EQUITY IN

THE CANADIAN

PUBLIC SERVICE

BY

TERRANCE GREEN

A Thesis
Submitted to the Faculty of Graduate Studies
in Partial Fulfilment of the Requirements
for the Degree of

MASTER OF PUBLIC ADMINISTRATION

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ABSTRACT

Equity, in the selection process of the Public Service of Canada, is a management practice under which fairness and justness of treatment can be confirmed.

Through the course of my investigation, I define the terms 'equity' and 'equality' for clarification during this discussion. I review the legislation, policies, programs, and practice under which the selection process to the public service takes place. To illuminate the concerns of equity, bias and discrimination, as being key factors, I review cases of Appeals as the mechanism by which employees can express their dissatisfaction of treatment they receive. I conclude my study with an examination of the PS-2000 initiative - a management driven process for the renewal of the public service.

My findings reveal that there is equity in the selection process. It is hindered by stereotype images held by some managers, but it is being driven both from the top down through policy and from the bottom up through the Appeal process.

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INTRODUCTION

The public sector, across Canada, has played a leading role in determining what constitutes minimum standards of merit, equity, and rights of individuals in both social and work environments, most notably that of the public service. The federal government has attempted to identify, isolate, and illuminate unequitable or prejudicial treatment in its bureaucracy. In 1986, the federal government expanded the environment where equity initiatives would take place. The Employment Equity Act,,of 1986 includes the private sector conducting business with the federal government.

In this analytical-instrumental study I will critically examine theories, legislation, regulations, guidelines, and some selected case studies to demonstrate the relationship between equity and merit in the selection process of the public service of Canada. A close examination of the systems and processes, relevant to the demography of the bureaucracy, will reveal equity of physical representation. An examination of the theories of representative bureaucracy will expose their relevance in a Canadian context.

For over two decades, the federal government has pursued the fundamental principle that all Canadians have equality of status and equal rights in all federal institutIons. This

policy direction is embodied in The Public Service Employment Act (1969), the Official Languages Act (1969), the Canadian Human Rights Act (1978), the Canadian Charter of Rights and Freedoms (1982), and the PS-2000 initiatives (1990). More specifically, these principles are described in the regulations and procedures in the Personnel Management Manual of the Public Service published by Treasury Board and amended on a regular basis.

With an abundance of legislation, regulations, and guidelines having an impact on recruitment, it is not surprising that managers can be confused. This confusion can be defined as unabridged bureaucracy.

> "a system in administration marked by constant striving for increased functions and power, by lack of initiative and flexibility, by indifference to human needs or public opinion, and by a tendency to defer decisions to superiors and to impede action with red tape."[1]

The confusion grew, in the fall of 1989, when line managers received the authority for staffing which meant that the managers not only must understand the policies governing their branch, but are responsible for understanding the policies and legislation relevant to recruitment and staffing. Managers at the same time are beginning to be assessed on their performance by the "Equity" initiatives that their directorate

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[1]Webster's Third New International Dictionary

undertakes. Confusion mounts as terms are not clearly defined and in many cases can be interchanged. i.e. 'equality' and 'equity' (for the purpose of this thesis, I will attempt to define these terms).

Formal equality, as seen by the Law, is the traditional theory of equality. It is an abstract based in the philosophy of how human beings should treat other human beings. Philosophers and theorists from Plato to recent times put forward proposals justifying both positions of equality and inequality.

> "...To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosophers of our own day runs a thread of universal agreement on this point. The notion of justice consists in a certain application of the notion of equality. The whole problem is to define this application in such fashion that, while constituting the elements common to the various conceptions of justice, it leaves scope for their divergencies..."[2]

The elements under which equality under the justice system that must be considered are the scope and the differences that are to be considered to accord equal treatment. The ideal is that human beings are created equal and therefore must be accorded equal treatment. In practice, a number of elements creep into our judgement and shadow our perceptions of how much equality will be accorded to segments of the population.

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[2]Ch. Perelman, Justice, Law, And Argument, Boston: D. Reidel Publishing Company, 1980, p.7.

> "The assumption that the units are like and therefore equal in some natural sense is one which clearly leads to a difficulty, especially as disparities in wealth and power evolve from the initial equality of the starting point...the liberal idea of equal treatment demands that people receive equal opportunities if they are equally qualified by talent or education to utilize those opportunities. In requiring the relativization of equal treatment to characteristics in which people are very unequal, it guarantees that the social order will reflect and probably magnify the initial distinctions produced by nature and the past."[3]

There are determining elements or characteristics that are used to distribute justice from an equal perspective. What should determine how much equality should be distributed and to whom? One could consider these elements as merits to be taken into consideration in the dissemination of justice. Under such restraints, fairness is taken into consideration by these theorists, as like people are being treated alike and therefore, equality is being served.

> "...Logically, says de Tourtoulon, the various conceptions of justice equality, far from being contradictory, are essentially the same. They differ only in their potentialities. Perfect equality being a limit-idea, its potentiality for being realised in practice is nil. The potentialities increase in proportion as the other egalitarian conceptions depart from the point which is set at infinity...
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> ...Some say that regard must be had to the individual's merits. Others that the individual's needs must be taken into consideration. Yet others say it is impossible to disregard origin, rank, etc...But despite all their differences, they all

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[3]M. A. Stewart, (Ed.), Law, Morality And Rights, Boston: D. Reidel Publishing Company, 1983, p. 311.

> have something in common in their attitude. He who requires merit to be taken into account wants the same treatment for persons having equal merits. A second wants equal treatment to be provided for persons having the same needs. A third will demand just, that is, equal, treatment for persons of the same social rank and so on. Whatever, then, their disagreement on other points, they are all agreed that to be just is to give the same treatment to those who are equal from some particular point of view, who possess one characteristic, the same, and the only one to which regard must be had in the administration of justice...
> We can, then, define formal or abstract justice as a principle of action in accordance with which beings of one and the same essential category must be treated in the same way...We see, then, that the egalitarian formula of justice, so far from manifesting an attachment to a humanitarian ideal, may constitute nothing better than a means of strengthening the links of solidarity within a class regarding itself as incomparably superior to the other inhabitants of the country...To form part of the same essential category is not merely a matter of possessing one identical given characteristic. It must be possessed in the same degree..."[4]

A difficulty arises when the people of one rank, or one set of merits, identify the differences in treatment with another set of merits and are unwilling to accept the inequality of treatment. This clash between groups with different sets of merit has been a contributing factor in revolutions and wars. It is not the sudden reality of such groups that the inequality exists, it is a result of a build up of the inequality over time.

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[4]Ch. Perelman, Justice, Law, And Argument, Boston: D. Reidel Publishing Company, 1980, p. 7-13.

> "...Given these wider possible effects of moral internalization, there are wider possibilities for clashes between moral norms and legal rules...These possibilities extend to the civil as well as the criminal law and include the general distributive principles underlying a legal system. Deutsch (1975), for example, distinguishes three broad types of values which can form the basis of distributive justice - equity, equality, and need - and discusses with reference to social psychology how different kinds of groups will tend to emphasize one over the others. For both Deutsch (1975) and Sampson (1975), the predominance in Western society of equity principles of justice (balancing reward to input) is a reflection of society's economic orientation, with a consequent emphasis on economic role and competitiveness in socialization processes."[5]

Equality and the measure of equality is a question that is still being debated in today's justice system. Should equality take into consideration such elements as race, religion, sex, physical impairments in the distribution of fair and just treatment? Is equality under the law equated to the right of the individual, and if so is this a right that is protected by the state? These are questions that are being asked of the justice system and the responses are as varied as the perceptions of what constitutes equality.

> "...Rawls seems to favor the liberal - that is, the negative - conception of equality, for he would limit individual freedom only to the extent that such limitations secure advantages for each other, rather than for the greatest number...the ambiguities of the notion of equality, which is given diametrically opposed interpretations by liberal and socialists ideologies...in almost every

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[5]Sandra B. Burman, and Barbara E. Harrell-Bond, (Eds.), The Imposition of Law, New York: Academic Press, 1979, p. 11.

> field there exists an opposition between those who call for a minimum of government intervention in what they consider to be their private affairs, and those who call for increased intervention by the collectivity, hoping thereby to satisfy, at the expense of the community, a growing number of individual needs..."[6]

It may make sense to say, Hart remarked[7], that people need rights less under some forms of government than others. Dworkin's response to Hart was that rights that have long been thought to be rights to liberty, are really at least in the circumstances of modern democracies, rights to treatment as an equal. This is the blight on which most groups that are disadvantaged or feel that they are treated unequally base their arguments for fair and just treatment.

> "The kind of equality which, since Aristotle, has been related to the notion of justice is that of equality of treatment. It is a matter, as Bernard Shaw puts it, of treating living human beings equally...
>
> In the same spirit, but less dogmatically, I. Berlin writes in his paper 'Equality', 'Equality needs no reasons; only inequality does'. Equality is not to be justified, for it is presumed just; inequality, on the other hand, if not justified, will appear arbitrary and so unjust...today the idea which is increasingly accepted is that of reducing inequalities between members of a society, or between nations and states whose development is

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[6]Ch. Perelman, Justice, Law, And Argument, Boston: D. Reidel Publishing Company, 1980, p. 52.

[7]Ronald Dworkin, A Matter of Principle, Cambridge, Ma; Harvard University Press; 1985, p. 369.

> backward, by giving privileges to those in the inferior position..."[8]

Thus, formal equality refers to equality in the form of the law and it is variously formulated as requiring that likes be treated alike and unlikes unlike, or that those who are similarly situated be treated the same. According to this theory, equality obtains if the law, in its form, treats men and women the same, or able-bodied and disabled persons the same, unless they are differently situated.

For disadvantaged groups, this theory poses fundamental problems. Two of them are:

1) it defines equality as a question of sameness and difference,[1] rather than as a question of dominance and subordination, and

2) it makes disadvantage invisible.[9]

> "Equality is a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness...Equality in employment means that no one is denied opportunities for

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[8]Ch. Perelman, Justice, Law, And Argument, Boston: D. Reidel Publishing Company, 1980, p. 83-87.

[9]Sheila Day, speech given at the Human Rights Day Conference, Winnipeg; December 10, 1991.

> reasons that have nothing to do with inherent ability."[10]

Equity, for the purpose of this thesis, is considered to be justice and fairness in the selection process of employment. It implies the flexibility to treat people differently in order to accord equal consideration. Thus, management practises. This concept implies risk, responsibility and benefits. Equity with this definition becomes principle driven unlike equality which by its connotation is emotionally driven.

