SUBMISSIONS TO: The Honourable Elaine Ziemba
Minister of Citizenship for Ontario

RE: Guidelines For Affirmative Action
Toward Employment Equity

FROM: Canadian Civil Liberties Association

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INTRODUCTION

The Canadian Civil Liberties Association (CCLA) is a national organization with 8 affiliated chapters across the country, more than 7,000 paid individual supporters, and more than 50 groups which themselves represent several thousands of additional people. The roster of support includes people from a wide variety of occupations, callings, and interests: writers, lawyers, broadcasters, trade unionists, homemakers, ethnic minorities, etc.

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, and visible minorities 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 reverse discrimination against blameless individuals.

Since the preparation of the ensuing submissions, the government has released its discussion paper on employment equity legislation. While this brief does respond to some of the government's inquiries, that is more attributable, because of the timing, to happenstance than to design. While we would hope to address more of the government's queries in due course, we believe it is important at this stage to consider some of the philosophical issues that are still not adequately resolved in our community.

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A. The Purpose of This Submission

This submission has been prepared in anticipation of the Ontario government's bill on employment equity. The comments of government members while they were in opposition, along with certain ministerial pronouncements, lead us to believe that the government's bill will contain some provisions for affirmative action. In view of the experience in other jurisdictions, there is every reason to believe that these provisions will trigger a number of serious controversies.

In the opinion of the Canadian Civil Liberties Association, certain practices associated with affirmative action deserve a significant level of criticism. It is also our view, however, that certain other forms of affirmative action deserve widespread community support. The purpose of the ensuing submissions is to make the relevant distinctions.

The focus of our attention are the special measures that may - and should - be proposed 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 expected to be addressed in the bill: disabled people. To the extent that we support affirmative action, it is likely that the beneficiaries will include disabled people. But, to the extent that we would restrict affirmative action, there may well be situations in which we would exempt 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 on the propriety and adequacy of measures for the disabled will await the introduction of proposed legislation. These pre-bill comments will be confined, therefore, to issues of race, ethnicity, and gender.

B. The Need for Affirmative Action

Surveys conducted in the mid and late 1980s reveal some disquieting patterns. 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[1]. 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%)[2]. A more in depth look at the occupational profile reveals a relatively large number of university graduates from visible minorities who are working in occupations for which they would be educationally over-qualified. In clerical positions, more than 19% of visible minorities had university degrees; only 6.5% of the general population with university degrees were working in these occupations[3]. In sales, there were 20% visible minorities with university degrees as against only 9.1% of the rest of the population[4]. Although visible minorities constituted more than 6% of the Canadian work force, they accounted for less than 1% of so central an institution as the RCMP[5].

There is no reason to believe that the figures for Ontario would differ in any significant respect from these general Canadian statistics. Black males in Ontario earned an average income of less than $20,000 a year[6]. That represents only 78% of the general average income of a little over $25,000[7].

In many respects, the situation with aboriginal people is even worse. In 1989, 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[8]. While men generally earned more than women, aboriginal men were significantly worse off than other men. In 1989, 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[9]. Aboriginal people were one third less likely to be in magagerial and professional occupations; aboriginal men were almost 50% less likely to wind up in such positions[10]. By contrast, there were many more aboriginal men in the category "other manual workers" than were their male counterparts in the rest of the population - 28.4% as against 18.6%[11]. Perhaps even more significant, aboriginal unemployment of 22.7% was more than double the national average[12].

Again, the situation in Ontario is not significantly different. In 1986, unemployment among aboriginal people was more than twice what it was in the general population - 14% as against 6.8%[13]. 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[14]. Yet both these communities have relatively large aboriginal populations.

The situation is substantially similar in the case of women. Despite the fact that about 70% of public elementary school teachers are women[15], a 1991 publication disclosed that fewer than 25% of principals were female and women occupied only 18% of the supervisory positions[16]. As of 1986-87, only 17.4% of full-time university faculty positions were held by women, and they accounted for less than 6% of the full professors[17]. By contrast, women occupied more than 89% of the clerical positions in the university sector[18]. As of 1988, Ontario women, who worked full-time year round were earning on the average less than 65% of what their male counterparts were earning[19].

It is difficult to believe that deliberate discrimination has not been a factor in at least some of these situations. In a number of

such situations, 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 of objective evaluation. And the more factors there are, the harder it will be to demonstrate the existence of discrimination.

