The Politics of Preference:

A Catalogue of Criticisms of Employment Equity

> *After this Theseus killed a man called Procrustes, who lived in what is now known as Corydallus in Attica. This person forced passing travelers to lie down on a bed, and if any were too long for the bed he lopped off those parts of their bodies which protruded, while racking out the legs of the ones who were too short. This was why he was given the name of Procrustes [The Racker]. — Diodorus Siculus,* ***The Library of History*** *(IV 59, 5)* [1]

Employment equity remains very much an unsettled issue in Canada. In 1995, the Conservative government in Ontario dismantled that province's employment equity structures at the same time as the Liberal government in Ottawa passed legislation to strengthen employment equity federally.[2] Given these conflicting legislative actions, a re-examination of this area of public policy is still in order. This essay attempts to clarify and advance the debate surrounding employment equity in Canada by offering a catalogue of criticisms which must be met by advocates of the policy if it is to be regarded as a legitimate response to a genuine problem.

I first identify those specific aspects of employment equity, as it is currently being administered, which are reasonably in dispute. Next, criticisms of the disputed aspects of the policy are marshaled under four headings, or analytical type: conceptual, principled, foundational, and practical. While most of the more important criticisms of employment equity are explicated here, this essay does not purport to be exhaustive. Nor, of course, are all of the criticisms adduced here original or of equal weight. The object is to show that employment equity, as it is currently being implemented in Canada, is in its central aspects a fundamentally wrong-headed policy, and that sound public policy would prohibit by law what is now condoned and widely practiced. I conclude by outlining a constitutional challenge to employment equity.

A) Employment Equity in Canada

Employment equity is a complex public policy. It posits several distinct objectives, in relation to four overlapping groups of people, encompassing an essentially open-ended list of measures for achieving these objectives. Furthermore, employment equity is pursued at a number of different levels: through federal and provincial legislation; through non-statutory government policy at the municipal level and above; and through administrative directives or fiat in both public- and private-sector workplaces. Finally, a great number of putative rationales have been advanced in support of this welter of objectives and measures. Given all of this complexity, it is almost inevitable that there would be some good and some bad aspects to employment equity – some measures to achieve some objectives in some contexts are bound to be more acceptable than others. By selectively focusing on the most favourable aspects of employment equity, proponents frequently bypass the concerns of its critics. It is necessary to begin, then, by identifying the issues upon which reasonable people might disagree, and discard the red herrings.

§1. The legislative regimes:

The *sine qua non* of employment equity in Canada is the goal of achieving proportionate representation in the workforce. There are two main variants.[3] Ontario's *Employment Equity Act* was the most ambitious legislative initiative, and expresses the "ideal" toward which

administrators and advocates presumably strive. Article 2.2 established as its main goal that:

> *2.2 Every employer's workforce, in all occupational categories and at all levels of employment, shall reflect the representation of Aboriginal people, people with disabilities, members of racial minorities, and women in the community.*

In contrast, the Federal *Employment Equity Act* prescribes in section 5 that:

> *5. Every employer shall implement employment equity by… instituting such positive policies and practices… as will ensure that persons in the designated groups achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in (i) the Canadian workforce, or (ii) those segments of the Canadian workforce that are identifiable by qualification, eligibility or geography and from which the employer may reasonably be expected to draw employees.*[4]

As long as the designated groups remain under-represented in the workforce relative to their representation in the population, the federal legislation will be the more "conservative" of the two, inasmuch as it does not require an employer to strive for representation beyond the current averages in the workforce (which may themselves be the product of pre-existing discrimination). In practice, however, under the federal plan the goals will be continually ratcheted up as every employer strives to achieve an ever-increasing average, until the "ideal" is reached or surpassed. Conversely, under the "ideal" program, the legislated goal is generally a long-term objective rather a practical, immediate requirement; as a concession to the reality of having too few DGMs in an applicant pool, more realistic intermediary goals are typically set on a case-by-case basis. Thus the two regimes may not differ a great deal in practice.

If the goal of proportionate representation were merely a pious wish of the legislators – if employment equity legislation were merely a feel-good, symbolic gesture – then it would not be especially worrisome, however misguided it might be. What critics find truly objectionable is that the goal of proportionate representation is made concrete through a scheme of legislated goals with timetables. This, the centrepiece of employment equity legislation in Canada, is sometimes attacked as setting "quotas." In the following section, I argue that this attack on employment equity is only partly correct.

§2. The focal point of contention:

The real debate between proponents and critics of employment equity is *preferential treatment in hiring and promotion* based on immutable biological characteristics such as race and sex and disability. This simple proposition requires considerable clarification.

First, what constitutes a preferential employment practice based upon the identified biological characteristics? There are obvious and clear cases where race and sex (and perhaps disability) are *bona fide* occupational requirements: hiring a black man to play the lead in ***Othello,*** or restricting entrants to a tennis tournament to women only, may serve as examples. There are also rather less clear cases where biological characteristics might be relevant to one's ability to perform a job: hiring persons of the local ethnic group for community policing, for example.[5] The debate, though, is whether public policy should require race or sex or disability to be taken into consideration in employment decisions outside of the performing arts, sports, and perhaps a very few special public functions. Can being of a particular race or sex, or having a disability, be considered meritorious in employment contexts, just as such? Can these attributes enhance a person's employment qualifications for jobs in general? There are two main attempts to bring the biological characteristics of DGMs within the domain of merit or qualifications: the

argument that this kind of diversity adds something to the workplace, and the role-model argument. These arguments will be addressed in §B3 and Part F respectively.

Second, the debate concerns preferential practices *directly involving employment,* rather than those relating to education, welfare, or other social benefits which might indirectly affect employment opportunities. The distinction is important because job competitions are zero-sum games: an advantage given to one candidate necessarily entails a handicap for the others. In contrast, directing special attention toward certain groups in other areas of social policy does not entail harming anyone else. Thus, to use a standard illustration, segregating girls and boys in high school science and math classes might benefit the girls in some way without causing the boys' performance to degenerate. Such preferential policies can be pareto-improvements to society, whereas preferential hiring and promotion can never result in a pareto-improvement.[6] Education, job training, and other pre-employment equalization policies tend to expand the pool of qualified candidates, whereas employment equity tends to constrict that pool.

Third, the debate in Canada focuses fairly narrowly on preference in hiring and promotion, although employment preferences can take many other forms.[7] In contrast, two of the most important U.S. Supreme Court cases involving employment preferences did not concern hiring or promotion. The issue in *United Steelworkers of America v. Weber* (1979) was set-asides for job training opportunities for black employees; while the issue in *Adarand v. Pena* (1995) concerned the preferential awarding of government contracts to companies owned by racial minorities.[8] I will not say much in what follows about employment preferences other than in hiring and promotion because they do not figure prominently in the Canadian context. Nor will I address the complex issue of what constitutes "reasonable accommodation" for employees (or job candidates) with special needs.

Fourth, at issue in the employment equity debate is whether *any* form of preferential employment practice, and not only some particularly egregious kinds, is justifiable. Advocates of employment equity frequently obfuscate the issue by claiming that it is intended merely to "remove barriers" to the advancement of DGMs, denying that it involves quotas or hiring the unqualified.[9] But the issue isn't whether employment equity forces employers to hire or promote unqualified persons – though it sometimes leads to that.[10] Nor is it whether employment equity requires hiring or promoting according to strict quotas – though it is difficult to see how mandatory minimum goals with timetables, backed by fines of up to $50,000, can be thought of as anything *but* quotas.[11] The issue is whether employment equity legislation permits, encourages, and in some cases even requires hiring or promoting those not *most* qualified for the position. That is the relevant consideration from the points of view of individual justice and economic efficiency; and the truth on this point is quite clear.

Since many advocates of employment equity are still in denial on this point, however, it might be useful to cite a few examples of hiring practices which illustrate it. (i) In 1992, the Fire Department in Kitchener, Ontario, administered a test to select new recruits to the force. All women and visible minority candidates who scored 70% or higher on this test were allowed to progress to the next step in the recruitment process, while white men who scored less than 85% on the same test were rejected. Thus hundreds of white men, who were more qualified by the Fire Department's own measure, were denied employment opportunities in favour of women and visible-minority candidates. (ii) In 1993, a job was advertised for a "director of information technology" in the Ontario government, at a salary of $74,000 to $111,000, for which WAM anglophones were declared ineligible. (iii) The ***Bulletin*** of the Canadian Association of

University Teachers has over the past decade routinely published ads for jobs open only to DGMs, especially women.[12] A recent example was a position in the Psychology Department at Wilfrid Laurier University, for which only women were invited to apply. (iv) Consider, finally, the composition of the Office of the Employment Equity Commissioner in Ontario:

> In response to verbal and written requests, the Office refused to provide such information. The responses to a series of Freedom of Information requests may explain this reluctance. The most recent figures, provided in January, suggest that hiring is overwhelmingly based on criteria of race and gender. The 1991 census indicates that women constitute 46.6% of the Ontario labour force; they constitute 90.5% of the Office of the Commissioner's staff. Racial minorities constitute 13% of the provincial labour force but 53% of the Office staff. What of able-bodied white males? The Office of the Commissioner reported that 0% had identified themselves in this category.[13]

Although hundreds more examples could be cited, these will do to illustrate the fact that one way in which employment equity allows employers to "remove barriers" to the advancement of DGMs is by removing more-qualified WAMs from the applicant pool.[14] And remember: this is only the most egregious form which employment preferences can take; countless more-subtle discriminations against WAMs occur every day under the auspices of employment equity.[15]

Indeed, it is highly disingenuous for advocates of employment equity to deny that it involves giving preference to DGMs in hiring and promotions. For if this were not meant to be the case, then there would have been no need to expressly provide for this possibility in the legislation. Recall that the Federal *Employment Equity Act* referred to instituting "positive policies and practices;" and Article 5.1 of the Ontario legislation allowed that, in pursuit of the goal of proportionate representation:

> *5.1 It is not a breach of this Act to give preference in hiring or to deny employment to someone if the preference or denial is one that is permitted under the Human Rights Code by section 11 (constructive discrimination), section 17 (handicap) or clause 24 (1) (a) or (b) (special employment).*

– that is, as long as the person being discriminated against is a WAM.[16]

§3. The issue restated:

An alternative way of stating the focal issue in this debate is in terms of equality of opportunity in employment. Equality of opportunity is a symmetric relation; it cannot be achieved for anyone unless it is achieved for everyone. This is not to say that equality of opportunity requires exactly the *same* treatment for everyone; it may require measures which facilitate participation for persons with special needs. Textbook examples of facilitative measures are having wheelchair access, providing parental leaves, and advertising hiring and promotional opportunities publicly rather than relying upon the "old boys' network."[17] Few would dispute that the law properly requires that reasonable facilitative measures be taken by employers to accommodate persons with special needs.[18]

On the other hand, equality of opportunity does not require that everyone be afforded exactly the same life experiences, either. A sizeable majority of Canadians come from families whose incomes are close enough to the median that it would be misleading to characterize them as being either "advantaged" or "disadvantaged" in this respect – even though lower-middle-class incomes are substantially less than upper-middle-class incomes. The point is that, with Canada's public education system and other social-equalization measures, anyone roughly in the middle of the range in family incomes in Canada is not significantly disadvantaged relative to anyone else in this rather wide range. Some theorists put a lot of weight on the distinction

between "formal" and "substantive" equality of opportunity. Formal equality of opportunity exists when there are no legal barriers to the equal participation of everyone; substantive equality of opportunity exists when everyone has the wherewithal to attain whatever position in society their interests and natural talents permit. Obviously, substantive equality of opportunity is an unattainable ideal to which we might approximate to a greater or lesser degree; the question is whether it can be advanced specifically by giving preference to certain people in employment later in life to "compensate" for disadvantages experienced earlier.

Many dubious criticisms of employment equity can be found in the popular discourse on the subject. Among them is the argument that no discrimination against DGMs exists in Canada. Another is based on the rigid, traditionalist ideology which holds that a woman's place is in the home. Proponents of employment equity would like the public to believe that everyone who opposes them does so for questionable reasons like these. But this is not so; there are many serious conceptual, principled, foundational, and practical problems with the central aspects of employment equity, which collectively destroy any pretence that justice lies in the way of preferential employment practices. Parts B through E of this essay adduce some of the more important of these criticisms.[19]

B) Conceptual Problems with Employment Equity

What I mean by a conceptual problem with employment equity is a problem with the coherence, validity, clarity, or authenticity of the policy. Policies with conceptual problems trade on ambiguity and vagueness for their support.

§1. Conflicting objectives [coherence]:

Canadian law relating to discrimination in employment has undergone radical change in the past two or three decades.[20] Prior to the 1980s, the primary objective of this legislation was to prevent direct discrimination for specific non-job-related reasons. The target was employers who, because of identifiable stereotypical attitudes about or prejudice toward members of certain visible groups, failed to employ them at all or in positions commensurate with their qualifications. Anti-discrimination laws were modelled on other kinds of human rights legislation, according to which individual complaints were investigated and adjudicated before a quasi-judicial tribunal.

As time went on, human-rights advocates became dissatisfied with the individual, complaint-based system for combating the evils of workplace prejudice and discrimination, in part because it was difficult in most cases to prove that invidious discrimination had occurred. Unsuccessful candidates typically did not know the qualifications of their competitors, or the weighting of criteria used by employers. Prejudiced employers did not tell unsuccessful candidates why they were not hired, or if they did then the reasons were always couched in legally acceptable terms. Meanwhile, human-rights advocates began to increase the scope of their concerns in several respects. First, they argued that much of the workplace discrimination that took place in Canada was not of the direct, intentional variety; rather, it consisted of more subtle, unconscious and unintentional forms of indirect discrimination, which they called "systemic discrimination."[21] Second, they maintained that it was not enough merely to prevent prejudice from operating in the present; it was also necessary to compensate victims for past discrimination, or to rectify its effects, with preferential treatment.[22] There has always been a

tension between the goal of preventing present discrimination and the goal of remedying past discrimination by means preferential employment practices, as the debate over "reverse discrimination" (i.e. direct discrimination against WAMs) has shown. In any case, for the various reasons mentioned above, legal action with respect to discrimination in employment veered sharply toward a more "systemic" approach beginning in the 1980s.

The stated goals of employment equity relate solely to the evils of workplace discrimination, whether direct or systemic, past or present. But the defining measures prescribed by the legislation do not bear any logical relation to these objectives. In subsequent sections of this essay (especially §B2 and §D3), I demonstrate how a lack of proportionate representation is consistent with there being no discrimination of any kind; here I show that proportionate representation could be achieved despite the existence of manifest discrimination.[23] Consider a workplace in which every employee over the median age is male, and every employee under the median age is female. In that case, men and women would be represented proportionately in the workplace; but this would most likely be the result of outright exclusion of women for a period of time, followed by the outright exclusion of men. Moreover, in order to maintain proportionate representation given this starting point, one would now have to start discriminating ruthlessly against women again, since all the retirees for the next period of time would be men and they would have to be replaced by men to maintain proportionality. Achieving proportionate representation in this kind of situation would require perpetual, cyclical discrimination of an extreme kind. While not nearly so stark or extreme as this, the scenario just described is currently playing itself out in the Canadian workforce, and it is the turn of WAMs to be excluded.

Given the logical disconnect between the stated goals of employment equity and the measures used to achieve these goals, one might suspect that a hidden agenda lies behind the legislation. Perhaps advocates of employment equity conflate discrimination with disadvantage, thinking that all disadvantage is a result of direct or indirect discrimination.[24] Actually, then, their quest for proportionate representation is really a quest to address any kind of disadvantage that might manifest itself in disparate employment outcomes. In other words, perhaps employment equity is seen by some advocates as a general-purpose affirmative action program, a program aimed at ameliorating conditions of disadvantaged generally and not only in the workplace.[24] But this view provides no better support for proportionate representation than the narrower one, and for the same reason: in the absence of disadvantage, some groups of people will still tend to gravitate toward some kinds of employment and others to other kinds of employment (see §B4, §C3, and §D3).[26] A lack of proportionate representation is thus related to neither discrimination nor disadvantage. In fact, the only goal which proportionate representation might be logically related to is the complete assimilation of DGMs into the Canadian mainstream. No doubt supporters would object to characterizing employment equity in this way, but it is difficult to see how every group could find itself proportionately represented at every level of every workplace unless there were an extremely high degree of homogeneity with respect to basic values within the population (see §C3).

For the purposes of the present section of the essay, it is sufficient to note that employment equity has two distinct, stated objectives: (1) to ensure that no individual is intentionally or unintentionally discriminated against in employment for reasons unrelated to work performance; and (2) to rectify the effects of past discrimination against members of certain groups. It has two further, implied objectives, namely: (3) to ameliorate conditions of disadvantage; and (4) to assimilate all other groups to the WAM mainstream in the Canadian

workforce. Sometimes other goals that are not stated or implied by the terms of the legislation are advanced by supporters, such as providing role models for DGMs, or increasing diversity in the workplace. The merits of these other goals will be discussed in later parts of this essay. The point to note here is that these goals are in many ways competing and conflicting, which makes their simultaneous achievement a logical and practical impossibility. As soon as the step was taken from preventing present to "remedying" past discrimination, the goals of employment equity became incoherent. The original problem of reverse discrimination is exacerbated with each successive expansion of the goals of employment equity; but in addition many new theoretical and practical problems arise.

There is an important political advantage to advancing self-contradictory legislation like employment equity: it can be sold to the general public under one guise (as promoting equality of opportunity between individuals), and to special-interest groups under another (as promoting preferences for them). Those who drafted and administer Canada's employment equity legislation evidently think that they can assure substantive equality of opportunity between individuals by promoting formal equality of outcome between groups, through the use of preferential policies. But this is like saying you would give your right arm to be ambidextrous. This misconception is explicit in the Federal *Employment Equity Act*, which states:

> *2. The purpose of this Act is to achieve equality in the work place so that no person 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 disabilities and persons who are, because of their race or colour, in a visible minority 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.*

As long as hiring and promotions are conducted in a manner that is procedurally fair, the resulting proportions of various groups should be completely irrelevant. By prescribing both procedures *and* targets, the administrators of employment equity behave like managers of a bus company who announce that their drivers are never to break the rules of the road, even as they post schedules which can only be met by speeding.[27] Whatever else might be said about substantive equality of opportunity, it is clearly undermined by preferential policies which aim at a particular distributional result.

§2. Random variation [validity]:

The second conceptual problem with employment equity is that it illegitimately conflates statistical disparities with systemic discrimination. It is of the utmost importance to understand that the inference to discrimination, or even disadvantage, from the kind of statistical disparities relied upon in employment equity legislation is completely invalid. To help see this, consider a parallel case: Suppose, plausibly, that Canadians have no prejudices against left-handers, and that left-handedness is not correlated with any other basis of discrimination or disadvantage. In that case, we would expect the distribution of left-handers in the workforce to be statistically normal. What this means is that most workplaces would cluster around the mean for left-handedness in the population (about 10%), but also that there would be considerable variation among employers. Some would have a workforce that is significantly more than 10% left-handed, and some would have a workforce that is significantly less than 10% left-handed. Indeed, some employers' workforces would have no left-handers at all, even though no discrimination of any kind was involved in bringing this situation about. But if left-handers were

a designated group, then those companies which by random draw ended up with "too few" left-handers would be in violation of the law and subject to penalties. They would be forced to hire away enough left-handers from the "over-represented" companies to bring their workforce up to the prescribed level. Overall, the same number of left-handers would be employed; indeed, there is no gain to left-handers overall, nor even to any specific left-hander, after proportionate representation is achieved in each workplace. Thus there is no good reason to think that this new distribution of left-handers in the workforce is any better than the random distribution.

Similarly, then, if a designated group happens to be "under-represented" in a particular occupational category at a particular firm, this provides absolutely no valid evidence at all that this company has discriminated against that group, intentionally, systemically, or otherwise. It could simply be a product of random variation, for all anyone knows to the contrary. This is especially likely when the disparity arises among smaller employers, where proportionate representation can be expected to be the statistical exception rather than the rule. If a company with 204 employees has 17 employees in each of the 12 "Abella job categories" identified by the *FCP*, the chances of producing proportionate representation in each of these categories by a random and therefore completely non-discriminatory hiring practice would be exceedingly small. Moreover, the requirement that every employer have each designated group *at least* proportionately represented in each category logically entails that every employer can have each designated group *at most* proportionately represented, too – unless WAMs are made to be disproportionately represented in the unemployment lines.[28]

We saw in §B1 above how proportionate representation can be consistent with the most extreme form of cyclical discrimination. Here we see that a lack of proportionate representation can be consistent with no discrimination at all. In short, the statistical methods employed by the law bear no logical relation whatsoever to its objectives. To put it bluntly: *employment equity criminalizes random variation.*[29] For this reason alone, it should be scrapped.

§3. Definitional problems [clarity]:

One of the more problematic aspects of employment equity concerns defining the categories 'visible minority', 'aboriginal Canadian', and 'disabled'.[30] Given that human racial classifications are highly disputable sociological constructs that have no basis in objective biological fact,[31] who is to count as a visible minority, or an aboriginal Canadian? Where along the continuum from (e.g.) Greece through Turkey and Iran to Pakistan does one draw the line at becoming "visibly" non-white? What about Latin-American descendants of the conquistadors – are they disadvantaged or not? (Official answer: Turks count as visible minorities, but not Greeks or Bulgarians; Argentines and Moroccans are visible minorities but not Spaniards.) Does a strong, identifying accent in speech mark one as a "visible" minority if one is a white immigrant from (e.g.) the former Soviet Union? (Official answer: No.) What about wearing a yarmulke, or other distinctive ethnic dress? (Official answer: Arabs count as visible minorities but not Jews, however each might dress.) How many of one's grandparents or great-grandparents have to be aboriginal, or otherwise non-white, for one to qualify? (Official answer: only one, as far back in the family tree as one cares to go.[32]) Exactly how blind or feeble-minded does one have to be to count as disabled for employment equity purposes? (Official answer: we accept whatever you tell us.) Given the mixed heritage and mixed health of a large proportion of the Canadian population, these are pressing questions.