> "...Equality can be equated to upper and lower class. That there can be no logical basis for equality does not lessen its usefulness as a political tool and general tool with which to improve society. Equality is a point of focus and opposition. Equality means to be treated emotionally rather than logically..."[11]

According to Roberts, affirmative action programs employ a vision of social justice both to motivate and to justify their intervention in social affairs. Social justice involves acting on rules that are thought to be fair, where fairness suggests some form of equity. If one believes that equity in opportunities presently exists in society, then a state of

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[10]Judge Rosalie S. Abella, Equality in Employment - A Royal Commission Report. Ottawa; 1984, p. 1-2.

[11]Edward de Bono, Wordpower, Aylesbury, U.K.: 1977, p. 20-21.

fairness and justice also prevails and affirmative action is unnecessary.[12]

Frederickson in his book, New Public Administration, outlines social equity as emphasizing;

- 1) equality in government services,
- 2) responsibility for decisions and program implementation for public managers,
- 3) change in public management,
- 4) responsiveness to the needs of citizens rather than the needs of public organizations, and
- 5) an approach to the study of/and education for public administration that is interdisciplinary, applied, problem solving in character, and sound theoretically.[13]

The stimulus for change was from within the bureaucracy. The change would see the governing values of the organization reflect the social values of the society which it served.

> "Social equity is a phrase that comprehends an array of value preferences, organizational design preferences, and management style preferences."[14]

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[12]Ibid., p. 153-154.

[13]Ibid., pp. 6-7.

[14]George Frederickson, New Public Administration. Alabama: 1986, p.6.

Many government documents, policies, reports, etc. unite to create an atmosphere promoting the government of Canada as dedicated to the principle of equity for all Canadians. As an employer, the government continues to be pledged to equity in opportunities and appointments based on merit. In full awareness of these commitments, indeed to give substance to them, the government adopted a policy of affirmative action in the Public Service. It believes that affirmative action is an effective strategy for eliminating barriers in employment and ensuring the equitable representation of disadvantaged groups in the Public Service. Affirmative action is, thus; supportive of the merit principle which embraces the concepts of sensitivity and responsiveness, efficiency and effectiveness, and equity in access to Public Service employment.

George Blackburn, in 1968, defined affirmative action as meaning any action taken to break historic social patterns of rejection, which have produced seriously disadvantaged minorities, whether or not these patterns result from cold-blooded, calculated conspiracies or merely result from thoughtlessness, apathy and lack of awareness.[15] Affirmative action was first coined by John F. Kennedy in March 1961 when

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[15]Walter S. Tarnopolsky, "Discrimination and Affirmative Action - Definitions: American Experience and Application in Canada", Race and Sex Equality in the WorkPlace: A Challenge and an Opportunity. Ottawa: 1980, p. 96.

he issued an executive order requiring that contractors act affirmatively to recruit minorities on a nondiscriminatory basis. His order was a policy to ensure qualified minorities equal access to job opportunities.[16]

> "The salient feature of the term 'Affirmative Action' is its 'liberal' connotation...like much of the language employed in modern social commentary, the designation 'Affirmative Action' is more inspirational than informative; it tells us more about the intentions of its users than it describes the programs they support."[17]

The application of these principles in relation to employment has culminated in a Treasury Board policy on affirmative action (June 1983). This policy was extended in 1985 to include visible minorities.[18] It was revised again in 1991 to take a more pro-active stance. Direction was given to departments to revise their own policies in response, (Transport Canada completed its policy in December, 1991 and we will examine parts of that policy during this thesis).

Additional impetus has also been provided over the years to some of the under-represented groups through the International

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[16]B. Ubale, "Affirmative Action:Objective and Policy", Race and Sex Equality in the Workplace: A Challenge and an Opportunity. Ottawa: 1980, p. 195.

[17]Lance W. Roberts, "Understanding Affirmative Action", Discrimination, Affirmative Action, and Equal Opportunity. Vancouver, B.C.: 1982, p. 149-150.

[18]Information obtained from Public Service Commission Annual Reports, 1979-86.

Year of Women (1975), the International Year of the Disabled (1981) and by the amendments to the Canadian Human Rights Act respecting disabled persons (March 28, 1983).

With the implementation of action as indicated above, one would assume that a strong message is being transmitted to the bureaucracy - the emphasis being a change in the public service from one of primarily white anglo-saxon males to a mix of the population that is being served.

The Employment Equity Act represented a milestone in Canadian history, for it was one of the first of its kind not only in Canada, but internationally for it demonstrated that the Government of Canada is committed to achieving equality of employment for all Canadians, regardless of their race, national or ethnic origin, colour, religion, sex age or disability. Employers covered by this Act are required to implement programs to ensure that members of designated groups - women, aboriginal peoples, persons with disabilities and members of visible minorities achieve equitable representation in the workforce. These designated groups are seen as having been frequently treated unfairly in the working world, being denied employment or opportunities for promotion for reasons other than lack of qualifications and hence being unreasonably denied an opportunity to share in our society.

As noted above, prior to the Employment Equity Act, several initiatives were undertaken in the areas of human rights, equal pay and affirmative action. In the early 1980's, the expression 'affirmative action' was changed to 'employment equity' due to the negative connotation with which the former has been associated. (These terms will be used interchangeably throughout this thesis.)

LEGISLATION AND REGULATIONS FOR EQUITY

The Canadian Charter of Rights and Freedoms was passed in 1982, and in 1985 the equality provisions came into effect.

In 1983, affirmative action programs were extended through the public service for women, natives and the disabled. By 1985, this extension also came to include visible minorities. In 1984, the Report of the Special Committee on Visible Minorities, Equality Now, was published, calling for affirmative action for visible minorities. In the same year, a Human Rights Tribunal for the first time ordered an affirmative action program following a finding of discriminatory practices, against Canadian National Railways. In 1984, Judge Abella's Royal Commission report, Equality in Employment was published, urging federal legislation requiring all federally regulated employers, in the private and public sectors, to introduce mandatory Employment Equity programs to bring about substantial changes, stressing that "Equality in employment will not happen unless we make it happen".

Hence in 1985, Bill C-62 was introduced and the Employment Equity Act was passed by Parliament and proclaimed into law in 1986. Under the Act, federally regulated businesses with over 100 employees, and Crown corporations with over 100 employees, are required to take the necessary actions to achieve a representative workforce through the development of employment equity plans, goals, timetables and

progress reports. (Approximately 430 firms are subject to the Act). Annual reporting started in 1988 and the Canadian Human Rights Commission (CHRC) was directed to play a role in analyzing employment equity progress reports for evidence of discrimination. The Commission was established under the Canadian Human Rights Act in 1978, and was given powers to use persuasion and publicity to discourage and reduce discriminatory practices. As well, it can investigate and conciliate complaints by employees of discriminatory practices by federal government departments, crown corporations and businesses under federal jurisdiction such as banks, airlines, railroads, etc. Furthermore, the CHRC can also appoint a tribunal (operating under Federal Court procedures and review) to hear a complaint and issue an order against an employer who is found to have discriminated. The order may entail that the discriminatory practice must cease, that the victim must be compensated, or that a special program or arrangement must be adopted by the employer. Employment equity initiatives are seen as follows:

> "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, or physical handicap of members of that group, by improving

> opportunities respecting goods, services, facilities, accommodation or employment in relation to that group."[19]

The wording suggests that preferential treatment of groups subject to discrimination would not constitute reverse discrimination of non-target groups. According to the legislation, target groups tend to be designated by evidence of long-standing disadvantages such as high and persistent unemployment rates, relative absence from large sectors of the economy, absence from decision-making positions, and wage differences that remain after factors such as skill level and experience have been taken into account.

Therefore Employment Equity policy is a broad strategy which is intended to affect promotion and career development as well as hiring and recruitment. The equity theory through the promotion of a positive self-image and the promotion of a positive work environment stimulates the concept of fairness.

> "Equity theory helps us to understand how a worker reaches the conclusion that he or she is being treated fairly or unfairly. The feeling of being treated equitably is an internal state of mind resulting from a subjective calculation of what puts into a job and what one gets out of it in comparison to some other relevant person."[20]

The federal government's goal of achieving a Public Service workforce that 'fairly represents' the diversity of Canadian

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[19]The Canadian Human Rights Act. (Bill C-25), Section 15(1).

[20]Donald E. Klingner and John Nalbandian, Public Personnel Management Contexts and Strategies, Englewood Cliffs, NJ: Prentice-Hall, Inc.; 1985, p. 211.

society is thereby seen by the government as a challenge for all managers in the federal Public Service.

> "In keeping with the trend toward positive recruitment initiatives in the public service, another phenomenon has surfaced which has created enormous implications for the merit principle. That phenomenon is known as representative bureaucracy and it is manifested in the numerous affirmative action and equal employment opportunity programs across North America which have been designed to bring about a more representative public service."[21]

The acceptance of this challenge is evident in the policies and guidelines adopted by departments. A good example of this is that of Transport Canada's Employment Equity Policy, which states:

> "1. Transport Canada recognizes that members of designated groups still face employment disadvantages characterized by a pattern of higher unemployment rates, limited occupational distribution and career progression as well as higher attrition rates compared with the rest of the work force.
>
> 2. Transport Canada is committed to equality of opportunity and fair treatment for all in recruitment, retention, promotion, training and development or in any other employment opportunity.
>
> 3. Transport Canada is convinced that true equality of opportunity for persons with disabilities, aboriginal peoples, members of visible minorities and women, particularly in the Management stream and non-traditional occupations, can only be achieved through strong pro-active and management-driven initiatives and special measures."[22]

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[21]Robert F. Adie and Paul G. Thomas, Canadian Public Administration - Problematical Perspectives. Scarborough, Ontario: 1987, p. 77.

[22]TP 116 EMPLOYMENT EQUITY. Transport Canada.

In the examination of the documentation, one sees an acceptance of equal treatment of the targeted groups through principles of 'equity'. One must assume that with the introduction of this policy statement that compliance by management would follow. This policy statement, identifies the acceptance by the department that representation of the identified groups is not becoming apparent as anticipated by the programs initiated by both Treasury Board and the Public Service Commission. Greater emphasis from a departmental perspective had to be drawn to these concerns since the programs did not appear to have a positive impact on the results of the department.

Programs to increase representation started with 'Language' in the late 1960's. Women and aboriginal peoples were identified and programs established to increase representation and advancement in the 1970's. Persons with disabilities were considered with the UN year of the disabled in the early 1980's and programs were created to encourage their introduction into the Public Service. Visible minorities were identified as a target group in the mid 1980's with the expansion of programs to increase their representation. One might expect that with over two decades to increase representation and develop equity in the treatment of targeted groups that substantial movement in departments towards greater representation should occur.

