SUBMISSIONS TO:	Standing Committee on The Administration of Justice of The Ontario Legislature
RE:	Bill 79 (Employment Equity)
FROM:	Canadian Civil Liberties Association
DELEGATION:	A. Alan Borovoy (General Counsel) Carla D. Adams (Research Associate)

Toronto

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Among the objectives which inspire the activities of the Canadian Civil Liberties Association is the quest for both equality of opportunity and procedural propriety. It is not hard to appreciate the relationship between these goals and the issue of employment equity and affirmative action. On the one hand, the inequalities experienced by women, aboriginal people, visible minorities, and those with disabilities, require strong, even extraordinary, measures to accelerate the pace of progress. On the other hand, there is a risk that such measures could become excessive; they might even lead to discrimination against blameless individuals from other groups.

The focus of our attention is the special set of measures to enhance the employment prospects of women, aboriginal people, and visible minorities. In selecting these issues for comment, we acknowledge that somewhat different considerations might apply to the other constituency that is addressed in the bill: disabled people. To the extent that we support employment equity, the beneficiaries should include disabled people. But, to the extent that we would restrict employment equity, there may well be situations in which we would nevertheless preserve its benefits for disabled people. It is conceivable that the creation of job opportunities for them could require a level of "reasonable accommodation" beyond what is needed for the other constituencies. Accordingly, our comments will be confined to issues of race,

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ethnicity, and gender. Even at that, there may be issues in the Bill that we cannot now address because we were unable to convene a board meeting in mid-summer.

One matter of particular relevance, however, did not require a formal meeting. In order for employment equity to work, it is obvious that the government must make available substantial resources. Numbers of people will need to be trained in order to qualify for the jobs at issue. The disadvantaged of all groups - the designated and otherwise - should be generously assisted to acquire the proficiency they will need to compete in the market place.

Similarly, the task of implementing such legislation could entail certain significant expenditures because of the need for efficient administration, imaginative conciliation, and scrupulous enforcement.

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The Justification for Employment Equity

A 1991 survey conducted by our research and educational arm, the Canadian Civil Liberties Education Trust, disclosed that, of more than 1200 jobs in Sudbury and Sault Ste. Marie retail establishments, no more than 3 jobs were held by aboriginal people. In a majority of the places accounting for more than 850 jobs, there were no aboriginal employees[1]. Yet both these communities have relatively large aboriginal populations.

After more than three decades of human rights legislation in the Province of Ontario, these statistics seem simply incredible. Unfortunately, similar patterns have emerged elsewhere. In the late 1980s - before the recession - unemployment among aboriginal people was more than twice what it was in the general population[2]. Even aboriginals who worked were substantially less well off than others. More than 17% of aboriginal men on full time salaries were paid less than $25,000.; under 12% of all men were in this category[3]. More than 60% of aboriginal women on full time salaries earned less than $25,000. a year as against less than 48% of all women[4].

Similar disparities afflicted the visible minorities. Although there were proportionately more university graduates among visible minorities than in the general population (23% as against 13.9%), the earnings of such visible minorities were often significantly less[5]. Visible minority men were significantly over-represented in the low income categories: among those earning less than $25,000 per year, visible minority men proportionately outnumbered, by almost 2-1, their counterparts in the rest of the population (21.4% as against 11.5%)[6].

Women also have been suffering significant inequality. Despite the fact that about 70% of public elementary school teachers are women[7], for example, a 1991 publication disclosed that fewer than

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25% of principals were female and women occupied only 18% of the supervisory positions[9].

It is difficult to believe that deliberate discrimination has not been a factor in at least some of these situations. Frequently, however, it might well be impossible to prove the discrimination that has occurred. Most often, the selection of employees is based upon a host of factors, not all of which are susceptible to objective evaluation. And the more factors there are, the harder it will be to demonstrate the existence of discrimination.

