

CASE STUDY ONE

**Ontario: Lessons of the Rise and Fall of Employment Equity Legislation from the
Perspective of Rights Advocacy**

BY

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INTRODUCTION

This study examines the recent rise and fall of employment equity in the province of Ontario, from the perspective of equity rights advocacy. Specifically, the study considers the activities of the Alliance for Employment Equity (AEE), the grassroots non-governmental coalition that emerged as a unifying centre for equity advocates during the height of debate in the province in the 1990s. This study is part of a larger project to address the ways in which employment equity has been treated in two distinctly different contexts, Ontario in southern Canada, and the new territory of Nunavut in the north. The southern project included organizing a community workshop on employment equity, involving members of the Alliance and other representatives involved in employment equity practices. This study presents findings based largely on papers, discussions and dialogues that were presented in that workshop.

The practice of employment equity is one of the major public policy initiatives designed to tackle issues of racism in the workplace. The most informed advocates also understand employment equity as part of the wider efforts to overcome social problems of inequality that both contribute to and are enforced by racialized practices in the workplace. Equitable access to employment is central to marginalized groups struggling to overcome the material effects of discrimination, and programmes designed to achieve equity in the workplace are critical in changing social attitudes and practices. From such a perspective employment equity policy, and the implementation of that policy to redress discrimination in the workplace, is seen as a basic human right, one that should and can be endorsed through state legislation.

Canada is recognized as a world leader in employment equity programmes, especially because of its extensive federal-level policies and legislation. The federal approach was instigated in

1983 with the Royal Commission on Equality in Employment.¹ The findings of the Commission formed the basis for the *Employment Equity Act* of 1986 (revised in 1996), which mandates actions to advance the representation and promotion of women, aboriginal peoples, persons with disabilities and members of visible minorities in the federal public service and in federally regulated industries.

Since 1986, the federal government has developed an extensive set of employment equity policies. In the case of visible minorities, however, these policies have yet to produce effective measures for promoting equality. At the provincial level, in contrast, employment equity policies are poorly developed and legislation is almost non-existent. At the current time, only British Columbia and Quebec have legislated employment equity – and in both cases these are very limited; the other provinces have a range of less formal and similarly limited policies.²

In December 1993, the Ontario provincial government under New Democratic Party Premier Bob Rae passed employment equity legislation that was to become the most comprehensive legislation to date under any Canadian jurisdiction. The *Act to Provide Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women* (1994, referred to hereinafter as the ‘Employment Equity Act’) applied stronger employment equity measures than those contained in the federal legislation, covering both the public service and the private sector. The legislation was repealed two years later under the newly elected Ontario Progressive Conservative majority government led by Mike Harris. This act, called the *Job Quotas Repeal Act* (1995, hereinafter the ‘Repeal Act’) occurred in an atmosphere of ideological backlash against the principles of employment equity in general, and against the move to provide substantive workplace equality for the four designated groups, including visible minorities.³

The AEE was at the forefront of the campaign leading up to the passage of the Employment Equity Act. After having worked for many years to see the fruition of the legislation, when the act was dismantled, they were compelled to shift perspective from a position of advocacy to one of adversary in defence of the repealed legislation. The group moved quickly to challenge the repeal based on their claim that the denial of employment equity contravenes the *Canadian Charter of Rights and Freedoms*. This case came before the Ontario Court, General Division, in November 1996, and was dismissed in July 1997. In April 1998, the AEE challenged the decision in the Ontario Court of Appeal; in December of the same year that Court, although acknowledging systemic discrimination in employment, dismissed the appeal on grounds that the complaint should have been lodged under the *Human Rights Code*. The Alliance, taking the position that the complaints-driven process that

regulates the Ontario Human Rights provisions does not address systemic discrimination, carried its legal challenge to the Supreme Court of Canada. In December of 1999, the Supreme Court declined to hear the appeal.⁴ Since that time, the AEE has temporarily closed its doors, while considering how to re-group and continue its efforts.

The balance of this study presents a brief description of the rise and fall of employment equity legislation in Ontario, followed by a discussion of the role of the AEE in advocating on behalf of employment equity. Our focus on the AEE stems from our recognition of the importance of grassroots organizations such as this in the struggle to overcome racism. Moreover, we consider the lessons for anti-racist coalitions when faced with conditions of backlash and an atmosphere in which anti-racist programs are set back.

The method of presentation of this argument will integrate legislative and policy analysis with findings resulting from a workshop on employment equity policy in Ontario, conducted by the authors for purposes of this study in partnership with the AEE. In October 1999, we organized and participated in a one-day workshop in Toronto attended by approximately twenty-five employment equity practitioners in Ontario.⁵ The workshop agenda included presentations from the authors, from representatives of the Alliance for Employment Equity, and from a representative responsible for employment equity implementation from the BC government, the only province that at that time had employment equity legislation in place. The experiences and contributions of these practitioners in attendance – many of whom have been advocates for employment equity before, during, and after the enactment of the legislation – provide a unique interpretation of the Ontario example.

Unlike other provincial and territorial debates which have taken place across Canada, the Ontario example includes not only a legislative or policy issue at the level of public governance, but also a Charter challenge through the courts. Though the challenge presented by the AEE was ultimately defeated, the initiation and preparation of the case played a crucial educational role among employment equity advocates. Importantly, it shifted the terrain of debate from one of backlash against employment equity to an issue of human rights as protected by the Charter of Rights and Freedoms. The lessons of this case study for advocates of employment equity within and beyond Ontario are rich indeed.