In the examination of statistics from the Public Service Commission (tables T-1 and T-2 below) describing women in the employee population of the public service over the last decade, the results of this acceptance is not shown. Women are showing a slight increase in the management category; however, it must be noted that this category was changed to include management assistance and managerial clerical support. In the non-traditional roles, scientific and professional, technical, and operational roles, we see very little movement towards increasing women over the time span. In the traditional role of administrative support, it must be noticed that males have not increased substantially, although there is a small movement to indicate that males are starting to appear in this category. It must also be noted that the increase in the administrative support role also coincides with the introduction of programs for aboriginal peoples and persons with disabilities. Since 1986, there was greater emphasis on recruitment of visible minorities. These observations may indicate that movement in the administrative support category may be related to attempts to increased representation of these targeted groups into the work place. Thus, the increase of males in this category may be misleading in terms of greater acceptance of equity in the public service.

(T-1) Representation of Women to Men by Employment Category: 1979-1984

Category	1979	1980	1981*	1982	1983	1984
Management:						
Men	96.3%	96.0%	-	94.8%	94.1%	93.0%
Women	3.7%	4.0%	-	5.2%	5.9%	7.0%
Scientific & Professional:						
Men	78.2%	79.0%	-	87.1%	87.3%	76.8%
Women	21.8%	21.0%	-	22.9%	22.7%	23.2%
Admin. & Foreign Service:						
Men	75.6%	73.4%	-	77.5%	66.3%	64.7%
Women	24.4%	26.6%	-	32.5%	33.7%	35.3%
Technical:						
Men	90.0%	89.6%	-	88.0%	87.8%	87.4%
Women	10.0%	10.4%	-	12.0%	12.2%	12.6%
Administrative Support:						
Men	20.3%	19.3%	-	17.8%	17.6%	17.4%
Women	79.7%	80.7%	-	82.2%	82.4%	82.6%
Operational:						
Men	81.3%	80.5%	-	87.7%	87.7%	87.1%
Women	18.7%	19.5%	-	12.3%	12.3%	12.9%
All Categories:						
Men	65.4%	64.4%	-	59.6%	59.4%	58.9%
Women	34.6%	35.6%	-	40.4%	40.6%	41.1%

* 1981 PSC Annual Report was not available.

(T-2) Representation of Women to Men by Employment Category: 1985-1990

Category	1985	1986	1987	1988	1989	1990
Management:						
Men	92.2%	90.9%	89.4%	87.7%	85.9%	84.7%
Women	7.8%	9.1%	10.6%	12.3%	14.1%	15.3%
Scientific & Professional:						
Men	75.9%	76.1%	75.5%	75.6%	75.0%	73.8%
Women	24.1%	23.9%	24.5%	24.4%	25.0%	26.2%
Admin. & Foreign Service:						
Men	63.4%	62.6%	62.7%	60.8%	58.8%	56.0%
Women	36.6%	37.4%	37.3%	39.2%	41.2%	44.0
Technical:						
Men	86.9%	86.7%	86.3%	85.7%	85.1%	84.3%
Women	13.1%	13.3%	13.7%	14.3%	14.9%	15.7%
Administrative Support:						
Men	17.3%	17.3%	17.2%	17.1%	16.9%	16.4%
Women	82.7%	82.7%	82.8%	82.9%	83.1%	83.6%
Operational:						
Men	87.1%	87.2%	87.1%	87.0%	86.8%	86.8%
Women	12.9%	12.8%	12.9%	13.0%	13.2%	13.2%
All Categories:						
Men	58.4%	58.2%	57.6%	57.1%	56.4%	55.6%
Women	41.6%	41.8%	42.4%	42.9%	43.6%	44.4%

Women can be seen as being the first to promote equity in the work place. In a Labour Conference in 1975, women delivered a plan of action to develop a work environment that would foster the career aspirations of their group. These planning

actions can be seen as elements that are now used to promote all target groups. Some of the actions included in their plan are as follows:

- To widen the range of employment opportunities for women, by breaking down traditional barriers to their employment in particular areas of work based on a sex-typed division of labour or on the grounds of their marital status;

- To develop counselling, training and employment policies which take account of individual aptitudes, capacities and interests, irrespective of sex;

- To promote the movement of qualified women into higher levels of skill and responsibility in the occupational structure;

- To analyze internal regional differences both in women's rate of activity and in the character of their participation in the work force with a view to providing equal work opportunities for men and women in all regional development planning and action;

- To ensure adequate and appropriate attention to women's integration in work life in all national economic and social development planning and action;

- To ensure adequate and appropriate attention to special categories of women workers including migrant women workers;

- To promote changes of attitudes towards the employment of women, irrespective of marital status including the promotion of more favourable and positive attitudes towards women employment by employers and workers, by men and women themselves and by society as a whole.

SOCIAL AND MORAL ISSUES OF EQUITY

Social and moral issues are connected with employment equity programs. The issues associated with discrimination and legislatively mandated behaviour to remedy the effects of discrimination, tend to be highly emotionally charged , and as a consequence, it is sometimes difficult to deal with the subject dispassionately. From the material presented in the previous section, we can clearly see how Canadian legislators have responded to various social demands and pressures in the area of employment equity. There is mounting evidence however, that change is slow, in some cases almost negligible, and that attempts to eradicate discrimination in our society have led to some predictable negative consequences. Though undisputedly a well-intentioned effort on the government's part, it is felt by the government that in order for employment equity programs to succeed, mandatory numerical targets or goals with implementation timetables must be maintained. The government concluded this from looking at other past affirmative action initiatives, many of which were of a voluntary nature or lacked enforcement mechanisms and have apparently not been successful.

An early example of an effective target or quota-driven affirmative action initiative in Canada was a massive program to increase francophone representation in the federal public

service to a level comparable to their presence in the Canadian population. "It was suggested", reports Lance Roberts "that the non-partisan criteria of merit and service should give way and should be replaced by ones which would ensure 'effectively balanced participation' and whereby 'merit' would become a 'dynamic concept', being only one of five principles upon which hiring and promotion were to be based. Included as well were the more subjective and arbitrary concepts such as 'sensitivity', 'equity', and 'responsiveness'.

Not all in our society agree, however. A number of interest groups and organizations expressed some very real concerns, suggesting that perspective was often lost in our haste to 'right the wrongs' seemingly committed in the past. Many of these groups expressed their opposition to quotas and to even special programs for that their major concern was that a person's membership in a particular group rather than his or her qualifications would determine eligibility for employment and promotion. Thus the stigma of the group membership still existed.

> "Physical abnormalities, for example, may be the most stigmatized differences because they are physically salient, represent some deficiency or distortion in the bodily form, and in most cases are unalterable. Other physically salient differences, such as skin colour or nationality, are considered very stigmatizing because they also are permanent conditions and cannot be changed..Stigma often results in a special kind of downward mobility. Part of the power of stigmatization lies in the realization that people who are stigmatized or acquire a stigma lose their

> place in the social hierarchy. Consequently, most people want to ensure that they are counted in the nonstigmatized 'majority'. This, of course, leads to more stigmatization..Stigma allows some individuals to feel superior to others. Superiority and inferiority, however, are two sides of the same coin. In order for one person to feel superior, there must be another person who is perceived to be or who actually feels inferior. Stigmatized people are needed in order for many nonstigmatized people to feel good about themselves...Hence, power, social influence, and social control play a major role in the stigmatization process."[23]

In addition to these problems, the public service is faced with the reality of an ageing work force. The intergenerational concerns of the young looking to get into the work force face the older worker who is still working in a productive career. Questions that arise when discussing equity must include the constructs of getting the young to work while still maintaining productive skilled and valuable older employees.

> "Perhaps not surprisingly, given the newness of the generational approach to social analysis, there exists disagreement amongst those who believe that the intergenerational framework is an appropriate way to think about the dynamic impact of modern welfare states...The effects of earlier exit from the labour force and increased life expectancy at higher ages have joined forces to change radically the nature and meaning of 'old age'... it is also questionable whether a claim for 'justice between the generations' can and should simply be added to all the other claims for political intervention... much will depend on the 'messages' that policies

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[23]Stephen C. Ainlay, Gaylene Becker and Lerita M. Coleman (Ed.) The Dilemma of Difference: A Multidisciplinary View of Stigma, New York: Plenum Press; 1986, p. 214-215.

> for transfers in the future send to the younger members of society...What societies must and will find themselves discussing soon is why the young adults of today can be expected to play the part assigned to them by history, that of willing funders of a lifetime welfare state which they themselves will never inhabit."[24]

Furthermore, there was some fear that individuals hired or promoted under special programs would face hostility from other employees and that some people hired would feel they had been accepted on a token basis and not on their own merit. Opponents of the policy further argue that affirmative action results in reverse discrimination, where employment equity under the disguise of redressing wrongs, merely compounds discrimination by replacing it with more discrimination. They also argue that individual members of a target group will benefit from employment equity simply on the basis of their membership in the group, regardless of whether they have personally suffered from discrimination. However, the Abella report had criticized this charge of reverse discrimination, stating that:

> "the end of exclusivity is not reverse discrimination, it is the beginning of equality. The economic advancement of women and minorities is not the granting of a privilege or advantage to them; it is the removal of a bias in favour of white males that has operated at the expense of other groups".

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[24]Paul Johnson, Christoph Conrad and David Thomson, (Eds.), Workers Versus Pensioners: Intergenerational Justice in an Ageing World, New York, Manchester University Press; 1989, p. 8-54.

Temporary discrimination as part of developing equality is further explained and supported by Judge Powell in the U.S. decision in the Bakke case[25]. Bakke was a white student who applied for a seat in medical school and was denied admittance as a result of seats being allocated to minorities.

> "...It is not Bakke's fault that racial justice is now a special need - but he has no right to prevent the most effective measures of securing that justice from being used...A flexible program is likely to be more efficient, in the long run, because it will allow the institution to take less than the rough target number of minority applicants when the total group of such applicants is weaker, and more when it is stronger. It is certainly better symbolically, for a number of reasons. Reserving a special program for minority applicants - providing a separate door through which they and only they can enter - preserves the structure, though of course not the purpose, of classical forms of caste and apartheid systems, and seems to denigrate minority applicants while helping them. Flexible programs emphasize, on the other hand, that successful minority candidates have been judged overall more valuable, as students, than white applicants with whom they directly competed.
>
> Powell sees an importance between a handicap and a partial exclusion. He says that in the former case, but not the later, an applicant is treated as an individual and his qualifications are 'weighed fairly and competitively'...but this seems wrong. Whether an applicant competes for all or only part of the places, the privilege of calling attention to other qualifications does not in any degree

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[25]Bakke v. Regents of the University of California 483 U.S. 265 (1978).
Two sources are available discussing this case:
Stewart, M. A. (Ed.), Law, Morality And Rights, Boston: D. Reidel Publishing Company, 1983. and,
Dworkin, Ronald, A Matter of Principle, Cambridge, Ma; Harvard University Press; 1985.