Another factor that could make discrimination increasingly hard to prove is the growing use of employment agencies to do such dirty work on behalf of employers. Two surveys performed by the Canadian Civil Liberties Education Trust within the last five years demonstrate this phenomenon. Of 15 agencies randomly tested in Toronto, Ottawa, London, and the Kitchener-Guelph area, our 1991 survey revealed that 12 readily agreed to refer applicants on a "whites only" basis[9]. A follow-up survey in the summer of 1992 in Hamilton and northern Ontario, showed 7 out of 10 which indicated their willingness to abide by such restrictions[10].

In any event, experience tells us that deliberate discrimination is not the only cause of such inequities. Even in the absence of an intent to discriminate, certain systems create barriers to equity and mobility. Perhaps, for example, an outmoded recruitment or promotion practice has unwittingly retarded the advancement of certain groups.

In a municipal fire department years ago, for example, job openings were never publicly posted. The personnel officials relied exclusively on the applications which had been previously submitted. As uninvited applications came in, they were given priority based on date of receipt. Whenever there were openings in the department, that file was the sole source of employee

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recruitment. In view of the small turnover of fire fighters, this policy effectively blocked the hiring of immigrants. In the main, they could not have been here long enough to have established the requisite seniority in the file of applications.

Another example of a similar phenomenon is the practice, at one time in greater usage than now, whereby employers advertised for job candidates with "Canadian experience". Suspicions became particularly aroused when this stipulation was advertised by an employer who was seeking a dishwasher. While such a job requirement was not, by itself, unlawful, it could easily have been used to bolster unlawful discrimination. Moreover, even in the absence of a discriminatory intent, such employment advertisements could well have a discriminatory effect. Large numbers of immigrants would simply be unable to qualify.

The height and weight requirements in some police departments have operated to reduce the number of certain minorities and women who could qualify for constabulary positions. In other police departments, the regulations with respect to headgear have effectively ruled out Sikhs who felt obliged to wear turbans.

A number of years ago, CCLA processed a case in which a Jewish woman was discharged from her job because she refused to work on a particular Jewish holiday. At no point did the employer formulate a policy of excluding Jews. He simply insisted that all of his employees, including Jews, must work on the day in question. Such a policy had the effect of excluding Jews even if that was not its demonstrated intent.

As a result of reflexive custom rather than conscious intent, certain employers may have confined their employee recruitment to their network of "old boys" clubs. As a consequence of coincidence rather than discrimination, some of those clubs may never have had occasion to process a membership application from a woman or a

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The factor that makes such practices unacceptable is their unreasonableness. No valid job-related considerations require that employers search for recruits only in their old boys clubs. There was no good reason why that fire department could not publicly post job openings as they arose. For the overwhelming number of jobs on the Canadian market, "Canadian experience" is simply irrelevant. As for police jobs, new strategies and advances in technology may well have reduced the significance of size and strength, and wearing turbans does not impede performance. Most employers can easily accommodate the conscientious objections of some religious people to working on particular days of the year.

If unreasonable practices produce discriminatory results, we believe the law should require that those practices be changed. In this regard, we appreciate the extent to which the law already does exact such requirements. It appears from the foregoing statistics, however, that the existing legal machinery cannot make enough of the desirable changes.

Beyond these systemic practices, there is another factor that could influence the under-involvement of women, aboriginal people, and visible minorities in key sectors of our economy. In many cases, women, aboriginal people, and visible minorities themselves probably hesitate to apply for certain positions in the belief that they will encounter discrimination. Even in those cases where such beliefs are wrong, they may well be understandable. If, in certain places, there has been nothing but a sea of white male faces for generations, it is quite reasonable to suspect discrimination.

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These persisting inequities, disquieting subterfuges, and systemic barriers created the need for a new approach. It will no longer be sufficient for government human rights agencies to sit on their formal jurisdictions waiting for complaints to come along. The conditions of equality must be "pro-actively" promoted. All of this explains the emergence of employment equity.

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Numerical Goals - The Contentious Issue

Of all the measures contained in the Bill, numerical goals are probably the most controversial. They have been denounced as "quotas" and as instruments of "reverse discrimination". They have also been criticized as subversive of the merit principle in job selection.