LEGISLATING EMPLOYMENT EQUITY IN ONTARIO

The AEE was formed in 1987 as an informal association of community advocacy groups, members of labour unions and individuals. The federal *Employment Equity Act* (1986) had been passed a year earlier, and pay equity legislation had recently been enacted in Ontario. The time seemed ripe to push for an expansion of the concept of employment equity into jurisdictions beyond the federal sphere. At that time, however, general concern for issues concerning women and of the disabled was more openly advocated and addressed than for visible minority and Aboriginal groups. By 1991:

There was a climate in which people were being discriminated against in employment, and there was no way to deal with it except through individual complaints, which didn't work as we had already seen for pay equity. So we decided that a law was needed in order to get employment equity going. The way we looked at equal pay for equal value was always a subset of employment equity, so this was the overarching measure. . . . We looked more at the Ontario pay equity act than at the federal legislation because it was proactive, had a place for shared roles in the workplace, and a strong role for the unions, although some conflict of interest for those in power. There was momentum for an equity act to be supported by the leaders [which included] a lot of support from the top, although not necessarily the mid-levels.⁶

In adopting an advocacy role, the AEE adopted a two-pronged strategy. One aspect was to conduct a broadly-based community education program, targeting especially labour unions and community groups, in an attempt to generate support for new legislation; the other was to lobby directly the New Democratic government to bring the legislation into effect. Both efforts had mixed, but generally positive, results among their target constituencies. It became clear in the early stages,

however, that the public perception of employment equity was one fraught with uncertainty over the specter of creating unfair advantage for the designated groups, and in particular for visible minorities:

There were many things to overcome. Everyone hated the notion of affirmative action [especially the] media and the unions. There were always some who felt comfortable jumping up to say that's reverse discrimination. [One very influential person]⁷ said you can never do anything to redress past discrimination. [It seemed that we could] never achieve a societal consensus; we were always on the edge, pushing on the most progressive edge and hoping we could sustain our momentum. . . . One of the problems was that we relied on the *Charter*, and the equality provisions were not well known. People didn't really care; they had a gut feeling that it was not fair, that the American quota system had been a disaster.⁸

Despite a general climate of scepticism, the NDP government became convinced of the need for employment equity legislation, and began to move toward creating it. In the Speech from the Throne on November 1990, the intention to introduce mandatory, broadly based and accountable employment equity legislation was announced, with a promise to consult with the people of Ontario about implementation. In March 1991, Juanita Westmoreland Traore was appointed the first Employment Equity Commissioner. The mandate of this office was to receive and review briefs and hold public meetings, in order to “create, implement and enforce legislation that is fair, workable and practical, the input and co-operation of many employers, unions, designated group members and other interested persons”⁹

In this climate, the AEE continued its lobbying strategy, involving both detailed responses to the content of the prospective legislation, and more general appeals for political support:

We became very, very involved in the details of the legislation. Pay equity had been vulgarized in the process of going through the committees, and we could end up with an unenforceable model if we were not careful with what was in this new Act. But the NDP felt very vulnerable to accusations that it [the party] was too close to activist groups, so they cut us out of the consultation process. We thought the [proposed legislation] was very weak and made comments that it was not results-oriented legislation. But they wanted to focus on climate and systems review, not on

numbers. We were afraid it would get watered down, and we did not have good connections to government officials. . . . We sought the help of a true champion in the legislature who intervened. We gave him our bottom line demands and said that if these conditions were not met, there would be no support from anyone.¹⁰

Although the AEE was at this point working in the same direction as the government, they found the situation fraught with political considerations:

Once the Commission was set up the head of the Commission was put on a very short leash by the minister. She tried to do a lot of public education, but she was in a strange role. She would meet with us, but could not get the minister to move. Two problems arose between the minister and the commission: the commissioner wanted a major public education campaign which the Alliance would take a role in, but the government decided that that ran the risk of being seen as using government money for political purposes. The second thing was that it was seen as a conflict of roles for the Commission to be involved in the development of legislation that she would administer. In the same way they decided they would do without activist roles, they would forego the expertise of the Commissioner.¹¹

Despite the misgivings of the AEE, public consultation was extensive. The Office of the Commissioner received over 400 written briefs prior to the first reading of Bill 79, and an additional 100 presentations and 184 written briefs after the bill was tabled.¹² The Ontario Human Rights Commission estimates that fourteen government offices were immediately responsible for administering some aspect of the legislation as it went forward.¹³ There was strong support from a range of government-sponsored offices, including the Ontario Women's Directorate, the Anti-Racism Secretariat of the Ministry of Citizenship, the Office of Disability Issues, the Race Relations and Policing Unit of the Ministry of the Solicitor General, the Employment Equity Program of the Ministry of Education, and the Ontario Human Rights Commission.