> lessen the burden of his handicap, or the unfairness of that handicap, if it is unfair at all. If the handicap does not violate his rights in a flexible plan, a partial exclusion does not violate his rights under a quota..."[26]

In some cases, the problems with employment equity were inherently difficult to anticipate while in the vast majority of other cases were perfectly foreseeable. Apart from weakening the merit principle, it is felt by opposition groups that affirmative action programs are disastrous for the competent minority person who would have "made it" in the absence of any preferential treatment. Preferential treatment is destructive to the person's self-image, for he or she will never know for sure whether he or she owes the promotion or acceptance to his or her own merits or to the fact that he or she happens to be a affirmative accion target. The individual's peers may not fully appreciate the person's accomplishments for similar reasons and perhaps the person's abilities will be open to suspicion in the eyes of clients. Opponents further argue that employment equity also harms the unqualified target or minority person, for when one is promoted into a position which calls for greater abilities than one has, when one is accepted by a school with requirements far in excess of one's abilities, when one is pushed into a work situation over one's head, then one is not

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[26]Ronald Dworkin, A Matter of Principle, Cambridge, Ma; Harvard University Press; 1985, p. 303-311.

the recipient of an advantage by any means. True, proponents of employment equity do not intend any such thing to occur, but there is abundant evidence that it does.

> "...the fundamental test as a series of interlocking definitions and distinctions. He defined having an obligation as lying under a rule, a rule as a general command, and a command as an expression of desire that others behave in a particular way, backed by the power and will to enforce that expression in the event of disobedience..."[27]

With employment equity, there are some rather obvious, but rarely talked about implementation problems relating, for example, to identification of target groups such that in identifying precisely which people, at present, are members of such groups? Identification can be quite problematical and it may prove to be considerably difficult to specify, even in principle, which groups should be rewarded. For instance, no clear-cut generally accepted definition of a native (aboriginal) or other minority groups exists. In Canada, the situation is highly convoluted and complex, for there are treaty, non-treaty, and Metis statutes for the native peoples as well as for female (but not male) out-marriage disenfranchisement. Identification is by its nature subjective and personal. There is also the issue, in the case of 'visible minorities', as to what exactly we mean by visible. To whom and to what end is one visible is the issue,

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[27]R.M. Dworkin, (ed.), The Philosophy of Law, New York, Oxford University Press; 1977, p.39.

i.e. in China, a white anglo-saxon is a visible minority, but in Canada, where the country is comprised of many races, many origins, is there a role for stigmatization? Is it a matter of degree of skin colour or racial difference for a groups or an individual to be designated as visible? Where do people of mixed race fit in or should they? Suppose a blue-eyed, blond, fair-skinned person claimed employment equity benefits as a black or an Oriental. It would be very difficult to deny this without becoming embroiled in despicable and tasteless disputes that were better handled in Nazi Germany.

Canada's experiment with promoting greater equality in employment opportunity and equity seems to be still at the trial-and-error stage. Some groups perceive the Employment Equity Act as largely a hands-off scheme whereby the Government can comment on the overall numerical outcomes of the process, but no one should inquire too closely into how much fundamental change they really represent. It is conceivable that the assumption and the goal of engineering a workforce that is proportional and representative of the various segments of population (the notion that representation of designated groups must be at least proportional to their availability in the external workforce). This notion essentially states 'equal justice' and requires every conceivable segment of society to be represented at every level, in every occupational category in all sectors of our

economy. It may, however, be rather bold to assume that within each segment of society, all members of all groups are alike, think alike, come from the same backgrounds, share the same interests, have the same goals, motivations, aspirations and political and social convictions and values. The notion ignores even such simple factors as age and education differentials, geographic location and concentration of the ethno-racial population make-up, and thereby somewhat trivializes the entire issue. As the Canadian Civil Liberties Association promotes,

> "it is not for the government to determine that any given percentage of women or persons of colour should **want** to serve in a particular position. It is for the government to ensure that all groups are open to the possibility of filling such positions and to the extent that their members want to do so, they do not suffer unfair discrimination. To simply give jobs and promotions to someone based partly on reasons of race, gender, disability cheapens everybody, and undermines the ability of Canadians to believe that their government is a fair and equitable one."[28]

This means that we should rely less on the approach of creating mandatory numerical goals, targets and timetables. The Act should instead of prescribing quotas seek to break down what systemic barriers to entry there may be in the hiring process for target groups. This could be accomplished by combining and strengthening several initiatives:

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[28]Canadian Civil Liberties Association, pamphlet.

i] The Canadian Human Rights Commission should be given far greater powers and resources in dealing with employment discrimination cases, providing for much stricter and severe penalties for discrimination on prohibited grounds against any individual. Employers should be still required, perhaps using the existing enforcement mechanism to submit reports on their hiring practices and accomplishments. These reports should continue to be monitored by the CHRC to identify employers potentially suspect of discrimination. The CHRC should then have the power and the financial and human resources to launch inquiries and prosecute when necessary.

ii] Maintain and increase funding under the Act for programs providing public education and awareness. This could be accomplished through a much more extensive use and involvement of media, trying to encourage social change and change general attitudes toward the issues of racism, sexism and discrimination. Similarly, continue to develop and teach programs to raise departmental managers' understanding of the principles of employment equity and the issue of employment discrimination.

iii] Give unions a greater role in representing the interests of their members in the grievance process by strengthening Section 4 of the Act to further require the

employer, in consultation with employee representatives or bargaining agents, to identify and eliminate systemic barriers to employment entry and promotion.

One of the greatest flaws with employment equity is the treatment of so-called 'visible minorities' as one homogeneous group in employment equity hiring and conversely the treatment of all so- called 'majority whites' as a homogenous group. For instance, Nova Scotia blacks, a special case, have a defensible claim to compensation on the basis of history, while it is not entirely clear that East Indian immigrant professionals of high caste status should enjoy the same benefits. However, since both groups qualify as a 'visible minority' target group and since employers presumably do not discriminate under employment equity as to the racial or ethnic **make up** of 'visible minority' individuals hired, one could easily claim that basic internal inequities may easily continue to exist in the 'visible minority' target group. The notion of proportional representation in the workforce is, however, not as detailed or as bold as to dictate detailed representational targets.

It is not difficult to adopt the view that racism and discrimination are not just a matter of physical or racial attributes but those of culture. For it is often the case that racism is targeted against strange accents and habits

rather than just racial or visible attributes. One of the difficulties that this raises, is that race is a concept that is used and not defined. For example, in a recent complaint against the Canadian Broadcasting Corporation a refusal of summer employment was alleged because of the complainant's national origin. The complainant, who is of French origin, claimed he was refused a position as a 'On Air Commentator' with the CBC because of his foreign French accent. Under the terms of settlement, the CBC gave assurances that it would access the complainant's qualifications on the same basis as those of other candidates if he decided to apply for similar positions in the future. It also agreed to compensate him in the amount of $2500.[29]

More time and further thought should be given to research into minority groups, regardless of their visibility, where perhaps such terms as a **'disadvantaged group'** might replace the all-inclusive, condescending and questionable term 'visible minority'. Hence an employment equity scheme should be devised which would benefit **the right groups** designated due to their social and economic weakness not due to their race or colour.

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[29]CHRC case of national origin, Lesourd versus Canadian Broadcasting Corp., Montreal; Feb. 1990.

According to a Treasury Board source[30], the Board is now looking at the possibility of adding a new target group into the employment equity initiative. This new group would be one of an 'Audible Minority'; individuals with foreign accents. It is yet unclear what exactly it implies, but the prospects may vary from exciting for some, to nightmarish for others. The impact of this initiative would undoubtedly result in a considerably greater fairness for a greater number of groups and individuals who, for whatever reason, are truly socially and economically disadvantaged.

[30]Middle manager working with Employment Equity Programs.

POLICY AND PRACTICE

The PSC since 1986 has maintained a statistical data base on target group representation in the public service. This data base in more recent years has also been used to produce statistical cross-referencing categories, e.g. aboriginal-women, disability-visible minority, etc. With maintaining numerical targets, it must be recognized that statistics could be misleading. For example, a department could recruit twelve aboriginal women with disabilities, the department could claim twelve aboriginals, twelve women, and twelve persons with disabilities. While multiple barriers add to the difficulty of individuals to attain equity in the selection process, it is important to keep in perspective the statistics. The multiple target group tables of the PSC assist in reflecting a more accurate representation of the work force.

One could also expect a wave of protest from minority groups and their leaders as some groups would stand to lose their current benefits in consideration for preferential hiring and promotion treatment.

It is apparent that there exists some significant statistical weakness in the various measures of discrimination and that the lack of persuasive empirical evidence has been largely ignored in the public debate about discrimination. Public

opinion and the attitude of legislators has largely taken what little research has been done on the subject at face value. Generally, cases are reported on an individual basis and the issue solved for the individual. However, the issue still remains for the individual in other situations and a paradox exists as the issue certainly remains for the group. Unfortunately, as is evident in several analyses, many affirmative action programs seek retribution for perceived past discrimination and ignore present day realities. It is entirely possible that discrimination that lawmakers are trying to eliminate, is often misinterpreted as it applies to the group. In its present form, the Employment Equity Act and the equivalent Treasury Board Policy have generated a great deal of public concern about the inequities behind statistics, for statistics without a proper interpretation are meaningless and misleading.

Traditionally, we were told that racial minorities earn less, and that this is evidence that the job market is filled with systemic racism. Utilitarianism would claim that such a situation is justified for the economic benefit of society as a whole.

> "By 'Utilitarianism' I mean the theory that the only sound, fundamental basis for normative (or Moral) appraisal is the promotion of human welfare...my argument extends to a number of normative views that are closely associated with utilitarianism but not equivalent to it, such as

> normative 'economic analysis' in the law. Second, it extends to many other 'goal-based' theories and perhaps to other normative theories as well.
>
> Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole...Utilitarianism claims that people are treated as equals when the preferences of each, weighted only for intensity, are balanced in the same scales, with no distinctions for persons or merit...The right of moral independence is part of the same collection of rights as the right of political independence, and it is to be justified as a trump over an unrestricted utilitarian defence of prohibitory laws...allowing restrictions on public display is in one sense a compromise; but it is a compromise recommended by the right of moral independence, once the case for that right is set out, not a compromise of that right.
>
> ...rights which have traditionally been described as consequences of a general right to liberty are in fact the consequences of equality instead, may in the end prove to be wrong."[31]

A recently published study by the Economic Council of Canada titled New Faces in the Crowd examined the social and economic consequences of immigration indicating that there are differences in income levels between white and non-white Canadians but that in itself is hardly evidence of discrimination. Canada's non-white population has more than doubled in the past 20 years, which means that a very high percentage of the nation's non-white population has only been in this country for a fairly short time, and one can hardly expect relative new Canadians to be making the same salaries as others. According to the council,

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[31]Jeremy Waldron, Theories of Rights, New York, Oxford University Press; 1985, p. 110-168.

