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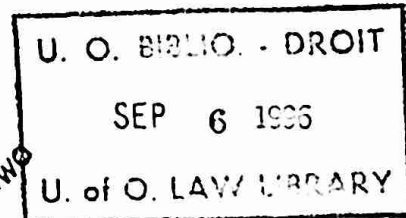
National Association
of Women and the Law

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SUMMARY OF A REPORT ON
AFFIRMATIVE ACTION PROGRAMMES
FOR WOMEN IN CANADA

By the: Montreal Association of
Women and the Law

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AFFIRMATIVE ACTION FOR WOMEN IN CANADA

The following is a brief summary of a study and report on the feasibility and potential impact of special or affirmative action programmes for women in Canada. A Summer Canada Project Grant from the Canada Employment and Immigration Commission provided funds for five students to prepare the original paper. The project was sponsored by the Montreal Association for Women and the Law but it does not necessarily reflect the views of the association. It is hoped that this summary will serve as a framework for the conference discussion of affirmative action.

On April 17, 1982 the Constitution Act, 1982 became law in Canada. Included in it is the Canadian Charter of Human Rights and Freedoms which protects all Canadians from discrimination and guarantees equality before and under the law to every individual. The Charter also permits the creation of special programmes which could improve the situation of presently disadvantaged groups in our society. Affirmative action is an example of this type of special programme and thus has become an essential component in Canada's constitutional future.

These special programmes are recognized as essential in redressing the imbalances that have resulted from past discriminatory practices. Disadvantaged groups can benefit from preferential treatment in the hope that "equality" can soon become a Canadian reality.

What is Affirmative Action for Women? Briefly, it is "an organized plan designed to give women the same opportunities in the labour marketplace as men". It addresses the problem of women's unemployment at an organizational level, concentrating on and trying to eliminate systemic discrimination or exclusionary employment practices affecting women as a group. Affirmative action endeavours to free women from job ghettos and to actively give them the opportunity of securing employment in non-traditional fields.

The Affirmative Action Division of Employment and Immigration Canada has defined it as:

"... a comprehensive, result oriented plan adopted by an employer as a remedy for employment discrimination with special emphasis on systemic discrimination. An active strategy designed to ensure equality of opportunity at all employment levels and to provide for the implementation of special measures necessary to ensure equality of results, given the specific conditions existing in the company. The measure of success of an affirmative action plan is the achievement of goals expressed as changes in the composition at all levels of the company's labour force."¹

The notion of systemic discrimination is central to an understanding of affirmative action. Systemic discrimination refers to employment systems, policies and practices which exclude women without being justified by the appropriate job relatedness or business necessity. Essentially, these practices are self-perpetuating, artificial barriers whose legitimacy derives from their historical consistency and unquestioned acceptance as valid methods of tailoring an applicant pool.

¹ For the purposes of simplicity and clarity, all quotes are taken from the text "Affirmative Action for Women in Canada" in which they have been fully annotated.

What are the necessary components of an affirmative action plan?

1. Equal Opportunity Measures - These are permanent changes to a company's employment system which involve a commitment to refrain from any overt discriminatory practices such as wage differentials between men and women performing the same job.
2. Remedial Measures - These refer to any action designed to redress past discrimination by providing specific benefits such as special training programmes for women.
3. Support Measures - These permanent measures alleviate an employment problem specifically affecting the group whose situation the company wishes to improve. For example, in the case of women, it might mean setting up a childcare programme at the company locale.
4. Goals and Timetables - Goals are programme objectives expressed in numerical terms, providing a target towards which to aim. Timetables outline when and what results are expected.

The effects of the programme are expected to be permanent in that women's representation in the workforce of the company will continue to reflect their availability in the qualified regional labour pool.

Critics of affirmative action programmes sometimes fail to realize that in order to be successful the CEIC states that a programme must include all of the above mentioned components. Affirmative action is sometimes confused with the more passive policies of equal employment opportunity, which only demand a neutral attitude from the employer, but they are really quite distinct. Equal employment opportunity programmes emphasize equality of treatment and do not involve the active initiative in dealing with systemic discrimination which affirmative action programmes do. In a 1965 address at

Howard University, then President Lyndon Johnson graphically illustrated the limitations of the equal employment opportunity solution to discrimination:

"You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others", and still believe that you have been completely fair."²

Affirmative action goes one step further, insisting on both equality of opportunity and equality of result.