The Employment Equity Act went considerably beyond the mandate established in the federal legislation. The most notable factor was its inclusion of a wider spectrum of employers than those covered by the federal act. The law included in its mandate the provincial government and all its agencies, public sector employers of ten or more employees (including municipalities, school

boards, universities, hospitals and all other health care facilities), as well as private sector employers with more than 50 employees. The law was generally aimed at promoting equality and removing workplace barriers. Despite the claims made by those who opposed the law, there were no quotas set for hiring or promoting members of the designated groups; rather employers were called upon to set employment equity plans, to take positive measures to remove systemic barriers, to conduct workplace surveys and to set timetables for reaching equity goals. A tribunal was set up to act as mediator and adjudicator in equity issues related to the legislation, and to review and enforce orders from the Employment Equity Commissioner. Employers failing to comply with Commission orders could be prosecuted, and fined up to \$50,000.¹⁴

Response to the call for participation was extremely mixed, and covered the political spectrum. We present some evidence of responses here in order to provide a flavour of the discourse. The topic of employment equity dominated radio call-in shows and other media for some time after its passage. Once the law was enacted, responses became increasingly more unfavourable.¹⁵ For the most vociferous opponents, the law was an affront to the concept of individual freedom and private enterprise, attacked the concept of merit,¹⁶ and would result in job losses.¹⁷

This perspective was given stronger profile during the early weeks of the implementation of the Employment Equity Act, which coincided with the period when both the Ontario and federal governments were gearing up for election campaigns. The Reform Party, predecessor of the Canadian Alliance, had adopted an anti-employment equity position as one of the major planks in its platform,¹⁸ playing to a public among whom, according to polls at the time, only about 20 percent favoured employment equity.¹⁹ The rhetoric of the opponents at the time shows a well established political tactic: to focus narrowly on one putative aspect of the new law, namely job quotas, which ironically were not and had never been a part of the legislation, and then to focus on that issue ignoring all others.²⁰ We could find virtually no discussion in the negative press coverage, for example, of discussion of the employment equity plans that emphasize the creation of a barrier-free workplace.

More common, however, were the middle-ground opponents, who expressed ‘concerns’ and misgivings about whether it was the right answer to problems of inequity. This type of press coverage ranged from describing the legislation as “ground breaking” but unlikely to win widespread support, and therefore likely to fail,²¹ to concerns about the financial costs of implementation.²²

There were also suggestions that the law was “idiotic”,²³ would lead to divisiveness among visible minority groups,²⁴ or to false claims to “Aboriginal ancestors” in order to make a fraudulent claim for “special treatment”.²⁵ Even some of the organizations representing the designated group members expressed mixed feelings about the law, perhaps in reaction to the barrage of charges that they would be given jobs on the basis of their designated status rather than “merit.” A group advocating for more jobs for aboriginal people called the law “draconian”, yet called on employers to respond by hiring more aboriginal workers.²⁶

The government had only partial support from the labour unions. Despite the fact that the AEE worked very closely with certain key contacts in the labour movement, criticism arose from various sources. Negative reactions were exacerbated by the NDP’s general loss of support from labour. The public sector unions, which had traditionally been favourable toward employment equity, later came out strongly against the Rae government in retaliation for the imposition two years later of a ‘social contract’ that saw public sector wages cut back.²⁷ The private-sector unions generally maintained higher support than did the public sector unions for the NDP government, but were less favourable to the principles of employment equity. As one labour activist put it:

There has been precious little political education around, or support for, the growing involvement of CAW in alliances with other social movements against capital's neo-conservative agenda. Union campaigns supporting employment equity, affirmative action, peace, and native self-determination didn't seem to fit well into the internal union political culture in Oshawa.²⁸

On the other hand, many of the supporters of employment equity, including key players in the labour movement, women’s groups and anti-racist groups and others, criticized the law before it was enacted because it did not go far enough. For some, the fact that the law did not affect smaller businesses was a “flaw”:

Proponents of Bill 79 say employment equity is essential. They point out that we live in a sexist and racial society and that voluntary measures have not worked in the past. I go along with that.

Briefly, Bill 79 states that employers in the private sector with more than 50 employees must survey their personnel in the designated groups, review their employee policies to find if there are any barriers, and set plans to lower any that are identified. There's a timetable and penalties for noncompliance.

Since the bulk of most businesses in Ontario, and particularly printers, have less than 50 employees, this is a real flaw in the bill. I suggest that inequities are far more frequent in smaller firms.²⁹

The Ontario Coalition of Visible Minority Women made the following points:

- Visible minority women face double and triple disadvantage
- The mandatory nature of the law and its reporting requirement should be supported
- Employment equity measures should include barrier elimination, job accommodation measures, positive measures and supportive measures
- The legislation should require negotiation with unions
- Education should be compulsory
- The law should include measures to ensure compliance and enforcement, with power given to the Commission to impose sanctions
- Workers need to have access to a systemic complaints system that avoids the delays inherent in the Human Rights Commission
- The legislation should cover all employers, with special provision for those with ten or fewer employees³⁰

A presentation by the Immigrant and Visible Minority Women's Organization made very similar arguments, emphasizing the need for two fundamental processes: extensive mandatory training and penalties for non-compliance.³¹ These presentations and others were similar in tone and content to the position taken by the AEE. Even among the advocates, there was a sense that while they wanted to push the bill to go farther, particularly in these two areas, the atmosphere was one in which it was difficult to achieve even as much as they did. Daina Green recalls:

In the lead up to the election, it did not matter whether the NDP backed away from or defended the legislation. It was their weakest piece of legislation. It never had majority support [within the party]. There was a lot of backlash even among equity seeking groups, and a general perception that employment equity had already been implemented, and a lot of people had already gotten their jobs because of employment equity measures. People got some idea of employment equity in their heads, and companies were looking at their employees, and saying, 'Let's hire a black person'. They had a vague idea of getting people into front line positions, with having a program in place to remove barriers.³²

Ontario's claim to be the first province, and for that matter the first political jurisdiction, to legislate broadly-based employment equity measures for the majority of employers and employees, thus emerged from the beginning in a highly contested discourse. It was on shaky political ground that was to be eroded completely when the NDP government was swept from power in the provincial election of 1995.