> "it takes all but the youngest immigrants up to 20 years to catch up to the earnings of Canadians, though catch up they nearly always do... Persons who came from Third World regions but who arrived here young enough to obtain all their education and experience in Canada, performed as well as native-born Canadians in nearly all cases."[32]

The Public Service has established and accepted in its policies the representation of target group persons in the bureaucracy. Exclusion Orders have been established for direct recruitment of target group persons into the ranks.[33] The procedures are incorporated into the personnel management roles. But the element missing that is crucial for the implementation to be successful is the accountability of managers to the implementation of equitable treatment and increased representation of target groups into the ranks in each department. The responsibilities are present as we can see in the policy of the departments. The following segment from Transport Canada gives a good example of where Treasury Board wants the responsibility but the departments fall short in making the evaluation process of managers accountable for these responsibilities:

> "7. Group Heads are accountable for:
>
> a. creating and maintaining a work environment conducive to the integration and retention of designated group members;

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[32]Economic Council of Canada, New Faces in the Crowd. Ottawa, 1991.

[33]Public Service Commission, Exclusion Order for Employment Equity target groups, expiry date April 1993.

b. the attainment of Employment Equity objectives within their Group as established in their commitment to the Deputy Minister;

c. ensuring that managers and supervisors within their responsibility area are aware of the Group's objectives as well as their own, and that they are held accountable for progress in their respective organizations;

d. ensuring that their Group develops, implements and reports on an Action Plan (including targets) to correct imbalances and inequities.

8. Managers are responsible for:

a. implementing Employment Equity objectives within their scope of authority;

b. developing strategies to improve the recruitment, representation and retention of designated group members;

c. actively promoting training and development, career advancement opportunities and developmental assignments for designated group members;

d. fostering a work environment conducive to the integration and participation of designated group members;

e. identifying in their annual plan activities or initiatives aimed at achieving the Employment Equity objectives outlined in their Group's Action Plan."[34]

Loosely stated, managers can be seen as viewing their role and the rules that they follow as meeting the ends that they want to achieve.

In The Canadian Charter of Rights and Freedoms, the state establishes elements of equity for examining concepts of what is to be considered acceptable practice. Pierre Trudeau, when he was Prime Minister, suggested that the new Charter of Rights represents the "collective vision" of the Canadian

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Transport Canada Employment Equity Policy, TP 116: 1991.

people, a society committed to upholding the equality and the rights of all its members.[35]

The Charter, provides for the equal treatment of all Canadians. It designates specific groups for which equality must be a consideration. It also allows for special measures as exceptions under the Charter as a means of reducing previous unequitable treatment.

> "Equal treatment may mean treating people the same way; or, it may mean treating people differently. The trouble is that the employer can not know, in advance of being prosecuted, which view the Commission will espouse, or the board of inquiry will uphold."[36]

Access to employment and the reimbursement for services rendered have been issues for social concern since the end of World War II. These issues have been noted in the United Nations Declaration of Human Rights and many other reports since that time. Harish C. Jain in the report to the Secretary of State, stated:

> "Pay and employment discrimination against minority groups has become a matter of social and political concern in the post-war decades...The concern for equality of opportunity has also been dramatized in recent decades because of the variety and number of immigrants...As a result, our society today is multi-cultural, multi-lingual, and multi-religious."[37]

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[35]Judge Rosalie Abella, (ed.) Equality In Employment - A Royal Commission Report - Research Studies. Ottawa; 1985, p. 55.

[36]Ian Hunter, "Human Rights: Liberty Can't be Legislated", Contemporary Canadian Politics. Scarborough, Ontario: 1984, p. 63.

[37]Harish C. Jain, Anti-Discrimination Staffing Policies: Implications of Human Rights Legislation for Employers and Trade Unions. Ottawa: 1985, p. 1.

The sentiments as expressed in the Charter are evident in the Canadian Human Rights Act. The excerpts below express concerns of equity of treatment protected by this legislation:

> "15. (II) It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, national or ethnic origin, colour, religion, age, sex, marital status, family status or disability of members of that group, by improving opportunities respecting goods, services, facilities, accommodation, or employment in relation to that group."[38]

In reviewing the putative power exerted in the primary legislation that affects equity of employment in the Public Service; it indicates that the way in which legislation portrays equity is subject to interpretation. Equity, as covered in this legislation, is a recent occurrence in Canadian history. Recruitment to the Public Service is governed by the Public Service Employment Act of 1968. In this Act, selection for appointment must be made in accordance with "Principles of Merit" as defined by the Commission.[39] The Commission is deemed to be the rational body that can determine the principles under which productive criteria for recruitment selection takes place.

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[38]Government of Canada, Canadian Human Rights Act. Ottawa: Queen's Printer, 1987.

[39]Government of Canada, Public Service Employment Act. Ottawa: Section 12.

It is reasonable to expect that clear, concise statements of definition would be present defining 'principle of merit' and 'equity' or 'equality'. Statements of merit, as referred to by officials of the Winnipeg office of the PSC, are found in each Annual Report published by the Commission. In recent years, the Annual Reports of the Commission include a glossary of terms for easier understanding of the concepts in the report. The concept is there, but not clearly stated, establishing a pecking order in 1948 (Veterans first), but, a little more elusive over the last decade. The following extracts from the last ten Annual Reports uncover the spirit inferred by this concept:

> "...**Equality of Access:** The Public Service Employment Act states unequivocally that the Commission "shall not discriminate against any person by reason of sex, race, national origin, colour or religion." Accordingly, and in support of specific Government policies, the Commission has continued its endeavour to remedy the low participation of certain groups at various levels in the Public Service..."[40]

The Commission issued two bulletins[41] on staffing processed to change objectives of staffing to incorporate Aboriginal Peoples programs. The first of these, issued in June 1979, instructs departments to ensure that indigenous people participate in staffing processes for positions that entail one or more of the following elements:

- policy or decision making that affects indigenous people
- design, development, implementation or evaluation of programs directed toward indigenous people

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[40]Public Service Commission Annual Report 1980. Ottawa: pp.6-7.

[41]A bulletin is used in the Public Service to introduce new, or changes to existing, policy or procedures. PSC bulletins are widely circulated throughout all departments and agencies where the PSC has authority.

- contact with indigenous people.

The second bulletin, issued in June 1980, promotes, by changes to the area of competition guidelines, maximum use of northern resources and talents. These changes require northerners in the Yukon and North West Territories to be considered before recruitment from outside the territories is initiated. This directive also provides for the assignment of Northern Careers Program participants to training positions.[42]

In 1982, one can only assume with the introduction of The Canadian Charter of Rights and Freedoms, the Public Service Commission in its Annual Report expressed in great detail elements that must be considered as part of merit. This extract gives members of selection boards for the Public Service several items that must be accounted for in the staffing process.

> "... it is essential that the ways in which merit is interpreted and applied be continually reviewed to ensure that the expectations and needs of the government, Parliament and the Canadian people as well as the needs of the Public Service are met...
>
> In carrying out its responsibility to interpret and apply the merit principle, the Commission believes that it cannot consider the best interests of the Public Service apart from the public interest. The Public Service exists to serve the public. Therefore, the public interest is paramount transcending the interests of the

[42]IBID. pp. 16-17.

government, political parties, management and public servants...

The public interest requires that merit be interpreted in relation to four factors.

- Efficiency and Effectiveness: Employment policies and practices must enable managers to ensure that programs and services for which they are responsible achieve the intended results at the least possible cost to taxpayers.

- Sensitivity and Responsiveness: Public servants must possess the background, knowledge, and experience necessary to achieve a good understanding of the interests of the various groups they serve.

- Equality of Access: Candidates for positions in the Public Service must be protected from unwarranted discrimination and equal opportunity for all must be ensured.

- Equity: Every employee and every person seeking employment in the Public Service must be treated justly and impartially.

For merit to be upheld, what must be achieved is a balance among these four factors based on rational adjustments which reflect the changes that occur in the needs of the Public Service and in the expectations of the Canadian people as expressed through Parliament and the government. In other words, no single factor of merit can be overlooked or compromised in favour of another, the general equilibrium must be preserved. At the same time, candidates' qualifications must be assessed objectively against the requirements of the job to be performed. If these conditions are met, merit will be able to respond to the values and expectations of different groups within Canadian society and special circumstances that may affect all or part of the Public Service..."[43]

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[43]Public Service Commission Annual Report 1982. Ottawa: pp. 10-12.

It becomes understandable that a cloud of confusion thickens around managers who try to abide by principles of merit. Managers who embrace stereotype images of target group members wonder how they can be effective, efficient, and equitable in their selection under the restraint of dwindling resources. Perception of equity is best expressed by H. Brinton Milward and Hal G. Rainey in a most definitive fashion:

> "...Equity (defined as equal treatment of citizens) and governmental responsiveness and accountability are also very important values in our political life...These values mean that there are multiple criteria for judging success or failure. A program can be run very efficiently and still be accused of being unresponsive, because to be efficient means that you cannot continually respond to this or that request or you will no longer be judged efficient. It is the ability of business to deflect many intrusions into how they operate that often makes them better able to perform on the efficiency criterion than government...Equity is another value that is difficult to reconcile with efficiency... it directs large amounts of money to a small proportion of the population but there were less costly ways to achieve the same goal.....The courts decreed that the money was to be spent to ensure equity with no thought given to economic efficiency..."[44]

D. Rhys Phillips also recognized that the principles of equity and economics were grave concerns of principles of effective business. In an article written for the Abella Royal Commission, these two principles are united as an efficient means for governments to conduct their business.

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[44]H. Brinton Milward and Hal G. Rainey, "Don't Blame the Bureaucracy!," Journal of Public Policy.Cambridge MA: May 1983, pp. 149-168.

> "Securing social equity in occupational and career opportunities must remain a priority objective of government...bottom-line results remain the touchstone of success. The achievement of this goal will not threaten the economic objectives of government and business. Indeed, properly handled, the matter of obtaining social equity itself contributes to the reaching of economic objectives."[45]

As concepts of equity and principles of merit become intertwined, employees in the bureaucracy become more cognizant of their rights. With the acceptance of the amendments to the Canadian Human Rights Act, which included the right to political party affiliation, principles of merit as defined by the PSC were clarified in relation to political neutrality, thus in 1983, merit does not reflect political affiliation.