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 the Toronto 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 recruitment. In view of the small turnover of fire fighters, this policy effectively foreclosed 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 east Asians 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 young 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 person of colour. But those employers who rely on such clubs are unlikely to attract minority or female employees.

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 the Toronto 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.

And we appreciate the extent to which the law now does exact such requirements. In our view, the law quite properly concerns itself with systemic impediments to racial, gender, and ethnic equality.

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.

Obviously, the traditional methods of complaint enforcement will not suffice to alter these structural inequities. Complaint enforcement depends upon the coincidence that an aggrieved person and an available job will be suited to one another. The number of such coincidences is not likely to be great enough to make a significant dent in these entrenched patterns. In any event, this approach does nothing about the people who never get to file complaints either because they never hear about the available jobs or because they are too intimidated to apply even if they do hear about them.

These systemic barriers and persisting inequities gave rise to the concept of affirmative action. According to this concept, it will no longer suffice for human rights commissions to sit on their formal jurisdictions waiting for complaints to come along. The commissions must "proactively" promote the conditions of equality. This will involve the self-initiated quest for and removal of obstacles to the participation of disadvantaged groups in various sectors of the economy. It will also involve the development of imaginative and vigorous programs of outreach and recruitment.

The Canadian Civil Liberties Association, therefore, supports affirmative action. As the foregoing makes clear, the attainment of greater equity in our society requires a lot more than reliance on complaint enforcement. At the same time, we are concerned about the way the concept of affirmative action has itself led to certain dubious practices. In some situations, it has led to the adoption of rigid numerical quotas based upon race, ethnicity, and gender and even to the practice of reverse discrimination. As sensible as we believe affirmative action to be, wisdom requires sensitivity to some of its potential side-effects.

Consider these:

(a) There is a significant risk that the requirement to fill a minority or female quota could lead employers to disregard relative merit and thereby to reject more discernibly qualified whites or men. While whites and men in general may enjoy certain advantages in society because of the heritage of discrimination, it is not acceptable for any individual whites or men to be made to suffer for the misconduct of other people.

(b) The adoption of rigid quotas can produce significant inequity. In the case of the Ontario Art College, for example, the requirement that only women will be eligible for certain jobs means that visible minority and native males will be ineligible. Thus, a less advantaged aboriginal man could be excluded from such a position even if he were more qualified than a middle-class white woman.

(c) It is not acceptable to postulate as necessarily desirable the goal that our public institutions must reflect the exact racial, ethnic, and gender proportions that exist in the total population. Thus, the position of the former Solicitor General was misconceived, for example, when he stipulated that, since the population was 50% female, it was desirable that our police forces be 50% female. The legitimate goal is to ensure that women, as well as men, and persons of colour as well as those who are white, acquire the perception and enjoy the reality that they will be welcomed and judged as individuals in the public institutions of our community. It is not for government to determine that any given percentage of women or persons of colour should <u>want</u> to serve in the police department. It is for government to

> ensure that all groups be open to the possibility of filling such positions and, to the extent that their members want to do so, they not suffer unfair discrimination.

The challenge, therefore, is to correct such excesses without losing the central core of the idea. In the interests of avoiding what is questionable and furthering what is valuable in the concept of affirmative action, the Canadian Civil Liberties Association recommends the adoption of the following guidelines. Our guidelines are not necessarily intended to be read as a proposal for wholesale implementation. Rather, they are designed to indicate the limits, as well as a range, of acceptable measures.

C. Guidelines for Affirmative Action

1. Subject to certain exceptions such as those indicated hereafter, there must not be preferential treatment on the basis of race, ethnicity, and gender in hirings, lay-offs, and promotions. It is a presumptive infringement of human rights to require, or to pressure, employers to discriminate in these ways against anyone.

2. Race, ethnicity, and gender may, and often should, be major factors in the efforts to attract new employees. Employers should be required by law, which includes the application of incentives and sanctions, to vigorously seek women and ethnic minorities for those places and positions where such groups have been apparently under-utilized. (For examples of such incentives and sanctions, see sections D and E.)