But, despite the denunciations, numerical goals make some sense. In most cases, the distinctions among appropriately qualified candidates are not considerable. And, since there are so many factors - including subjective tastes - that account for who gets chosen, it is very hard to prove the existence of discrimination in individual cases.

Indeed, in order to make most human rights complaints stick, the aggrieved parties must effectively demonstrate that they are significantly more qualified - an exceptional situation - than are the successful applicants.

Employment equity simply reverses the onus. Employers who do not fulfil their numerical goals will have to demonstrate that the persons they chose were discernibly the best. They will also have to demonstrate the vigour of their recruitment efforts and the reasonableness of their selection standards.

Since the employers are the ones with the relevant information - they know why they made the choices they did - there is some validity in changing the onus this way. And, since there is not usually a substantial difference among appropriately qualified candidates, the principles of anti-discrimination and merit need not become the casualties of employment equity.

Unfortunately, however, the Bill misconceives the legitimate purpose of the exercise. At the moment, the aim of the Bill is for

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every place of business to contain proportionately the same racial and gender mix as exists in the larger community.

What is the justification for this? Why should every fire department, for example, have as its "ultimate objective" (the words are from the Solicitor General in relation to the police) an equal number of men and women? In today's society, is it true that such a large number of women would actually want to be fire fighters? If not, why must we change their minds? We should, of course, try to broaden their perspectives: help them appreciate that fire fighting could be a viable option and then ensure that they do not face discrimination.

But it is not legitimate to regard numerical goals as a vehicle for social engineering.

The experience at the Ontario College of Art illustrates a further difficulty with the Bill's objectives. Faced with a legitimate need to hire more female instructors (there were pitifully few), the College decided that women would get priority treatment for all jobs vacated by retirement during the 1990s.

Since it was believed that there were as many qualified females as males in the available talent pool, the idea was to produce a situation at the College which reflected the gender mix in the community as quickly as possible. Indeed, the proponents of the plan expressed regret that, even by the end of the century, the 100% hiring of women for such jobs would still leave an over-all balance of only 37% women on the faculty.

If it is believed that men and women are equally divided in the available talent pool, why was the numerical goal 100% female rather than 50%? After all, a 100% female target necessarily discriminates against males - perhaps, in some cases, even visible minority or aboriginal males. In any event, such discrimination in

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this situation cannot be justified, even if the victims, this time, are males rather than females.

Some supporters of the government approach argue that plans such as the one at the Ontario College of Art may justifiably be used to compensate for yesterday's discrimination. If certain women who have been long dead were improperly denied jobs 50 or even 30 years ago, how does it compensate them to accord preferential treatment to other women today? A legitimate plan of compensation could give preference to one of the actual individuals who suffered such discrimination in the past. But it's not legitimate to transfer that compensation to someone else simply because the someone else is of the same gender.

An exacerbating factor is that such compensation may inflict a commensurate disadvantage on numbers of males simply because their gender is different. In a number of cases, these males may well have been born years after the discrimination that the compensation is designed to redress. It is unacceptable to punish innocent people for the sins of others.

In the opinion of the Canadian Civil Liberties Association, the legitimate purpose of employment equity is not to compensate for yesterday's sins or to quickly mirror the community mix. Rather, it is to avoid discrimination from now on.

In order to determine the appropriate numerical goals, employers should ask the question: how many people from the designated groups would be hired and promoted if the employers adopted a policy of vigorous recruitment, reasonable job qualifications, and non-discriminatory selections.

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qualified for the jobs in question. Moreover, it might be possible to estimate the number of such qualified people who would wish to enter certain occupations from an examination of the applications and enrolments in training and educational courses. The previous experience of similar operations would also assist in determining appropriate goals.

Recommendation #1

The Bill and Regulation should be amended in order to ensure the following:

(a) The determination of numerical goals need not be aimed at providing that places of business reflect the same racial and gender mix as exists in the larger community.