> "...The principle of merit in the public service - appointments to and promotions within the public service are based on the assessment of the personal and professional qualifications of candidates, without regard to their affiliation to a political party, or their political allegiance..."[46]

In 1908, to make changes to the civil service, The Public Service Employment Act was established with considerable pressure by the union movement to stop patronage appointments to the bureaucracy. The early Act ensured a competitive

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[45]Judge Rosalie Abella, (ed.), Equality In Employment - A Royal Commission Report - Research Studies. Ottawa; 1985, p. 63.

[46]Public Service Commission Annual Report 1983. Ottawa: p.12-13.

process with no consideration given to political affiliation. With principles of merit incorporating political affiliations, as being potentially meritorious, the door is opening to increased political activity in the bureaucracy.

In 1984, for the first time, in the PSC Annual Report, we discover a definition of affirmative action. Equity, as a concept, has been well indoctrinated into the principles of merit. With the statement of what is intended by affirmative action, greater emphasis is placed on the development of programs that should increase the representation of target group persons into the bureaucracy.

> "...Equality of Access to Public Service employment is an integral part of the merit principle...
>
> Since the introduction of the affirmative action program directed towards women, the disabled, and indigenous people, the Commission undertook a review of its roles, responsibilities, and services in this area to ensure that, as far as possible, it was serving the needs of both departmental managers and target group members..."[47]

The definition of affirmative action is found in the glossary and reads as follows:

> "An approach which applies specific analytical tools to identify the sources of discrimination against certain under-represented groups and to remove any obstacles to the equitable

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[47]Public Service Commission Annual Report 1984. Ottawa: p. 23.

> representation of these groups in the Public Service employment..."[48]

Note that the definition as it existed in 1984 did not include the development of special recruitment programs or designated appointments. This definition allows only for the analysis of the system to identify and remove barriers that may impede the recruitment of targeted groups into the ranks of the public service. There is no indication from this definition that targeted appointments as a means to increase representation of specified groups was an acceptable practice. However, this seems to follow the pattern of equity in employment in other jurisdictions, e.g. the evolutionary movement in the United States from vague discretionary programs to mandated specific programs over a couple of decades.

The evolution of merit, invoked changes that took the principle from a pecking order of selection to a complex multi-aspect criteria for managers to consider in recruitment. The PSC, in 1985, generalized the concept to read:

> "Principle of Merit - In general terms, principle whereby persons are selected for appointment on the basis of their qualifications for the positions being staffed."[49]

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[48]IBID. p. 111.

[49]Public Service Commission Annual Report 1985. Ottawa: p. 107.

This statement follows a number of sections in the Report which outlined specific programs, objectives, and goals for the recruitment of targeted groups into the ranks of the Public Service. This definition of merit reflects closely the U.S. recruitment process.

> "Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills including open consideration of qualified applicants for initial appointment is clearly the premier merit principle. The condition of the system in relation to this merit principle hinges first, on the effectiveness of the Job Information System to assure "open consideration"; second, on the "state of the art" for determining "relative ability, knowledge, and skills"; and third, on how well the best methods of evaluation are applied in the process of deciding who should be appointed and who should be promoted."[50]

The Canadian definition above reverts back to the concept of **"best qualified"** without qualifying what the term constitutes. Unfortunately, this generalized definition gives managers the avenue to express stereotype images. As a senior manager of a large department recently stated to me:

> "...I have limited resources. In the selection process, I must hire who I perceive to be the best qualified to assist me in reaching the goals of my branch... Equity is nice, but a manager is rated on the performance of his branch. Achieving equity goals simply adds bonus points..."[51]

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[50]Bernard Rosen, The Merit System in the United States Civil Service, Washington D.C., US Government Printing Service; 1975, p. 11.

[51]Part of a discussion I had with a Level #1 manager with a large federal department in Winnipeg. Oct. 23, 1990.

The manager felt very strongly that in the selection process for recruitment, the concepts of equity (potentially hiring a target group person) meant that he would not be maintaining efficiency in his branch. It was very obvious that this manager held strong stereotype images of members of target groups. These images were maintained even though the manager indicated that he had attended several sensitivity sessions related to each target group.

The issue of economic efficiency as related to equity has appeared as a major issue by managers in relation to equity or accommodation to principles of employment equity. Incidences are: accommodation not limited to requirements of persons with disabilities, but also allowances for women for maternity leave, aboriginal peoples for training of other employees for cross-cultural sensitivity training, etc., issues - unrelated to knowledge or abilities. When equity is discussed in economic terms, the concept loses its focus. The focus of managers then appears to reflect:

> "...The recruitment of competent and motivated men and women raises a host of problems. Should an advantage be given to university graduates? Should emphasis be placed on general education, or on training for a specific job? Above all, should candidates be drawn from all segments of the population, or from one major social group?..."[52]

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[52]Talcott Parsons, (Ed.), The Theory of Social and Economic Organizational Trends. pp.329-340.

Such a statement confirms the stereotype image held by managers. That is, that it would hinder their primary goal of performing the functions of their area in the most economic, efficient, and effective manner if they were to implement aspects of equity into their management practise. Principles of equity to these managers means that they would be recruiting less than the "best qualified" for positions in the organization. The implementation of equity becomes a high risk economic endeavour. For equity in employment to work, it is essential that an understanding of governing values of the concept be firmly understood by personnel involved in the selection process.

Equity of employment is not a legislative requirement in the federal Public Service, it is a voluntary requirement on the part of departments, and the responsibility for compliance rests with the manager. Managers are deemed to incorporate the values of the society in which they serve. Managers holding stereotype attitudes of target group images, see equity as a liability to the effective performance of their areas of management. Policies and programs promoting equity are perceived as a nice thing to do when resources are plentiful but not essential to implement when resources are under restraint.

The federal policy on equity of employment was clearly stated by the Hon. Robert de Cotret, in his role as President of the Treasury board, as:

> "The objective of Employment Equity is to achieve equality in the Workplace so that no one is denied employment opportunities or benefits for reasons unrelated to competence. It means removing barriers in employment systems, policies and practices which may adversely impact on the employment or career progression of these groups. It means implementing special steps to correct the effects of past employment disadvantages and promote the participation of designated groups."[53]

The legislation, policies, regulations, and procedures which govern the recruitment process are poised for change. The direction is towards increased representation of the designated target groups - groups which traditionally have been under-represented in the bureaucracy.

The traditional bureaucratic administrative structure, which is evident in the federal Public Service, possesses two central characteristics which are relevant to this analysis. The more basic of these two is the principle of hierarchy, which entails strictly defined roles articulated in terms of layers of authority. Policy is set at the top of the hierarchy and transmitted down through rules and close authoritative supervision which ensure that the rules are followed. Categories of decisions, decision points, and decision

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[53]Treasury Board Bulletin, circulated September 1986.

criteria are all closely defined, and the most rule-bound of roles are those at the bottom of the hierarchy. In addition, bureaucratic structures promote a cohesive (vis-a-vis the environment) and homogeneous social structure. Conformity to a comprehensive and rather strictly defined set of norms is a primary characteristic of bureaucracies. (Because these norms are primarily middle class, bureaucratic organizations often find that they can neither understand nor communicate with lower-class clients.)[54]

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[54]Gideon Sjoberg, Richard A. Brymer, and Buford Farris, "Bureaucracy and the Lower Class," The Case for Bureaucracy.

APPEALS - MANAGEMENT DISCRETION IN CHECK

Managerial discretion is balanced by unions examining the relationships between unions and management that impact or influence *equity* or "*Merit Principles*". Generally, merit means that the best qualified person is the person who is appointed. In the Canadian context, "best qualified" is the interpretation awarded by the courts, however, there is the flexibility to interpret merit as being the fitness to the position.

> "Appointments to, and within, the public service are based on merit, in the sense that the person appointed is the one who is best qualified. In the Canadian context, the merit principle has often been explained as requiring that public service appointments be based exclusively on merit, in the sense of fitness to do the job, and that citizens have a reasonable opportunity to be considered for public service employment... moreover, fitness for the job does not necessarily require that the most qualified person be chosen. Many people interpret the merit principle solely in terms of appointing the most qualified person;...it is also in accord with the decisions of Canadian courts which have consistently interpreted merit to mean best qualified.
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> The Commission recently stated that "several principles underlie the mandate of the Commission: the best qualified persons are to be appointed to ensure a highly competent Public Service; employees are to be treated fairly and equitably; and managers are to be served by a staffing system that responds quickly to their needs."[55]

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[55]Kenneth Kernaghan, "Career Public Service 2000: Road to Renewal or Impractical Vision?", Canadian Public Administration. vol 34 #4, Winter 1991, p. 562.

We can determine the effect of this check and balance system. Through the examination of adjudication of challenges related to issues of *equity,* we can establish trends in the grievance/appeal process that link Unions and management emphasis on "*equity*", (bias and discrimination). Through this aspect, we can determine to what degree these processes act as an instrument of change to achieve greater equity in the work place. The PSC has two processes that are followed depending on the competitive process; investigations which are used if the competitive process is open to persons outside the Public Service; and appeals, which are used in the case of closed competitions open only to persons already employed by the Public Service. This paper will concentrate on the appeal process as information from this process is more widely available. This process is being reviewed to reflect a broader scope under which appeals can be launched.

> "It could be argued, for example, that principles should be added to deal with appeal rights against promotion, demotion, and dismissal decisions and with assurances of an appropriate retirement and pension system."[56]

To understand Appeals and how they impact on equity, the fairness and justness of management, it is important that we first understand the process. The process is multi-levelled

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[56]Kenneth Kernaghan, "Career Public Service 2000: Road to renewal or impractical vision?", Canadian Public Administration. vol 34 #4, Winter 1991, p. 554.

and extends from the PSC to the Supreme Court of Canada. Appeals can also be referred back and forth between levels which tends to add to the confusion of the process. To assist in understanding the process we will examine a few choice cases.

Case #1.1: Marcel Martel v The Attorney General of Canada

In December 1986, the appellant had successfully contested the Department's claim that the assignment of a candidate to a PM-03 position, Collections Unit Head, did not constitute an acting appointment without competition. The Commission subsequently ruled that the appellant's opportunity for advancement had been prejudicially affected. He therefore appealed again and his appeal was heard in April 1987.

Following the Commission's positive ruling, the Section Chief prepared a statement of qualifications including basic and rated requirements, and evaluated the candidates in light of the factors identified. He took into account the two employees' performance appraisals for the past three years, certain work review reports, interviews with their immediate supervisor, and his own personal knowledge of the candidates. *It should be pointed out that there had been disputes in the past between the Section Chief and the appellant, who was President of the local section of the employees' union.* According to the Section Chief, the appellant was fully qualified, but the other candidate was even more so.

