550 Troper 'Immigrant City' 342.

551 Fleras & Elliot *Engaging Diversity* 256.

by granting citizenship to immigrants, their dignity<sup>552</sup> has been acknowledged and they have been recognised as full members of Canadian society.

Currently, the Citizenship Act<sup>553</sup> regulates the acquisition and loss of citizenship. As in South Africa<sup>554</sup> and the US,<sup>555</sup> the core of the Canadian concept of citizenship is that all people who are lawfully and permanently residing in Canada are entitled to be full members of the country. Citizenship may be obtained in one of three ways: by birth in the territory (*ius soli*),<sup>556</sup> by being born outside the country to a Canadian parent (*ius sanguine*)<sup>557</sup> and through a process of naturalisation.<sup>558</sup>

Naturalisation entails a process whereby a foreigner who settles in the country, and who complies with certain requirements, can apply for Canadian citizenship to the Minister of Employment and Immigration.<sup>559</sup> Applicants for naturalisation must show that they have resided in Canada for a period of at least three years after having been granted permanent

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552 See chapter 2 par 3.3.2 above.

553 Of 1985.

554 See chapter 4 par 2.3.5.4 above.

555 See chapter 5 par 4.3.3 above.

556 Citizenship by birth basically entails that any person born in the territory of Canada is a citizen by birth (ss 3; 12; 13 to 17 of the Citizenship Act). Certain exemptions exist in respect of a person whose parents, at the time of his or her birth, were not citizens or were not lawfully admitted to Canada for permanent residence and where either of the parents was (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government; (b) an employee in the service of a person in the previous paragraph; or (c) an officer or employee in Canada of a specialised agency of the UN or of any other international organisation to which diplomatic privileges and immunities were granted. Deserted children found in Canada (s 4(1)) and children born after the death of either parent (s 4(2)) are deemed to be born in Canada. A person born of a Canadian parent outside Canada may obtain citizenship within two years of birth (s 4(3)).

557 See ss 4; 5 of the Citizenship Act.

558 Sections 5(1); (2); (3); (4) of the Citizenship Act.

559 Immigration is regulated under federal authority by way of the Immigration and Refugee Protection Act of 2001 (hereafter the 'Immigration Act'). The Immigration Regulations provide for various categories under which people may qualify for admission as immigrants. These include: (a) family class sponsorship; (b) independent immigrants; and (c) refugees. The second of these, independent immigrants, include independent workers, assisted relatives, self-employed people, investors, entrepreneurs and retired people. The applicants are assessed against certain criteria for granting visas, which basically revolve around the ability to establish themselves in Canada (ss 12; 13 of the Immigration Act). Great weight is given to workers. The Immigration Act must be applied to ensure that decisions taken under it are consistent with the Charter, 'including its principles of equality and freedom from discrimination ...' (s 3(d)).

residence,<sup>560</sup> and must demonstrate an adequate knowledge of one of the official languages<sup>561</sup> and of the responsibilities and privileges of citizenship.<sup>562</sup>

Citizens are entitled to all rights, powers and privileges and are subject to all obligations, duties and liabilities of citizenship.<sup>563</sup> Canadian citizens may lose<sup>564</sup> or renounce their citizenship voluntarily,<sup>565</sup> or it may be revoked.<sup>566</sup> The Citizenship Act does not seem to distinguish meaningfully between different classes of citizens on the basis of the various ways of obtaining citizenship.

Two acts are relevant for establishing who may work in Canada, and who, in turn, may be eligible for affirmative action once in the workplace. First, the Immigration Act provides that<sup>567</sup>

[a] foreign national may not work ... in Canada *unless authorised to do so under this Act* (own emphasis).

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560 Section 5(1)(c) of the Citizenship Act. Lasting for a period of four years. Services of exceptional value to Canada may be recognised and citizenship may be granted without complying with the general requirements (s 5(4)). No period may be counted as a period of residence if, during such period, a person: was under a probation order, was a paroled inmate, or was confined in any penitentiary, jail, reformatory or prison; was charged with, or was on trial for, certain offences; was being investigated for certain crimes; was convicted of an offence under certain acts; did not obtain authorisation to return to Canada under the Immigration Act (s 22).

561 Section 5(1)(d) of the Citizenship Act. This requirement may however be waived on compassionate grounds (s 5(3)).

562 Section 5(1)(e) of the Citizenship Act. An applicant must show that he or she is not under a removal order or the subject of a declaration as a security risk. This requirement may however be waived on compassionate grounds (s 5(3)).