These intractable definitional questions are side-tracked by Canadian legislation with the

provision that employees are to self-identify – and employers are forbidden to correct any employee information given. But this provision only raises moral and practical problems without solving the conceptual one; for employees need guidance from the law, and telling them that they can decide for themselves what categories they belong to does not provide it. Self-identification within vague categories is bound to lead to all kinds of inconsistencies – among employees within workplaces, between one workplace and another, and between workplace surveys and national census data.[33] Discrepancies between workplace surveys and national census data are especially likely to be an artefact of investigation, given that the methods and purposes of the national census are quite different from the method and purpose of workplace surveys.[34] Finding such a discrepancy is therefore not a scientifically valid basis for inferring that discrimination is the cause. This is especially likely in smaller workplaces, where the decisions of a few marginal cases can alter significantly the proportions of DGMs.

§4. Biology-consciousness and "diversity" [authenticity]:

Historically, the underlying motivation of anti-discrimination legislation had been the desire to eliminate biology-consciousness from employment decisions. While there is no contradiction in the idea of fighting fire with fire, there is at least a paradoxical air about the desire to eliminate biology-consciousness in employment by forcing employers to survey and closely monitor the biological characteristics of employees and job candidates, and by forcing them to hire and promote the prescribed proportions of biologically-defined groups on pain of serious penalty.

Many present-day advocates of preferential employment practices reject the longstanding desire to eliminate biology-consciousness in employment, and instead wish to promote what might be called "diversity-consciousness." They are motivated by a desire to enlighten the population on the positive values of a multi-ethnic workplace. The question to be addressed in this Part is whether such a goal is internally coherent or authentic. One problem arises when it comes to promoting employment prospects among the many ethnic groups in Canada which lean toward a more traditional way of life. Hiring more members from these groups will entail hiring a "disproportionate" number of *men* from these groups. If by promoting these visible minorities one also tends to promote men who favour women in traditional roles, then the goal of increasing ethnic diversity in the workplace is incompatible with the goal of promoting gender equality. Here, diversity conflicts with equity, rather than being an expression of it.

Besides this incoherence, the kind of diversity envisioned by those who advocate proportionate representation in the workplace is a very shallow ideal, indeed. A truly multi-ethnic society would be one in which each group does its own thing, which would not necessarily be white man's thing. Probably the single policy change which would do more than anything else to promote a truly multi-ethnic society would be to replace the current homogeneous public-education system with a voucher system, which would allow parents considerable choice in the kind of school they could send their children to. Such a system would allow groups to establish schools which emphasize those cultural values and outlooks which define their group. Yet I suspect that very few supporters of "diversity in the workplace" would be in favour of dismantling the public-education system, and it is not difficult to see why. Their wish to create a microcosm of society in every office, industry, or profession could only be achieved by completely homogenizing society, by pressing everyone from the same mould. In the absence of considerable coercion, it would be very unlikely that, for example, the children of

Asian Taoists would be as likely to become lawyers as Jews who study the ***Talmud*** from an early age. Proponents of proportionate representation want to see a "rainbow" of faces in Canada's workplaces, but only as long as the same aspirations and aptitudes exist behind all of these faces.[35] This is not authentic diversity.[36]

Proponents of proportionate representation typically respond to this accusation by saying (to pursue the previous example) that the reason students of the ***Tao*** are on the whole less likely to be interested in the legal profession than are students of the ***Talmud*** is that the law as it is administered in Canada is undesirably narrow, in a "eurocentric" way; someone with an "Eastern perspective" might actually have something valuable to contribute to the legal profession which we might not get by hiring only "better qualified" persons of the more usual type. (This kind of argument is frequently run in many other employment contexts with 'women' and 'men' appropriately substituted. Men and women, it is alleged, have different styles of working and interacting.[37]) Although clearly based upon an empirical claim which will have varying degrees of plausibility in different employment contexts and with respect to different groups, this argument is advanced as though it were an obvious, necessary truth in all cases where "under-representation" exists. In fact, the argument treads a tightrope path in arguing that biologically defined groups are importantly different in employment-related ways, but that these important differences should not translate into disproportionate representation in any occupation.[38] This general claim is extremely implausible and a tenuous reed upon which to base social policy which abrogates of the fundamental human rights of WAMs. Besides, if all that this kind of argument succeeds in doing is to show that the "standard" conception of merit in some employment contexts is problematic, then the appropriate policy response is *laissez faire:* let people make employment decisions to the best of their abilities; if they make mistakes then they will pay the price for them, and if they properly value diversity they will prosper by virtue of it.

C) Principled Objections to Employment Equity

By principled objections to employment equity I mean objections which are based upon the fundamental moral and legal precepts of liberal democracy. I take it that the precepts themselves are not generally in question, but only their application to the issue at hand; thus I do not pause to defend the precepts I invoke in Part C.

§1. The two-wrongs fallacy:

Everyone learns as a child that two wrongs don't make a right; but proponents of employment equity fail to appreciate what a powerful blow this simple ethical principle is to their cause. Two forms of the two-wrongs fallacy apply here. The first finds expression in the charge of "reverse discrimination." The point is that discriminating against you, now, by her does not "correct" discrimination against me, then, by him. Preferential employment practices meet none of the normal conditions for compensatory justice: that the very person who perpetrated a civil wrong must compensate the very person who was harmed, and that the compensation must be commensurate with the harm suffered. Treating individuals merely as members of groups, and transferring employment benefits and harms between them willy-nilly on that basis, cannot be deemed "compensatory justice" or "rectification" for past wrongs, without doing violence to the concepts of compensation and rectification. Indeed, it is the very essence of bigotry to wish to bring harms upon a person simply because he belongs to the same group as someone who (let's suppose) has harmed a member of a group to which you belong.

The argument for preferential employment practices based upon compensatory justice has been refuted so forcefully and repeatedly in the literature on this subject that even proponents of these policies typically take pains to disavow it nowadays.[39] Still, it bears comment since the dark sentiments which underlie the argument frequently lurk just below the surface. Thus L. Andrew Cardozo, founder of the National Employment Equity Network, writes approvingly, "As noted anti-racist activist Wilson Head observed, white men have had an affirmative action program in Canada for 125 years, now the rest of us want a part of it."[40] This statement brings to mind the Old Testament principle of visiting punishment upon the sons for the (perceived) iniquities of their fathers, "even unto the third and fourth generation." The vast majority of Canadians reject this theory of intergenerational justice.[41]

The second form of the two-wrongs fallacy finds expression in the following kind of challenge. The proponent of employment equity will often ask, "How do you account for the fact that, for example, only 22% of university teachers are women, and that only about 3% of engineering professors are women? Surely you don't claim that these numbers reflect a natural superiority in men, or even random variation. Surely this is the result of a history of very serious systemic discrimination in our society...." But the challenge is misguided. One need not defend the history of western civilization, nor even of post-war Canada, in order to oppose employment preferences today. All kinds of influences – parental, educational, socio-economic, cultural, and geo-political – affect how different groups are distributed in different occupations at any given point in time. Some of these influences are benign and some are invidious; some take place at the employment stage, and some occur earlier. One could indiscriminately label all of these complex influences 'systemic discrimination', and I would be willing go along with that as long as one does not use this label as a misdiagnosis of the problem. If the root causes of the patterns of employment that we find in Canada today have almost everything to do with broader social influences and relatively little to do with discrimination at the stage of employment (whether intentional or not), then even our best efforts at combating the latter problem will do very little to change these patterns. The point is that we must direct our efforts and our scarce resources where they will do the most good, not necessarily where the problems manifest themselves in the end.

The above challenge tacitly supposes that one can "rectify" an injustice at one stage in individual or social development with a further injustice at a later stage. But the two-wrongs fallacy reminds us that injustice must be corrected at the stage at which it occurs, not at some other stage. More generally, the idea is to address the root causes of a social problem rather than its symptoms. Substantive equality of opportunity does not exist when some of the participants in a foot-race did not have the opportunity to train while others have trained extensively; but the proper way to deal with this inequity is to provide everyone the opportunity to train, rather than to load the advantaged runners down with sand bags once the race is called. Similarly, substantive equality of opportunity in employment must be promoted through educational and welfare initiatives at the time when identifiable disadvantages occur, rather than by handicapping or excluding certain job candidates once they enter the workforce. Requiring employers to bear the burden of ameliorating all of the purported conditions of disadvantage found in Canada is to off-load the primary responsibilities of government onto business.[42]

§2. Civil rights and civil disobedience:

Fundamental human rights are supposed to have a universal moral appeal. Security of person, freedom of expression, natural justice: these are all things which every individual benefits from; they are things we all have an interest in granting to others in exchange for being

able to enjoy them ourselves. Fundamental moral rights like these are antecedent to any legal or political recognition; indeed, they underpin the legitimacy of all of the more mundane legal and political rights citizens might have. But if a human right is a universal right, a right one has simply by virtue of being a human person, then employment preferences cannot logically qualify as such. They cannot be made universal; or at least, *nobody* benefits by giving *everyone* an employment preference. Rights to employment preferences, then, are at best political rights; that is, they are rights which have been secured for one segment of the polity against another, through democratic processes. The question is whether this is a civil right which we should recognize, one which is truly underpinned by universal human rights, or whether the principle of universal non-discrimination might be a better right to recognize, politically and legally.

The most powerful figure in the civil rights movement in North America is Rev. Martin Luther King Jr. In his justly famous "I have a dream" speech, he forcefully enunciated the fundamental normative principle upon which opposition to preference in employment is based: "Judge us not by the color of our skin, but by the content of our character," he implored. Those who promote biology-consciousness in employment by advocating "goals with timetables" abandon Rev. King's dream of a society in which individual character traits override group attributes. It must be a big disappointment and embarrassment for supporters of employment equity that Rev. King was so clear on the matter – so much so that one sometimes encounters denial that he actually meant what he said.[43]

Canadians can no longer expect to enjoy the civil right of being judged as individuals, based solely on the content of their character, in employment contexts. Another civil right which is being eroded by workplace surveys is the right to privacy. Employment equity legislation does not compel employees or job candidates to self-identify; it is careful to state that completion of workplace surveys must be voluntary. But at the same time, employers are allowed to classify as a WAM anyone who does not complete the survey.[44] One can be classified by race, sex, and disability for employment purposes against one's will. This practice in effect forces DGMs either to accept preference in employment, or to suffer from it; there is no neutral ground. Civil libertarians have long defended the principle that, except in rare circumstances, one's medical history and family tree are none of one's employer's business; with employment equity, being required to share this information becomes the norm.

There are also legitimate concerns about the confidentiality of data collected on workplace surveys. Employment equity plans pursuant to the *FCP* are public documents, and although they report only aggregate data within each workplace, it might nevertheless be relatively easy in some cases to infer how specific individuals have responded to the survey from the aggregate data. A workplace with 204 employees divided among the 12 "Abella job categories" will have groupings at least as small as 17 employees. When data is aggregated on this scale, the confidentiality of individual responses is effectively lost. Understandably, people might be reluctant to indicate that they suffer from a mild or even a significant disability if they might be identified as or even suspected of being less capable as a result. In contrast, the aggregate data from the national census preserves the anonymity of individual respondents perfectly, so that responding to it implies no risk of being stigmatized.

An effective form of civil disobedience for protesters of the "Jim Crow" laws in the American south was to refuse to self-segregate. Those in Canada who appreciate the moral repugnance of employment preferences based on immutable biological characteristics might follow this lead and refuse to differentiate themselves from DGMs. Since the categories used by

employment equity are undefined to begin with, and since employers may not question or seek proof of an employee's responses, anyone may with impunity indicate that they belong to any of the designated groups. If enough of those who disagree with employment equity were to do this, the numbers of DGMs found in the workforce would be artificially inflated to the point where employers would have no legal obligation to hire preferentially, since their prescribed targets would already be met (on paper).[40] The only effective way for a government to respond to this form of civil disobedience would be to set up bureaucracies whose purpose is to determine officially the racial, ethnic, and disability status of Canadian citizens. This would, however, transform the velvet-gloved totalitarianism of "voluntary" employment equity into the equivalent of the overtly coercive policies of Nazi Germany and South Africa under apartheid.[46] All Canadians would no doubt be outraged at this transformation – as they should be at its velvet-gloved cousin.

§3. Ethnocentrism:

The Canadian policy of multiculturalism is often contrasted with the American "melting pot" philosophy. Canadians typically regard this difference with pride, thinking that tolerance of cultural diversity as a great virtue of Canadian society. But for advocates of employment equity, it is a virtue more honoured in the breach. Members of diverse cultures are not to be left to pursue their own interests as they see them, but are to be coaxed and cajoled into obtaining their proportionate representation in the white, male mainstream. Nothing could do more to create an American-style melting pot than employment equity as embodied in Ontario's *Employment Equity Act*. There is in fact an invidious ethnocentrism and sexism inherent in employment equity, though it is rarely recognized as such. For what the objective of proportionate representation implies is that if WAMs are highly concentrated in a particular occupation, then the right thing, the proper and correct thing, is for every other group in society to imitate them. This fallacy is especially clear in the case of aboriginal Canadians, many of whom would prefer self-government and a traditional way of life to the complete assimilation to the "white man's rat race." The patronizing and moralistic way in which Canadian governments treat aboriginal Canadians through employment equity is reminiscent of the way the Catholic Church did decades or even centuries ago by sending them to boarding schools.

While this point applies with perhaps less force to members of visible minorities, the persistent but benign effects on employment patterns of the many different cultures which have been brought to Canada over the years cannot be ignored. To see "systemic discrimination" in need of "correction" behind these cultural preferences is to seriously down-play the importance, the dignity, and the genuine diversity of the cultures which shape individual occupational choices in Canada. For many of Canada's religious, ethnic, and racial groups, employment equity is a Trojan horse which threatens to undermine their distinctness.[47]

Similarly, a significant minority of Canadian women, especially visible-minority and working-class women, still quite consciously and eagerly opt out of the white man's rat race in favour of a more traditional role, at least for significant periods of their married lives. The point here isn't that this is somehow women's proper role; the point is simply that many women still choose it, and in most cases not without sound, independent thought. Employment equity does not merely give women an easier "in" to the workforce should they wish to exercise that option; it actually denigrates the choices stay-at-home women make by implying that they are not pulling their weight as far as achieving the putatively desirable social goal of proportionate representation is concerned.[48] Worse, it positively punishes these women by artificially reducing

the employment opportunities of their husbands. And it harms not *only* these women, but many career-primary women, too. The vast majority of Canadian women still prefer to take a few years off work when their children are young; but unless their husbands have secure, well-paying jobs to support them, they cannot do so. For these women, employment equity does not necessarily improve their choices; it may well reduce them.

Actually, there is one important exception to the rule that women are to be promoted into occupations dominated by men: there is no concerted drive to have women represented equally in dirty and dangerous jobs – the so-called death professions.[49] Over the decade 1972-81, fully 97.4% of occupational deaths occurred to men;[50] yet nobody has seriously suggested that we try to equalize *this* employment opportunity. The assumption seems to be that if men are concentrated in these dirty and dangerous jobs, rather than in relatively comfortable, safe, female-dominated jobs like clerical work, this is a product of their own choice rather than of systemic discrimination. Men in dangerous, traditionally male occupations, it seems, have choices and privileges, whereas women are the slaves of social convention and the victims of stereotyping. By suggesting that women's occupational choices are less autonomous than are men's, employment equity legislation actually patronizes and degrades women as a group. More and more DGMs are starting to speak out against this implicit attribution of inferiority.[51]

D) Foundational Claims Relating to Employment Equity

Everyone agrees that in an ideal world there would be no place for preferential employment practices; and everyone agrees that Canadian society is far from ideal. The issue to be addressed in this Part is whether the ways in which Canada falls short of the ideal are such that preferences in employment are justified as a means of approaching the ideal more closely. Is the empirical basis upon which preferential employment practices have been advanced substantially true of Canadian society? Such a question is of course essentially open-ended; so despite being one of the longest parts of this essay, foundational claims will necessarily have to be dealt with in a greatly truncated fashion. The object is merely to show that what has been advanced to date, particularly by the "echo-feminists," is altogether inadequate to establish the foundational claims, in the face of some rather compelling counter-evidence.[52]

§1. Race and sex as proxies for disadvantage:

Employment equity treats race and sex as proxies for disadvantage. It in effect divides Canadian WAMs and DGMs into two distinct and separate castes, like the Brahmans and the untouchables of India: any DGM, no matter how privileged, is deemed to be disadvantaged relative to any WAM, no matter how disadvantaged. A social-science research proposal which used race and sex as proxies for social disadvantage in Canada would be rejected out of hand by the Social Sciences and Humanities Research Council of Canada, as fundamentally flawed. But employment equity is not a research proposal; it is an experiment in social engineering. Since its victims are only WAMs (rather than laboratory rats, which have the animal-rights lobby to look after their interests), the normal checks and safeguards for experimentation involving live subjects have been suspended and the project has proceeded apace.

Obviously, the Canadian "mosaic" bears no resemblance to the picture of Canadian society which employment equity presupposes. Women and visible minorities are vast and heterogeneous groups whose members are certainly not uniformly disadvantaged relative to

WAMs – if they are disadvantaged, overall, at all. In this long section I attempt to do three things: In subsection (a) I contest the employment-equity dogma that female Canadians are disadvantaged in significant respects relative to male Canadians; and similarly, I contest the dogma that visible-minority Canadians are disadvantaged relative to white Canadians in significant respects. In subsection (b) I attempt to explain some common ways in which faulty analysis has lead to the misconceptions contested in (a). Finally, in subsection (c) I point out that variables other than race and sex are probably better predictors of disadvantage, yet are ignored by those purportedly attempting to ameliorate it.[53]

(a) Counter-evidence:

Given the extreme inter-relatedness of male and female lives, it is *prima facie* implausible to maintain that female Canadians are substantially disadvantaged overall relative to male Canadians, socio-economically. As many girls as boys are born into wealthy, privileged families; and as many boys as girls are born into impoverished families. Since educational attainment is a good predictor of later employment success, it is highly significant that, compared to males, females attain higher grades, higher pass rates, and higher participation rates at every level in the educational system in Canada, from kindergarten to university. At the present time, there are 25% more female than male undergraduates in Canadian universities. In fact, tens of thousands more boys than girls fail or drop out of high school each year. Says one researcher:

> …in 1990-91, 70.2% of girls [from Quebec high schools] entered college, compared with only 52.9% of boys.... [If] you were to project these [educational] tends to the year 2050, you would eliminate boys and men from the work force.[54]

If justice requires ameliorating the conditions of disadvantage of the worst-off members of society first,[55] and if employment equity were really aimed at ameliorating disadvantage, then it ought to be directed in the first instance at the disproportionate number of males who are dropping out of our education system. Instead, they are precisely the ones who bear the biggest brunt of the policy (see §E3).

The premise that women in Canada are disadvantaged specifically with respect to employment is not borne out by the available employment statistics, either. The unemployment rate among men in Canada is persistently 1 or 2 percentage points higher than the unemployment rate among women. Statistics Canada reports that the disparity is even greater among those aged 15 to 25: "Among the young, 74 per cent of the women and 69 per cent of the men who graduated from university had jobs" in 1993.[56] This is in spite of the fact that young women are still more likely than young men to take time away from the labour market for child-rearing duties. Again, between 1986 and 1990 women increased their numbers in the 10 highest-paying occupations by 53%, while the number of men increased by only 1% over the same time period. Statistics Canada reports that the proportion of women in the top third of the occupational hierarchy in Canada exceeded 50% for the first time in 1994.[57]

With respect to visible minorities, note that Canadian immigration law has for decades favoured relatively wealthy, well-educated, and skilled applicants. Consequently, this group is not, on the whole, disadvantaged relative to native-born Canadians by any objective measure. There is, for example, no correlation between designated-group membership and educational attainment in Canada. Even as long ago as 1981, the national census showed that Filipino-Canadians had the highest percentage of members who had attained some post-secondary education (59%). They were followed by Jews (53%), East Indians (46%), Koreans (43%),

Japanese and blacks (both 41%), Scandinavians (40%), and Dutch (39%). On this scale, Chinese-Canadians were tied in ninth place with Canadians of British ancestry (38%). Below them ranked persons of German (37%), Polish (35%), Ukrainian (32%), and French (29%) descent. Italian-Canadians had the same rate of attainment of post-secondary education as did aboriginal Canadians (23%) – and yet are deemed to be advantaged members of Canadian society.[58] Data from Statistics Canada based on the 1991 census show that 18% of Canada's 1.9 million visible-minority adults held a university degree, compared with only 11% of other Canadians.[59]

The employment picture for visible minorities in Canada is more mixed. The general population reported an average income of $17,453 on the 1986 census, while visible minorities reported an average income of $18,908.[60] According to the Statistics Canada study mentioned above, the participation rate in the workforce was 66% for visible minorities, compared with 68% for the rest of the population. But Filipino-Canadians had a participation rate of 75%; and blacks, South Asians, and Pacific Islanders were also above the average for other Canadians at 69%.[61] *Some* visible-minority groups do, of course, experience higher rates of unemployment than do other Canadians.[62] This is especially the case for visible minorities who come to Canada as refugees or as elderly adults through family reunification, and who do not have the language or other skills needed to enter the Canadian labour force quickly. What they require is training opportunities, not employment preferences. But the overall differences between DGMs and WAMs must be put into perspective. The small, 1 or 2 percentage points of a difference observed in most comparisons are not more significant here than they are when (e.g.) unemployment rates for men are compared with women. In fact, few of these discrepancies are meaningful; much larger discrepancies than these can be found among WAMs in various regions of the country, or between one province's population and the rest of the country. Yet nobody has suggested a nation-wide policy of preferential hiring for Newfoundlanders, for example.