THE BACKLASH

Following the election of the Conservative Party under Mike Harris in 1995, action to discredit and repeal the Employment Equity Act was swift and strong. Within a few months, not only had the Act been repealed, but many measures that had been in place prior to passage of the Employment Act were also eliminated.³³ The offices that had been supportive of the Employment Equity Act, including those mentioned above, were also shut down; other offices that advocated for equity-seeking groups found their funds cut back to the point that they could barely continue to function.³⁴

The very title of the *Job Quotas Repeal Act* reveals much about the ideological context in which it was introduced. Using arguments characteristic of the backlash in Canada and internationally, the emphasis was placed on those who had suffered from demonstrated systemic discrimination in employment and in society as a whole, claiming that they had enjoyed unfair advantage. The Repeal Act not only eliminated all measures in place to advance employment equity, but it required that all information gathered in connection with the previous law be destroyed,³⁵ occasioning a massive paper shredding exercise. One experienced employment equity practitioner and advocate reflected on the impact of this announcement:

In 1995, after the provincial government repealed the Employment Equity Act and the other pieces of legislation, they campaigned to destroy information that had been gathered. One of the additional things that many people don't know about, is that any piece of documentation or recorded research on employment equity, for example something that went through the Ontario Women's Directorate or any agency that had 'employment equity' in it, was to be destroyed according to the law. There included books or documented research, whatever. These were to be destroyed and they did destroy them, they destroyed that information. So this

reminded us of something. It goes back to another period in time when a whole culture was to be erased.³⁶

Moreover, the destruction especially of demographic data on representation of members of the designated groups in hiring, retention and promotion, made the implementation of voluntary employment equity programs very difficult.

The repeal of the employment equity legislation took place in the context of ideological attacks and funding cuts to equity seeking groups in Ontario. Daina Green provides a graphic summary:

During the provincial election in the spring of 1995, one of the key election issues was getting rid of this very, very, 'terrible' law, that was ruining the business climate in Ontario and causing all these 'unqualified' women and other dirty people to be hired in these jobs that they didn't deserve. And that was a very successful campaign strategy. I think we all felt very deeply that we were being blamed for the need for employment equity and also for the beginning of the success of that model. The election campaign vilified employment equity and said that it was against merit. So when the current government began its first term it undertook a series of steps immediately to close down a number of the equity promoting activities.³⁷

The elements of the employment equity law that were specifically designed to address systemic discrimination faced by members of racial minorities and Aboriginal peoples were now rendered null and void. At the same time, any official, public recognition of racism was eliminated. The impact of the backlash in rolling back the rights of visible minority women at the official policy level was therefore to render the entire issue invisible.

The government closed down all the anti-racism secretariats. Anti-racism was no longer a term used by the government. It removed every employment equity coordinator from the province of Ontario, save one, in Corrections, who to this day retains his title; he is some kind of an anomaly. Then employment equity was no longer an acceptable term, nor was any reference to anything called a designated

group. So that was lost. All of the regional offices of the Ontario Human Rights Commission were closed, so that people outside of Toronto had no place to go to actually talk to a human being. And it became very difficult to talk to a human being in Toronto from the Human Rights Commission as well.³⁸

In the face of this massive assault, it is a tribute to the Alliance for Employment Equity that the organization not only survived, but re-grouped and began a new campaign. After a series of strategic discussions among members of the Board of Directors of the Alliance, and within the community and labour-based membership of the organization as a whole, a challenge was undertaken to the Harris government's attack on employment equity under the *Canadian Charter of Human Rights and Freedoms*. Four individuals, representing each of the designated groups identified in the repealed legislation, were named in the case. The argument maintained that the Ontario Conservative government's removal of employment equity legislation in the province was in violation of Section 15 of the Charter.³⁹ Legal counsel, Chile Eboe-Osuji, who was later joined by counsel Mark Hart, presented the case to the Ontario Court General Division in November of 1996. When the case, referred to as *Ferrel et al. v. Attorney General of Ontario*, was dismissed by Judge Dilks, the Alliance appealed. At that point, in the fall of 1997, Barbara Bedont joined the legal team. Speaking at the October 1999 workshop, Barbara Bedont noted:

There is really a distinction between whether something is wrong and whether something is illegal. Basically, the role of the lawyers was to advise the Alliance as to whether it was illegal. We were saying that when the government repealed the Employment Equity Act, that what was taken away was a remedy for discrimination, and that by doing that it was denying equal benefit and equal protection of the law. In our Leave to Appeal memo, we used the following analogy in order to demonstrate what we mean. If you are walking along and you come upon a river and you see someone drowning in that river, now obviously you are not responsible for that person drowning. If you then throw a lifesaver to that person and they are holding on to that lifesaver, they have a chance now to survive. And then you yank that lifesaver away from them. You are now complicit in the death of that person.