Other critics are afraid that affirmative action is reverse discrimination. Proponents of affirmative action remind us that it is an attempt to undo an historical preferential system favouring men which has institutionalized imbalances in the labour market. Professor Steven Wexler, writing for the University of British Columbia Law Review, concludes that "in effect, the majority is not being penalized by preferential treatment being granted to a minority group; it is simply being denied the fruits of discrimination."³

Another concern about affirmative action is that the use of crude quota systems could mean unqualified staff and decreased workplace productivity. In fact, proponents of affirmative action do not suggest using simple numerical quotas alone and they always recommend that goals make use of a population of qualified job applicants. There is no question of an absolute preference based on gender alone without regard to qualifications.

² *ibid.* p.16

³ *ibid.* p.20

Why is affirmative action necessary? Wouldn't public education programmes aimed at changing attitudes toward women also eliminate discrimination?

The crux of the problem of women's inequality is, of course, not to be solved by labour force participation alone. Women's own attitudes to and about themselves must change and embrace the concept of equality and all of its ramifications. Men also, must modify attitudes and ideas which treat women as unequal.

The primary intent of affirmative action is to change practices, not to focus on changing attitudes.

"If most of the problem of equality could be solved by demonstrating that women have capabilities comparable to men, the issue would have been largely resolved by women's extensive and varied participation in the war economy."⁴

But the issue has not been resolved and inequality remains a reality in the workplace. Consider these facts:

- Full time working women earn only fifty eight cents for every dollar earned by men
- Two thirds of all minimum wage earners in Canada are women
- In 1981, women constituted 40% of all the labour force and the majority of these women were employed in nine occupational categories whereas men were more evenly distributed throughout sixty-five categories.
- Women now represent under one percent of the labour force in blue collar trades
- Women are currently concentrated to an overwhelming 66% in clerical, sales and service occupations

⁴ *ibid.* p.107.

- Despite the still prevalent attitude that men work because they must and that women work for "other" reasons, in 1980, 40% of the female labour force was single, separated, widowed or divorced. The majority of this 40% relied on employment as their major source of income.

Legislation: Affirmative action programmes in Canada are included within the ambit of human rights legislation. Please see table I for a brief illustration of federal and provincial legislation.

Human rights legislation in Canada, while it can deal quite satisfactorily with individual acts of discrimination, is generally not equipped to deal effectively with the discriminatory systems which give rise to the individual acts. The growing recognition of systemic discrimination as a major barrier to equal opportunity in employment demands that human rights commissions, boards of inquiry and courts, as the case may be, be given the tools to deal with it more efficiently. One of the most effective tools might be provisions that would permit the imposition of special programmes as a remedy in discrimination cases. As indicated in table I, current possibilities for this type of remedy exist in the Canadian Human Rights Act and in those of Saskatchewan and Quebec's proposed Bill 86.

To date, prohibition of discrimination and encouragement of voluntary adoption of special programmes have not, alone, been effective in eradicating discrimination in Canada. Existing human rights legislation must be re-evaluated in terms of its ability to improve the situation of previously disadvantaged groups and to enhance equal opportunity.

TABLE I: LEGISLATION

JURISDICTION	NAME OF ACT	CREATION OF COMMISSION ⁸ ALLOWED?	SPECIAL PROGRAMMES WHO APPROVES PROGRAMMES?	SPECIAL PROGRAMMES EXPLICITLY ALLOWED AS A REMEDY? ⁹
British Columbia	<u>British Columbia Human Rights Code, RSBC 1979, c. 186</u>	yes, in 1969	yes, s. 11(5)	Commission no.
Alberta	<u>Individual's Rights Protection Act, RSA 1980, c. I-2</u>	yes, in 1972	yes, s. 13(1)(a) & (b)	Lt.-Gov. in no Council; may be delegated to Commission by regulation.
Saskatchewan	<u>Saskatchewan Human Rights Code, RSS 1978, c. S-24.6 (looseleaf)</u>	yes, in 1972	yes, s. 47(1)	Commission yes, ss. 31(7)(a) and 47(1)
Manitoba	<u>Manitoba Human Rights Act, SM (consolidation), c. H-175</u>	yes, in 1970	yes, s. 9	Commission no
Ontario	<u>Ontario Human Rights Code, SO 1981, c. 53</u>	yes, in 1961	yes, s. 13	no approval required, but Commission may inquire into special programmes