3. There are some achievements and qualifications that may appear more impressive in certain persons of colour or women than they would in certain whites or men, because the persons of colour and women may have had to overcome the discrimination and obstacles occasioned by their race and gender. A "B" standing awarded to certain native high school graduates, for example, might be worth more than a similar grade in graduates who had not faced the prospect of trying to study under the impoverished conditions of many reserves or in the hostile atmosphere of many cities. Strictly from the standpoint of merit, therefore, race, ethnicity, and gender can sometimes be a valid tool of assessment.

4. In situations involving the under-utilization of women and certain minorities, race, ethnicity, and gender may be used as tiebreakers where candidates have roughly equal qualifications. This is not to compensate for the discrimination practiced yesterday but to provide assurances against any discrimination being practiced today.

5. In certain rare situations, race, ethnicity, and gender might constitute bona fide occupational qualifications. For example, undercover police work in certain black or Chinese constituencies might legitimately require the hiring of officers who are black and Chinese respectively.

6. There are some situations in which the quest for merit need not be the primary basis for exercising choice. Conceivably, an exception might be created to favour the disadvantaged. Suppose, for example, a builder won a government contract to build roads and low-cost housing in some economically depressed area. There is nothing wrong with providing priority access to the new jobs on the basis of the degree of poverty and length of unemployment that individual candidates may have been suffering. Just as our society lowers the tax rate on the basis of lower income, so might we expand job opportunities on that basis. While certain minorities such as aboriginal people would likely benefit from such an arrangement, the scheme would nevertheless be colour, gender, and ethnicity blind. It would not likely benefit, for example, those aboriginal people whose incomes were significantly above the poverty line.

7. Because of the frequent and substantial difficulty in proving discrimination, there could be a recurring need for a special remedy: one that is demonstrably effective in removing discriminatory barriers. For such purposes, it would be permissible to allow and, in circumstances such as those in guideline number 8, even to require, employers to formulate goals as to the number of people they plan or ought to hire and promote, within designated periods of time, from the targeted races, ethnicities, and gender.

The setting of numerical goals should respond to the question: How many from the targeted constituencies would be hired and promoted if such people were vigorously recruited and there were no

discrimination on any of the prohibited grounds? In addition to assuming the availability of government-prepared demographic and occupational profiles, the goal-setting exercise should require the following conditions:

(a) That, in most circumstances, the employer will be permitted to set the goals subject to amendment by an independent board of inquiry or court on the motion of the human rights or employment equity commission.

(b) That the mere failure of the employer to hire or promote the requisite number within the designated period will not, by itself, render the employer liable to legal sanctions.

(c) That the employer could have the onus of justifying any failure to hire or promote the requisite number within the designated period; failure to provide such justification could render the employer subject to legal sanctions.

(d) That, notwithstanding the goal, the employer will retain the legal obligation to avoid discrimination against individuals on the prohibited grounds; individual job applicants and employees of any race, ethnicity, or gender will retain the legal right to invoke the traditional enforcement provisions of the human rights laws in response to such discrimination.

8. The circumstances in which employers could be required to set numerical goals include the following:

(a) The employer is a public institution

(b) The employer is or will be engaged in contractual relations with the government

(c) The employer is or will be the recipient of significant government assistance such as special grants, low cost loans, and tax concessions.

(d) The employer is relatively large or central to the economy of the province or any of the municipalities

(e) The human rights or employment equity commission has reasonable grounds for concern that the employer may be discriminating unlawfully, recruiting inadequately, or permitting the existence of systemic impediments

(f) A board of inquiry or a court has found the employer guilty of violating our human rights laws.

9. It might be permissible to conduct statistical surveys of race, ethnicity, and gender in the employment practices of various institutions and places of business. Such data would be available for the following purposes:

(a) As a rough barometer of progress - a situation of no or slow progress as compared with employers in similar operations or locations could serve to trigger further and deeper probes to uncover the possible existence of intentional discrimination, systemic impediments, and/or inadequate recruitment efforts.

(b) In order to monitor the extent to which employers have achieved the numerical goals that have been permitted or required.

10. To whatever extent identifiable information is gathered on the race, ethnicity, and gender of job applicants and job holders, it will be necessary to provide for safeguards to ensure that the information is not used to facilitate unacceptable discrimination and that its mere collection will not generate the suspicion of such discrimination. Legislation should therefore be enacted to regulate the collection of the data, to restrict access on a "need to know" basis, and to prohibit dissemination beyond that point. Security measures should also be required.