563 Section 6 of the Citizenship Act.

564 Section 7 of the Citizenship Act.

565 Section 9 of the Citizenship Act.

566 Section 10 of the Citizenship Act.

567 Section 30(1) of the Immigration Act.

A foreign national is defined as<sup>568</sup>

'[a] person who is not a *Canadian citizen or a permanent resident*, and includes a stateless person' (own emphasis).

In terms of the Immigration Act, only citizens and permanent residents qualify to work in Canada.

The Immigration Act has specific provisions aimed at dovetailing immigration objectives with employment policies.<sup>569</sup> The Act endeavours to balance the employment prospects of immigrants and the effect of such employment on Canadian citizens' and permanent residents' prospects for employment.<sup>570</sup> Immigrants must therefore obtain authorisation for employment before a visa will be granted permitting them to enter the country.<sup>571</sup>

Typically, an employer should determine that it has a need for a particular employee or group of employees not presently Canadian citizens or permanent residents. The following scenarios are possible: (a) the employer has established that the particular skills required are not to be found in Canada; or (b) prospective employees may have been contracted by prospective employers.<sup>572</sup> Once an employer has made a decision to employ such a person, or such people, the employer must detail the qualifications and experience of the applicant/s and must submit this and other information to an immigration officer to

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568 Section 2(1) of the Immigration Act. A permanent resident, in turn, is defined as 'a person who has acquired permanent resident status and has not subsequently lost that status ...' (*ibid*). The Immigration Act basically distinguishes between temporary and permanent residents, and between foreign nationals and citizens (ss 21; 22).

569 Blanpain *International Encyclopedia* 190.

570 *Ibid*.

571 Sections 11; 12; 13 of the Immigration Act. However, certain people are exempted from obtaining employment authorisation (listed in the Immigration Regulations, ss 19(1); 19(2); 20). These include diplomats, sports teams, entertainers, foreign representatives, trade representatives of foreign countries, company and union employees who come to Canada for less than 90 days, and other such special cases. Of great practical importance is the list of approximately 60 occupations, including certain professionals and technicians, investors, traders and intra-company transferees who are exempted from the requirements under chapter 16 of the North America Free Trade Agreement entered into on 17 December 1992, a free trade treaty with Mexico and the US. Exemptions must usually be renewed annually.

572 Blanpain *International Encyclopedia* 190.

enable the latter to consider: (a) whether or not the employer has made reasonable efforts to hire citizens or permanent residents of Canada; and (b) whether the job that has been offered is 'good' in the sense that the conditions of employment are acceptable to Canadian citizens and permanent residents.<sup>573</sup>

The Immigration Act thus to some extent ensures that Canadian citizens and permanent residents have priority when jobs are allocated, thus possibly making them eligible for affirmative action.<sup>574</sup>

The second Act that is relevant in this context, the CEEA, defines the 'Canadian workforce' as comprising<sup>575</sup>

*'all persons in Canada of working age who are willing and able to work'* (own emphasis).

Unlike the situation under the Immigration Act, this implies that all people willing and able to work, including immigrants who have not yet obtained permanent residence, (temporary residents) may work, and may, once in the workplace, arguably benefit under affirmative action.

### *Evaluation of Canadian citizenship*

It is difficult to reconcile these discrepancies in the two laws. On the one hand, it makes sense to prioritise jobs for citizens and permanent residents who have made some commitment to the country. On the other, and seen against the background of actively seeking workers to enlarge the population of the country and the high rate of naturalisation, it seems logical that immigrants without citizenship or permanent residence status should also be eligible to work. Immigrants are, amongst other things, recruited because of the very contribution they can make in the workplace.

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573 *Op cit* 191-4. The immigration officer has to consult with the National Employment Services Office in the specific geographical area when making these assessments. The National Employment Services Office then acts as a placement office for the applicant/s.

574 Similar to the South African situation (see chapter 7 par 4.3 below).

575 Section 3 of the CEEA.

### 4.3.4 *A matter of interpretation*

#### 4.3.4.1 *Introduction*

Neither the Charter nor the CEEA lists citizenship as a ground of non-discrimination.<sup>576</sup> But, 'citizenship' has been upheld as an 'analogous' ground of non-discrimination, similar to the South African position.<sup>577</sup>

#### 4.3.4.2 *Citizenship as an analogous ground: Andrews and Lavoie cases*

In these cases, the Supreme Court held that the rights guaranteed in section 15(1) of the Charter applied to all persons, 'whether citizens or not'.<sup>578</sup> It recognised the powerlessness of non-citizens, a 'discrete and insular minority' which needed to be protected by section 15.<sup>579</sup> It was emphasised that the term 'discrete and insular minority' had changed historically, and would continue to change with changing political and social circumstances.<sup>580</sup> Further, it was stressed that the determination of an analogous ground had to be made not only in the context of the law that was subject to challenge, but also (and rather) in the context of the place of the particular group in the 'entire social, political and legal fabric of society'.<sup>581</sup>

#### *Evaluation of interpretation*

Against this background, it is submitted that it makes sense that citizenship not be used as a criterion for beneficiaries of affirmative action, and, in particular, for visible

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576 See pars 3.6.3; 3.7.3.2 above.