(b) The determination of numerical goals will depend instead upon an assessment of how many from the designated groups would be chosen if
    i) their recruitment were vigorously pursued,
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A Residual Safeguard Regarding Discrimination Against Others

It is essential that the pursuit of numerical goals not become a vehicle for permitting any kind of unwarranted discrimination. Thus, despite their adoption of numerical goals, employers should be obliged to avoid discrimination against individuals on the prohibited grounds. Moreover, individual employees and job applicants should be granted the legal right to file human rights complaints when they suspect discriminatory selections.* On this basis, white Anglo-Saxon males as well as blacks, native people, and women could insist that they be free from discriminatory treatment.

The crux of what we are proposing concerns the onus of proof. Without employment equity plans, those alleging discrimination must prove their claim. As indicated, they are not likely to succeed unless they can demonstrate discernible superiority over those candidates that were selected. In the main, this burden now falls upon the designated groups: visible minorities, women, and aboriginal people.

With employment equity, the onus of proof will shift to the employers. To whatever extent they fail to achieve their numerical goals, they will have to demonstrate, among other things, that the persons they hired were better. Again, as a practical matter, they are not likely to succeed unless the persons they selected were discernibly superior. In the main, the designated groups - visible minorities, women, and aboriginal people - would thus be relieved of the onus they now bear - at least until the numerical goals were filled.

Similarly, any individuals who believed that they were wrongly bypassed in order to fulfil a numerical goal, would have the onus of proving that they had suffered unwarranted discrimination. As indicated, this would likely mean demonstrating that they were

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discernibly superior to those who were selected in their stead. In the main, this burden would fall upon white male candidates. The onus they would have to carry until the goals were filled would be virtually identical to what the designated groups would have to carry after the goals were filled and in those situations where there were no employment equity plans.

In our view, redistributing the onus of proof in this way - sometimes it would be carried by the designated groups and sometimes by white males - would likely constitute as fair a system as our fallible society can achieve. Employers would be pressured by numerical goals into accelerating the pace of opportunity for those most likely to suffer discrimination under the existing regime, but there would exist a residual safeguard to protect others from unfair discrimination.

Recommendation #2

The Bill and Regulation should be amended to ensure, that notwithstanding the existence of employment equity plans, the following will apply:

(a) employers will be legally obliged to avoid discrimination against individuals on the prohibited grounds and

(b) individual employees and job applicants - white males, as well as women, visible minorities, and aboriginal people - will be permitted to file human rights complaints when they suspect discriminatory selections.

Summary of Recommendations

The Canadian Civil Liberties Association calls upon the Standing Committee on the Administration of Justice to amend the Ontario Government's Bill 79 (Employment Equity) and Draft Regulation along the following lines:

Recommendation #1

The Bill and Regulation should be amended in order to ensure the following:

(a) The determination of numerical goals need not be aimed at providing that places of business reflect the same racial and gender mix as exists in the larger community.

(b) The determination of numerical goals will depend instead upon an assessment of how many from the designated groups would be chosen if
   i) their recruitment were vigorously pursued,
   ii) reasonable job qualifications were adopted, and
   iii) the individual hirings, promotions, etc. were non-discriminatory.

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NOTES

1. CCLET survey described in CCLA letter to The Honourable Elaine Ziemba, May 24, 1991.

2. 1990 Annual Report Employment Equity Act, 37.

3. 1990 Annual Report Employment Equity Act, 40.

4. 1990 Annual Report Employment Equity Act, 40.

5. Employment and Immigration Canada, 1990 Annual Report Employment Equity Act. (Hull, Quebec: Minister of Supply and Services Canada, 190), 57.

6. 1990 Annual Report Employment Equity Act, 60.

7. Ontario Women's Directorate, Employment Equity Programs in the Public Sector A Survey Report 1988 (Toronto: 1989), 76.

8. Federation of Women Teachers' Associations of Ontario, Affirmative Action Employment Equity 1991, 9.

9. CCLET employment agency survey described in CCLA letter to The Honourable Bob Mackenzie, January 18, 1991.

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