D. Examples of Acceptable Affirmative Action Without Numerical Goals

The idea is to make employers look where they may not have looked before: place ads in the visible minority, aboriginal people's, and women's press; go to minority and women's organizations well in advance of anticipated job openings and ask them to recruit suitable candidates - indeed, pay such organizations a recruitment fee in the same way that an employment agency might be paid; visit native friendship centres and advise aboriginal people of impending job opportunities and urge them to apply. Imagine, for example, what kind of impact would be created on the long-suffering and neglected people of the White Dog Indian Reserve if the personnel manager of a nearby Kenora factory attended their band meetings to request that candidates come forward for jobs in the plant.

Unfortunately, our society cannot rely on employers to undertake such initiatives on a voluntary basis. There have to be enforceable sanctions. Consider the following possibilities.

Every year governments in Canada award thousands of contracts which produce millions of dollars for the private sector. We favour legislation requiring that, as a condition of obtaining such government contracts, private-sector employers would have to undertake the most appropriate of the above measures to broaden the participation of women, aboriginal people, and visible minorities in their respective business operations. To whatever extent such employers failed to comply with whatever measures they had undertaken to perform, the human rights or employment equity commission should be empowered to seek a variety of remedies including damages, cancellation or performance of contracts, and future compliance.

Conceivably this approach may not be adequate to produce great enough change at a fast enough pace. Moreover, it would not touch

those private-sector employers who are not seeking government contracts. For such purposes, the commission might be empowered to order public hearings on an industry-by-industry basis. Such hearings would ask the industries themselves to indicate what initiatives would be workable and desirable for them. Other constituencies (minorities, labour, human rights groups, and so on) would also be invited to make representations. The hearings would recommend broader racial, gender, and ethnic recruitment programs geared to the particular circumstances of the industries involved. At that point, the commission could be empowered to negotiate with the industry representatives for enforceable agreements like those above. The incentive for the companies to sign such agreements would come from the publicity and pressures generated by the hearings.

In any event, employers would be hard put to resist. Remember, the contracts would essentially specify additional areas and methods of employee recruitment. Any employers who refused to agree to obviously reasonable steps would make themselves look unreasonable, and that could hurt business. Indeed, there is reason to believe that a significant number of employers would sign such agreements without any public hearings at all.

Another approach might involve a flat-out legislative requirement that employers make every "reasonable effort" to attract women, aboriginal people, and visible minorities. Such efforts could be defined to include some of the foregoing measures. The commission could also undertake special initiatives to enhance the impact of such a law. The commission might conduct surveys among the target groups and their organizations so as to make available to employers the names and addresses of people who could assist in the recruitment effort: leaders of organizations, editors of such newspapers, and even potential job applicants themselves. Such a commission effort would make it virtually impossible for employers to be excused for any failure to take the kind of minimal steps

indicated here. And it would also reduce the difficulty that boards of inquiry or other adjudicators might find in applying the "reasonable effort" test in the legislation. Sanctions might include the power to award damages and order rectification.

The measure of an employer's performance would not necessarily be the number of targeted people hired, but the nature of recruitment efforts made. As long as they made the requisite efforts, employers would not be required to prefer one group at the expense of another. But there is good reason to believe that a significantly increased hiring from the targeted groups would be likely to accompany an increased recruitment attempt.

Once a greater number of visible minorities, aboriginal people, and women began to apply for a greater number of available jobs, it would become increasingly difficult for the affected employers to discriminate against them. In the very process of attracting so many such candidates, the employers would be creating a pool of potential human rights complainants in the event that their hiring practices appeared unacceptable. Indeed, the mere knowledge that they were subject to this additional scrutiny would likely induce employers to behave more fairly.

The feasibility of these proposals is based upon the assumption that the greatest number of employers in Canada are neither bleeding hearts nor hardened bigots. Faced with the pressures of these programs, most employers would take the path of least resistance: cooperation.

To whatever extent, however, any employers persistently failed to correct their practices of overt discrimination, systemic impediments, or parochial recruitment, we believe that the law should contain a more radical remedy. On the basis of an application by the commission to a court or other appropriate independent tribunal, it should be possible to impose a monitor on

the employer for a given period of time. The function of the monitor would be to advise about, or, if necessary, even participate in the actual hiring and promotion decisions for the employer during the period in question.