Clearly, then, WAMs and DGMs do not comprise two distinct castes in Canadian society. In fact, there is very little, if any, *overall* differences between these two groups on standard socio-economic indexes of advantage or disadvantage. Yet employment equity requires that, in a job competition between an only-child woman with two professional parents, and a man who is the fourth child of an unemployed single mother, the woman is to be given preference. And in a competition between a child of wealthy Hong Kong immigrants and the son of a Newfoundland fisherman, the immigrant's child is to be given preference. One might think that those who administer employment equity policies can be trusted to exercise common-sense judgment when it comes to such manifestly unfair cases as these. Unfortunately, the reality is not encouraging. Here is what Ms. Westmoreland-Traor■ had to say about examples such as these:

> Some critics maintain that under employment equity, the daughter of a professional couple, say a doctor and a lawyer, will have greater employment opportunities than, say, the son of an unemployed Hamilton steelworker. Is that fair?... The commissioner takes the long way around the barn, but when we come back to the starting point she says the son of the unemployed steelworker still has more employment opportunities than the daughter of an upper middle-class couple because he is not a woman. Being a woman, she says, is a basic disadvantage in the job market. "That is the social and economic reality of today." No need for further questions, no need for further answers, no need for further data…[63]

(b) Common fallacies:

Why have our legislatures and our courts been so eager to accept such an obviously distorted portrait of Canadian society as employment equity implies? Legislators, of course, are

prone to political pressures from well-funded and well-organized special-interest groups, who flood the field with one-sided statistics and "studies." And those who run the legal system are also just advocates in law with no special training in or knowledge of social science. It is thus easy for our policy-formulators to accept, naïvely and uncritically, the illegitimate statistical arguments that are frequently used to "show" that DGMs continue to suffer from significant, widespread barriers in employment. These statistical sleights-of-hand must be guarded against.

The most common statistical argument used to support employment equity is the simple comparison of the proportion of DGMs currently employed in a particular profession or occupational category to the proportion of DGMs currently entering the qualified candidate pool. The reason this comparison is meaningless and inappropriate is that those currently employed in the labour force have been hired over a period of several decades, when the proportion of qualified DGMs available was in every relevant occupation much lower that it is today.[64] Historical patterns in employment cannot be explained by current applicant-pool data alone. To get valid results, three methodologies are available; but they involve considerably more research effort, sophistication, and objectivity than advocates of employment equity typically demonstrate. The first method is to compare the progress of a cohort group through the ranks of a profession. One comprehensive study of the Fortune 500 corporations used this methodology and found that, in *each year* from 1980 to 1992, American women with MBA degrees progressed through the corporate ranks faster, and in higher proportions, than their male cohorts.[65]

The second way to reach valid conclusions regarding the existence of discrimination in employment is to compare the composition of the current workforce with the composition of the historically available qualified candidate pool. Such analyses can usually be done only in the case of women, due to availability of statistics. The table in the *Appendix* summarizes the results of this approach with respect to hiring at Canadian universities. As can be seen by comparing the percentage of women in line 1 with that in lines 2 and 3, or by comparing the percentage of women in line 4 with that in lines 5 and 6, it is possible to conclude that there might have been some discrimination against women in the 1950s and '60s. (Alternatively, these discrepancies might be due to the fact that women of this age cohort were more likely to voluntarily remove themselves from the workforce, either permanently or for significant periods of time, in deference to family responsibilities.) By parity of reasoning, though, we must conclude that women have been increasingly favoured for university teaching since the early or mid-1970s. To see this, compare the proportion of women in line 13 with the proportion of women in lines 14 and 15; or compare the proportion of women in line 19 with that in lines 20 or 21.[66]

How might the fairness of current hiring and promotion practices be assessed using only current data? The National Action Committee on the Status of Women (NAC) purported to answer this question in a monograph called ***Justice Works,*** which was released in February 1992 and was influential in the drafting of Ontario's *Employment Equity Act*. NAC analyzed the records of the Ontario operations of three large corporations: Air Canada, the Canadian Broadcasting Corporation, and the Bank of Nova Scotia. Data on employment representation, hires, and terminations were presented for the years 1987 to 1990 inclusive. The object was to show that progress for women is "glacial" without coercive legislation. To this end NAC pointed out that, during this four year period, the overall proportion of women at Air Canada and the CBC increased "only" 2.0% and 1.8% respectively, while at the Bank of Nova Scotia it declined by 0.4%. But these small overall changes mask significant incremental changes – changes which suggest that current hiring practices by these companies were already more than fair to female

candidates. Here is what is really behind these statistics:

The number of women working at Air Canada increased by 21.1% over the four years in question. In contrast, the number of men increased by only 10.8%. More significantly, the net increase in the number of employees (hires minus terminations) was 902, of which 436 were women and 466 were men. That is, 48.3% of the net increase in employment at Air Canada from 1987 to 1990 were women. This is not far from matching the proportion of women in the population – actually quite an impressive hiring record for a male-dominated industry. (Women comprised less than a third of employees at Air Canada in 1987.)

The NAC analysis is at its most inaccurate with respect to the CBC. During 1987-90, the CBC was experiencing down-sizing – the least favourable situation in which to increase the representation of new entrants to the job market – and men disproportionately bore the brunt of this down-sizing. The total labour force at the CBC declined by 11.1% from 1987 to 1990: 2.4% due to the net reduction of 98 women, and 8.7% due to the net reduction of 363 men. While men comprised 64.0% of CBC's workforce in 1987, they accounted for fully 78.7% of net job losses over the next four years.

Finally, consider the situation at the Bank of Nova Scotia, where the proportion of women declined from 69.7% in 1987 to 69.3% in 1990. During this four year period there was a net increase of 610 women and 331 men. That is, "only" 64.8% of the net increase in employment were women. I say "only," since this figure is somewhat lower than the pre-existing proportion of women employed at the Bank of Nova Scotia. Yet this is hardly something for NAC to lament, for it is still considerably higher than the proportion of women in the general population. Indeed, if the Bank of Nova Scotia had used NAC's (ostensibly) preferred hiring principle to fill vacancies in all job categories, then 22.1% fewer women would have been hired over this four year period than actually were.

Of course all of the foregoing analyses, like NAC's own, are flawed by the fact that we do not know the kinds of information on the basis of which reasonable employers actually hire people. We don't even know simple aggregate data on the composition of the qualified-applicant pools, among other things.[67] Maybe the reason women comprised 48.3% of the net employment increase at Air Canada is that Air Canada was hiring disproportionate numbers of flight attendants and ticket-takers, rather than pilots and baggage handlers; or maybe women suddenly began to graduate as pilots and aeroplane mechanics in high proportions at this time. And maybe the reason men bore a disproportionate share of the layoffs at the CBC was that women tended to have more seniority there, or were simply better, on average, than the men. *Maybe;* but these speculations are doubtful. A more plausible hypothesis is that these incremental hiring and termination figures already reflect a fair degree of reverse discrimination at these firms; they certainly refute the notion that women are "last to be hired and first to be fired," as NAC concludes. NAC applauds the Bank of Montreal for voluntarily endorsing employment equity, and infers from this example (somewhat incomprehensibly) that "employment equity will not happen unless it is mandatory." The figures provided by their report suggest another conclusion: that the only difference between the Bank of Montreal and the other companies "analyzed" by NAC is that the former has a leg up in the feminist-relations department.

Another influential statistical sleight-of-hand in the employment-equity arsenal is to make invalid generalizations to the population as a whole from an unrepresentative sample. While it is true that those at the very top of the corporate, political, judicial, and academic

hierarchies are still mostly men, it does not follow that men *in general* are advantaged in employment opportunities (or in life prospects) relative to women. It could very well be true also that men are disproportionately represented among society's dregs. Indeed, men are disproportionately represented among Canada's premature dead (whether by suicide, assault, or occupational risk); men are almost twice as likely as women to live below Statistics Canada's low-income cut-off despite working full time;[68] there are nine times as many incarcerated men as women; and so on. While the mistake of generalizing from the statistics detailing the fortunes of the worst-off men to the status of men in general is never made, it is curious how much influence the parallel mistake – generalizing from the statistics detailing the fortunes of the best-off men to the status of men in general – has had over Canadian social policy.

(c) Exacerbating other forms of discrimination:

One aim of employment equity is to ameliorate conditions of disadvantage. As argued above, it is doubtful that disadvantage is significantly correlated with race and sex in Canada. Actually, there are many other variables with which disadvantage is more highly correlated, but which are ignored by our courts and our legislatures. It is well known, for example, that first-born children tend to receive more attention and greater favours from their parents, and consequently tend to out-perform their younger siblings by a significant margin.

> A completely disproportionate number of famous individuals in history were either first-born or the only child. In more mundane achievements as well, the first-born tend to excel. A study of National Merit Scholarship finalists showed that, even in five-child families, the first-born became finalists more often than all other siblings combined. The same was true in two-, three-, and four-child families. Such disparities, among people born of the same parents and raised under the same roof, mock presumptions of being able to equalize life chances across broader and deeper differences among people in a large, complex, and, especially, multi-ethnic society.[69]

It is also well known that height and physical attractiveness significantly affect assessments of competency and merit.[70] Personality is another important variable, as is ideology in some employment settings (e.g. universities). If it is meaningful to ask employees whether they consider themselves to be disadvantaged by virtue of having a physical or mental disability, then it is equally meaningful to ask if they consider themselves to be disadvantaged by virtue of their position in the family tree, or due to physical appearance, personality, or ideological unorthodoxy. Yet few would argue for employment equity laws to remove these very real disadvantages.

The point is not just that employment equity focuses upon the wrong variables; the point is that by doing so it exacerbates the negative effects of whatever disadvantages might be suffered along these other lines.[71] Supporters are quick to point out that employment equity will not result in exceptionally talented WAMs going without jobs, though it will likely "take them down a notch or two." Indeed, the impact will be felt most severely by those with modest talents. The most significant effect will be for marginally talented DGMs to displace marginally talented WAMs from employment, and especially for those marginally talented DGMs who are first-born, attractive, out-going, and so on to displace those marginally talented WAMs who have reached the job market despite overcoming the disadvantages of their family position, appearance, or personality. The logic of employment equity is that it bumps relatively disadvantaged WAMs down (or out of) the job queue in favour of relatively advantaged DGMs. This follows the principle: to her who has, more shall be given; and from him who has not, even that which he has shall be taken away.[72] This consequence is to be *expected.*

This argument reaffirms the earlier conclusion that, practically as well as morally, the

best way to ameliorate conditions of disadvantage is the straightforward one of ameliorating disadvantage. That is, first identify the specific kinds of important disadvantage to be addressed (e.g. income or education level); second, identify those *individuals* who fall below some standard in these respects; and third, give those qualifying individuals the help they need to bring them up to minimum standards. If a disproportionate number of the individuals who need amelioration turn out to be DGMs, then so be it; the proxy variables identified by employment equity are just "fifth wheels" in the operation of truly ameliorative policies.

§2. Groups and discrimination:

Invidious discrimination does occur in Canada, although it is not unreasonable to believe that Canada is among the least racist and sexist of countries in the world. Canada also accommodates the disabled to a higher degree than nearly all other countries. But an important point to appreciate is that such prejudice as does exist in Canada is certainly not confined to one group only – WAMs. Rather, prejudices of every imaginable variety exists in Canada, and DGMs are as likely to hold them as anyone else. To think otherwise is to fall into the grip of what Bertrand Russell called the myth of the superior virtue of the oppressed.[73] Immigrants sometimes import their native prejudices into Canada; blacks and Asians sometimes get along less well with each other and with aboriginal Canadians than either group does with whites; Sikhs do not associate much with Hindus, nor Serbs with Croats; and so on. Moreover, prejudice is not always of the harmful variety; favourable prejudices exist as well. Traditional attitudes, for example, include chivalry – the desire to come to the aid of damsels in distress. The exemplar *par excellance* of the contemporary, chivalrous, knight-in-shining-armour is Stephen Lewis, whose advocacy report on race relations to Ontario's Premier Bob Rae provided considerable impetus to that government's employment equity initiatives.[74] The very fact that employment equity has reached the excesses noted throughout this essay is testament to the degree of chivalry of Canada's political, academic, judicial, and business elites.[75] Some feminists think it is improper these days for men to hold doors open for women – though quite proper for them to hold open the doors of opportunity for women, and to slam them shut on their male competitors.

The problem is that employment equity requires only WAMs to "compensate" all of the other groups for all of the discrimination, and even all of the disadvantage, which exists in Canadian society, by taking a seat at the back of the bus when it comes to employment opportunities. In fact, it places a disproportionate burden upon *young* WAMs, those just entering the workforce who have discriminated against others, and benefited from discrimination themselves, the least. Even if all of the questionable presuppositions of employment equity were correct, a far more appropriate remedy would be for *older* WAMs to correct the problems of racial and sexual imbalance in the workforce by, for example, taking early retirement or opening up their own positions to competition from DGMs on the same terms as they would impose on younger WAMs. For, according to the social theory underlying employment equity, the older WAMs have been the cause of current disparities, and they have benefited from them the most historically. Although this suggestion has been made in academic debates and in print for many years now, as far as I am aware not a solitary tenured male supporter of employment equity has yet volunteered to put his own job, rather than somebody else's, where his mouth is.[76]

§3. Group differences:

A key presupposition of employment equity is that there are no significant cultural or

biological differences between the races or sexes which might significantly skew employment patterns away from proportionate representation at every level of every workplace. This presupposition flies in the face of the preponderance of research evidence existing today. Much has been written in recent years concerning the ramifying effects of culture and biology on occupational choice. Again, it would be impossible to summarize all of this literature; a few dramatic illustrations will have suffice to serve my purposes here. I divide the discussion into two subsections, dealing with culture and biology separately.

(a) Cultural differences:

After examining patterns of immigrant and minority employment throughout the world, Thomas Sowell observes a persistent trend of groups finding an economic niche in their new society, and then passing down their trades or businesses to their children through the generations.[77] For example, many of the Jews who fled persecution in the old world became tailors in their country of destination. Tailoring is a highly portable skill, and one that could be marketed anywhere in the world. Consequently, it remains true today that the clothing sectors in many new-world cities (e.g. New York) are dominated by Jewish merchants. Similarly, the original British immigrants to South Africa were predominantly mariners, whereas the original Dutch immigrants tended to be farmers; thus even today, in spite of strenuous efforts to achieve more balance, the South African navy is still dominated by Anglos, whereas the army is dominated by descendants of the Dutch. In North America, the descendants of Irish immigrants are considerably "over-represented" in law enforcement, in the boxing ring, and in the priesthood. Nor is it a coincidence that aboriginal cultures do not tend to produce their "fair share" of workers in the fields of science research and high technology; "dominating nature" is purportedly not in their value systems. Chinese immigrants to many countries have found their niche in the retailing sector. E.O. Wilson explains how occupying this niche in Jamaica has served the tiny Chinese minority there extremely well.[78]

Stating themes that have echoed throughout this essay, Richard Bernstein puts his finger precisely on the paradox at the heart of employment equity in Canada, although he is discussing the broader movement of multiculturalism in America:

> The paradox is that the power of culture is utterly contrary to the most fervently held beliefs and values of the advocates of multiculturalism. Multiculturalism is a movement of the left… But culture is powerfully conservative. Culture is what enforces obedience to authority, the authority of parents, of history, of custom, of superstition. Deep attachments to culture is one of the things that prevents different people from understanding each other.... Out of a burning wish for betterment grew what has now become a kind of bureaucracy of the good, fighting battles that have already been won, demanding ever greater commitments of virtue from a recalcitrant popula tion. This bureaucracy, made up of people who, like Robespierre, are convinced that they are waging the good fight on behalf of virtue, is the instrument of ideological multiculturalism whose effectiveness lies precisely in appearing to be the opposite of what it actually is.... Multiculturalism... is a universe of ambitious good intentions that has veered off the high road of respect for difference and plunged into a foggy chasm of dogmatic assertions, wishful thinking, and pseudoscientific pronouncements about race and sex.... It draws on the old Puritan notion of America as the city on the hill, a new moral universe, to impose a certain vision of rectitude. And, in this, the idealistic and good-hearted movement of inclusion and greater justice veers toward a dictatorship of virtue…. Indeed, a single-sentence summation of my theme would be this: multicul-turalism as it is commonly formulated and practised is the derapage of the civil rights movement.[79]

(b) Biological differences:

The subject of biological differences between the sexes and races is highly controversial. Opposition to employment equity emphatically does not depend upon any particular conclusions in this regard; but clearly if significant biological differences *do* exist between the races or sexes, this would put into serious doubt the ideal of proportionate representation in all occupations. This is why, typically, proponents of employment equity are dogmatic in their denial of the existence of any biological differences, to such an extent that they automatically label basic research into these questions as "racist" and "sexist." This attitude is clearly inappropriate, for if we know anything about how biology interacts with culture to produce the array of value systems and aptitudes we find in Canada and the world, we know that we don't know very much. In the absence of knowledge, it would be courting disaster to try to force every group into the same occupational mould.

We do know some things, however. We know that there are literally hundreds of human characteristics that are race- or sex-linked.[80] For example, a certain kind of colour-blindness affects only males, and the frequency with which males suffer from this condition varies considerably from geographical region to geographical region. Consider also sprinting ability: At the 1992 Olympic Games, all 8 finalists in the 200-metre race and 15 of the 16 semi-finalists in the 100-metre race belonged to a racial group deriving from West Africa, even though they represented countries as diverse as the United States, Canada, Britain, Cuba, Jamaica, Brazil, and Nigeria.[81] Genetic differences like these do not bother most people; what people find troubling are purported genetic differences in characteristics which could have more significant or widespread social implications, such as in mathematical or linguistic aptitude. But the scientific evidence cannot be ignored in these areas. Many highly competent studies have found persistent differences in these aptitudes which cannot be fully explained by social variables.[82]

One important point about biological differences is that variance is often a far more important statistical measure than the average. It is consistent with the empirical evidence available at this time that, for example, males and females in the general population are equally adept in spatial-rotation ability, *on average.* But the evidence also indicates that there is greater variance in this ability among males, meaning that there are significantly more males than females who excel and who do poorly at this skill. In fact, Professor Kimura's studies find a "size effect" of about 13-to-l in favour of males in spatial-rotation ability at the upper tail of the distribution. What this means is that if an exceptionally high level of spacial-rotation skill is a necessary requirement for successful architects or engineers, then one would expect there to be 13 highly successful male architects and engineers for every female, in the absence of discrimination. This fact, if confirmed, would throw a wrench into the employment equity works if the goal is to achieve proportionate representation in every field of human endeavour.

Curiously, feminists sometimes argue that employment equity is required *because* men and women are biologically different. With slight variations depending on the context, the argument is that because men and women have different, but "equally valid," management styles, communication styles, teaching styles, or learning styles, the workplace is best served by having both sexes equally present. This argument has already been addressed in §B4. All I wish to add here is that it is very unlikely that two independent conditions should be met at once: (1) that men and women are significantly different, and yet (2) these differences have no effect on productivity levels in any given field. Such an argument takes the yin-yang faith to new levels!

Recapitulation:

According to the employment equity plans at both the University of Alberta and the University of Calgary, visible minorities are significantly over-represented in faculty positions, relative to their proportion in the population. I can think of only three ways to explain this phenomenon; but each of them violates a central dogma of employment equity. (i) Perhaps visible minorities have a special aptitude for academic research, whether biologically or culturally derived. This explanation violates the dogma that all relevant employment characteristics are randomly distributed throughout the general population. (ii) Perhaps visible minorities have benefited from discrimination in their favour. This violates the dogma that visible minorities are an historically disadvantaged group in Canada, subject to damaging stereotyping and prejudice. (iii) Perhaps the finding that visible minorities are over-represented in faculty positions in Alberta's universities is a mere statistical artefact, and has no further significance. Perhaps it is a product of inconsistent or unreliable survey instruments, or of skewness resulting from the voluntary nature of the surveys. Or perhaps it is a product of random variation; visible minorities are over-represented in Alberta's universities but they are under-represented at some of Canada's other universities. These explanations violate the dogma that proportionate representation is to be expected at *every* level of *every* workplace in the absence of discrimination. Obviously, if all possible explanations for the common occurrence of DGM over-representation violate one or other of the central dogmas of employment equity, then employment equity must be based upon a mistaken, internally inconsistent ideology. And if this is so, then nothing can rescue it; it is refuted in its own terms and should be discontinued.

E) Practical Problems with Employment Equity

Although our politicians and academic elites like to pride themselves on being world leaders in introducing "progressive" human-rights legislation, including employment equity, Canada is in fact a relative late-comer to this area of legislation.[83] One might hope that we could benefit from the experience of other countries, anticipating and avoiding the practical problems and pitfalls. Unfortunately, those who are ignorant of world history are doomed to repeat it.

§1. Self-identification and stereotyping:

Since claiming DGM-status augments one's employment rights (among other things), there is a strong economic incentive for people to self-identify as DGMs, no matter how marginal their claim to that status is. "Since the passage of the federal *Employment Equity Act*, there has been a staggering 41 per cent jump in the number of Canadians claiming aboriginal origins."[84] Among working-aged persons, there was a 27% increase in those claiming some form of disability. As a proportion of the population, this represents an increase from 13.2% to 15.5%. Over half (54%) of those claiming some disability categorized it as "mild."[85] These trends raise questions about the credibility of the statistical comparisons upon which employment equity rests, as well as the credibility of some individual claims to DGM status. Furthermore, these increases in national census figures contrast sharply with the under-reporting of DGM status in workplace surveys noted in endnotes 33 and 44. The consequence of the over-reporting on the national census together with the under-reporting on workplace surveys is to make it nearly impossible for some employers to ever achieve the statistical proportionality required by employment equity. This is a practical problem with which the employment equity bureaucracy has yet to deal seriously – though it is understandable why they are reluctant to do so (see §C2).