And this is what we were trying to argue with the Ferrel case. When the government yanked away the government Equity Act, it was essentially, taking away the hope of these groups to overcome the discrimination that they were experiencing in the workforce. And by doing so they were assisting the perpetuation of that discrimination. In a sense they were re-imposing those discriminatory barriers to employment equity. We pointed to the circumstances surrounding the repeal of the Act. We pointed to the fact that during the election, they repeatedly made misrepresentations regarding what was contained in the Act...And the way that they did it perpetuated the myth which is the very basis for discrimination, namely, that if you hire people from the disadvantaged groups you are hiring less qualified people. And so we were saying that this is helping to perpetuate the discrimination and governments can't do that under Section 15 of the Charter.⁴⁰

The section of the Repeal Act that called for the destruction of demographic information related to the implementation of employment equity programs was also taken up in the Charter challenge:

We were also saying that the government is actually going further, that it's not just about letting employers hire whoever they want. If the employers wanted to continue voluntarily with employment equity programs, now by virtue of this legislation, they were making it more difficult for them to do so. So again, it's proof that the government was taking active steps in order to actually prevent the elimination of discrimination. Our argument was that this is a violation of Section 15.⁴¹

The Charter challenge proved unsuccessful in the courts, but as a strategy for sustaining and mobilizing the Alliance for Employment Equity and for educating a wide section of the population of Ontario, the challenge played a crucial role. The case attracted wide support, through many hours of *pro bono* work by legal experts, and active participation in court demonstrations and media representation among members of the Alliance. Several large and influential labour and community organizations came forward as interveners in the case. These were the African Canadian Legal Clinic, the Ontario Federation of Labour, the DisAbled Women's Network, the Women's Legal Education and Action Fund (LEAF) and the Congress of Black Women. Clearly, though the Harris

government was attempting to eliminate the use of the term anti-racism, in practice anti-racism activists, including anti-racist activist women, were not prepared to be rendered invisible by legislative dictate. Independently and within the broad coalition of the Alliance for Employment Equity, visible minority women were able to maintain a public voice in defense of employment equity in Ontario.

What then are the implications of the assault on employment equity policy that has taken place in Ontario in recent years? What does it mean in normative terms that Canada's largest province is home of such an intensive and officially endorsed backlash? The term 'backlash' has become widely used in both popular and academic literature in recent years to refer to a phenomenon whereby reaction against a particular development seen as 'progressive' – such as employment equity, 'affirmative action' programs in the United States,⁴² environmental issues, etc. – 'triggers' a negative response among those of moderate persuasion who might otherwise support the initiative. In the process, proponents are branded as 'radical', and the victims (in this case members of visible minorities) as self-interested, even privileged. In the United States, for example, it is now widely believed that a backlash against the practice of affirmative action has led to reversals that take the situation back to conditions prior to implementation of any such programs.⁴³

Explanations of the backlash effect, both popular and academic, have been well advanced in recent literature, and we do not attempt to review them here.⁴⁴ Most of the discussions have taken place in an American context, and there is to date little substantive analysis of the backlash effect in Canada. Allowing for significant contextual differences between the two countries, both in terms of the legal and institutional systems and popular cultures, the situation in Ontario seems to conform to the emerging understanding of backlash as a social construction that is both deliberately used as a mechanism of reactionary politics, and complicitly accommodated by many of those who might otherwise support equity measures. This is not, however, to suggest that backlash is a figment of someone's imagination; it has very real effects.

The backlash effect is most successful when it creates an environment in which those who seek redress for the cumulative effects of historic oppression are further marginalized. From the perspective of rights advocacy, the backlash effect attempts ideologically to claim the ground of democratic practices based on an abstract notion of merit, while discounting the reality of systemic discrimination. Discrimination in access to the workplace, is thereby enhanced. This process is further advanced by limiting access to the courts, or commissions of enquiry, that are meant to

investigate systemic discriminatory effects. The concerns of those who face systemic discrimination to achieve basic equality are often transformed into discussions of democratic rights. Members of designated groups are depicted as individuals with the same rights as all others, without recognition of the systemic discriminatory effects that result in the very social construction of the designated groups. This retreat into a rhetoric of democratic rights of ostensibly equal individuals has been referred to as “democratic racism”.⁴⁵ It results in situations where not everyone is equally able to achieve the benefits of "equality", but this unequal situation is condoned because it does not transgress normative democratic ideals. Barbara Bedont understood this point in the development of the Charter challenge in Ontario, claiming on the contrary that constitutional rights demanded the re-enactment of the repealed Employment Equity Act.

Our argument was that taking away the Employment Equity Act was a violation of Section 15 of the Charter. And Section 15 states that 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. . . . This section on the equality rights guarantee basically has established an Aristotelian approach to equality. I will explain what I mean by that. There are two concepts of equality. One is that you should apply the same rules to everybody. So for instance you say to everybody you all have Sunday off and by having the same rules, that is supposed to be one form of equality. This concept of equality was rejected very early on in the life of this provision. Instead they adopted the Aristotelian approach that says that you treat likes alike, and you treat different persons differently, in order to ensure a more effective equality. So you have some people take Sunday off, you have some people take Saturday off, you have some people take Monday off, according to their needs or their special interests. This concept of equality has evolved, leading to one of the most important cases, the Eldridge case. This came out of BC where a deaf patient was unable to access medical care because there were no sign language interpreters. The Supreme Court of Canada saw this as a violation of Section 15. This case established that when the government is providing some kind of benefit, it has to take steps to supply access to those benefits even if it means giving certain groups special considerations. So, for deaf patients for example, the government has to provide sign language interpreters. And only in this way, can everyone have access to the same degree of medical care.⁴⁶

Despite the very important issues of principle that the appeal process uncovered, there is no question that the experience of losing the appeal was demoralizing, not only for the AEE members, but for the anti-racist struggle in general.