The law already contains many analogies to what we are proposing, for example, the inspector under the Business Corporations Act, receiverships for faltering companies, and trustees in bankruptcy. In a situation of demonstrated recalcitrance as regards their human rights obligations, there is no reason why employers could not be rendered susceptible to a similar set of remedies. The legislation would have to outline as clearly as possible the triggering circumstances and then provide for procedural safeguards to minimize the risk of abuse. Considering everything, however, an extreme situation could well warrant a more intrusive response.

E. Examples of Acceptable Affirmative Action With Numerical Goals

A word about the objective of numerical goals. It cannot be automatically assumed that every institution and place of business should contain a racial, ethnic, and gender mix numerically proportionate to the available work force in the community of its location. People are often attracted to and repelled from certain occupations for a variety of reasons that have nothing to do with unacceptable discrimination. Indeed, employment aspirations are often influenced by cultural orientations. Thus, job desires frequently vary from group to group.

In our view, the acceptable objective of numerical goals is to counteract unacceptable discrimination. Since discrimination is often difficult to prove, the fulfillment of numerical goals helps to demonstrate, for the jobs at issue, that discrimination has been effectively overcome. Essentially, therefore, compliance with numerical goals serves to satisfy the community that the employers in question have adopted a "no discrimination" policy. Without such a barometer of employment and promotional practices, there will often be insufficient evidence of the fair play that our laws and norms require.

In recognition of the difficulties involved, the determination of the actual goals should be left as much as possible to employers themselves. For the planning period at issue, employers should ask themselves how many people from the targeted constituencies would be hired and promoted if they pursued a policy of vigorous recruitment and avoided discriminating on any of the prohibited grounds. For these purposes, there should be recourse to government-prepared demographic and occupational profiles indicating the number of people from the targeted constituencies in any community who would likely be qualified for the jobs in question. Moreover, it might be possible to estimate the number of qualified people who wish to join certain occupations from an

examination of the applications and enrolments in training and educational courses. If the commission were satisfied with the number chosen by the employer, that would become the goal for the purpose of evaluating the employer's performance.

In the event, however, that the commission believed the employer's goals were significantly less than the application of the above formula would reasonably produce, there could be a hearing before an impartial adjudicator - a board of inquiry or a court. At such a hearing, the commission would bear the burden of demonstrating the inadequacy of the employer's goals. Among the factors that the adjudicator would consider in determining the matter would be the following: the performance of comparable employers, the past performances of this employer, the number of people from the targeted constituencies who appeared able and willing to take the jobs in question, and, of course, the number of job openings that the employer could reasonably anticipate within the designated period.

It is expected that adjudicative proceedings would be the exception rather than the rule. The commission would prefer to avoid such proceedings because of the not insubstantial burden it would have to carry. The employers would prefer to avoid them because of the unpleasant publicity that would likely ensue. In the greatest number of cases, therefore, it is likely that goals will be consensually determined.

At the end of the designated period, the employer's performance will be subject to evaluation on the basis of the previously set goals. The employers would have the burden of justifying any shortfall of their goals. They are the ones who best know their circumstances. They know what difficulties and obstacles were confronted in attempting to fulfill these goals. They also know which qualifications they were seeking and what other candidates were interviewed. Employers are in a better position than anyone

else, therefore, to indicate the reasons for whatever results were obtained.

If they were able to justify their failure to fulfill the stipulated goal, they would be off the hook. The goal should be seen as a flexible guideline, not as a rigid quota. Any employers who were unable to justify their failure would properly be subject to legal sanction as though they had violated the Human Rights Code. Ultimately, of course, this determination would be made by a board of inquiry or a court at the instigation of the commission.

The crux of the goal-setting exercise is that the burden of proof shifts to the employer. In situations where there is no goal, those alleging discrimination must demonstrate the validity of their claims. This applies even to individual complaints in situations where there is a goal. But as far as the goal itself is concerned, the employer must demonstrate the reasonableness of not fulfilling it.