Proponents claim that employment equity will enhance the status of DGMs. In fact, the

very opposite has proven to be the case wherever in the world preferential policies have been implemented.[86] Some time ago, it was assumed that a visible minority or woman who reached an elevated position in society must be exceptionally talented to have succeeded in a "man's world." Nowadays, DGMs in elevated positions are more likely to be suspected of having got there through preferential treatment. There are two obvious mechanisms at work here. First, the claimed need for preferential treatment implies that members of the group could not succeed on their own merits – that they are naturally inferior. Second, if an organization has a policy which requires a WAM candidate be significantly better than a DGM in order to be hired or promoted, then *some* of the DGMs who are hired or promoted will be significantly less talented than any of the WAMs in the organization. Over the long run, the WAMs in the organization will tend to be "stars," while the "B-team" will become dominated by DGMs. This is not to slight the natural abilities of DGMs; it is merely to point out the logical consequence of a policy which applies two different screening filters to WAM and DGM candidates. Creating B-teams throughout the workforce that are dominated by DGMs can only serve to confirm whatever negative stereotypes the legislation is ostensibly aimed at combating.[87]

§2. The costs of employment equity:

We could probably eliminate shooting deaths in Canada if we were prepared to abrogate people's personal freedoms and to pay the high enforcement costs necessary to eliminate guns. For good reason, Canadians believe that these costs are greater than the benefits, even though the benefits include many lives saved. The point of this example is that justice is not a free good; and like everything else, its cost escalates exponentially as you approach perfection. The costs of justice – the cost of eliminating the effects of workplace discrimination – are both economic and moral. The moral cost is reckoned in terms of the loss of individual liberty and personal responsibility that government regulation entails. Although the cost of employment equity in terms of intrusions into people's private business are considerable, and perhaps the greater of the costs of employment equity,[88] I will focus here on only the economic costs, since these alone are sufficiently high to show that employment equity is a self-defeating policy.

Determining the economic costs of employment equity is a more difficult problem than it might at first appear, because the costs of the federal, provincial, and municipal bureaucracies needed to administer the programs are only the tip of the iceberg. (Tens of millions of dollars had been allocated for the province of Ontario alone.) In addition, there is the cost of complying with the legislation which is incurred by employers: the cost of hiring an employment equity officer or consultant to implement the workplace program, the lost productivity while employees complete the committee and paperwork, and so on. (The private-sector costs of compliance with regulations in general are estimated to be about fifteen times greater than the public costs of legislation.) On top of that must be added enforcement costs, including whatever fines or litigation result from the process. We should also expect some loss in efficiency due to a misallocation of human resources resulting from the need to meet artificial targets, as well as from poorer employee morale as a result of employees seeing their rightful promotions being usurped by those less qualified.

Then there are the transaction costs: the extra cost of searching out qualified DGMs, negotiating with members of this group who are in high demand elsewhere, and giving them special training if they are not quite up to the standard. Next there are opportunity costs, the value of whatever has been foregone because of the time and money which has been devoted to

pursuing employment equity. This includes the cost to society of production that simply won't take place. For example, if an Ontario company with 46 employees had been thinking of expanding, it might decide not to do so since expansion would have brought the company within the reach of employment equity legislation, which set a threshold at 50 employees. The costs of complying with the legislation could easily make modest expansion unprofitable. And, perhaps most importantly, there will be the cost in jobs lost as companies either relocate from or avoid starting up initially in the jurisdiction which imposes the high implementation costs of employment equity on their operations.

An American study estimated that the total cost of the Equal Employment Opportunities Commission in the United States amounts to 4% of the American GDP.[89] This is greater than the amount of money spent on public education in the U.S., or on agricultural subsidies. It is difficult to extrapolate from this study an estimate how much employment equity costs the Canadian economy, because in some ways Canadian legislation is less intrusive and in some ways it is more so. In any case, the costs are significant.[90] As a result, society as a whole will be considerably poorer – fewer useful things will be produced. And this means that there will be fewer jobs to go around, and higher unemployment overall. So while employment equity might give DGMs jobs in a rather visible way with one hand, it takes them away again in many hidden ways with the other hand. It is self-defeating.

§3. The burdens of employment equity:

It has been argued that employment equity legislation is needed in order to assure that employers respond appropriately to the changing demographics of this country – as if the profit motive weren't generally sufficient incentive to hire the best available talent without discrimination.[91] According to 1991 census data, about 61% of the population belonged to at least one of the four designated groups; but, given the likely increases in the numbers in these groups since that census, let's suppose that 67% of new job entrants belong to one of the four designated groups today. In that case, those who happen at present to be white, able-bodied, teen-aged boys can expect that 67% of their job competitors will be eligible for legislated preference in hiring when they reach the job market. When 67% of job candidates fall into categories which are eligible for preferential treatment, the benefits to individual members of the designated groups will necessarily be small, since 67% of their potential competitors will be receiving similar considerations. (If a hierarchy of the disadvantaged is established, then the distribution of benefits among members of the designated groups will not be uniform, though the average benefit will still be quite small.) But – and this is the significant point – for every preferential benefit that is conferred upon a DGM, a corresponding harm will be conferred upon a WAM. Since a 67/33 split implies that there will be twice as many persons in the former group as in the latter, the harms to WAMs will be twice as highly concentrated than the benefits to DGMs.

One of the goals of employment equity is to reduce unemployment rates among the designated groups. Suppose that employment equity succeeded in reducing this unemployment rate by 1 percentage point. Since employment equity does not create jobs, but (at best) merely redistributes them, this reduction could only have been secured at the expense of WAMs. Given the projected ratios of people entering the workforce, the reduction in the unemployment rate among DGMs by 1 percentage point would entail at least a 2 percentage point increase in the unemployment rate among WAMs. (I refer to this as getting WAMMED.) But in fact things are considerably worse than this. Because of the considerable costs involved, rather than being

neutral with respect to overall employment rates, intrusive employment equity legislation is certain to suppress business activity. If new job creation is reduced by only 1 percentage point as a result of business people trying to avoid the added financial costs of employment equity, then unemployment among young WAMs would have to be increased by at least 3 percentage points *simply to leave DGMs as well off on this measure as they were before the legislation was implemented!* Obviously, the hardest-hit of the WAMs will be those who were most disadvantaged to begin with – the high school drop-outs noted earlier – a real double WAMMY.[92]

If one is inclined to think that the scenario presented here is an exaggeration, then consider the situation that WAM philosophers have faced recently in the Canadian job market. I mention only three examples here, though more could easily be adduced: (i) "An Ontario university recently had 163 applicants for a tenure-track position – 150 men and 13 women. All 13 females were short-listed; not one male made the list. A woman was eventually hired."[93] (ii) "A prairie university short-listed all five female candidates of some 150 applicants for a tenure-track philosophy job. The job was offered to the first four women in turn, as one after the other turned it down for better jobs elsewhere. When the fifth woman rejected it because the university cold not find a job for her husband, a man was hired. Loud protests over gender inequality erupted on campus."[94] (iii) For several years in the mid-90s, there had been three positions open in the Philosophy Department at the University of Victoria. The Administration demanded that the department hire two women first, after which they would discuss filling the third position. The department refused to accept these conditions, saying they would only hire the best candidate, regardless of sex. Since this was unacceptable to the Administration, there is an impasse.[95] (One of the positions was eventually filled in 1996, by a woman whom the department considered to be the best available candidate. Ironically, this same woman had declined a tenure-track position in 1986 from the University of Waterloo, in part because it was a position for which men were not allowed to compete. At the time, she wrote a letter to a university newspaper denouncing the policy, saying she did not want to work under the stigma of having been a preferential hire.)

Philosophers are well-known for taking ideology to extremes, and I do not mean to suggest that the prospects for young WAMs are as bad as these examples imply in all fields of employment. Clearly, most business people, and even most government bureaucrats, are constrained by productivity objectives from engaging in preferential hiring to the degree noted above. But it is hardly a defense of a policy to argue that, although its effects are bad, they aren't as nearly bad in practice as would be the case were the policy applied in a thorough-going manner. A policy isn't more justified because it is followed only half-heartedly by most people. Quite the opposite, in fact; the only reason it isn't apparent to everyone that employment equity is a conceptual, moral, and practical absurdity is that it doesn't enjoy general application in practice. Its worst consequences, therefore, are not widely known.

§4. Employment equity and the business cycle:

Employment equity directs employers to create a comprehensive plan mapping out the composition of their workforces three or five or more years into the future – that is, well into the next business cycle.[96] In such a dynamic economic environment as we see in Canada these days, such comprehensive planning is at best guesswork. The government cannot reasonably expect employers to forecast their workforce composition accurately some years into the future when the government itself cannot determine even one year in advance what its major economic

policies or objectives will be. Governments exert considerable influence on the economy in countless ways: Deficits effect interest rates and international exchange rates; taxation policies effect investment decisions, as do labour and environmental policies; international-trade initiatives effect export and domestic markets; immigration policy effects the size and composition of the labour pool from which employers draw; and so on. In addition, there are market forces, including technological innovations which cannot be anticipated, to contend with. Without knowing these and a hundred other critical variables, employers can hardly be expected to know even whether they will be expanding or down-sizing three or five years into the future. In this context, drawing up goals with timetables is a useless exercise for most employers.

F) The Role-Model Argument

Employment equity is sometimes defended on the ground that it provides role models for DGMs, thereby facilitating their entry to various sectors of the workforce. This argument challenges the distinction made earlier between measures which facilitate the participation of DGMs in fair and open job competitions and measures which give DGMs preferential treatment, since preferential treatment for some DGMs is thought to be an important means of facilitating entry to the workforce by other DGMs. This highly influential argument is dubious on all four counts: conceptually, morally, empirically, and pragmatically.

§1. What a role model is:

To begin with, the argument presupposes a mistaken idea of what a role model is. A role model is an exemplar of a particular role or position, someone whom aspiring persons would do well to imitate. A good role model as a university teacher, for example, is someone who exemplifies scholarly attributes to a high degree: a thirst for knowledge, good judgment, diligence, enthusiasm, and technical skills, to mention a few. What we want people to model is the *role* of the exemplar, not his or her attire or hair style or other incidental attributes associated with race or sex. It is bizarre, quite frankly, to suppose that a less-qualified person could make a better role model, at least in the respects that really matter. In fact, preferential hiring precludes the very possibility of DGMs functioning as role models; hiring inferior candidates to serve as role models is a self-defeating practice. (Recall in this connection §E1.)

There is one area of employment where the distinction between the role and the person occupying it might not be quite so clear as is suggested above, namely primary-school teaching. Quite possibly, young children cannot separate the role from its exemplar quite as easily as adults can. But in this area of employment, the role model argument actually works in the opposite direction of legislated employment equity – i.e. in favour of male teachers over females. Primary-school teaching is a female-dominated occupation; but if young boys need to know that school work is an acceptably masculine thing to do, then having a higher proportion of male primary-school teachers would go some way toward achieving this end. Having more male primary-school teachers might actually go some way toward reducing the disproportionately high drop-out and failure rates experienced by boys in Canadian educational systems. Yet it is no accident that considerably less emphasis has been put upon recruiting men into primary-school teaching than upon pushing women into university teaching.

My suggestion is that, in general, one human being is a better role model than another

only if he or she is a better exemplar of the role, i.e. only if he or she is more qualified or meritorious for the job. But if it makes sense to divide the human race into smaller groupings, and to attribute a role-model effect to persons on the basis of membership in smaller groups, the next obvious question is how far we should go down this road. As noted in Part D, visible minorities encompasses a vast and heterogeneous collectivity, and we should not assume that all members of this collectivity are interchangeable just because they fall under the same legislated label. If a WAM cannot function as a good role model toward a person of Chinese ancestry, then why would a black or an east-Indian work any better? As long as Muslims comprise only a small proportion of the Canadian population, it is inevitable that they will only encounter a tiny number of Muslim role models in the educational system or workplace. Is that a serious problem in need of correction; and if so, how can employment equity (as opposed to massive immigration from Muslim countries) remedy it? We should hope, for the sake of Canada's visible minorities, that role models can transcend biology.

§2. Violating individual rights for utilitarian ends:

The principled objection to the role-model argument is simply that it is wrong to abridge fundamental human rights – rights affecting how people support themselves and their families – purportedly for the sake of "the greater good." This would be wrong even if employment equity *did* promote the greater good, which it does not. Imagine a scenario in which a state bureaucracy is vested with the power to redistribute body parts so as to equalize opportunities among members of a society. If you have two good eyes, for example, you might be required to "donate" one of them to a blind person.[97] The repugnance of this scenario is appreciated by nearly everyone; yet employment equity entails something similar. Next to our bodies and perhaps our families, nothing defines who we are more than our careers. People generally choose careers that reflect their individual abilities, their unique ambitions, and their personal ideals. Because of the central importance of careers in people's lives, policies which redistribute them among the population based on arbitrary biological attributes are extremely odious. According to the U.S. Supreme Court, such policies can only be justified if they promote a "compelling government interest." (See further §G2.) Providing *faux* role models for DGMs is clearly not a compelling government interest, especially in view of the actual empirical evidence of its effects.

§3. Tracking the role-model effect:

Once a person's race- and gender-expectations are established (some time before early adulthood), he or she will be little influenced by the race and sex of their role models. A cursory review of the evidence bears this out. Consider just the university context: Overall, the proportion of women on Canada's university faculties has barely doubled in the past 30 years, from about 12% in the early 1970s to about 24% today. Yet female enrolments in doctoral programs have quadrupled (to almost 40% today), and women now comprise a significant majority in both undergraduate and Masters programs. Professional programs such as law, dentistry, and optometry illustrate this point even more dramatically: in Canada, only about 18% of faculty in these professions are women, yet women significantly out-number men in enrolments. If the empirical premise of the role-model argument were correct, such dramatic shifts in expectations, behaviour, and success in such an historically short period of time would be unthinkable. Evidently, the role-model effect is dwarfed by other societal influences.

Moreover, even granting the mistaken premise of the role-model argument, it still does

not justify the goal of proportionate representation. If an occupation had be 50% female in order for women to have enough role models in it to encourage women to enter it, then we could never make any progress from a starting point with fewer than 50% women employed in the occupation. Presumably all that is required to let women know that they can succeed in a given occupation would be the existence of a few high-profile women in that occupation. Since this level of representation has already been (almost?) universally achieved, further employment equity legislation should gain no support from the role-model argument.

§4. The practical consequences:

I noted in §E1 that preferential hiring and promotion policies tend to exacerbate whatever stereotypes might already exist in society. This fact must surely damage the effectiveness of preferentially hired or promoted DGMs as role models in the eyes of the public. Moreover, evidence indicates that those who owe their positions to preferential policies tend to suffer from lower self-esteem, to take less credit for successful outcomes, and to under-value their own leadership abilities.[98] They also experience more stress, self-doubt, and loss of confidence.[99] Without the opportunity to prove themselves on merit, DGMs tend to view their own work performance adversely; this must be projected onto those who would use them as role models.

G) A Constitutional Challenge

The conceptual, moral, empirical, and pragmatic critiques sketched in the previous five Parts of this essay show that employment equity is a multi-faceted travesty; and yet, not every travesty in the law is unconstitutional. Indeed, the absolute paucity of case law on the question suggests that the constitutionality of employment equity is widely considered to be so obvious as to not to merit a serious legal challenge. In this Part of the essay, I raise a number of legal arguments which should at least cast doubt upon any glib acceptance of the *status quo*.

The obvious place to look for constitutional protection from employment equity, as well as for constitutional protection for the policy, is in s. 15 of the *Charter of Rights and Freedoms*, the "Equality Rights" provision, which states:

> ***15(1)*** *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*
> ***15(2)*** *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups, including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.*

A straightforward interpretation of s. 15(1) would seem to prohibit the kinds of preferential hiring policies implicit in employment equity regimes in Canada, while a straightforward interpretation of s. 15(2) would seem to provide them with a rather broad defense. Indeed, the apparent reason s. 15(2) was put into the *Charter* is precisely to protect affirmative action programs from *Charter* challenge.[100] But these appearances are, I think, deceptive; nothing in constitutional law is quite so straightforward.

Iacobucci J. has recently stated that "Section 15… is perhaps the *Charter*'s most conceptually difficult provision."[101] This is the case for three inter-related reasons. First, s. 15 concerns the abstract and, in my view, highly problematic concept of equality. Second, it guarantees equality "without discrimination," a phrase which raises its own interpretive issues.

Third, the manner in which the first two conceptual difficulties are resolved must be sensitive to the implications this has for the relationships among s. 15(1), s. 15(2), s. 28, and s. 1 of the *Charter*. As a result of these conceptual difficulties, the brief history of s. 15 jurisprudence has spawned a bewildering assortment of split decisions and divergent reasons from the S.C.C. *Law* represents the Court's latest – and unanimous – attempt to "synthesize" the earlier rulings into a coherent doctrine, even while acknowledging that the Court's understanding of s. 15 is still "evolving." In fact, the synthesis is *Law* is not entirely successful; some tensions, ambiguities, and dubious elements remain in the S.C.C.'s reasoning about s. 15.[102] Still, from a doctrinal point of view, it represents an improvement in a number of respects upon certain earlier judgments, and these improvements open the door, I think, to a successful challenge of employment equity.

§1. Section 15(1) analysis:

On its face, s. 15(1) would seem to protect "*every individual*" from the kinds of direct, government-mandated discrimination countenanced by employment equity. But, early on in its s. 15(1) jurisprudence, the S.C.C. was concerned to narrow the scope of challenges under this head. Most laws inevitably create distinctions between people which adversely effect some. The *Criminal Code*, for example, makes thousands of distinctions between offenders and non-offenders, conferring penal liabilities upon only the latter. It would be impractical if every distinction in law which adversely affected someone were deemed to fail to satisfy s. 15(1) and had to be justified by the government under s. 15(2) or s. 1; the Court would then be thrust into the position of having to review the policy credentials of every piece of legislation which draws an adverse distinction. This would, inappropriately, make the Court into a super-legislator.

(a) The requirement of pre-existing disadvantage:

For this reason, in the S.C.C.'s very first s. 15(1) case,[103] McIntyre J. set out what makes a distinction in law discriminatory. He began by stating the two-fold purpose of s. 15: (i) to fight the evils of harmful stereotyping and prejudice, and (ii) to remedy the effects of stereotyping and prejudice, and to ameliorate the condition of disadvantaged persons. Given this two-fold purpose, he reasoned that "The words 'without discrimination'… are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage."[104] Thus to be "discrimination within the meaning of s. 15(1)," a distinction had to be based upon a ground enumerated in s. 15(1) or upon an analogous ground, and it had to have a discriminatory purpose or effect which offended the purpose of s. 15.

Dilating upon the concept of 'analogous groups', Wilson J. explained that a ground may qualify as analogous to those listed in s. 15(1) if persons characterized by the trait in question are, among other things, "lacking in political power," "vulnerable to having their interests overlooked and their rights to equal concern and respect violated," and "vulnerab[le] to becoming a disadvantaged group" on the basis of the trait.[105] This again suggests that only members of groups subject to negative stereotyping, prejudice, or suffering from pre-existing disadvantage may succeed in a s. 15(1) challenge. This theme echoes throughout subsequent S.C.C. rulings on s. 15(1), as the following sample illustrates:

> **[A1]** …it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being

challenged.[106]

> **[A2]** Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed, the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 – namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society.[107]
>
> **[A3]** …in order for discrimination to be made out, the claimant must show that the denial [of equal treatment] rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based upon the stereotypical application of presumed group or personal characteristics.[108]
>
> **[A4]** Although Cory J. did not, in the passage just quoted from the *Egan* decision, specifically advert to the role of factors such as stereotyping, prejudice, and historical disadvantage in the second step of the discrimination analysis, the remainder of his analysis in that case clearly reveals the fundamental importance of such factors, in accordance with the framework established in *Andrews*…. [A] court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries…. And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?[109]

It would be tedious to multiply examples. Indeed, a whole area of s. 15(1) jurisprudence has grown up around the problem of diagnosing analogous grounds. These judgments leave the impression that if the appellant had failed to establish membership in an analogous group, their claim would have been rejected.[110] The upshot of this way of determining whether a distinction in law is discriminatory in such a way as to attract s. 15(1) scrutiny is that anyone who belongs to one of the more advantaged groups in society is not entitled to the guarantees of equality supposedly accorded to "every individual." For this reason, the S.C.C.'s s. 15(1) rulings frequently, and understandable, elicited comparisons in the popular press to the slogan of Napoleon, the pig in George Orwell's Animal Farm: "All animals are equal, but some animals are more equal than others." This line of jurisprudence, then, would render it difficult – though not impossible, as we saw in §D1 – to challenge employment equity laws for discriminating against the quintessentially advantaged group WAMs.

(b) A more liberal and inclusive interpretation:

But equally clearly, the conclusion drawn from the above line of jurisprudence is wrong. To say that the listed or analogous grounds warrant "particular" consideration under s. 15(1) is not to say that they *alone* warrant consideration. What is truly meant is simply this: that it is *especially* wrong for laws to add discriminatory treatment on top of pre-existing disadvantage, so that when this happens it will almost always violate s. 15(1) guarantees of equality. Perhaps members of disadvantaged groups bear a lesser burden of proof of discriminatory treatment than members of more advantaged groups; or perhaps the discrimination will have to be more significant to be successfully challenged by members of a more advantaged group. But no absolute divide between the equality rights of the advantaged and the disadvantaged is contemplated by the wording of s. 15(1).