There was a lot of conflict around the appeal because we had effectively lost our case, so the risks were higher when we appealed to the Court of Appeal and the Supreme Court. We knew we had a very low chance of winning. . . . But our strength was at its highest. We got a lot of calls, three major intervener groups, lots of public support, which kept the spirit positive for a small group of people. But it was very concentrated among specialists at that point. Regular designated group people had lost faith and were dealing with other kinds of attacks. After we lost the appeal to be heard by the Supreme Court, we went into a decline, and we currently have no institutional support.⁴⁷

The loss of both institutional and public support, even among those most affected, is a significant result in an atmosphere of backlash. A number of factors – demoralization, lack of funding, withdrawal of infrastructure, shifts in public opinion – combine to create a downward spiral. The result is that the employment equity issue went from the centre of public debate to the back burner:

In the post-1995 period, social organization in Ontario has gone into a slump, with very little support. Big organizations lost interest in this fight because it no longer appeared winnable. The only boost was really the fact that the federal legislation came in and was a validation for us because it used the Ontario model. The backlash is repeated in a depressing way among visible minority groups, who feel that if you do enact legislation people will always think that members of these groups got their jobs because of it and not because they were qualified.⁴⁸

We do not want to diminish the negative effects of backlash, which we maintain is a real and significant phenomenon. However, employment equity advocates in Ontario have not emerged from the period of backlash silenced. On the contrary, because the backlash effect is actually about a competition of visions of democratic practice, and a struggle for the ground of human rights more broadly, the battle lines have been drawn on two sides. There is, to our knowledge uniquely in

Ontario, an organized and confident community that is highly educated in the political issues associated with employment equity, and continues to support its implementation.

ADVOCATING FOR EMPLOYMENT EQUITY RIGHTS: THE CONTINUING STRUGGLE

The policy vacuum that has been left in the aftermath of the repeal is profound. The Ontario government has developed an alternative “Equal Opportunity” policy that stresses “diversity” as a benefit to business productivity. In addition to the fact that it is directed primarily at the private sector and excludes the public service, this policy is explicitly *not* about redress of systemic discrimination. In a guidebook to the policy titled *Business Results Through Diversity*, notably published jointly by the Alliance of Manufacturers and Exporters Canada and the government of Ontario, equal opportunity is explained as “a new model – not employment equity or affirmative action”.⁴⁹ The policy guidelines continue to distinguish this merit-based program that applies to all employees on a voluntary basis from a quota system that offers “special privileges” with “bureaucratic requirements” as a human resource program.⁵⁰ This message is entirely consistent with the ideological position upon which the Employment Equity Act was repealed. “Equal Opportunity” is predicated on the assumption that all individuals are equal, and therefore should be offered equal treatment. The reality of systemic discrimination that unequally restricts access to employment positions and advancement for qualified persons of appropriate merit among designated groups is explicitly denied. The systemic impact of sexism, racism and oppression is erased from the policy.

If the backlash has been institutionalized at the government level, however, issues of discrimination continue to affect visible minorities, aboriginal peoples, persons with disabilities and women on a daily basis in the workplace environment and beyond. Visible minority women, who experience both racial and gendered forms of oppression, have been rendered particularly vulnerable.

At a forum on “Employment Equity: Measures that Work”,⁵¹ held in Toronto in April and sponsored by the Alliance for Employment Equity, Ethel LeValley, Secretary-Treasurer of the Canadian Labour Congress (CLC) and a long-standing advocate for workplace equity, recalled her

experiences as an aboriginal woman employed as a clerk at Algonquin Park. She worked there for eighteen years before taking a position with the Ontario Federation of Labour and later as an executive member of the CLC. For many of those years, her interest in becoming an enforcement officer in the park was denied on the grounds that: “You’re too short. You’re a woman. And you’re too aggressive.” After the Employment Equity Act was passed, she suddenly found herself promoted to the enforcement position. Moreover, she was placed in charge of the enforcement team, as Park Warden, and those under her direction were all male. She was also given exceptionally long hours, more irregular shifts, and barely any more pay. As Ethel LeValley stated:

I believe the Ministry was setting me up to fail, though it didn’t work. I took the job in charge of enforcement. I passed the course. And I grieved the hours. I won that grievance. But I think the employer set me up to encourage a backlash from the men I was supervising. That’s a true story. It makes you wonder, what happened to others who were working during the employment equity legislation?⁵²

The struggle continues on a number of levels and in a variety of contexts, including the workplace. While our research makes no claim to have studied workplace conditions – although we recognize the profound need for such work to occur – the example just cited perhaps provides some insight into one of the ways in which post-legislation issues have been worked out in areas beyond the legislative arena. This example also shows that even where the employment equity legislation has had some positive effects, it has not served as a panacea that would or could on its own secure an end to workplace discrimination.

Yet the struggle against such discrimination also continues. A wide array of community based organizations and, significantly, important sections of the Ontario labour movement, have become highly sensitized to issues of systemic discrimination and the need for pro-active workplace processes to ensure redress. Five years after the repeal of the Employment Equity Act, Ontario has a concentration of self-educated, highly trained employment equity experts, who in turn represent or are part of wider pro-employment equity communities. This is not to suggest that the backlash has no support within the Ontario population – this we assume is obvious. It is, however, the continued support for employment equity principles that commonly goes unnoticed. The debate regarding the development and implementation of employment equity continues below the surface.