It is essential, however, that any policy of pursuing numerical goals not become a vehicle for endorsing reverse discrimination. Thus, employers should retain the legal obligation to avoid discrimination against individuals on the prohibited grounds. Moreover, individual employees and job applicants should retain the legal right to invoke the normal processes of the Human Rights Code in response to their suspicions of discrimination. On this basis, white Anglo-Saxon males as well as blacks, native people, and women could continue to insist that they be free from discriminatory treatment. Thus, the setting of goals would function, not as a cover for reverse discrimination, but as an assurance against all discrimination.

F. A Perspective on Affirmative Action

The Canadian Civil Liberties Association regrets the extent to which our society has succumbed to an either/or mentality around the issue of affirmative action. We believe that much of the problem can be abated by focusing less on generalities and more on specifics. To many people, for example, the term "affirmative action" means reverse discrimination and rigid numerical quotas. To many people, opposition to affirmative action means the acceptance of an unjust status quo with its inevitable inequities.

In our view, both responses are unacceptable. No fair-minded person can accept the substantial inequities that characterize racial, ethnic, and gender relations today. Similarly, fair-minded people would have great difficulty accepting discrimination against anyone on the basis of race, ethnicity, or gender. The above guidelines represent an attempt to preserve what's desirable and expunge what's questionable in the idea of affirmative action. They are a way of going beyond the inequities of the status quo without embracing the excesses of preferential treatment. They simultaneously eschew reverse discrimination and allow for permissible exceptions. Reconciliation becomes more attainable in the concrete than in the abstract.

As usual, the means to be used can more readily be chosen when we clarify the ends to be served. Very often, the ends are expressed in terms of "equality". What is left in confusion is whether this refers to outcome or to process. In general, we believe that the legitimate goal of the exercise is equality of opportunity, not equality of result.

In large part, democratic societies owe their very origin to the injustices that predecessor societies perpetrated in the interests of ascribed status. The fledgling democracies represented a rebellion against distributing power and benefits on the basis of

class, caste, creed, and colour. The injustices of yesterday are not redressed simply by changing the beneficiaries today. Thus, the democratic philosophy generally prefers to award society's benefits, not on the basis of the happenstance of birth into a particular group, but on the basis of achievements associated with individual performance. The idea is to ensure that everyone has an equal chance to enjoy the fruits of our public life.

As we all realize, however, the selection of appropriate means does not always flow from a clarification of the ends. Even if greater racial, ethnic, and sexual diversity were considered a desirable goal, for example, preferential treatment and discrimination on such grounds would not thereby become an acceptable means. Indeed, for all of the reasons outlined above, our society should strive to achieve its legitimate goals as far as possible <u>without</u> exercising such preferences or discrimination. That, of course, is the whole point of the foregoing guidelines.

It is quite possible that the guidelines will not answer every question that may arise in the design and implementation of acceptable affirmative action programs. And, even within their purported purview, there will be tough judgment calls that are only partly illuminated by the guidelines. We harbour the hope, nevertheless, that, by spelling out as much as we have in such specificity, the guidelines will make a useful and significant contribution. To that end, we urge the Minister to consider them in the preparation of Ontario's employment equity legislation.

Notes

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

2. 1990 Annual Report Employment Equity Act, 60.

3. 1990 Annual Report Employment Equity Act, 57.

4. 1990 Annual Report Employment Equity Act, 57.

5. Norman Inkster (Commissioner of the R.C.M.P.), untitled speech in National Conference on Racial Equality in the Workplace: Retrospect and Prospect, Harish Jain, Barbara M. Pitts and Gloria DeSantis, ed. (Hamilton: McMaster University, 1990), 257.

6. Ministry of Trade, Science and Technology, Employment Equity Program A Profile of Visible Minorities and Aboriginal People. 1986 Census - 20% Sample Data, chapter 3, 11.

7. Employment Equity Program, chapter 1, 11.

8. 1990 Annual Report Employment Equity Act, 40.

9. 1990 Annual Report Employment Equity Act, 40.

10. 1990 Annual Report Employment Equity Act, 37.

11. 1990 Annual Report Employment Equity Act, 37.

12. 1990 Annual Report Employment Equity Act, 37.

13. Employment Equity Program, chapter 14, 5; chapter 1, 5.

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

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

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

17. Employment Equity Programs in the Public Sector A Survey Report 1988, 49.

18. Employment Equity Programs in the Public Sector A Survey Report 1988, 49.

19. Ontario Women's Directorate, Infoflash No. 1 (Toronto: September 1990), 5.