577 See chapter 3 par 3.5.1.3(a)(i)A above.

578 See pars 3.6.3.1(a); 3.6.3.1(b)(i)A; 3.6.3.1(b)(i)B above.

579 *Ibid.*

580 *Ibid.*

581 *Ibid.* It was however indicated that citizenship might, in some circumstances, be properly used as a defining characteristic for certain types of legitimate governmental objectives.

minorities who come to the country as immigrants. Systemic discrimination suffered over centuries will require a substantial period of time to integrate these people. It is submitted that one way of integrating these people is *not* to use citizenship in the context of affirmative action in the workplace.

This argument acquires further weight against the background of the Charter, which acknowledges, accommodates and values differences rather than ignoring or denying them.<sup>582</sup> In this regard, it was seen that Canada is described as a ‘mosaic’.<sup>583</sup> Essentially, then, Canada’s approach is to integrate immigrants – in the workplace as well. Moreover, in the case of *Law*, it was held that the challenge for the judiciary in interpreting and applying section 15 of the Charter was to *transform ideals and aspirations into practice* in a manner *meaningful* to Canadian society.<sup>584</sup> It is submitted that this is exactly what is done by not requiring citizenship as a requirement for visible minorities to benefit from affirmative action in the Canadian context. It appears that this approach fosters unity in Canadian society.

In terms of the principles of international law, which require that affirmative action measures must not be contrary to the non-discrimination principle,<sup>585</sup> it may then be said that, in the Canadian context, race, visible minority status, sex and disability – the bases for the designated groups – as grounds on which to affirm disadvantaged people are ‘sufficiently connected’ or ‘relevant’ to the right to equality. With regard to an analogous argument for citizenship (as a criterion to benefit from affirmative action over and above being a member of one of the designated groups), it may be said that this is a ground that is *not* relevant. Thus, it is correct in terms of the principles of international law *not* to use citizenship as a criterion, as this would have been unfairly discriminatory in the particular Canadian context.

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582 Abella Report 13; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 6.

583 A situation differing from the ‘melting pot’ of the US.

584 See pars *Evaluation of interpretation; Evaluation of citizenship* above.

585 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

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## *Evaluation of citizenship*

Citizenship in the context of Canadian affirmative action was seen to be a non-issue. This has been explained on the basis of two broad themes: (a) the particular historical context in which immigrants were actively and aggressively pursued by governments over centuries to strengthen the population and economy, and where such immigrants make up a large percentage of the population; and (b) although visible minorities were initially excluded from the political community in that they were denied citizenship, this was rectified in the 1940s.<sup>586</sup>

This is in contrast to the position in South Africa where the black (indigenous) majority were denied citizenship under apartheid, and, with this being rectified only fairly recently – in the 1990s – citizenship is therefore still a sensitive issue. To sum up: (a) the nature and particular historical circumstances of the group that is affirmed, together with the (b) timing of correcting the exclusion from citizenship therefore determine whether citizenship can be used fairly as a criterion to benefit from affirmative action at a specific point.

The position of Canada is different from that of the US in that the latter: (a) endeavours to ‘assimilate’ immigrants into the US population rather than ‘integrate’ them; and (b) has never experienced problems with regard to the size of its population.

## **5 CONCLUSIONS**

### **5.1 Introduction**

As in the other chapters, only brief concluding remarks are made here because the various issues have been dealt with comprehensively in the evaluatory paragraphs under each issue.<sup>587</sup>

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586 See par 3.3.2 above.