A glance at the Alliance for Employment Equity homepage indicates the extensive knowledge base that developed in Ontario.⁵³ In addition to background information about the Alliance and its activities, the website includes headings such as “Charter Challenge Update”, with detailed documentation about the legal implications of the repeal of the Ontario legislation, and “Myths and Facts about Employment Equity”. Here is how one of such myths is carefully refuted:

MYTH 1: Employment equity is reverse discrimination:

Discrimination is treating one group unfairly. For example, if men and women were equally distributed in all job levels and salary levels of an organization, it would be discriminatory to selectively advertise for women, or to offer special training programs for them. But until all groups catch up, special, positive measures are needed to make sure they are represented in the workplace at the same levels as in the community. We know that the designated groups have been repeatedly discriminated against for many years. Employment equity rights old wrongs. “Reverse discrimination” implies that women, non-white workers and people with disabilities are being preferred over white, able-bodied male workers. The facts show that it is minority workers and women who face discrimination, get less access to educational programs and training, and are often denied jobs and promotions even when they do have the qualifications and experience. The problem is so serious that pro-active measures are needed to make change faster. Temporary measures aimed directly at under-represented groups are considered “special programs.” The Ontario Human Rights Code and the Canadian Charter permit them to relieve disadvantage. In the short term, some people who have counted on getting jobs or promotion by hearing about them by word of mouth, or because they “fit in” to certain workplaces will find more people competing for openings. Employment equity measures, currently voluntary in workplaces covered under the Ontario Labour Relations Act, are intended to counter a system which has provided a kind of “affirmative action” program for white, Anglo-Saxon males for a long time in certain industries. With employment equity measures in place, white males can no longer expect to step into the middle of the line – they will have to line up at the back with everyone else. That’s fair. Employment equity levels the playing field for all workers. Some people are worried that their own children will have to compete with a greater pool of

potential hires. This is a difficult issue, especially since there are not enough good, unionized jobs to go around these days. We can think of our daughters as well as our sons. However, employment equity programs do not mean that all people hired or promoted will be members of designated groups. There will always be people hired and promoted who are not members of designated groups.⁵⁴

While legislation was and remains understood to be an important measure to ensure redress for systemic discrimination, the law itself is only one step in a much larger struggle. As a result, while there is disappointment over the defeat of the Charter Challenge in the courts, there remains a sense that the struggle needs to be waged on a number of fronts, not only the legal one. As the Alliance for Employment Equity news release expressed it upon the Supreme Court decision to deny leave to appeal:

This disappointing result ends a spirited struggle through the courts and in the public arena, which began four years ago. In December of 1995, the newly-elected Progressive Conservative government of Mike Harris repealed several laws aimed at correcting the under-representation of racial minorities, persons with disabilities, Aboriginal people, and women in Ontario's workplaces. The Alliance for Employment Equity, representing hundreds of community and labour groups who support mandatory measures to eliminate discrimination in employment, filed suit immediately. We believe that governments must not be allowed to repeal laws that protect human rights.⁵⁵

Daina Green endorsed this perspective:

Finally, a few reflections on this battle. At the outset, we asked, 'how can we stop the government from taking away our hard-won advances?' We must also ask, 'where would we be today if we had not embarked on this intense tussle with the government through the courts?' We might be trying to shake off a long hibernation, and struggling to rebuild our movement, and our organization, from scratch. Instead, we have moved the debate forward, maintained its profile and its credibility. We may even outlast our opponent.⁵⁶

This debate has relevance beyond Ontario's borders. To provide but one example, British Columbia is currently the only province in Canada with employment equity legislation in place. This legislation applies to the provincial public service only, and is part of wider legislation regarding human resource management. At the October 1999 workshop on employment equity, Brian Dagdick, Director of the Equity and Diversity Division of the Public Service Employee Relations Commission in BC, presented a keynote address. As a long-standing advocate for employment equity and an experienced public servant, Brian Dagdick indicated that experiences such as that in Ontario and elsewhere led members of the BC NDP government to anticipate a serious backlash during the process of implementing the 1994 directive.⁵⁷ However, a backlash targeting this policy did not occur during the term of the BC NDP government. Moreover, Dagdick found that the threat of the backlash may be greater than its actual strength:

We did a baseline statistical analysis of what the BC government looks like, in 1993-1994. We surveyed all 40,000 BC government employees. The survey was confidential but it was not anonymous. There were employee numbers on each one. People knew that. We sent it out and we gave people a choice as to whether or not they filled it out. We didn't give people a choice about whether or not they returned it. This practice continues today. People filled out that initial survey and we thought - this was going to be the end of the world, right? All of the various government officials, senior government officials, were telling us at the time that this was it. This was the thing that was going to break its back. You were going to get backlash. There was going to be fighting in the street when we sent this to 40,000 employees. So, we sent it out. And we got an almost 80 percent response rate from people. The return rate was 78 percent. It took about a \$100,000 campaign in order to make that happen. We had people in every ministry to help us with doing this and we pushed very hard over a one-month period in order to get this done. Now, what was the backlash? Often times we don't do things for fear of the backlash. The backlash was about 25 returns out of 40,000 of people. They came back calling us various names. Some of the things we could mention are "commie pinko", "social engineer", "femmi-Nazis." Those are the things we can mention. There were worse. But there were only 25 or 30 of these. And so you have to have some perspective. On the other side, 32,000 people filled out the form and sent it in. I don't know if they were

happy or not about it. And then a number of people, about 20 percent, didn't bother doing anything, or sent it in blank. So, if the backlash was just those 25 or 30 people, out of 40,000 people, then it's not that big. There is the backlash and there was nothing to be frightened of. There was nothing to be scared of. Nobody went to the streets on this.⁵⁸

These observations notwithstanding, the terrain of debate regarding employment equity policy in BC, as in the rest of Canada, is changing and unstable. The BC election, saw the success of the Liberal Party, and a backlash against employment equity is already showing signs of development. Certainly in that province there is stark evidence of backlash targeting the rights of aboriginal peoples and visible minorities. Ontario's experience may prove to be an unfortunate bellwether indicating what lies in the future for BC.