The confusion of the Court seems to stem in part from their failure to keep the distinct purposes of s. 15(1) and s. 15(2) separate. The purpose of s. 15(1) is to prevent discrimination by the state; while the purpose of s. 15(2) is to permit government programs that ameliorate conditions of disadvantage, even if they may involve discrimination. Consequently, in its early judgments the Court frequently stated the dual purpose of s. 15 to be the prevention of

discrimination and the amelioration of disadvantage. Perhaps because there was a paucity of s. 15(2) cases before the courts – because all of the action stemmed from s. 15(1) challenges – this dual purpose quickly became the purpose of s. 15(1) all by itself, rendering s. 15(2) redundant.[111] Contrary to S.C.C. doctrine that remains in effect with *Law*, I would argue that s. 15(1) has no ameliorative or remedial purpose, and this factor should play no part in a s. 15(1) analysis.

The line of argument sampled in the A-series of quotations above sits uncomfortably with another line of argument which recognizes a more expansive and inclusive approach to s. 15(1) urged above. Here is a sample of the second line of argument, drawn mostly from dissenting and minority-concurring opinions:

> **[B1]** Thus, were the legislature suddenly to decide that first degree murder would only be an offence when committed by a man, one would face an illegitimate distinction that would trigger s. 15(1). It would place a serious burden on males that was not imposed on females when there was no reason related to sex for imposing such a burden.[112]
>
> **[B2]** Some of the words used in *Turpin*, on the other hand, may be read as suggesting that discrimination is not established merely by a distinction within s. 15 which imposes a greater burden or confers a greater benefit. Rather, one should look for a disadvantage peculiar to the "discrete and insular minority" discriminated against, to determine if it suffers disadvantage apart from and independent of the particular legal distinction being challenged…. [There follows the passage quoted in A1 above.]
>
> This language lends itself to the argument that a distinction against men as compared with women is not discrimination within s. 15 because men cannot claim to be a "discrete and insular minority" and can rarely show disadvantage apart from the provision they are challenging.
>
> …In my view, these arguments take the interpretation of the language in *Turpin* further than is justified. There is no suggestion in that language that men should be excluded from protection under s. 15 because they do not constitute a "discrete and insular minority" disadvantaged independently of the legislation under consideration. The Court must be taken to have had in mind s. 28 of the *Charter*, which provides that notwithstanding any other provisions, the rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons… Thus Wilson J. states that the search for independent disadvantage applies "in most but perhaps not all cases" and says that finding a "discrete and insular minority" is "merely one of the analytical tools which are of assistance."[113]
>
> **[B3]** … analogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. Nor is it essential that the analogous ground target a discrete and insular minority; this is belied by the inclusion of sex as a ground enumerated in s. 15(1). And while discriminatory group markers often involve immutable characteristics, they do not necessarily do so. Religion, an enumerated ground, is not immutable. Nor is citizenship, recognized in *Andrews*; nor province of residence, considered in *Turpin*. All these and more may be indicators of analogous grounds, but the unifying principle is larger: the avoidance of stereotypical reasoning and the creation of legal distinctions which violate the dignity and freedom of the individual, on the basis of some preconceived perception about the attributed characteristics of a group rather than the true capacity, worth or circumstances of the individual.[114]
>
> **[B4]** However, I agree with McLachlin J. that membership in such a disadvantaged group is not an essential precondition for bringing a claim under s. 15 of the Charter.[115]

(c) A conflict resolution in *Law*:

The more expansive and inclusive way thinking about discrimination contained in this B-series of quotations is supported by the Court's mantra that *Charter* rights are to be given a "liberal and generous" interpretation. This approach finally becomes overt and emphatic in the judgment of Iacobucci J. in *Law*. Below, I set out his "synthesis" of s. 15(1) jurisprudence

leading to the unanimous acceptance of this position, beginning with the more abstract propositions and ending with the more concrete.

> **[C1]** ¶88 In general terms, the purpose of s. 15(1) is 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 persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.
>
> **[C2]** ¶53 …Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[116]
>
> **[C3]** ¶70 …The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee.
>
> **[C4]** ¶65 It should be stressed that, while it is helpful to demonstrate the existence of historic disadvantage, it is of course not necessary to show such disadvantage in order to establish a s. 15(1) violation, for at least two distinct reasons. On the one hand, this Court has stated several times that, although a distinction drawn on such a basis is an important indicium of discrimination, it is not determinative: [references omitted; the most important of these are quoted in the B-series above]. A member of any of the more advantaged groups in society is clearly entitled to bring a s. 15(1) claim which, in appropriate cases, will be successful.
> ¶66 On the other hand, it may be misleading or inappropriate in some cases to speak about "membership" within a group for the purpose of a s. 15(1) claim. The *Charter* guarantees equality rights to individuals. In this respect, it must be made clear that the s. 15(1) claimant is not required to establish membership in a sociologically recognized group in order to be successful. It will always be helpful to the claimant to be able to identify a pattern of discrimination against a class of persons with traits similar to the claimant, i.e., a group, of which the claimant may consider herself or himself a member. Nonetheless, an infringement of s. 15(1) may be established by other means, and may exist even if there is no one similar to the claimant who is experiencing the same unfair treatment….
> ¶ 68 Moreover, in line with my earlier comment, in referring to groups which, historically, have been more or less disadvantaged, I do not wish to imply the existence of a strict dichotomy of advantaged and disadvantaged groups, within which each claimant must be classified. I mean to identify simply the social reality that a member of a group which historically has been more disadvantaged in Canadian society is less likely to have difficulty in demonstrating discrimination. Since Andrews, it has been recognized in the jurisprudence of this Court that an important, though not exclusive, purpose of s. 15(1) is the protection of individuals and groups who are vulnerable, disadvantaged, or members of "discrete and insular minorities."…
>
> **[C5]** ¶ 83 …in some cases it will be relatively easy for a claimant to establish a s. 15(1) infringement, while in other cases it will be more difficult to locate a violation of the purpose of the equality guarantee. In more straightforward cases, it will be clear to the court on the basis of judicial notice and logical reasoning that an impugned law interferes with human dignity and thus constitutes discrimination within the meaning of the Charter. Often, but not always, this will be

> the case where a law draws a formal distinction in treatment on the basis of enumerated or analogous grounds, because the use of these grounds frequently does not correlate with need, capacity, or merit. It may be sufficient for the court simply to take judicial notice of pre-existing disadvantage experienced by the claimant or by the group of which the claimant is a member in order for such a s. 15(1) claim to be made out. In other cases, it will be necessary to refer to one or more other contextual factors. In every case, though, a court's central concern will be with whether a violation of human dignity has been established, in light of the historical, social, political, and legal context of the claim. In order to succeed under s. 15(1), it is up to the claimant to ensure that the court is made aware of this context in the appropriate manner.

These passages practically *invite* a s. 15(1) challenge to employment equity, and in particular to the centrepiece of that legislation, mandated proportionate representation. In case there is any remaining doubt about the verdict of s. 15(1) on employment equity, I next go through the guidelines summarized by Iacobucci J. at ¶88 of the *Law* decision to determine the prospects that employment equity laws might withstand a s. 15(1) challenge. The guidelines pose a series of questions which must be answered in the affirmative to make a successful challenge.

1. *Does employment equity impose differential treatment between WAMs and DGMs, in purpose or effect?*

Yes, both in purpose and in effect.

2. *Are WAMs subject to differential treatment based on one or more of the enumerated and analogous grounds?*

Yes, employment equity expressly requires employers to discriminate on the basis of sex, race, and disability.

3. *Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from WAMs in a manner that reflects the stereotypical application of presumed group or personal characteristics, 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?*

Yes, employment equity places a burden upon WAMs inasmuch as it requires them to be significantly better than DGMs in order to be hired or promoted by employers subject to the legislation; and it withholds benefits inasmuch as it denies them employment opportunities. Furthermore, it does this in a manner that reflects the stereotypical application of presumed group characteristics, namely that all WAMs are advantaged members of Canadian society and so are not entitled to equal concern, respect, and consideration in the employment context. It might be objected that only *negative* stereotypes perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society;[117] thus the stereotype that WAMs are advantaged cannot have this effect. But the fact of the matter is that positive stereotypes can be just as harmful as negative ones; and negative stereotypes can in some contexts be advantageous. Being mathematically gifted is not an undesirable trait; yet stereotyping Asians as mathematically gifted can lead to an unfortunate narrowing of interests in educational and employment contexts, and it can place a burden of unrealistic expectations upon Asians who are not mathematically gifted. Similarly, the stereotype that men are more competent than women, whereas women are more emotionally dependent, can lead to significant disparities in treatment by the criminal justice system. It can lead to unfair assumptions about who was the "controlling mind" in a crime involving both male and female

perpetrators, and consequently who deserves a favourable plea-bargain or lower sentence.[118] Stereotyping WAMs as advantaged makes them vulnerable to reverse discrimination in employment, whether they are in fact advantaged or not.[119]

4. Is there a conflict between the purpose or effect of employment equity and s. 15(1)?

Yes. What comes through clearly in the C-series of quotations above is that s. 15(1) is meant to guarantee fair or "substantive" equality of opportunity to all individuals in Canada. Inasmuch as employment equity pursues a kind of equality of outcome among groups, countenancing the sacrifice of some for the benefit of others, the purpose of employment equity laws clashes dramatically with the purpose of s. 15(1).

5. Viewed from the perspective of reasonable WAMs, does employment equity have the effect of demeaning their dignity, taking into account the relevant contextual factors?

Yes. Specifically: (A) WAMs today are no more or less advantaged than women or visible minorities, overall (see §D1). They are about as likely as not to experience pre-existing disadvantage relative to the competition they face for jobs in general. (B) This is because there is no genuine correspondence between the grounds on which employment equity requires discrimination and the actual need, capacity, or circumstances of WAMs and DGMs. Employment equity fails utterly to take into account the actual situation of WAMs in a manner that respects their value as human beings or as members of Canadian society. It is, indeed, a paradigm case of harmful stereotyping. (C) Employment equity does not have a valid ameliorative purpose or effect, one which accords with the purpose of s. 15(1), as explained in answer to question 4 above. Indeed, as argued at endnote 111, there truly is no ameliorative purpose to s. 15(1) in the first place. Furthermore, employment equity is as likely as not to involve adding legislated discrimination upon pre-existing disadvantage, as noted in (A) and (B) above. (D) Most significantly, perhaps, employment equity impedes a very important interest, and it does so on a wide scale. It was recognized in *Andrews* that even easily surmountable restrictions on employability, such as the personal characteristic of citizenship, was a real disadvantage to the claimant, resulting in an infringement of s. 15(1). In summary, if the existence of only one of the contextual factors may be sufficient to show that a law denies a claimant human dignity, then this essay clearly establishes that employment equity denies WAMs this dignity.

§2. Section 15(2) Analysis:

Iacobucci J., for a unanimous Court, makes matters clearer by saying, "…I would not wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others, requiring the court to consider justification under s. 1, or the operation of s. 15(2)."[120] In this section, I move on to consider a possible defense of employment equity under s. 15(2).

(a) An ameliorative purpose or effect:

The paucity of s. 15(2) jurisprudence provides a meagre basis on which to argue the likelihood of employment equity being protected under this head. This is no doubt because s. 15(2) is generally deemed to be broadly permissive of "affirmative action" programs, and because employment equity is generally characterized as an affirmative action program. Both suppositions must be called into question here. With respect to the first, here is what McLachlin J. (as she then was) had to say about interpreting s. 15(2) in one of the few times the S.C.C. has had occasion to comment upon it:

> …Subsection 15(2) is potentially far-reaching in its application. Interpreted expansively,… it threatens to circumvent the purpose of s. 1. Under s. 15(2) it must only be shown that the "object" of the legislation was amelioration of conditions of a disadvantaged individual or group, and there is no need to demonstrate that the legislation used proportionate means. I prefer the approach to s. 15(2) adopted by Huddart L.J.S.C. in *Re MacVicar and Superintendent of Family and Child Services*, (1986), 34 D.L.R. (4th) 488 (B.C.S.C.), at pp. 502-3:
>
> > To ensure that the s. 15(1) guarantee of equal protection and benefit has real effect, s. 15(2) must be construed as limited to its purpose. It was included in the *Charter* to silence the debate that rages elsewhere over the legitimacy of affirmative action…. It was not intended to save from scrutiny all legislation intended to have positive effect…
> >
> > If this provision could be saved, little discriminatory legislation could ever be attacked successfully, for almost all positive law has as its stated object the betterment or amelioration of the conditions in our community of a disadvantaged individual or group.[121]

The proposition that s. 15(2) "was included in the *Charter* to silence the debate that rages elsewhere over the legitimacy of affirmative action" might seem to dampen the prospects of a successful challenge to employment equity. But the important point to be gleaned from this passage is that more than the stated objective of the legislation is relevant to determining its validity under s. 15(2). The actual terms of the legislation must be considered to determine what the true purpose or effect of the legislation is likely to be and whether that purpose or effect is limited by s. 15. Legislators cannot immunize legislation from constitutional scrutiny simply be stating in the preamble that the object of the legislation is to make some allegedly disadvantaged group better off; purported affirmative action programs are allowed under s. 15(2) only in so far as their purpose and effect is genuinely ameliorative. To the extent that this may not be so, a policy might have to be saved under s. 1 by showing that the policy's objectives are pursued using proportionate means.

We saw in §B1 that the stated and implied goals of employment equity are many and varied – indeed, conflicting and competing. But what is the true goal, the essence of employment equity? I argued in Part A that the true goal can be inferred from the mechanics of the legislation, which mandate the attainment of some kind of proportionate representation for designated groups in the workplace. But this objective, insofar as it is distinct from and does not effectively achieve the amelioration of conditions of disadvantage, is not sanctioned by s. 15(2). One leitmotif that runs throughout every Part of this essay is that an absence of proportionate representation is not even a remotely valid indicator of either discrimination or disadvantage; if we are to interpret the *Charter* carefully, then it must always be incumbent upon those who seek proportionate representation and other forms of employment preference to show how it can be expected to contribute to the amelioration of disadvantage.[122] It would seem, then, that the whole idea of mandating "goals with timetables" for the attainment of proportionate representation for designated groups is anathema to s. 15(2), while other forms of employment preference can only survive s. 15(2) scrutiny if they can be expected to ameliorate *actual* disadvantage, as opposed to the mythical disadvantages imagined by politically powerful special-interest advocacy groups which have captured legislators.

(b) Strict scrutiny:

While the amelioration of *actual* disadvantage is a necessary condition for a policy to survive s. 15(2) scrutiny, it is not sufficient. For clearly it would defeat the purpose of s. 15(2) if the amelioration of disadvantage of one group were achieved by heaping discrimination on top of the pre-existing disadvantage of another group. For example, if high unemployment in one region of the country (say, New Brunswick) were to be fought with an affirmative action policy

which diverted jobs from another area of high unemployment (say, Newfoundland), this would merely succeed in increasing the inequalities between these two areas without making a net contribution to ameliorating disadvantage. If the policy involved direct discrimination against Newfoundlanders, it could not be successfully defended under s. 15(2), I submit, since it would violate the human dignity of Newfoundlanders for no net benefit. [123] Yet, as nearly every section of the earlier parts of this essay showed, the tendency of employment equity is to achieve precisely this. Employment equity tends to favour the most advantaged members of the target group, and to disadvantage the least advantaged WAMs – especially the young, the poor, and gay WAMs.[124] The following are some examples of contextualized situations in which employment equity would not seem to survive a careful s. 15(2) scrutiny:

> **Scenario 1:** A WAM who comes from an economically or socially disadvantaged background – e.g. from a rural area with few educational opportunities; from the family of a single mother; from a poor family; etc. – might successfully challenge an employment equity program which ignores his disadvantage and gives preference to an economically and socially advantaged member of a designated group.
>
> **Scenario 2:** A WAM might successfully challenge an employment equity program that is in place despite the fact that the target groups are adequately represented in the particular workplace.
>
> **Scenario 3:** A non-targeted DGM might successfully challenge an employment equity program which aims exclusively at only one segment of the disadvantaged population – e.g. women or aboriginal persons.
>
> **Scenario 4:** A (would-be) stay-at-home mom might successfully challenge an employment equity program that is used to deny her husband an employment opportunity on the ground that it indirectly discriminates against her by making her choice to care for the children herself more difficult, and also because it violates her human dignity by implying that her choice to stay at home is less worthy of respect.

The point that is being made with the kinds of cases outlined in this section can be generalized: Whenever affirmative action takes the form of zero-sum policies affecting vast and diverse groups like those targeted by employment equity, it should be extremely difficult to defend it under s. 15(2). In contrast, the kind of facially discriminatory but positive-sum affirmative action policies urged elsewhere in this essay will be relatively easy to defend under s. 15(2). To survive a s. 15 challenge, then, employment equity should have to be fairly narrowly tailored to address real, specific problems. The correct approach, I submit, is taken by O'Connor J. of the U.S. Supreme Court, writing for the majority in *Adarand*. In striking down the policy of preferentially awarding government contracts to businesses owned by racial minorities, she wrote, "[A]ll governmental action based on race – a group classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed." Preferential policies based on racial classifications are justified only when they "serve a compelling governmental interest, and [they] must be narrowly tailored to further that interest."[125] Blanket policies favouring minorities do not meet the highest judicial test of "strict scrutiny," since they fail to meet any of the requirements of remedial or compensatory justice (see §C1). Since no group in Canada, with the possible exception of some First Nations peoples, has suffered anything close to the historical discrimination and disadvantage of blacks in the U.S., the S.C.C. would be improvident to be even more open to group preferences here.

It is important to remember in the context of this section that all differences between individuals or groups do not amount to disadvantages, i.e. to substantive inequalities of

opportunity. This raises two theoretically critical issues, and one practical one. The first is how to measure or quantify disadvantage. The answer provided by the S.C.C.'s analogous-grounds analysis, I submit, is too crude – and too heavily steeped in myth and stereotype – to serve the purpose. It is too crude because (a) it treats disadvantaged status as an all-or-nothing proposition, whereas what we need in order to apply the recommended strict-scrutiny test is a measure that is at least capable of producing an ordinal ranking (if not a cardinal ranking); and (b) it takes into account only a small and selective range of factors which might result in disadvantage – and these in a rather unsatisfactory way. Without a more systematic and rigorous approach to quantifying disadvantage, judicial notice of the existence of disadvantage could easily amount to little more than the imposition of judicial prejudice. Second, we must determine in a principled way how much of a difference in the above measure is needed in order for one individual or group to be considered disadvantaged relative to another for the purposes of a s. 15 analysis. I submit that in order for there to be genuine disadvantages requiring strong corrective measures, the differences must be significant enough to seriously impair a person's life prospects. Differentiating between various levels of middle-classness isn't appropriate. From a practical point of view, it strains the concept of disadvantage beyond all plausibility to suppose that well over 60% – and perhaps as high as 80% – of the people in one of the world's most affluent, tolerant, and accommodating countries are disadvantaged to the extent that direct legal discrimination is called for to "rectify" the problem.

(c) The implications of s. 28:

By far the largest target group identified by Canadian legislation as beneficiaries of employment equity is women; and employment equity for women is also the most deeply entrenched in practice. Yet s. 28 of the *Charter* can plausibly be interpreted as prohibiting outright this particular practice. This section provides that:

> *28. Notwithstanding anything in this* Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*

As with s. 15(2), there is a dearth of jurisprudence dealing with s. 28 on the basis of which one might be able to construct a constitutional argument.[126] But note that s. 28 refers to "equal rights and freedoms," rather than to rights to equality as in s. 15. Given this difference in language and the principle of interpretation that Parliament is deemed not to be redundant, we must assume that s. 28 and s. 15 do not amount to the same thing as far as male and female Canadians are concerned. Obviously, we must also assume that they are not contradictory, either. How are they to be reconciled, then?

The first thing to bear in mind is that s. 28 is the stronger guarantee; it trumps s. 15(2), in the sense that any interpretation of s. 15(2) must be subservient to the purpose of s. 28, rather than the other way around. This is so for two reasons: First, the language of s. 28 arrogates unto itself priority over s. 15(2) – "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Second, whereas s. 15(2) of the *Charter* is subject to the limitations set out in s. 1, as well as to the s. 33 legislative over-ride provision, s. 28 unconditionally binds Parliament and the legislatures, with no exceptions.

From the previous discussion, we know that s. 15(2) permits facially discriminatory treatment where that treatment has the purpose and effect of ameliorating genuine disadvantage, as long as those it facially discriminates against are not persons with pre-existing disadvantages. There are two ways in which this right, the legal permission to discriminate under s. 15(2), might

be subject to s. 28. The first interpretation would allow any law, program, or activity of government which aims at the amelioration of disadvantage for females as long as it is equally accessible to equally disadvantaged males. What is prohibited on this interpretation is discrimination against individual men and women who are roughly equal to or inferior on the disadvantage scale relative to the successful candidate. If in reality women were on the whole significantly disadvantaged relative to men, then employment equity programs would still be allowed to reflect this difference by giving preference to women more frequently than to men. Giving preference to men would not be excluded, it would only be more unusual. That is, employment equity tailored to the individual circumstances of the candidates would still have a favourable impact upon women if, overall, their individual circumstances warranted it; and if their circumstances didn't warrant preference, then no good reason exists why they should receive preference anyway – as they currently do.