587 See pars *Evaluation of Athabasca case*; *Evaluation of Ontario Human Rights Commission case*; *Evaluation of Law case*; *Evaluation of Apsit case*; *Evaluation of Lovelace case*; *Evaluation of Abella Report on disadvantage*; *Evaluation of the concepts ‘unqualified’ and ‘merit’*; *Evaluation of*

In this chapter, it was attempted to provide a historical and legislative overview explaining Canada's approach to equality and affirmative action. A comparison with Canadian law is important for South Africa, as the two countries share a common history of colonialism and slavery, directly related to the current inequalities in their respective societies. Canada, like South Africa, subscribes to the notion of substantive equality – a group-based approach – in response to systemic discrimination. The constitutional and ordinary legislative frameworks of the two countries are in fact quite close to each other. It was pointed out that the CEEA has formed the basis for the South African EEA. Also, the Constitutional Court and Labour Court of South Africa often refer to, and fall back on, Canadian jurisprudence. Moreover, Canada has about 20 years of experience of affirmative action which may assist South Africa – which is presently in its infancy as regards the matters under discussion – in structuring its debate.

The discussion in this chapter further concentrated on the same four areas focused on in respect of South Africa and the US, namely whether actual disadvantage or membership of a designated group is required to benefit from affirmative action, the deficiencies of categorisation, the role of merit in affirmative action, and the use of citizenship as a criterion in the application of affirmative action.

Early indications in Canada were that equality was interpreted in a formal and restrictive way, similar to the position in South Africa and the US.<sup>588</sup> But, in time, the notion of substantive equality was embraced as applicable to a Canadian society riddled with inequalities. Consequently, the Human Rights Act, the Charter and the CEEA were adopted. All of these provided for the right to non-discrimination and affirmative action. While the first and second merely authorised affirmative action, the CEEA provided for mandatory affirmative action in the workplace.

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*large-scale immigration; Evaluation of Canadian citizenship; Evaluation of interpretation; Evaluation of citizenship* above.

588 See chapter 3 par 3.1.1; chapter 5 pars 3.2.1; 3.2.3 above.

## 5.2 Disadvantage

### 5.2.1 *Past personal disadvantage or group membership*

With regard to the concept ‘disadvantage’, the Canadian Supreme Court has interpreted it in the constitutional context as relating to ‘group membership’ since the inception of affirmative action.<sup>589</sup> This interpretation was later substantiated and confirmed in the Abella Report, which also formed the basis of the CEEA.<sup>590</sup> The Abella Report strongly recommended that disadvantage be *assumed* in favour of members of the designated groups.<sup>591</sup> This is similar to the South African position.<sup>592</sup> Although the CEEA is not as clear as the Abella Report on assumed disadvantage, to date, no one has challenged the conclusion of the Abella Report that the designated groups are in fact disadvantaged.<sup>593</sup>

This group-based approach however changed in later years when the Canadian Supreme Court in *Apsit*<sup>594</sup> held that past discrimination against a group, as well as the cause of it, had to be proven – quite similar to the position in the US.

The *Apsit* interpretation has however been fiercely criticised. In essence, the standard set by *Apsit* was criticised as being too high.<sup>595</sup> It was argued that the use of the ‘cause’ of a group’s disadvantage – an ‘amorphous, complex and indeterminate’ concept – would probably lead to many affirmative action programmes being challenged.<sup>596</sup>

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589 See pars 3.5.4.2(c)(i); *Evaluation of Athabasca case* above.

590 See par 4.1.2.2 above. The well-researched Abella Report stands in stark contrast to the American situation where no investigation took place to decide on a strategy for affirmative action and to pinpoint its beneficiaries, and where, consequently, benefiting groups multiplied.

591 *Ibid.*

592 See chapter 4 par 2.1.3.2; *Evaluation of disadvantage* above.

593 See par 4.1.3 above.

594 [1988] 1 WAR 629 (Man QB) (see chapter 5 par 3.6.5.3(b) above).

595 See par *Evaluation of Apsit case* above.

596 *Ibid.*

In *Lovelace*,<sup>597</sup> the Canadian Supreme Court even further complicated the concept of disadvantage and imported the discrimination test into the affirmative action context. This has also evoked strong criticism.

These developments came as a surprise, since they occurred against the background of the well-researched Abella Report and of the early interpretation of 'disadvantage' as a group-based approach to be assumed in favour of the designated groups. However, seen against the background of strong criticism, it is unclear whether the *Apsit* and *Lovelace* cases will be followed in future. This situation is not recommendable for South Africa.