Extending the Ontario situation to the federal level presents yet another significant contrast, and a central paradox. It has certainly not escaped the notice of employment equity advocates that the federal government has been relatively successful in its recent moves to improve the employment equity program, starting with the revision of the *Employment Equity Act* in 1996, and continuing with extensive changes including a major Task Force on the Participation of Visible Minorities in the Federal Public Service.⁵⁹ The issue of why the backlash has been so significant at the provincial level, but has gone hardly noticed at the federal level is an important one, although considerably beyond the scope of the current discussion. The apparent contradiction between the directions of federal and provincial employment equity policies was noted by Daina Green:

There are 275,000 employees in Ontario covered under the federal act. These are federal government employees. Then there is the federal contractors program, which covers an additional 860 employers of which 56 per cent are in Ontario. So we are talking about a total of a million employees covered under the federal contractors program, probably almost one half million in Ontario. We are talking about upwards of 750,000 workers in Ontario currently touched by employment equity – including the planning, surveys, identification of barriers, goals, timetables and reports. So it's not dead. Where is this backlash that the Harris government yelled at us about? This is just all going forward very quietly. Of course some people don't like it. But the media is not jumping all over it anymore. It is not that, as we were told, all these

people are being hired without merit. We are not hearing any of this. It really puts the lie to that whole campaign against employment equity.⁶⁰

Moreover, there is perhaps room for optimism regarding the influence that the federal program might have at the provincial level:

I think that because the Alliance [Party] did not win in the 2000 election the worst fears of federal employment equity being kicked out were not realized, and there is a possibility of the federal legislation becoming stronger, and affecting a huge number of people in Ontario. This could result in a strengthening of the realization that there is a need for legislation again. Because the federal law is creeping along under the radar, there is the possibility that we can build upon it. I'm getting calls from organisations that want to implement equity programmes properly, and we can help them to do so. We have no shortage of work. Many of these programmes are voluntary. They get people talking about systemic discrimination and about how to deal with it at the source. Many people realize that there are things to do, and it is not a bad climate for people who want to go ahead. There is not very much attention on it, if we can get some sort of critical mass of support, it would help to dispel arguments that the world will fall apart. We will then be able to go forward on established, rather than potential success – knowing that the sky didn't fall.⁶¹

CONCLUSION

LESSONS OF THE ONTARIO EXAMPLE

Every province in Canada represents a particular historical and current context in which systemic discrimination and challenges against it occur. In this sense, every provincial and territorial context is unique. If the Ontario example is unique, however, this does not mean that it is exceptional. The rise and fall of provincial employment equity legislation also sets an example for other provinces, and allows us to examine retrospectively what works and what does not on the stage of anti-racist activism.

Our research is specifically developed with a view to achieving employment equity. However, the current study is limited in both scope and application. It raises more questions, perhaps, than it answers. Nonetheless, we feel that we can conclude by making several points about how anti-racist activism occurs in a backlash situation, and where we might build upon recent experiences.

Our analysis shows that the backlash effect has two significant dimensions. Among those who oppose employment equity, it provides an ideological justification framed in terms of democratic rights of individuals in order to discredit the concept of systemic discrimination and the need for systemic, pro-active policies of redress. Among those who support employment equity, the backlash effect creates a climate of demoralization, exacerbated by the cutting back of resources and institutional support, and a situation of concern that if the struggle is waged too strongly it will result in further erosion of progress. These two dimensions reinforce one another. In the current context, this situation has led advocacy groups, of which the AEE is a prime example, to decline, or to continue the campaign upon less publicly visible fronts, in hopes that over time the environment of public discourse will once again shift.

The challenge then becomes how to encourage such a shift in public discourse. Our research shows a number of possibilities. One is to make broader connections, outside the Ontario context,

for example to the Province of British Columbia or to the federal level, where the backlash effect has been more muted for the time being. Another is to recognize that while the courts represent a significant site of struggle for anti-racist justice, there are other arenas where support needs to be cultivated. These include the municipal level, and the workplaces where voluntary participation continues to raise awareness of equity issues, and the diminished but still significant activist groups where support for equity issues is strongest.

Education programmes developed at the workplace, local trade union, and community levels can provide an important basis upon which to build. The ideological plane upon which employment equity issues are discussed is highly charged, complex and volatile. While its effects may take a long time to take hold, it is upon that plane that educational programmes need to be developed, to provide factual information, to dispel myths about the principles of employment equity, and to raise awareness of the deleterious effects of unfair practices, both for racialized minorities and for society in general.

In an atmosphere where institutional support in Ontario for employment equity rights advocacy is at such a low ebb, we do not wish to paint a falsely optimistic picture of the changes that can occur in the near future. We can, however, acknowledge that there remains considerable potential at the grassroots level, and we can recognize that without that grassroots involvement, the situation might be considerably worse than it is. The right to employment equity remains at central and necessary to the anti-racist struggle.

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