The second interpretation would require that employment equity be practised in a symmetrical and even-handed manner as between men and women. Thus, for example, in those segments of the workplace and in those sectors of the economy where men are under-represented or face stereotypical barriers to entry, s. 28 could be seen as requiring that men be given suitable employment preferences. For example, men who have an interest in female-typed occupations such as nursing, primary education, and secretarial work face significant social stereotyping which is at least as inhibiting as any stereotyping faced by women in traditionally male-typed occupations. If we are to treat these cases equally under s. 28, then men seeking employment in these sectors should enjoy the same preferences as women seeking employment in traditionally male-typed occupations.

These are not mutually exclusive interpretations, and the most suitable approach, the "liberal and generous" approach under s. 28, would be to combine them in any employment equity program which was to survive s. 15(2) scrutiny. The problem with the second way of reconciling s. 15(2) with s. 28 is that it fails to address the problems discussed in subsection (b) above, and therefore constitutes at best a partial solution. It represents the minimum that s. 28 might require to be meaningful.

§3. Is employment equity saved by s. 1?:

The conclusion from the previous section is that, to survive a s. 15 challenge, employment equity laws must (i) jettison mandated goals with timetables for achieving proportionate representation; (ii) they must be narrowly tailored to specific problems so as not to countenance discrimination against one disadvantaged individual in the pursuit of ameliorating the disadvantage of another; and (iii) they must do this in a fair, symmetrical, and even-handed way as between men and women. Very little of what passes for employment equity in Canada today survives this test. We must now inquire whether, despite all of this, employment equity as we know it might nevertheless be saved by s. 1 of the *Charter*. Section 1 provides that:

> *1. The* Canadian Charter of Rights and Freedoms *guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

In other words, *Charter* rights are not absolutes; they may in fact be violated by government. But this section imposes a very stringent burden upon the government to justify any law which violates a *Charter* right, if it is not to be struck down. In broad terms, legislation which violates a *Charter* right might nevertheless be justified in a free and democratic society if larger interests

are at stake – if, for example, other *Charter* values are in play – and if it would be highly impractical to pursue these interests in any way other than through the impugned law. Analysis under s. 1 follows a well-worn path which I believe is relatively easy to apply to the present issue. The *Oakes* test, which the S.C.C. has developed as a framework to justify *Charter* violations under s. 1, contains four parts.[127]

The first issue that must be addressed under the *Oakes* test is whether the law contains a "sufficiently important objective" to warrant abridging s. 15 and s. 28 rights. As we have seen, employment equity laws encompass several competing and conflicting objectives; so what is the relevant way to characterize the purpose of employment equity for a s. 1 analysis? McLachlin J. (as she then was) says that "the objective that is relevant to the s. 1 analysis is *the objective of the infringing measure*."[128] I argued in the previous section that two kinds of measures infringe s. 15(2), and one infringes s. 28: mandated goals with timetables; preferences for vast and heterogeneous groups which will inevitably result in many kinds of case to adding legislated discrimination on top of pre-existing disadvantage; and preferences for women without equivalent preferences for men.[129] Can any of these measure be said to promote a pressing and substantial objective, or a collective goal of fundamental importance? No. Achieving proportionate representation in the workplace; advancing the employment interests of relatively advantaged women, visible minorities, aboriginal people, and disabled people at the expense of relatively disadvantaged WAMs; and giving disadvantaged women preferential treatment in the workplace without equivalent treatment for disadvantaged men – none of these is a substantial objective at all.

In deference to the possibility that more relaxed standards of scrutiny should apply to a s. 1 defense of a s. 15 breach, let's consider a broader and more positive characterization of the purpose of employment equity. The purpose of fighting the evils of workplace discrimination, for example, would presumably count as a sufficiently important objective. This would then take us to the second branch of the Oakes test: a determination whether the means chosen to meet this objective are demonstrably justified. *Oakes* prescribes three criteria of evaluation. The first is that the chosen means must be rationally connected to the objective. "The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose."[130] The law must be "carefully designed to achieve the objective in question" and should not be "arbitrary, unfair, or based on irrational considerations."[131] I have argued in the earlier Parts of this essay that the legislative measures by which employment equity is embodied in Canada are not at all carefully tailored to fighting the evils of workplace discrimination. In fact, most of these measures – in particular, goals and timetables for proportionate representation – are completely unconnected to that objective. To alter the metaphor, they constitute little better than a shot-gun approach where a sharpshooter is required. As a result, employment equity is bound to produce more collateral damage than it rectifies. Moreover, it is based upon irrational stereotypical thinking[132] which as often as not produces arbitrary and unfair results. Even on the most relaxed standards of evaluation, employment equity fails the rational connection test.

Since employment equity clearly fails to satisfy the rational connection test, it is strictly unnecessary to consider the remaining requirements for salvation under s. 1. Nevertheless, it is instructive to see how employment equity stacks up to these requirements as well. The second criterion under the "demonstrably justified means" requirement is that the law must impair the abridged rights (i.e., s. 15 and s. 28) as little as reasonably possible. This is sometimes referred to as the "least drastic means test." The problem for employment equity here is that, clearly, it does

not attempt to fight the evils of workplace discrimination in a way which impairs s. 15 and s. 28 equality rights as little as is reasonably possible. As was argued previously, affirmative action programs could survive a constitutional challenge as long as they did not mandate pre-established goals with timetables, as long as they were narrowly tailored to take into account the actual needs and capacities of Canadians, and as long as they did so by treating disadvantaged males and females equivalently or even-handedly. In particular, outreach programs which advance the interests of DGMs without discriminating in a substantive sense against WAMs would do so, as would special training or mentoring programs for DGMs. In fact, most positive-sum policies would pass both the s. 15 tests and the s. 1 test. So would facially discriminatory preferential policies which are narrowly tailored to address real disadvantages on a case-by-case basis, or which treated men who may face employment barriers due to stereotypical attitudes equivalently to women in that situation. All that prevents affirmative action from meeting a constitutional challenge is legislative laziness bolstered by the politics of preference.

In response to the suggestion that it would be too costly or otherwise impractical, and therefore unreasonable, to narrowly tailor employment equity to meet the standard of scrutiny suggested by the challenge presented in this essay, the S.C.C. has repeatedly indicated that cost and administrative inconvenience cannot warrant the abrogation of *Charter* rights unless perhaps in exceptional circumstances like an emergency; only values which are tantamount to *Charter* values could tip the s. 1 scales in favour of an impugned law. Wilson J. says, for example:

> I have considerable doubt that the type of utilitarian consideration brought forward [in the instant case] can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so.[133]

If the law-makers cannot construct a law which is effective and cost-efficient without violating *Charter* rights, then it should not implement that law. In short, if the purpose of employment equity is construed narrowly in terms of the impugned measures, then it fails to provide a sufficiently important objective to warrant s. 1 salvation; whereas if the purpose is construed broadly in terms of fighting the evils of discrimination, then it fails to use suitable means to this end and again is not saved by s. 1.

Finally, the last part of the *Oakes* test requires that there be a "proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'." In other words, there must be a "proportionality between the deleterious and the salutary effects of the measures."[134] A clear negative answer to each of the first three questions implies a negative answer to this one, also.

To summarize this Part of the essay: Employment equity violates s. 15(1) of the *Charter* by virtue of mandating direct discrimination against certain individuals based upon a stereotypical view of their needs and capacities. If the ameliorative purpose of s. 15(2) is taken seriously and strictly, then much of what passes for employment equity in Canada cannot be justified under s. 15(2), either. Furthermore, it violates s. 28 as well by failing to attempt to ameliorate conditions of disadvantage in a symmetrical or even-handed manner as between men and women. Nor are these defects saved by s. 1 of the *Charter*. Employment equity as we know it is at once constitutionally under-inclusive and overbroad. This travesty of public policy is also a constitutional travesty and must be struck down or (at least) radically pruned.[135]

CONCLUSION

Of all the ways to combat the evils of workplace prejudice and discrimination, preferential hiring and promotion in the pursuit of proportionate representation are arguably the most unfair and costly, and the least effective and constitutional. The greatest weapon against these evils is probably the competition of a global marketplace, since in an open, competitive environment employers pay a harsh price for not employing those most capable at a particular job.[136] Beyond that, public pressure in the form of boycotting and protesting against discriminatory employers has shown itself to be effective as well. Nor should voluntary affirmative action by private employers of good will be ignored. Insofar as the government has a positive role to play in the eradication of these problems, the rigorous enforcement of non-discrimination laws on behalf of individual complainants would certainly be helpful. If affirmative action is called for, then it must be narrowly tailored to addressing serious problems in a way that takes into account the actual needs and capacities of individuals affected by it.

Insofar as employment equity has goals other than fighting prejudice and discrimination, these are best pursued by other means, also. Requiring private businesses, or even government departments with independent mandates, to implement a policy aimed at promoting the general welfare is bound to be counter-productive. Socio-economic disadvantage is best identified and attacked directly. Well-designed welfare policies are better suited to combating the problems of economic disadvantage than are ill-designed employment policies; and educational reforms can do more to overcome social disadvantage than any other measure. Obviously, these topics are beyond the scope of this essay. The point being urged here is simply that good intentions are not enough to justify the moral, practical, and legal shortcomings of employment equity.

Sir Isaiah Berlin, a much-honoured defender of liberty, has said, "There are men who will kill and maim with a tranquil conscience under the influence of the words and writings of some of those who are certain that they know how perfection can be reached."[137] The administrators of employment equity are certain they know how perfection in the workplace can be achieved, and consequently are quite prepared to kill and maim the careers of innocent WAMs with a tranquil conscience in an effort to achieve it. Nowadays, young men are at least five times more likely to commit suicide than young women. (In the early 1960s, the suicide rates were nearly equal.) UBC nursing Professor Ray Thompson attributes this "epidemic" to the increasing pressures being heaped upon boys as they enter adulthood.[138] While the burdens of employment equity are just one of these pressures, their effect should not be dismissed casually. Men in our society are still largely defined by their careers, so that when a man struggles to obtain a career it is especially damaging to his self-esteem. Whatever one thinks about the benefits of employment equity, fair-minded, humane persons cannot recommend it with an untroubled conscience.

Appendix

Table 1

		Total	Female	% F
i) Full Professors in 1986-87:				
1.	With Ph.D. degrees	10,100	631	6.3
2.	Ph.D. degrees earned 1955-70	8,737	768	8.8
3.	Ph.D. degrees earned 1955-76	19,444	2,149	11.1
4.	With masters degrees	1,370	119	8.7
5.	Masters degrees earned 1955-70	59,753	12,041	20.2
6.	Masters degrees earned 1955-76	123,098	28,958	23.5
ii)	Associate Professors in 1986-87:			
7.	With Ph.D. degrees	8,640	1,259	14.6
8.	Ph.D. degrees earned 1971-76	10,707	1,381	12.9
9.	Ph.D. degrees earned 1960-80	25,121	3,430	13.7
10.	With masters degrees	2,705	651	24.1
11.	Masters degrees earned 1971-76	63,345	16,913	26.7
12.	Masters degrees earned 1960-80	165,351	44,584	27.0
iii)	Assistant Professors in 1986-87:			
13.	With Ph.D. degrees	3,830	997	26.0
14.	Ph.D. degrees earned 1977-83	12,414	2,719	21.9
15.	Ph.D. degrees earned 1971-87	31,601	6,432	20.4
16.	With masters degrees	2,022	753	37.2
17.	Masters degrees earned 1977-83	89,733	33,201	37.0
18.	Masters degrees earned 1971-87	214,770	76,518	35.6
iv)	Lecturers in 1986-87:			
19.	With Ph.D. degrees	167	58	34.7
20.	Ph.D. degrees earned 1984-87	8,480	2,332	27.5
21.	Ph.D. degrees earned 1977-87	20,894	5,051	24.2
22.	With masters degrees	760	329	43.3
23.	Masters degrees earned 1984-87	61,692	26,404	42.8
24.	Masters degrees earned 1977-87	151,425	59,605	39.4

Endnotes

1. Cited by Anthony Flew, ***The Politics of Procrustes***, (Temple Smith, 1981).

2. Ontario's *Employment Equity Ac*, S.O. 1993. c. 35, enacted by Bob Rae's New Democratic government, was repealed by Mike Harris's Conservatives two years later (S.O. 1995. c. 4, s. 1). The Federal *Employment Equity Act* was introduced by the Mulroney Conservatives and strengthened by the Chr■tien Liberals (S.C. 1995, c. 44).

3. Two other significant variables in the legislative regimes warrant only a mention here. First, some laws apply to only the public sector while others the private sector as well. And second, employment equity laws always specify a threshold size of employer to which they apply, although different programs set different thresholds. A detailed exposition of the legal regimes concerning employment equity can be found in I. Christie, G. England, and B. Lotter, Employment Law in Canada, 2nd. ed., (Butterworth's, 1993).

4. Employment equity legislation in Canada always identifies the same four "designated groups": women, visible minorities, aboriginal peoples, and the disabled. I will use the following abbreviations: DGM for 'designated-group member'; WAM for 'white, able-bodied male'; and *FCP* for '*Federal Contractors Program*' (Treasury Board Directive No. 802984, "Federal Contractors Program for Employment Equity – Departmental Responsibilities Concerning Contracting for Goods and Services of $200,000 or More," 25 August 1986, Circular Letter No. 1986-44). Also, the term 'biology-consciousness' is used as a shorthand for 'race-consciousness, sex-consciousness, and disability-consciousness'.

Although much of the discussion in this essay focuses upon the situation of women in Canada, this is not because employment equity is a male *vs*. female issue. For one thing, the lives of men and women are too intimately intertwined for it to be the case that what negatively affects one sex will not redound upon the other. For another, it is far from clear that employment equity is really in the interests of women. Rather, the reasons particular attention is paid to the case of women are these: (i) women constitute by far the largest of the designated groups identified by employment equity legislation; (ii) the implementation of employment equity is furthest advanced in the case of women; (iii) reliable employment statistics are frequently unavailable for the other designated groups, especially from decades past; and (iv) many of the theoretical points made below are most dramatically illustrated by contrasting men and women, and apply with lesser force (but equal validity) to the smaller or more homogeneous groups. Some caution is advised in extending each argument to each group.

5. Police officers must be able to communicate and interact comfortably with those they are supposed to protect and help. So if Chinese immigrants, for example, predominate in a neighbourhood, then fluency in Mandarin may well be a *bona fide* occupational requirement. It would certainly *enhance* one's qualifications. This requirement might in turn effectively restrict the applicant pool to persons of Chinese descent, without being in any way discriminatory. This argument can be extended plausibly to counting aboriginal status as relevant for candidates for policing jobs in aboriginal regions or neighbourhoods. Even where language is not a barrier to communication, perhaps a deeper understanding of the local aboriginal culture would help a police officer to perform the job, and to have this deeper understanding it might be almost necessary to have been raised in it. But is it reasonable to stretch this kind of argument so as to count being Italian-Canadian an asset for policing in an Italian-Canadian neighbourhood, over (say) being Irish-Canadian? If this argument is taken too far, it could result in handicapping candidates of Chinese or aboriginal descent for most community-policing jobs in Canada, since most neighbourhoods are not predominantly Chinese or aboriginal or….

6. The zero-sum nature of job competitions is often obfuscated or unappreciated by proponents of employment equity, leading them to make illogically exaggerated claims about its benefits. An illustration of this problem occurs in the article "Return on Equity" (***Globe and Mail,*** 16 May 1995, B14). The article is about self-styled "experts" Trevor Wilson and Gail Cook Johnson, who have developed what they call the "Equity Quotient Questionnaire," which is supposed measure employees' understanding and acceptance of employment equity. An example of the kind of question contained on this questionnaire is this: "Do the chances for advancement by all employees deteriorate or improve when a company works to develop employment equity?" Presumably, an employee who says that the chances deteriorate is rated as retrograde, while an employee who says that the chances improve is rated as enlightened. The question is so transparent that it would be difficult to credit any results obtained by asking it – everyone must surely know which answer will give them a better score. But the fundamental problem with this question is that the only logically possible answer isn't

given as an option. A company has a fixed number of promotions to award at any given time; all that employment equity could possibly do is affect the way in which these promotions are distributed among the candidates. That is, it neither enhances nor reduces the chances of advancement for *all* employees. The most that proponents of employment equity can claim, then, is that it makes the distribution more fair; but inasmuch as it involves preferential treatment for members of the designated groups, this is not obviously true, either, as we shall see.

7. E.g., the Ontario government at one time provided $500,000 in loan guarantees, through the Women's Business Alliance, to help female entrepreneurs get more access to funding (***Globe and Mail,*** 10 October 1994, B6). (It may still do so.)

8. *United Steel Workers of America v. Weber* (1979) 443 U.S. 193; *Adarand v. Pena (Secretary of Transport, State of Colorado)* (1995) 515 U.S. 200. [Hereafter *Adarand*.]

9. Thus Juanita Westmoreland-Traor■, former head of Ontario's Employment Equity Commission, is reported as saying that she "spends part of her time 'putting away straw issues'... [such as] people's fears that employees will be hired or promoted because of their gender or race, not because of their ability." (***Globe & Mail,*** 4 October 1994, B2). This statement is highly disingenuous. Employment equity does not require that people be hired or promoted *simply* because of their sex or race or disability; they are supposed to be minimally qualified, as well. But by the same token, employment equity permits people to be denied employment simply because of their race, sex, or lack of disability, as we shall see. When a candidate lacks only one characteristic by virtue of which he is not given equal employment opportunities it is fair to say that the person who is eventually hired or promoted owes that fact to her sex or race or disability, and not to her qualifications.

10. Jeff White reports that "In 1992, Ontario Provincial Police Commissioner Thomas O'Grady proposed the force intervene at the National Parole Board to obtain 'expeditious consideration' for pardons for certain convicted criminals. His reason? So the OPP could hire them to meet employment equity quotas." ("The New Racists," ***Next City***, vol.1, no.3 (Spring 1996), p.40).

11. The penalty of $50,000 for non-compliance was specified in Ontario's *Employment Equity Act*. The penalty for failure to comply with the *FCP* is to be cut off from federal government funds – something that simply cannot be contemplated by many federal contractors, including universities.

12. In the 1991 *Status of Women Supplement* to the ***CAUT Bulletin,*** which was devoted to the subject of employment equity in the university context, two independent contributors (Susan Jackel, at p. 15; and Michele Pujol, at p.19) state that it is difficult to recruit and retain female faculty due to competition from other employers in North America. Similarly, the faculty association newsletter from the University of British Columbia once advised: "Applications from outstanding women should receive immediate response to avoid competition from other universities" (1 May 1991). Judith Potter, in ***Western News*** (31 January 1991, p. 4) says, "...there are insufficient numbers of female PhD applicants... [and] those same applicants are in demand by many other universities. Either we meet the competition or we change the criteria [i.e. do not require female applicants to have a PhD] if we are truly committed to increasing the numbers of full-time women faculty." These statements do not suggest that the doors of academe are slammed shut in the faces of women; just the opposite. They do not indicate a demand-side problem of discrimination, but a supply-side pseudo-problem.

13. Martin Loney, "The Politics of Race and Gender," ***Inroads,*** Issue 3 (Summer 1994), pp.84-5.

14. Martin Lonely refers to employment equity as the practice of "removing the barrier of qualification." (personal communication)

15. The weakest form of employment preference is the "tie-break" system, whereby a DGM is given the position if all else is equal. But even this mild form of preference is significant for most entry-level jobs, where there typically isn't anything to distinguish between candidates.

16. The terms 'qualifications' and 'merit' did not appear anywhere in the Ontario Act, leading Professor Doreen Kimura F.R.S.C. to quip that the Act is "completely without 'merit'." (personal correspondence)

17. Ironically, recruiting for the Office of the Employment Equity Commissioner of Ontario relied upon precisely this method: "The Commissioner was appointed not through open competition but by the Premier's Office…. The Office of the Commissioner has never advertised a position in any newspaper, preferring to rely upon what it calls 'outreach'. This appears to mean sending notices of recruitment to a small and unrepresentative number of organizations around Toronto." (Martin Loney, "The Politics of Race and Gender," ***Inroads,*** Issue 3 [Summer 1994], p. 85.) What is a vice for the old boys, it would seem, is to be counted a virtue among the new girls.

18. Richard Epstein, Forbidden Grounds: The Case Against Anti-Discrimination Laws, (Cambridge &

Harvard, 1992), makes a strong case against even these modest requirements. I repeat, however, that the requirement of "reasonable accommodation" is not the subject of this essay.

19. Criticisms of preferential employment practices are related to each other in many complex ways. The primary grouping in this essay is by analytical type, rather than by topic or logical progression. However, an attempt has been made to match the order of criticisms within each analytical type so that arguments which follow a natural progression can be pieced together by following section numbers. For example, the conceptual problem of conflicting aims discussed in §Bl is related to the "two wrongs" fallacy discussed in §CI, which in turn is related to the foundational issue of using race and sex as proxies for disadvantage discussed in §D1; and this, finally, is related to the practical problem of exacerbating stereotypes discussed in §El. The most logical sequence to read another strand of argument is §D3-§C3-§B3-§E3. The arguments adduced in other sections of this essay weave a more complicated web, so connections will be noted in the text. In Part F I focus on the single topic of role models and adduce arguments from each of the four analytical types to challenge it.

20. A much fuller account of the history of legislation in this area is provided by Rainer Knopff; Human Rights and Social Technology: The New War on Discrimination, (Carleton University Press, 1989).

21. A typical definition of systemic discrimination is: "indirect, impersonal and unintended discrimination that is a result of inappropriate standards which have been built into employment systems over the years" ("CAUT's Policy Statement on Positive Action to Improve the Status of Women in Canadian Universities: Preamble," ***CAUT Status of Women Supplement, CAUT Bulletin*** (March 1991), p. 12.)