The appellant contested the validity of the selection criteria and the manner in which the selection was carried out. He questioned the personal knowledge of his qualifications which had been used by the Selection Board, as well as the lack of uniformity of the Board, which was made up of only one person. According to the appellant, that person was biased.

Appeal Board Decision
(Baillie, 21.05.87)

The Appeal Board dismissed the appeal. The appellant was asking the Appeal Board to decide that it was necessary to possess several other qualifications which, in his opinion, had not been evaluated by the Selection Board. The Appeal Board decided that it cannot substitute its opinion for that of the Department, and that it is the manager's responsibility - not even the Selection Board's - to determine the

qualifications required for a given position. The Appeal Board could intervene if the Department had acted in a completely unreasonable manner. Moreover, as a member of the Selection Board, the Section Chief could interpret the criteria he had established as manager and choose, in practice, the selection tools which would best enable him to evaluate the candidates.

The Appeal Board concluded that there had been no "apprehended bias" on the part of the Board. Reasonable apprehension of bias is not considered sufficient grounds for intervention by the Appeal Board.

Case #1.1 demonstrates that bias can be used as a rationale for Appeal, but the bias must be substantiated. This decision is relevant as bias generally reflects the attitudes of persons involved and thus the posture of the management. Bias is one of the identified barriers to achieving equity in the work place. But more importantly, this case demonstrates how a case can be appealed on more than one occasion depending on the circumstances. The appellant won his first appeal, but lost his second appeal on the grounds of bias.

Case #1.2: Federal Court of Appeal Judgment - A-374-87
(Pratte, Marceau, MacGuigan, 17.02.88)

The application is allowed, the decision a quo was set aside, and the matter was referred back to the Appeal Board so that it could decide it again, bearing in mind that it must determine whether the appointment in question was made without evaluating the candidates in terms of all the requirements of the position, and, if so, whether this irregularity resulted in failure to respect the merit principle.

In the case, the Appeal Board committed the same error as in Laberge v. The Attorney General of Canada.

Carol Lynn Patterson v. The Public Service Commission Appeal Board

In September, 1986 the Canadian Transport Commission announced a closed competition for the purpose of establishing an eligible list to fill existing and anticipated vacancies to

Traffic Officer positions, classified at the PM-01 level. The competition in question was open to "all employees of the Canadian Transport Commission across Canada".

The applicant was a candidate in the competition. However, the selection board which had been established to assess the relative merit of the various participants in the competition concluded that the appellant failed to obtain a passing mark on the knowledge rating factor. The appellant was therefore found to be unqualified and her name was not placed on the eligible list.

On January 21, 1987 the appellant presented an appeal under Section 21 of the PSEA on the grounds that she was unfairly assessed on the written exam for the position applied for.

In the course of the hearing, the representative of the Canadian Transport Commission pointed out to the Appeal Board that, at the time the applicant submitted her candidacy in the competition, she had occupied, on an indeterminate basis, an identical position to the positions which had been the subject matter of the competition. The principal difference between the PM-01 position occupied by the appellant at the time of the competition and the PM-01 positions which were the subject matter of the competition was different supervisory persons to whom the PM-01 employees would report.

Appeal Board:
(Hershorn, 13:03:87)

The Appeal Board found that it did not have the jurisdiction to hear the appeal on the basis of the person seeking to appeal was not an unsuccessful candidate within the meaning of Section 21 *because an unsuccessful candidate did not include someone who was already appointed in an identical position to those being staffed.*

Federal Court of Appeal: A-173-87
(Pratt, Marceau, Desjardins, 25:02:88)

The application was allowed, the decision under attack set aside and the matter referred back to the Board for a decision on the basis that the appellant was an unsuccessful candidate within the meaning of Section 21 of the PSEA.

The Court found that the appellant clearly took part in the competition and that she was therefore a candidate in the competition. In addition, she was found not to be qualified therefore it could not be said that she was successful. Having not succeeded, the appellant was clearly an unsuccessful candidate who had a right of appeal under Section 21.

The Court found that the real question that should have been raised by the Board was whether the appellant was entitled to participate in the competition. The Court would have answered that question in the affirmative since the competition was open to " all employees of the Canadian Transport Commission across Canada" and in order to find that the applicant was not such an employee, it would be necessary to add qualifications or limitations to the definition of the area of the competition made by the Commission. This, the Court was not ready to do.

Case #1.3: PSSRB decisions and ensuing Federal Court Decision. 16.04.81 - (166-8-9376).

- The grievor had worked as a producer with the National Film Board under contract for approximately ten years, and had been found to be highly competent and capable in the performance of his duties. As a result of the bargaining agent's efforts to regularize the status of approximately 130 such persons working under contract, the grievor was offered a term position, which was allowed to lapse at the end of the term. During his term employment he entered a competition for a permanent position as producer, but was found unqualified.

- The grievor contended that he occupied "a continuing position" as contemplated by subsection 13(1) of the National Film Act. Should the PSSRB recognize this, then the employer ought to be prevented from denying the grievor his rights as an employee by reason of his failure to be appointed as a permanent employee by the Governor in Council. The employer should not be permitted to avoid its obligations to employees both under the collective agreement and the PSSRA by hiding behind the shield of the N.F.A. Should PSSRB conclude that the grievor remained an employee for purposes of the PSSRA, then PSSRB would be compelled to find that the grievor was terminated without just cause.

PSSRB - An adjudicator would be exceeding his/her jurisdictional competence by treating the grievor as a permanent employee as defined by section 13 of the N.F.A. The determination is a prerogative reserved exclusively for the Governor in Council. The source of the injustice lies in the creation of the PSSRA and the grievor's sole remedy is before a court which might provide some recompense.

02.07.82 - 166-8-9724, 9725).

- The grievor complained that the employer had denied him a position as Regional Producer, which had been posted as vacant, and for which he had applied. In filling this vacancy, the employer had failed to comply with the terms of Article 14 of the agreement between the parties.

PSSRB - Based upon the evidence, the adjudicator ordered the employer to complete the selection process that it began when it posted the Regional Producer's position vacant.

21.01.83 - Federal Court - (A-719-82).

The adjudicator did not err in law in determining that Article 14 of the Collective Agreement required the N.F.B., when the selected candidate refused the position, to proceed with the selection from the other candidates of the one most competent, or to determine that none of them was competent, and did not err in ordering the N.F.B. to complete the process.

09.03.84 - 166-8-9724, 9725).

- The new Selection Board found the grievor unqualified.

- The grievor's position was that the employer's judgment about his lack of competence was wrong, and he was entitled to the position pursuant to the terms of Article 14 of the collective agreement.

PSSRB - Based upon the evidence, the Board ruled that the Selection Board should alter its conclusions, should find that the grievor was competent to perform the job within the meaning of Article 14.03, and pursuant to that provision and Article 14.06, and **recommended his appointment to the position.**

Cases #2 and #3 clearly demonstrate the complexity of the Appeal process and indicate two distinct directions that Appeals can take. In both cases, we see artificial barriers preventing the appellants from competing for positions for which they feel qualified. It must also be stated that in neither case did it state that the appellants were not qualified.

We will be looking at two categories of bias. Cases where the appeal was allowed and those where the appeal was denied. In

this category, where the appeal is denied, we can learn a lot about the manner in which bias allegations are heard.

Case #2.1: NICKEL 90-IAN-0616X (Gendron)
Date of Decision: September 7, 1990

Whether appeal filed in time... apprehension of bias on part of selection committee

The appellant received (by Priority Post) the Public Service Commission's opinion that his opportunity for advancement had been prejudicially affected by the appointment but only after the time period for filing an appeal had expired. Both of the parties urged the Appeal Board to accept jurisdiction. Among other allegations, it was argued that the appellant's interview amounted to an assessment by those who had already decided to appoint the other person on a without competition basis.

HELD: If the appellant's right of appeal is not to be illusory, his appeal must be accepted as timely. Although the Chairperson agreed with the appellant that any reasonable person could see that it would be natural for the selection committee to tend to justify its original decision, the Appeal Board is bound by Federal Court of Appeal decisions which hold that *the existence of an apprehension of bias on the part of the selection committee is not sufficient to set aside a selection process.*

Appeal dismissed.

Case #2.2: **PACHOLEK**, 90-DPW-0879 (Stewart)
Date of decision: October 26, 1990

Bias of Board chairman

Alleged there was a reasonable apprehension of bias and if so, then bias was found according to law, Appellant's representative listed events on the part of a former colleague of Board chairman, and alleged the chairman could not be seen to be able to act independently.

HELD: Absolutely no evidence brought to support apprehension, much less actual bias. **Selection Boards are not quasi-judicial, so rules of natural justice do not apply**. Actual bias has to be proven, and it was not.

Appeal Dismissed.

Case #2.3: **GUIBORD**, 90-MOT-0205 (Girard)
Date of decision: April 18, 1990

Alleged narrow-minded assessment and biased assessment of personal suitability

As a result of an allowed appeal, the department's corrective action resulted in the appellant's having been assessed against the personal suitability factor as compared with the proposed appointee.
The assessment of that factor was carried out and the appellant was found not qualified. The appellant alleged that one member of the selection board ignored or misrepresented information concerning the appellant This led to a very narrow-minded assessment of her which was unduly unfavourable. She also claimed that the same member of the selection board showed a personal bias against her and went out of his way to identify shortcomings in her performance in relation to the personal suitability factor.

HELD: After a review of the evidence and arguments, the appellant's concerns are justified, but not to the extent that any intervention from the Appeal Board is warranted. Even with a more reasonable assessment, the appellant might be found qualified but not to the extent that she would displace the proposed appointee on the eligibility list.

Appeal dismissed.

Case #2.4: PILGRIM 87-21-DPW-7 (Giffin)
Goose Bay, Labrador 13 May 1987

Impartiality of Selection Board -- assessment procedures

It was alleged that none of the three members of the Selection Board was competent to serve on that Board either because of a conflict of interest or bias.
The brother-in-law of the first member of the Selection Board was a selected candidate.
The second Selection Board member had a falling out with the appellant because he had asked for the Public Service Commission's opinion as to whether that Selection Board member's recent appointment without competition to the position he currently occupied prejudicially affected his opportunity for advancement.
The third Selection Board member had made known to the appellant his support for the stance of his colleague in the dispute.
It was further alleged that, in preparing the examination and interview questions, the second Selection Board member had deliberately omitted any questions relating to two trades,

with which the incumbent of the position had to be familiar. The appellant was qualified in those two trades. This action demonstrated the negative bias of that board member towards him and the inadequacy of the assessment that the Selection Board made of the candidate's qualifications.