### **5.2.2 Deficiencies of categorisation**

Some of the deficiencies of categorisation as used by the CEEA have been pointed out. These include five main criticisms, which are similar to those found in the US and South Africa, namely over-inclusiveness, the experience that those least in need of affirmative action in the various groups in fact benefited from it, under-inclusiveness,<sup>598</sup> the fact that no provision was made for degrees of disadvantage, and particularly, that no provision was made for multiple disadvantage.<sup>599</sup> The latter was, however, recognised in practice. During the third review of the CEEA, it was held that the fact that the CEEA failed to explicitly recognise double or triple disadvantage suppressed recognition of multiple disadvantage.<sup>600</sup> It was recommended that a means be developed to separately identify individuals who were members of more than one designated group and to provide a comparative analysis of their disadvantages in employment that might result from belonging to more than one designated group.<sup>601</sup> It is submitted that the concept of multiple disadvantage should be recognised in South

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597 [2000] 1 SCR 950; 188 DLR (4<sup>th</sup>) 193 (see par 3.6.5.3(c) above).

598 Under-inclusiveness of male workers in traditionally female jobs was specifically pointed out.

599 See par 4.1.4 above.

600 *Ibid.*

601 *Ibid.*

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Africa, as it has been done in Canada. Specific recommendations will be made below in this regard.<sup>602</sup>

Further specific criticism dealt with the definition of visible minorities and people with disabilities.<sup>603</sup> With regard to the first, the use of race and colour to distinguish visible minorities from the majority, and the use of race, in particular, have been criticised. Poverty or 'social condition' has been mooted as a criterion to establish disadvantage, similar to the position in the US and South Africa.<sup>604</sup> Another specific criticism pointed to the fact that the method of self-identification led to undercounting in certain workplaces.<sup>605</sup>

### 5.3 Merit

It was seen that though the CEEA appeared to embrace the merit principle for affirmative action, a modified merit principle has been acknowledged in practice. This is similar to the situation in South Africa.<sup>606</sup> This is in contrast to the US, which embraced individual merit. Like South Africa, Canada emphasises education and training to assist the designated groups in the attainment of skills and professional qualifications which will provide them with legitimate qualifications for jobs.<sup>607</sup> This was seen to be particularly relevant for two of the designated groups – aboriginal peoples and disabled people – which lack qualifications and experience in the workplace.

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602 See chapter 7 par 2.3.3 below.

603 See par 4.1.4 above.

604 See chapter 4 par 2.1.4; chapter 5 par 4.1.4 above.

605 *Ibid.*

606 See pars 4.2.1; 4.2.2; 4.2.3; 4.2.4 above.

607 *Ibid.*; chapter 3 par 3.5.2.3(c)(ii) above.

## 5.4 Citizenship

It was seen that citizenship is a non-issue in the context of affirmative action in Canada.<sup>608</sup> This was explained on the basis of two broad themes: (a) the large-scale immigration experienced in Canada as a result of actively recruiting people to increase the Canadian population; and (b) the early correction of granting visible minorities citizenship and inclusion in the political community. These people have traditionally been excluded, and have been discriminated against because they were viewed as 'foreigners'. Integration/inclusion of these people has been seen to be one of the main aims of affirmative action. The nature and particular historical circumstances of the groups therefore determined that the criterion of citizenship could not be used in the context of affirmative action.

In conclusion, it has recently been stated that, since the enactment of the CEEA, progress has been slow.<sup>609</sup> It has also been stated that Canada is currently in a period of 'uneasy transition' – it is moving beyond the focus on the individual into a new stage in an endeavour to come to grips with systemic discrimination.<sup>610</sup> Here, the situations that the law confronts are not aberrational in the sense of being a departure from the norm, but are continuing features of everyday life.<sup>611</sup> The collective realities are that women in full-time employment earn on average only 72 percent of the wages paid to men, and disabled people and aboriginal peoples remain underemployed in Canadian society.<sup>612</sup> In essence, then, despite the comprehensive affirmative action measures, discrimination and poverty for minority groups and women is still found. In this regard, it has recently been reiterated that substantive equality is the 'only equality' for Canadian society,<sup>613</sup> but that a lot remains

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608 See par 4.3.1; *Evaluation of Canadian citizenship* above.

609 Thomas 'Employment Equity in South Africa' 245; Agócs 'Employment Equity Legislation' 261-69; Hucker 2 265; Report New Employment Equity Act and Regulations strengthen Canadian Workplace 1.

610 Hucker 1 137-8.

611 *Ibid.*

612 *Ibid.*

613 McLachlin 'Most Difficult Right' 22.

to be done to make it truly work.<sup>614</sup>

Having compared Canadian law with South African and American law, attention now turns, in the final chapter, to the summaries, conclusions, recommendations and projections that could enable South Africa to better the South African position.

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614 L'Heureux-Dubé 'The Pursuit of Equality' 353.