22. The leading case involving judicial imposition of goals and timetables upon an employer as a result of a finding of direct and systemic discrimination is *Canadian National Railway v. Canada (Human Rights Commission)* [1987] 1 S.C.R. 1114.

23. This point is advanced by Leo Groarke in "Affirmative Action, Women and the 50% Solution," ***Policy Options,*** vol. 14, no.4 (May 1993).

24. Indeed, supporters of employment equity frequently talk as though discrimination were the *only* explanation for disadvantage. But one can be disadvantaged for many reasons besides having faced social prejudice and discrimination. A refugee who arrives in Canada with little more than the shirt on his back, for example, is certainly disadvantaged; but equally certainly, this is not the result of prejudice or discrimination which he has suffered in Canada – nor possibly anywhere else, since he might well be from a privileged group in his country of origin.

25. A proponent of this view of employment equity is Dale Gibson, a former Manitoba Human Rights Commission chairman and now Professor Emeritus of the Faculty of Law, University of Alberta. According to Jeff White, Professor Gibson wrote an article published in 1985 in which he admitted –

> …that employment equity "employs the very statistical methods that antidiscrimination laws condemn." Its real purpose is to eliminate statistical imbalance. But statistical imbalance is not necessarily the result of discrimination. Gibson acknowledged this but claimed it is "irrelevant. Affirmative action," he said, "is not aimed primarily at prejudice or discrimination. [Only] some of the imbalance which affirmative action is intended to redress is the result of discrimination." In Gibson's view, statistical imbalance itself constitutes an injustice. ("The New Racists," ***Next City,*** vol. 1, no. 3 (Spring 1996), p. 38.)

26. Commenting on Professor Gibson's views as outlined above, Jeff White says:

> This has disturbing implications. The view implies that the underrepresented gentiles [in the professsions in Europe] of the 1920s and 1930s were right to feel aggrieved. It implies that they were right to take corrective action [by restricting admissions to universities from Jewish applicants], though there had been no discrimination in favour of Jews. (*ibid.*)

The same thing that happened to the Jews in earlier decades happened to the "over-represented" Asians in the California university system, until a proposition banning race preferences was passed in 1998.

27. I argue in later sections that the targets prescribed by employment equity are mathematically (§B2), morally (§C3), scientifically (§D3), and practically (§E3) invalid or unrealistic. Here the claim is that they generally require preference in hiring ("speeding") in order to be met. As noted previously, Ontario's *Employment Equity Act* required employers who were covered by the legislation to aim to achieve proportion-of-population targets – targets which are not likely to be achievable in the foreseeable future, if ever, without strong preferential treatment. Targets like this give effectively unlimited discretion to the administrators of the policy. Even in the administration of the ostensibly more conservative *FCP,* targets tend to be artificially inflated. Thus, for example, although the proportion of university teachers in Canada who were women in 1993 was 21.8%, the

target suggested by the *FCF* was 28.4%. The 28.4% figure is derived from the proportion of female teachers in Canada's universities *and colleges.* Obviously, universities and colleges do not have equivalent labour pools; one surmises that they were deliberately lumped together simply in order to produce a discrepancy in need of "correction."

28. As was noted earlier, by requiring that every workplace to have at *least* as many DGMs as in the national average, the *FCP* actually tends to ratchet up the proportion of DGMs in the workforce. This is because there is no provision either in the law or in its implementation to increase the representation of WAMs where *they* are "under-represented." For example, the employment equity plan at the University of Alberta, called ***Opening Doors*** (1993), prescribes "minimum targets" for hiring DGMs, as required by the *FCP*. If the targets for women were met in all job categories there, then that workplace would become 53.1% female. (The overall national average is only 45% female.) In fact, the greatest discrepancy between UA's workforce and the national average, according to ***Opening Doors,*** is in the category of supervisors, where males are "under-represented" by 35 percentage points. Yet this is deemed progress, not a problem in need of correction. Of course, once *all* employers have achieved the target of having "at least" the national or local average for each of the designated groups in each job category, these national and local averages will no longer be the same as they were at the start of the exercise; they will have gone up. Thus it is not difficult to see how policies like this, if pursued to the letter, will lead to WAMs being disproportionately represented on the unemployment lines (see §Dl and §E3). Given their consistent track record to date, proponents of employment equity seem perfectly willing to accept that result.

29. Granted, 'criminalize' is an exaggeration for effect; no employment equity law in Canada imposes an actual prison sentence for failing to meet its requirements. I let it stand because, in the first place, there is no concise phrase meaning a civil sanction which could amount to a death sentence for a corporation. Besides, a prison term *is* ultimately the sanction for refusal to pay a fine resulting from the law.

30. There are moral and practical aspects to this problem, as well as the definitional (i.e. conceptual) one raised here. The moral issue is raised in §C2 and the practical issue in §E1. I assume that there is no problem with *defining* 'women', although the moral and practical concerns with self-identification are perhaps as relevant for women as for the other DGMs.

31. Biologically speaking, races are sub-categories within species which are distinguished by differential fertility rates. For example, if two populations of mice have higher fertility rates among their own group than between groups, they are said to be of different races. Fertility rates between human groups do not differ; thus from a biological point of view, there are no human races.

32. The 1901 Canadian census declared that "only pure whites will be classed as whites." Sadly, we have returned to that standard.

33. In 1989, Statistics Canada attempted to collect data on race through a direct question, and found that 85% of West Asians (Afghans, Armenians, etc.) and 70% of Latin Americans declared themselves, "incorrectly," to be white. Another study, reported in *A Matter of Fairness: Report of the Special Committee on the Review of the Employment Equity Act* (Ottawa: Queen's Printer, 1992) found an under-reporting of protected status of approximately 50%.

34. On workplace surveys, employees are asked, "Do you consider yourself to be disadvantaged by virtue of belonging to a visible minority?" Or even: "Do you have a disability which your employer might consider to be a disadvantage in employment?" These are complex questions; they ask: Are you a member of a visible minority, and if so do you consider yourself to be disadvantaged because of it? Or: Do you have a disability, and if so might your employer hold prejudices about you as a result of it? Visible minorities who do not consider themselves to be disadvantaged, or who do consider themselves disadvantaged but not because of their ethnicity, would answer "No" to this kind of question. No acceptable answer is available to someone who is disabled but who does not wish to speculate about his employer's possible prejudices. Quite different, more specific, questions are asked on the national census.

Another reason why the numbers on a workplace survey might differ systematically from those of the national census is that there are many reasons for responding to the national survey besides its use for employment equity purposes. A person whose visible minority, aboriginal, or disabled status is marginal might identify him- or herself as such anyway on the national survey in order to improve the profile of a group to which he or she has some sentimental attachment, or in order to lend weight to a case for having a variety of social services available to members of these groups. But if this same person disagrees with preferential, quota-based hiring practices, he or she might choose not to self-identify as a DGM on the workforce survey.

35. For more on the influence of ethnicity on occupational choice, see §D3. Whether the kind of aesthetic considerations of workplace composition mentioned in the text might be sufficient to abridge fundamental human rights is discussed further in §C3.

36. To illustrate the proposition that true diversity is not really what proponents of proportionate representation want, I offer the following illustrations from Canadian universities.

(i) In January 1991, the President's Standing Committee on Employment Equity at the University of Western Ontario released its first annual review. Recommendation 10 of this review would require administrators to demonstrate "that short listed candidates have been interviewed regarding evidence of their understanding of, and commitment to, employment equity" ***(Western News,*** 31 January 1991). In other words, this committee would like to test candidates for teaching jobs in mathematics, engineering, and medicine for their political-ideological purity before hiring them. Perhaps even more alarmingly, they in effect recommend weeding out all political scientists and political philosophers who have principled disagreements with current employment policies. Imagine the effect this would have upon the prospects of obtaining a well-rounded, liberal-arts education there!

(ii) In February 1993, the administration of the University of Alberta released its plan for employment equity, called ***Opening Doors.*** At the beginning of the following Fall term, a properly established club called Students for Equality set up a booth in the "Butterdome," along with all of the other student clubs on campus. Their purpose was to make students aware of the administration's employment equity plans, and to generate opposition to them. Did the University administration accept this exercise of freedom of association and democracy, this independence of mind? Did they make the Students for Equality "feel welcomed and valued" – as ***Opening Doors*** promises to do? Hardly! In what can only be described as a *tour de force,* the Associate Registrar himself came to the booth of Students for Equality and suggested that it would be best if they packed up their things and went away. In short, they were shown the "open doors."

(iii) Typically, the committees charged with developing employment equity plans at Canada's universities are highly "representative": members of all the designated groups are sought. But I have yet to see such a committee produce anything that is not 100% supportive of the goal of attaining "at least" proportionate representation. One of the more fraudulent claims in ***Opening Doors*** is found in its opening paragraph: the claim that it "represents the views of a diverse and multicultural community." It doesn't even occur to the authors to question what the appropriate kind of diversity is in a university context; they simply and naively presuppose that if a group is composed of a "representative number" of women, visible minorities, aboriginal peoples, and the disabled, then it is suitably "diverse" – even if they are all ideological clones. This is the politically correct conception of diversity. In contrast, if you believe that one of the primary purposes of a university education is to open people's *minds,* then you would think that the relevant kind of diversity in a university context would be diversity of reasonable opinion, reflected in deep and multi-faceted disagreements. By this more appropriate measure of diversity, ***Opening Doors*** is an abject failure. Indeed, one can only conclude that the President's Employment Equity Implementation Committee was hand-picked precisely to *avoid* reflecting any degree of diversity of opinion on this matter. In this the PEEIC is utterly typical of its kind.

(iv) I have engaged in many debates on the subject of employment equity at Canadian universities. In contrast to the typical President's Committee on Employment Equity, these debates have been remarkably "unrepresentative" in the respect in which employment equity is concerned – they have involved a highly disproportionate number of WAMs. Yet, in spite of this biological homogeneity, they have exhibited a far greater diversity of opinion than can be found in the "diverse" groups who write employment equity reports.

37. Though the jury is still out on this empirical question. See, for example, Finbarr O'Reilly, "Women achieve workplace equality – as bullies," ***National Post***, 21 September 2000, A1-2.

38. See Leo Groarke, "Affirmative Action, Women and the 50% Solution," ***Policy Options,*** vol. 14, no. 4 (May 1993). The debate resurfaces in §D3.

39. Here is a short list of critical sources: Robert Simon, "Preferential Hiring: A Reply to Judith Jarvis Thomson," ***Philosophy and Public Affairs,*** vol. 3 (1974), pp. 312-320; George Sher, "Justifying Reverse Discrimination in Employment," ***Philosophy and Public Affairs,*** vol. 4 (1975), pp. 159-170; Alan Goldman, Justice and Reverse Discrimination, (Princeton University Press, 1979); C.R. Carr, "Unfair Sacrifice – Reply to Pluhar's 'Preferential Hiring and Unfair Sacrifice'," ***Philosophical Forum,*** vol. 14 (1982), pp. 94-97; Janet Richards, The Sceptical Feminist, (Penguin, 1982); Celia Wolf-Devine, "An Inequality in Affirmative Action," ***Journal of Applied Philosophy,*** vol.5 (1988), pp. 107-108; Rainer Knopff, Human Rights & Social Technology: The New War on Discrimination,

(Carleton University Press, 1989); Frederick Lynch, Invisible Victims: White Males and the Crisis of Affirmative Action, (Greenwood Press, 1989); Frederick Lynch, "Surviving Affirmative Action (More or Less)," ***Commentary,*** vol. 90 (August 1990); and Leo Groarke, "Affirmative Action as a Form of Restitution," ***Journal of Business Ethics,*** vol. 9 (1990), pp. 207-213.

40. L. Andrew Cardozo, "Levelling the Playing Field," ***Policy Options,*** vol. 14, no.2 (March 1993), p. 28.

41. A Gallop poll found that 74% of Canadians agreed with the statement: "The government should hire new employees based on their qualifications." Only 21% of respondents agreed that "The government should actively hire more women and minority group members." The remainder expressed no opinion. Only 25% of women, and 17% of men, agreed with the latter statement (***Toronto Star,*** 23 December 1993).

Preferential hiring practices do not even garner majority support among blacks in South Africa. Only 28% of Africans agreed with positive preferences, while a further 19% agreed with the tie-breaking principle of giving jobs to blacks where all else is equal. As for the rest, 21% of Africans agreed with basing hiring decisions strictly on merit, while providing blacks with special training opportunities; and the largest group, 31% of Africans, agreed with hiring based on merit with no special training for blacks. (R.W. Johnson, "Affirmative action fails its biggest test," ***National Post***, 3 October 2000, A18.)

42. Having squandered untold billions of dollars over the years on frivolous business ventures, bailouts, subsidies, perquisites, and boondoggles, and thus having run up huge debts, it is understandable that Canadian governments would now see fit to demand that the private sector bail them out for their dismal performance on social objectives. They can no longer borrow money to throw at these problems.

The purpose of this essay is to point out the many weaknesses of the central aspects of employment equity, and not to solve all of society's problems. It is beyond to scope of this essay to suggest appropriate reforms in education, welfare, and so on that might genuinely promote the end of levelling the playing field for disadvantaged persons in Canada. However, I wish to distance myself from such fads as restructuring the curriculum to make it more "accommodating" for members of the designated groups by rewriting history.

43. For example, after quoting Rev. King during a debate at Queen's University (1 February 1995), a black female law student accused me of "misinterpreting" him and of taking his words "out of context." It was asserted that if he were alive today, Rev. King would support employment equity as it has evolved since his untimely death.

44. Voluntary response rates of about 80% are common, at least in the university context. Such low response rates for this kind of exercise could easily make statistical comparisons invalid in yet a third way (in addition to random variation and inconsistent survey methods), namely by producing a skewed sample. Of course, the assumption that all those who fail to complete the survey are WAMs does not correct for this possible skewness. In a letter to the ***Globe & Mail*** in the Fall of 1993, W.F. Avery observed that at least 50% of the visible-minority persons in his workplace did not identify themselves as such. See also endnote 33.

45. I have advocated this means of sabotaging employment equity in a letter to the editor of the ***Globe and Mail***, as has law professor Robert Martin on an episode of "Face Off" (***CBC Newsworld***), both early in 1995. Around the same time, an equality-seeking group in Ontario began passing out flyers at various workplaces around the metro Toronto area which advised employees to respond to their workplace surveys in this way.

46. Here is why the politics of preference inevitably leads to calls for race-purity bureaucracies:

> SHESHATSHUI, Nfld. - The Innu Nation is demanding the Labrador Metis Association prove its members are really aboriginal.
>
> "This is the biggest scam since Europeans arrived in Labrador," Innu Nation president Peter Penashue said yesterday. "We feel it's time the so-called Metis are challenged. We feel there's no such thing as Metis in Labrador."
>
> The Innu Nation says the Labrador Metis Association is getting funds that should be going to what it calls legitimate aboriginal groups and individuals. Mr. Penashue said the Metis have been able to secure $600,000 a year in training money meant for Innu and Inuit students....
>
> "I remember when being aboriginal meant having brown skin and being stigmatized by non-aboriginal people in Labrador. Most settlers denied any aboriginal heritage, but the second they saw money in being aboriginal they all of a sudden became Metis, to the detriment of the Innu…."
>
> John Martin, a director on the Metis association's board, said his people are under no obligation to prove their ancestry.... "This is a wonderful opportunity for the Innu to slam us and now they're really slamming us."

(***Globe and Mail***, 17 September 1996, A4.)

47. See §D3, as well as Neil Bisoondath's Selling Illusions: The Cult of Multiculturalism in Canada, (Penguin, 1994), for a more extended discussion of the points raised in this paragraph.

48. Simone de Beauvoir urged that "No woman should be authorized to stay at home and raise her children. ...one should not have the choice precisely because if there is such a choice too many will make that one." This is quoted by Christina Hoff Sommers in Who Stole Feminism? (Touchstone Books, 1994), pp.256-7.

49. For more on this point, see Warren Farrell, The Myth of Male Power, (Simon & Schuster, 1993).

50. ***Employment Injuries and Occupational Illnesses 1972-81,*** (Minister of Supply and Services, 1984).

51. See, for example, Christina Hoff Sommers, Who Stole Feminism? (Touchstone Books, 1994); and Shelby Steele, The Content of Our Character: A New Vision of Race in America, (St. Martin's, 1990). See also the biography of California's Proposition 209 proponent Ward Connerly, Creating Equal: My Fight Against Race Preferences (reviewed by Neil Seeman, ***National Post***, 30 September 2000, E5).

52. Repeating over and over again the same dubious, skewed, one-sided, unsubstantiated, or brazenly fabricated claims, especially to an uncritical media and in the equally uncritical journals devoted to "women's studies," is the favoured means by which the foundational claims purporting to support employment equity (and other radical-feminist causes) are foisted upon an unsuspecting population. Gretchen Morgenson accurately refers to this process of amplification and distortion as the "feminist echo chamber," in her review of Susan Faludi's Backlash ("A Whiner's Bible," ***Forbes,*** 16 February 1992). Three recent book-length expos■s of these tactics are: Christina Hoff-Sommers, Who Stole Feminism?, (Touchstone Books, 1994); John Fekete, Biopolitics Rising, (Robert Davies, 1994); and Cathy Young, Ceasefire!, (The Free Press, 1999).

53. Disadvantage is a more fundamental concern than "social prejudice and stereotyping," which is the focus of the Supreme Court of Canada (see Part G). This is so for two reasons: (i) Our *Charter* guarantees fundamental freedoms of thought, belief, opinion, and conscience. Thus laws cannot attack prejudice directly; they can only address its effects. (ii) Secondly, if social prejudice and stereotyping does not result in adverse real-world effects – i.e. measurable disadvantages – then it is not at all clear why we need a law which sacrifices other people's employment interests in order to deal with the problem. It might seem unfair, but the law has traditionally held that people who are able to mitigate their damages are entitled to less (or no) compensation as a result.

54. *Per* Jocelyn Berthelot of the *Centrale de l'Enseignement du Quebec.* The passage is quoted by Katherine Young in ***The McGill Reporter*** (7 October 1992), citing the ***Montreal Gazette*** (6 June 1992).

55. This is the fundamental principle of justice enunciated by John Rawls in A Theory of Justice, (Belknap Harvard, 1971). This book has been so influential in the second half of the 20th century that it has been called the "Bible" of liberal thought.

56. ***Globe and Mail,*** 14 November 1994. It might be suggested that the reason university-educated women have a higher labour-force participation rate than university-educated men is that they are socially conditioned to accept lower pay, and employers are taking advantage of this willingness to work for less. This hypothesis is refuted by another Statistics Canada study, this one by Ted Wannell and Nathalie Caron in 1994. It showed that women (as well as visible minority) graduates of Canadian universities actually earned *more* than university-educated white men. They indicate that disparity is greatest and most consistent in the public sector, likely as a result of employment equity. (Cited by Jeff White, "The New Racists," ***Next City,*** vol. 1, no. 3 (Spring 1996), p. 38.)

57. "Women set to overtake men in 'best' jobs," ***Globe and Mail,*** 14 March 1994, A11.

While equally represented in this top third of occupations in Canada, women at this level still tend to be paid less, on average, because they are considerably younger, on average, than the men in these occupational categories. But the foundational errors behind pay equity are the topic of another essay.

58. Edward Herberg, "The Ethno-Racial Socioeconomic Hierarchy in Canada: Theory and Analysis of the New Vertical Mosaic," paper presented to the annual meeting of the Canadian Sociology and Anthropology Society, (May 1990), University of Victoria. I cite these numbers to show that visible minorities were doing quite well in Canada long before employment equity even existed. A wealth of more-recent data along the same lines can be found in Martin Loney's The Pursuit of Division: Race, Gender, and Preferential Hiring in Canada, (McGill-Queen's 1998).

59. Statistics Canada, ***Canadian Social Trends,*** no.37 (Summer 1995). Remarkably, after only 40 years of having been interred and having had all of their property confiscated, Japanese-Canadians had a median income 46% higher than Canada's supposedly privileged WASPs. (Jeff White, "The New Racists,"

Next City, vol.1, no. 3 (Spring 1996), p. 38.)

60. ***The Frankfurt Advertiser,*** 18 May 1995, p.11.

61. These Statistics Canada data are consistent with the findings of a 1991 Economic Council of Canada study by Arnold Desilva, called ***New Faces in the Crowd***. After analyzing the statistics and considering an assortment of other studies and experiments, Desilva says, "The main conclusion to emerge is that there is no significant discrimination against immigrants in general."

In the summer of 1994, Liberal immigration policy came under fire by some members of the Reform party, who claimed that immigrants were abusing the social welfare system. Instantly, the media uncovered studies that were favourable toward immigration. A story in the ***Montreal Gazette,*** headlined "immigrants fare well in professions: census figures buck stereotypes" (13 July 1994, A3), is typical of stories that appeared across Canada at this time. In the context of immigration policy, "bucking the stereotypes" is positive – it means that immigrants overall had lower unemployment rates and worked longer hours that other Canadians, and indeed used welfare less. Interestingly, nobody in the liberal media seemed to make the connection with employment equity, namely that these same studies show that immigrants succeeded in Canada without it. It is fair to say that the ones who are most driven by inaccurate stereotypes about the economic performance of visible minorities in Canada are supporters of employment equity, including our courts and tribunals.

62. Thomas Sowell provides strong evidence to suggest that preferential policies actually exacerbate inequalities within the groups they favour, as the most-advantaged among them are advanced further while the least advantaged are not helped at all. See Preferential Policies: An International Perspective, (Wm. Morrow, 1990).

63. Andrew Dreschel, "Reversal of Fortune," ***Hamilton Spectator,*** 1 October 1994. (This line of the reporter's questioning was prompted by a prior phone conversation with me.)