SPECIAL PROGRAMMES
EXPLICITLY ALLOWED
AS A REMEDY?

WHO APPROVES
PROGRAMMES?

SPECIAL PROGRAMMES
ALLOWED?

CREATION OF
COMMISSION

JURISDICTION

NAME OF ACT

no

yes, in 1975 no

Charte des droits et
libertés de la per-
sonne, 1975, LRQ; c
c. C-12

Québec

yes, s. 86.3

yes, ss. 86.1
and 86.2

Bill 86 (proposed),
loi modifiant la
Charte des droits et
libertés de la per-
sonne

Commission

no

yes, in 1971 yes, s. 13(1)

New Brunswick Human
Rights Act, RSNB 1973,
c. H-11

New
Brunswick

Commission

no

yes, in 1967 yes, s. 19

Nova Scotia Human
Rights Act, SNS 1969,
c. 11

Nova Scotia

Commission

no

yes, in 1975 yes, s. 19

Prince Edward Island
Human Rights Act,
RSPEI 1975, c. 72

Prince
Edward
Island

Commission

no

yes, in 1974 no

Newfoundland Human
Rights Code, RSN 1970, c.
c. 262

Newfoundland

Commission

JURISDICTION	NAME OF ACT	CREATION OF COMMISSION	SPECIAL PROGRAMMES ALLOWED?	WHO APPROVES PROGRAMMES?	SPECIAL PROGRAMMES EXPLICITLY ALLOWED AS A REMEDY?
Northwest Territories	<u>Fair Practices Ordinance, 1966, RONWT 1974, c. F-2</u>	---	yes, s. 14	Commissioner	no
Yukon Territory	<u>Fair Practices Ordinance, 1963, ROYT 1971, c. F-2</u>	---	no	---	no
Canada	<u>Canadian Human Rights Act, 1977, SC 1977, c. 33</u>	yes, in 1977	yes, s. 15	no approval required, but programme must fit s. 15 description	yes, s. 15(1)

Affirmative Action in Practice in Canada. At the federal level there are two organizations which work with the public to put affirmative action into practice: the Canadian Human Rights Commission (CHRC) and the Canada Employment and Immigration Commission (CEIC). Implementation of affirmative action programmes is, at present, purely voluntary in Canada.

To date, the response of the business community to affirmative action has been very wary. Business is concerned about government intervention, requirements to report on business practices, and it fears added costs and loss of autonomy. At present, affirmative action as defined by the government does not exist at the corporate level, nor does it appear likely to happen on a voluntary basis in the near future.

The picture within government itself is more promising. In 1980 the federal government announced that the Department of Employment and Immigration, the Treasury Board, and the Department of the Secretary of State would be implementing affirmative action programmes. This move is intended to make the federal government an example for the rest of Canada and although it does not entail participation of the entire federal civil service, it may prove to be a useful precedent and example.

One of the important issues raised by reviewing the present Canadian experience is that of mandatory compliance for affirmative action. From a study of the U.S. programmes (reported in the unabridged version of this article) it is clear that the relative success of affirmative action in that country is at least partially related to the existence of mandatory compliance with regard to the programmes. All companies with more than fifty employees or with contracts of over \$50,000.00 come within the mandatory programme.

Currently, there is a move to raise these thresholds and ease compliance regulations. Although there are very tight budget considerations there, to date, affirmative action is viable in the U.S.

Conclusion

It is through action that we demonstrate our intentions and change our situations, if we so wish. Thus, although affirmative action is far from being the complete solution to the problem of discrimination in women's employment, it is nevertheless an active solution demanding positive movement and significant visible change.