64. The main reason why there are more members of visible minorities in the present qualified-applicant pool than in decades past, obviously, is that immigration continues to increase their proportion in the general population. In the case of women, one important cause is the rather remarkable gains made in educational attainments, as noted above. Changes in societal norms relating to family size undoubtedly play an equally important part.

65. The study was reported in ***The Chronicle of Higher Education***, 24 November 1993. One cannot infer from this study that the situation is the same in Canada; I use it merely as an illustration of the kind of research which needs to be done and has not been done, if serious empirical support for employment equity is sought.

Note that one shouldn't expect proportionate representation in an occupation until at least one generation after proportionate representation has been achieved in the initial qualified-applicant pool. For example, if women first became equally represented among graduates from law faculties in Canada in 1990, then one should not expect them to be equally represented in the profession until 2025 or so. This is because it will take a full generation for the male-dominated group of lawyers pre-1990 to reach retirement age. Failure to appreciate the stock-and-flow dynamics of employment has lead many advocates astray in prescribing compressed timetables.

66. This table comes from Grant A. Brown, ***The Employment Equity Empress Has No Clothes: An Inquiry into Preferential Hiring at Canadian Universities***, (Gender Issues Education Foundation, 1992), p. 11. It is reproduced in the Fraser Forum Critical Issues Bulletin III (1993), ***In Defense of Academic Freedom and Scholarship***, p. 42. Either source may be consulted for an exposition of the methodology and assumptions underlying the comparisons in this table.

My analysis shows that discrimination in favour of women in university hiring accelerated dramatically in the decade *prior to* the introduction of employment equity in Canada. It continued to accelerate, at increasing rates, after 1985. For an analysis of more recent statistics which bear this out, see Andrew Irvine, "Jack and Jill and Employment Equity," ***Dialogue,*** vol. XXXV (1996), pp. 255-91. Eva Ryten, Director of Research for the Canadian Medical Colleges, analyzed the history of hiring faculty in Canada's medical colleges, and found no evidence of discrimination against women there, either. Her findings are reported in "Women and academic medicine," ***Canadian Medical Association Journal,*** vol. 145, no. 9 (1991), pp. 1076-1077.

One can be excessively sceptical about statistics, and obstinately believe that these studies do not conclusively *prove* that there has been no widespread, systemic discrimination against women in hiring at Canadian universities. But obstinacy in belief is not a sufficient basis for public policy; the onus must be on those who would defend employment preferences to prove conclusively that such discrimination has in fact occurred, and continues to occur. Given the statistics marshalled in the cited studies, this is a very tall order.

67. Data on the applicant pool for faculty hires at the University of Alberta was temporarily made available in the early 1990s. To illustrate how this information can be useful to uncover discrimination in hiring, I quote from a useful analysis by faculty member Terry Elrod: "Fifty-three women were hired from 464 women applicants (11.4%), whereas 117 men were hired from 2019 applicants (5.8%). Thus a woman applicant was 2.0 times as likely to be hired as a male applicant." Assuming that talent is not correlated with sex, Elrod goes on to calculate that the probability of 53 or more women being hired from this pool purely by chance is 1 in 30,000. ("A probability of less than 1 in 40 is conventionally regarded [by courts] as *prima facie* evidence of discrimination," he notes.) Elrod further calculated that in the Faculty of Arts 29% of the applicants were women while 70% of the jobs (21 out of 30) went to women. That is, women were 5.7 times more likely to be hired than men in the Faculty of Arts. The probability of this happening by chance is 1 in 450,000. (Terry Elrod, "Data on U of A hiring indicates women applicants are favoured 2 to 1 (6 to 1 in Arts," ***Academic Concerns***, vol. 1, no. 1, 9 February 1992.) After this analysis was published, the University stopped releasing information about the composition of the applicant pool for faculty hiring.

68. Morley Gunderson and Leon Muszynski, ***Women and the Labour Market,*** Canadian Advisory Council on the Status of Women, (1990), p. 63. This is doubtless a consequence of the fact, noted previously, that boys are far more likely than girls to drop out of high school.

69. Thomas Sowell, Preferential Policies: An International Persnective, (Wm. Morrow, 1990), pp. 155-156.

70. See for example James Sheppard and Alan Stratham, "Attractiveness and Height," ***Personality and Social Psychology Bulletin***, vol. 15 (1989), pp. 617-627; and James Calvert, "Physical Attractiveness," ***Behavioural Assessment***, vol. 10 (1988), pp. 29-42. More recently, Tom Arnold reports ("Shiny is sexy? Balderdash," ***National Post***, 1 November 2000, A1-2.): "Less hair means fewer job opportunities, study concludes." And Robert Taylor similarly reports ("The ugly truth of employer discrimination," ***National Post***, 23 November 2000, C1): "Based on a sample of 11,000 people aged 33, the survey found a substantial wages differential exists between people deemed to be attractive or unattractive…. The survey claims that employer prejudice over an employee's physical appearance is widespread." As long as men dominate hiring committees, physical attractiveness will tend to work to the (unfair) advantage of women.

71. The "theory of the second best" in economics states that, in an economy with only one inefficiency, it is always an improvement to correct it; but in an economy with many inefficiencies, correcting one of them might not lead to any overall improvement (since this correction might merely exacerbate other inefficiencies). The argument in the text is a social analogue to the theory of the second best, substituting 'society' for 'economy' and 'discrimination' (or 'disadvantage') for 'inefficiency.

72. This is the politically correct version of Matthew 13:12.

73. Bertrand Russell, "The Superior Virtue of the Oppressed," Unpopular Essays, (Unwin Paperbacks, 1950), pp.69-75.

74. Again, I can do no better than cite Martin Loney's The Pursuit of Division: Race, Gender, and Preferential Hiring in Canada, (McGill-Queen's 1998) for an extensive elaboration of the themes explored in this paragraph.

75. According to an Associated Press story in February 1992, "A working woman's best bet in a boss is a man with a daughter. Studies show that men in their mid-fifties who have grown daughters are more likely to promote women employees. That's because they want their daughters to do well in their careers, says Felice Schwartz of the research firm ***Catalyst*** in New York."

76. Leo Groarke makes this point in "Affirmative Action as a Form of Restitution," ***Journal of Business Ethics***, vol.9 (1990), pp.207-213. One rationale I have heard for why tenured WAM professors who support employment equity should not have to take early retirement is that they can do more good by staying employed and promoting the cause of employment equity than by giving up their job to one DGM. But why assume that the replacement DGM will be any less committed to the cause? This rationale gives some indication of the strength of chivalry (and hypocrisy) which prevails among Canada's academic elite.

77. Thomas Sowell, Preferential Policies: An International Perspective, (Wm. Morrow, 1990).

78. E.O. Wilson, On Human Nature, (Harvard, 1978), pp. 160-61.

79. Richard Bernstein, The Dictatorship of Virtue, (Knopf, 1994), pp. 1-3.

80. "It is interesting to note that the number of traits identified by geneticists as X-linked [i.e. female-linked] has been growing linearly with the years, at a rate of about 3 per year from about 1958 to 1982, so that by 1982 there were from 115 to 250 X-linked

traits identified, depending on the criterion…. It would be naïve to suppose that behavioral processes were somehow immune to such gene influences" (Thomas Hoben, "A theory explaining sex differences in high mathematical ability has been around for a long time," ***Behaviour and Brian Sciences***, vol. 16, no. 1, [1993], p. 188.

81. I owe this illustration to Tom Flanagan, who used it in his talk at the University of Alberta, 28 September 1993.

82. A good introduction to this topic is Doreen Kimura's article in the August 1993 issue of ***Scientific American***. Her recent book, Sex and Cognition, (MIT Press, 1999) is a more technical but still accessible and thorough treatment of the subject. See also the June 1988 issue of ***Behaviour and Brain Sciences*** (vol. 11, no. 2) where Camilla Benbow summarizes her findings on differences in mathematical reasoning ability in intellectually precocious preadolescents, and responds to a host of critics.

83. See Thomas Sowell's Preferential Policies: An International Perspective, (Wm. Morrow, 1990).

84. Jeff White, "The New Racists," ***Next City,*** vol. 1, no. 3 (Spring 1996), p. 39.

85. ***Globe & Mail,*** 22 November 1994, A6.

86. Thomas Sowell, Preferential Policies: An International Perspective, (Wm. Morrow, 1990).

87. For an insightful account of this phenomenon, see Robert H. Frank, "The Political Economy of Preference Falsification: Timur Kuran's Private Truths, Public Lies," ***Journal of Economic Literature,*** vol. 34 (March 1996), pp. 115-23.

In her report on equality for women in the legal profession, retired Supreme Court Justice Bertha Wilson seems to recognize this problem, in part. She notes the "chilly climate" that is created for women who have advanced in their profession through preferential treatment, by male colleagues who grumble about being passed over. But instead of advocating against preferences for this reason, she blames the male victims for their grumbling and suggests that the "chilly climate" they create is all the more reason to give preferences to women!

88. With respect to the moral costs I will only say that those who start with the premise of "zero tolerance" for any particular evil are well on their way to becoming fascists.

89. Peter Brimlow and Leslie Spencer, "When quotas replace merit, everybody suffers," ***Forbes*** (15 February 1993), pp. 80-102.

90. Mike Bell, in his commissioned assessment of the Government of the Northwest Territories' native employment program concludes that the net effect over a four-year period was to increase the proportion of aboriginal people working for the Government of the NWT from 30% to 32% – that is, by 242 persons. In fact, since the wages paid by the GNWT were significantly better than those paid by the administrative offices of local bands, this increase might be nothing more than a skimming of aboriginal employees from local to government positions. The administrative cost of this project to the GNWT alone was $21 million, not counting various in-kind contributions from local departments.

91. Edward Harvey and John Blakely, "Employment Equity in Canada," ***Policy Options***, vol.14, no. 2 (March 1993), p. 3. They predicted that by the year 2000, 85% of new job entrants will belong to at least one of the four designated groups.

92. If we can continue to expect many women to take some time off work for family responsibilities at some time in their careers, then the problem noted here will be exacerbated even further. For in order to maintain a 50-50 employment ratio, firms may have to hire 60 or 70 per cent women to make up for those they lose through attrition.

93. ***Vancouver Province,*** 31 May 1994, A14.

94. ***Vancouver Province,*** 31 May 1994, A14.

95. ***Vancouver Courier,*** 24 July 1994, p. 10.

96. *Employment Equity Act*, S.C. 1995, c. 44, s. 10.

97. This example derives from Robert Nozick, Anarchy, State and Utopia, (Basic Books, 1974).

98. Madeline E. Heilman and Michael C. Simon, "Intentionally favoured, unintentionally harmed? Impact of sex-based preferential selection on self-perceptions and self-evaluations," ***Journal of Applied Psychology,*** vol.72, no.1 (1987), pp. 62-68.

99. Madeline E. Heilman et al, "Skirting the competence issue: Effects of sex-based preferential selection on task choices of women and men," ***Journal of Applied Psychology,*** vol.76, no.1 (1991), pp. 99-105. Many minority scholars have expressed similar concerns: Thomas Sowell, "Are quotas good for blacks?," ***Commentary***, vol. 65 (1878), pp. 39-43; Shelby Steele, "A negative vote on affirmative action," ***New York Times Magazine*** (13 March 1990); Dinesh D'Souza, Illiberal Education: The Politics of Race and Sex on Campus, (Free Press, 1990).

100. Peter W. Hogg, Constitutional Law of Canada, (Carswell, 1999), student ed., pp. 1016-1017. See also §G2 below.

101. *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at ¶2. [Hereafter *Law*.]

102. It is beyond the scope of the present essay to provide a full critique of the s. 15 "synthesis" in *Law*; I restrict myself to clearing matters up insofar as this is necessary for a challenge to employment equity.

103. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. [Hereafter *Andrews*.]

104. *Andrews*, *supra*, pp. 180-181; quoted by Iacobucci in *Law*, *supra*, at ¶27.

105. *Andrews*, *supra*, p. 152; quoted by Iacobucci J. in *Law*, *supra*, at ¶29.

106. *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1331-33; *per* Wilson J. [Hereafter *Turpin*.]

107. *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 992; *per* Lamer, C.J.

108. *Miron v. Trudel*, [1995] 2 S.C.R. 418, at ¶128; *per* McLachlin J. (as she then was). [Hereafter *Miron*.]

109. *Law*, *supra*, at ¶¶34, 39; *per* Iacobbucci J.

110. See, e.g., *Andrews*, *supra* (citizenship); *Turpin*, *supra* (province of residence); *Schachtschneider v. Canada (C.A.)* [1993] 1 F.C. 40 (C.A.) (marital status); *Egan v. Canada*, [1995] 2 S.C.R. 513, *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [hereafter *Vriend*], and *M. v. H.* [1999] 171 D.L.R. (4th) 577 (S.C.C.) (sexual orientation). No less an authority than Peter W. Hogg (*supra*, pp. 987ff) takes this line of cases as establishing the rule that "discrimination must be on listed or analogous grounds" to warrant s. 15(1) scrutiny. (Note that this edition of Hogg's authoritative text was written before *Law*, *supra*.)

The concept of 'historical disadvantage', so heavily relied upon in this line of S.C.C. judgments, is not found in the *Charter*; it is an invention of the Court, and it is not a neutral one. Since individuals do not exist over historically significant periods of time, individuals cannot be "historically disadvantaged" as such. Thus, by judicial fiat, an individual could be deemed disadvantaged only if he or she belonged to a group which the courts can be persuaded has experienced a history of disadvantage in Canada. As one editorial writer put it, "This is not [only] a case of group rights over-riding individual rights; this is a case of group *histories* determining individual rights." (***Globe and Mail,*** 14 July 1993.)

111. In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, Sopinka J. goes so far as to say, "…the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, *but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society*…" (at ¶66; emphasis added). This is a strained and very far-reaching construal of s. 15(1). In fact, the idea of ameliorating conditions of disadvantage arises only in s. 15(2), and is nowhere to be found in s. 15(1). To say that the purpose of s. 15(1) is, even in part, to ameliorate conditions of disadvantage is to make the amelioration of conditions of disadvantage a *positive requirement* of every law in Canada. Every law would, in effect, have to be a mini-affirmative-action program. Employment equity, according to this interpretation, would not only be permitted by s. 15(1); it would be required. We should make no mistake about the enormity of the implications in this interpretation. Ameliorating conditions of disadvantage is an open-ended policy, with no clear limits other than those determined by the judiciary. This amounts to handing the courts total discretion to over-rule all policy decisions a government might make, on the ground that the government has not done enough to further substantive equality. And this amounts to usurping the role of government, not reviewing it.

112. *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906; *per* Wilson J. [Hereafter *Hess*.]

113. *Hess*, *supra*; *per* McLachlin J. (dissenting).

114. *Miron*, *supra*, at ¶149; *per* McLachlin J.

115. *Miron*, *supra*, at ¶15; *per* Gonthier J. (dissenting).

116. It is tempting and, I think, justified to worry that the expression of high moral sentiment found in C1 and C2 is vacuous, not in the sense of being meaningless but in the sense of being capable of an indefinite range of meanings. But insofar as they have a definite meaning, it would seem to refute the notion that s. 15(1) contains a strong remedial or ameliorative purpose. Ever since utilitarianism was first advanced as a coherent moral and political philosophy some 200 years ago, it has been attacked for its failure to take seriously the separateness of persons, the fact that individuals have their own lives to live and are not simply interchangeable parts of some super-organism, society. Individuals are not to be sacrificed for the sake of others. A similar debate has been waged over the practical implications of majoritarianism inherent in democracy. The very phrases seized upon by the S.C.C. in the above quotation – protecting "essential human dignity and freedom," "equally deserving of concern, respect, and consideration" – have been used by critics of utilitarianism and advocates of limited

government to make this point. Whatever ameliorative purpose can be read into the requirements of s. 15(1), then, are constrained by the prohibition suggested by these phrases against discriminating against one group for the benefit of another.

117. Textual support for this view can be found at ¶64 of *Law*, where the Court says, "A stereotype may be described as a misconception whereby a person or, more often, a group is unfairly portrayed as possessing *undesirable traits*, or traits which the group, or at least some of its members, do not possess" (emphasis added) – though even here the Court recognizes in the end that one can be harmed by having traits attributed to you that you do not in fact possess.

118. According to Sanderman J.A. (Alta.), women generally receive a 25 to 33 percent discount in sentencing, whereas men are routinely offered the option of having the charges against their female co-accused dropped entirely if they plead guilty. (Comments made to a moot court audience on 11 October 2000, University of Alberta.)

119. "Everybody wants to be a victim. And the paradox is that victim status accrues precisely to those who can acquire enough clout to make others afraid of them. Victimhood has become one of the fruits of power. Anyone can be an underdog; the trick is to be a registered, pedigreed underdog" (attributed to Joseph Belloc Sobran).

120. *Law*, *supra*, at ¶73.

121. *Hess*, *supra*, p. 944.

122. When Wilfrid Laurier University announced its policy to exclude male applicants to a faculty position in developmental psychology in the summer of 1999, the rationale offered was that they wanted to achieve "gender balance" in the department. The Chair of the Psychology Department emphasized that the Department had had difficulties hiring women in the past, despite concerted efforts to attract female candidates, because qualified women were in high demand elsewhere. (See again endnote 12.) On the basis of these public statements, I helped a colleague to prepare a challenge to the WLU hiring policy, on the ground that "gender balance" *per se* isn't a constitutionally valid basis for discrimination. We argued that the employer must prove that the persons targeted by their hiring policy – in this case, women with a Ph.D. in developmental psychology – are disadvantaged in Canada relative to the excluded group – men with a Ph.D. in developmental psychology – in order not to run afoul of s. 15(2). Since, by their own admission, this was not so, this particular program should not withstand constitutional scrutiny. The case worker for the Ontario Human Rights Commission who handled the complaint dismissed it without showing the slightest comprehension of the difficulty we noted. The challenge is presently being reviewed by the OHR Commissioner.

123. Net of federal government transfers, the per capita income of Newfoundland was recently the same as that of Venezuela. Thus Newfoundlanders can make a clear claim to having a history of economic and social disadvantage in Canada, yet Newfoundlanders are not considered by Canadian courts to be a "protected group."

124. Whatever kinds of preferential employment policies might survive a defense under s. 15(2) and a justification under s. 1, they will have to be in certain ways more inclusive that the policies enacted in Canada to date, with their four designated groups. In *Vriend*, *supra*, the S.C.C. determined that Alberta's *Individual Rights Protection Act* (R.S.A. 1980, c. I-2) was unconstitutionally under-inclusive by virtue of failing to contain sexual orientation as a protected ground. I see no reason why the same reasoning would not lead the Court to read sexual orientation into any *Employment Equity Act* under s. 15(1), giving gay men the same rights to preferential hiring and promotion as the other DGMs. Further, since employment equity has an especially adverse impact upon younger WAMs (see §E3), it could very well amount to discrimination on the basis of age as well. Indeed, it is difficult to see why WAMs who belong to any of the listed or analogous groups wouldn't have a legitimate complaint that employment equity is under-inclusive in a way that makes it unconstitutional. The under-inclusivity of the WLU program was also argued in our complaint to the OHRC; but it, too, was evidently not understood by the case worker.

125. *Adarand*, *supra*, at ¶¶10, 11.

126. An important reason for the paucity of jurisprudence on s. 15(2) and s. 28 of the *Charter* is that those who might have grounds to use them in a constitutional challenge do not have access to the legal and financial resources needed to bring a case all the way to the S.C.C. This is another consequence of the paradox of victimhood referred to earlier. By virtue of being deemed advantaged, WAMs are not given access to the millions of government dollars available to others for court challenges; only registered, pedigreed underdogs have access to these resources.

127. The test was first enunciated in *R. v. Oakes* [1986] 1 S.C.R. 103. [Hereafter *Oakes*.] Hogg (*supra*, pp. 752-3) notes that the Court in *Andrews*, *supra*, was divided over whether the strict *Oakes* test should apply to s. 15 cases, or whether a lesser test might be

appropriate. He is of the opinion that the *Oakes* test should apply, and this seems to be the practice of the Court, anyway.

128. *RJR-MacDonald v. Canada* [1995 3 S.C.R. 199, at ¶144 (emphasis in the original).

129. Given that s. 28 applies "notwithstanding anything in this *Charter*," it is arguable that an infringement of s. 28 cannot even be saved by s. 1.

130. *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713 at p. 770.

131. *Oakes*, *supra*, at p. 139.

132. Lest anyone think that I exaggerate here, recall the claim of Ontario's erstwhile Commissioner of Employment Equity (associated with endnote 63 above), to the effect that even the most advantaged woman was disadvantaged relative to even the most disadvantaged man. This merely acknowledges the logical implications of employment equity.

133. *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177, at p. 218.

134. *Oakes*, *supra*, at p. 139 (emphasis in the original); *Dagenais v. CBC* [1994] 3 S.C.R. 835, at p. 889. Hogg (*supra*, p. 751) notes that this fourth step in the s. 1 analysis has never had any effect on the outcome of a case, and argues convincingly that this is because it is redundant. If a law passes each of the first three tests, how could it fail the third?

135. The effect of unconstitutionality is that the law is struck down wholesale, such that even practices under the law which might otherwise survive s. 15 scrutiny are rendered unconstitutional.

136. See Richard Epstein, Forbidden Grounds: The Case Against Anti-Discrimination Laws, (Cambridge & Harvard, 1992); and Walter Block and M.A. Walker, Discrimination, Affirmative Action, and Equal Opportunity, (Fraser Institute, 1982).

137. Address to the convocation at the University of Toronto, where he was awarded an honorary doctorate (***Globe & Mail***, 24 November 1994).

138. ***UBC Reports***, 11 January 1990, p. 3.

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