HELD: The fact that the first member of the Selection Board was related to one of the selected candidates and that the other two members of that Selection Board reacted unfavourably to the appellant's challenge against the appointment without competition of the second board member merely gives rise to an apprehension that the selections were tainted by bias. The Department was less than prudent in choosing as a Selection Board member, an individual who was related to one of the candidates. However, this is not a ground on which the Appeal Board can intervene; evidence of actual bias or unfairness is required. Given the information indicated in the position description, the examination and interview questions were adequate to assess all of the qualifications required to properly carry out the duties of the position.

Appeal DISMISSED

It is important to note that in two of the three cases above, the appeal Boards did identify that bias existed in the case, but not enough to warrant action on the part of the Appeal Board. One must keep this in mind in reviewing the cases where bias was a determining factor in allowing the Appeal. The question that arises is - how much must bias exist and be proven before one can reasonably expect an Appeal Board to act favorably to an appeal. An emerging difficulty with arbitral jurisprudence is its vagueness, when Canadian Courts have traditionally shown expertise to arbitral bodies and their expertise when making decisions in an area where they have a quasi judicial role. The Courts as we have seen in Cases #1.2 and 1.3 will refer the Case back to the originating Board

rather than making a decision when there is no definitive answer.

Case #3.1: **GANNON and DEREGT** 90-AGR-0572 (GENDRON)
Date of Decision: August 13, 1990

Adequacy of Interview questions to assess personal suitability... bias on part of the selection board

The appellants submitted among other allegations that the questions used in the interview to assess personal suitability were inadequate for the purpose. The questions asked candidates to describe situations where they had exhibited good judgment, decisiveness,etc. It was also alleged the selection board was biased in favour of the selected candidate.

HELD: The questions used to assess personal suitability could not possibly gather sufficient or adequate information upon which a reasonable selection board could assess a candidate's interpersonal relationships, decisiveness, judgement and reliability. While the evidence did show an apprehension of bias existed, it fell short of proving actual bias.

Appeal Allowed.

Case #3.2: **ROSCOE**, 90-MOT-0349 (Hershorn)
Date of decision: 7 June 1990

Bias - change to weights after partial result known - fairness

The chairperson of the Selection Board changed the distribution of weight between the three rating factors after learning the results of the knowledge assessments to de-emphasize the impact of the knowledge scores. An acceptable rationale for the revised weights was presented to the Appeal Board.

HELD: The Appeal Board did not accept that the true basis for initiating a reallocation of weights among qualifications had nothing to do with actual results obtained by the various candidates on knowledge. The Department was unable to provide any justification for embarking upon a reconsideration of weights to be allocated to qualifications at the point knowledge scores became available. The Appeal Board found that *the true object of the change was an attempt to disadvantage the candidate obtaining the highest knowledge score.*

Appeal allowed.

Case #3.3: **LOVE**, 90-MOT-0975 (Hershorn)
Date of Decision: October 17, 1990

The appellant contended that incidents involving himself as a union representative making allegations against a selection board member rendered the latter as predisposed to not select him for appointment.

Also, the department admitted tabulation errors which resulted in the establishment of an eligibility list which lists successful candidates in other than merit order.

HELD: The evidence supporting actual bias fell short of persuading the Appeal Board that the impugned board member lacked the objectivity to make selections for appointment. Too much emphasis had been placed by the appellant on relatively insignificant incidents which were unlikely to affect the board member in the making of selections for appointment.

On the matter of the order of candidates listed on the eligibility list, the Public Service Commission was asked to conduct a review of calculations that might be needed for the purpose of establishing a list in merit order.

Appeal allowed, after department conceded.

Case #3.4: **MARSHALL** 90-IAN-0857 (Gendron)
Date of Decision: December 13, 1990

Closing date not advertised but no prejudice... doubt as to whether screening was conducted properly... appellant found unqualified though acted in same position with strong fully satisfactory rating... doubt as to whether assessment of appellant was conducted properly.

The department described the selection process as a 'competition by inventory'. Fourteen allegations were made on behalf of the appellant These included that the selection board violated the Act in failing to prescribe a closing date, erred by not 'screening' three of the candidates (including the selected candidate), erred by conducting an irregular interview of the appellant (she could not establish eye contact with one of the seven interviewers, the interview was interrupted, and she felt as though she was rushed), erred by using inappropriate interview questions, erred in finding the appellant unqualified for the position even though she received a glowing appraisal while acting in the position and received a merit raise, and erred in establishing a key factor. There were inconsistencies between the stated results

of the competition and the document given to the Commissioners summarizing the results of the competition.

HELD: The Appeal Board had serious doubts about the screening process given the unexplained inconsistencies in the documentation and a member of the screening board's testimony that he thought the selected candidate and two other candidates had been referred under the government program where training would be provided and that he thought he had to consider these candidates and that the Public Service Commission had referred their names for consideration. Further, the Appeal Board followed the Davis (ABD,[4-1]2.5(a)-40 (Girard) decision and held that there was a presumption that the assessment of the appellant was improper because there was information in the selection board's possession that was contradictory to its assessment but the selection board made no effort to reconcile the contradiction. This presumption was even stronger given the circumstances of the interview and the inconsistencies in the documentation. The Appeal Board concluded that the assessment of the appellant was improper. The closing date of the competition was in fact the date the screening board met and there was no evidence that anyone was prejudiced by the fact that the date had not been predetermined and advertised. The interview questions were not unreasonable and the key factor was appropriate.

Appeal allowed.

Case #3.5: **McCaffrey-Davis et al.**, 90-SEC-0804 (Hershorn)
Date of Decision: November 20, 1990

Preliminary screening - Attempt to deter candidate; Use of pass marks developed after candidates' exams marked; Bias of Selection Board member; several attempts to deter candidate

After considering a litany of methods by which the department had deterred the appellant from first being screened into the competition (which included a cancellation and resuscitation of the competition), which was followed by an attempt to manage the assessment of Knowledge through resort to belatedly establishing of the passmark after several of the candidates' papers had been graded, the Appeal Board found actual bias against one of the appellants.

Appeals allowed.

Case #3.6: **HUSSEY** 90-DOE-0781 (Giffin)
Date of decision: 25 September 1990

Rated requirements --- selection board essentially derogates assessment responsibilities to supervisor in conflict of interest situation.

The appellant placed third on an eligibility list for a term Cleaning Services Person, essentially seasonal, appointment in a National Park. Candidates were evaluated on the information provided in their application for employment, their performance appraisals and, since all had worked for the Park previously, information from their former immediate supervisors. The appellant questioned the correctness of his appraisal - he had been advised by his supervisor that it was a normal one for the first-year employee - especially if it was critical for his placement in this competition in circumstances where the brother of the supervisor placed ahead of him.

HELD: The essential flaw in this competitive process was the failure of the selection board to make an independent assessment of the candidates' qualifications; instead, from the evidence of its reports on the candidates, the selection board relied primarily on appraisals and other information from the supervisor of the position who was in conflict of interest, with his brother as one of the candidates, and whose written appraisals on the other two candidates were confusing and unacceptably short on detail for the purpose of assessing candidates for the various requirements in the statement of qualifications.

Appeal allowed.

Bias in all of these cases gave a distinct advantage to preferred candidates. It is very obvious that bias in these hearings led to preferential treatment, thus, not fair and just to all candidates. Equity in these selection proceedings was not upheld. The Appeal process allowed corrective action to occur.

Discrimination is another means of allowing preferential treatment. In the following cases we will examine cases under the category of discrimination as found by the PSC Appeals Branch.

Case #4.1: **DOHERTY**, 90-MOT-1404 (Murby)
Date of decision: December 27, 1990

Minimum pass mark; Use of overall pass mark

The selected candidate failed to achieve the minimum pass mark with respect to knowledge. The appellant alleged that, in the circumstances, he was not qualified. The department replied that even though the candidate failed knowledge, he was still qualified because of the limited importance placed on knowledge and because knowledge could be acquired on-the-job.

HELD: The selected candidate could not be seen to be qualified for the position. All recognized qualifications described in the Selection Standards, such as "knowledge" were discrete qualifications and had to be met before a candidate could be seen as qualified and eligible for appointment. A decision to seek evidence of an ability to acquire knowledge rather than of the actual possession of knowledge had to be made before a statement of qualifications was established and had to be reflected in the statement of qualifications itself.

In this case, the knowledge requirement was described in the statement of qualifications as "knowledge of vehicle parking at airports". The Selection Board had to ensure candidates possessed that knowledge before proposing them for appointment.

Appeal allowed.

Case #4.2: **HOULE**, 90-MOT-0342 (Carbonneau)
Date of decision: April 19, 1990

Appellant erroneously screened out of competition

The department conceded that it has erroneously screen out the appellant from the competition and was now prepared to screen her in.

Appeal allowed.

Case #4.3: **LANDSIEDEL** 90-CAE-0626 (Gendron)
Date of decision: August 14, 1990

Competence of Selection Board - Assessment of Knowledge -- Selection Board's Conclusion - Discrimination

The appellant did not attend the appeal hearing but submitted his argument and evidence in writing. His allegations, in part, were that the selection board was not competent; there was discrimination on the part of the selection board; one member of the selection board made inappropriate remarks

during the interview; he was denied a postponement of the interview whereas another candidate was given one; his interview answers were scored incorrectly; and, that the selection board did not properly assess his knowledge, previous work experience and past performance.

HELD: As the appellant did not appear at the hearing, the department was not given the opportunity to test the appellant's evidence by way of cross-examination. Therefore, where there was a difference between the evidence of the appellant and the evidence of the department's witnesses (who were present at the hearing), **little weight could be given to the appellant's written statements.**
The Appeal Board was satisfied with all of the department's responses to the allegations and concluded that the selection process was conducted fairly and in accordance with the merit principle.

Appeal dismissed.

Case #4.4: **G. McBride et al.**, 90-EIC-0280 (Robinson)
Date of Decision: May 28, 1990

General Administration Test

The appellants alleged that the GAT should not have been used as a screening tool since it discriminated against **females, older candidates and those with less education.** In addition, the use of the GAT was contrary to departmental personnel policy. The appellants testified that they were under stress when they wrote the test and they stated that the examination room was cold and poorly lit. It was also contended that the merit principle was not respected because the appellants had shown that they were qualified by actually carrying out the duties of a similar position to that under appeal on an acting basis.

HELD: The appellants have failed to refute the studies conducted by the Personnel Psychology Centre that the GAT test items are not biased and there is no adverse impact on the test on the basis of gender, age or education. The appellants have also not supported the contention that the use of the GAT was against departmental policy.
No convincing evidence has been presented that the conditions under which the examination was conducted were so intolerable that the test results should be disregarded. While the appellants may have the ability to perform the duties of the position, unfortunately they did not demonstrate this on the GAT and it has not been shown that the GAT was not a valid selection tool. There is no reason to conclude that the proposed appointments were not based on merit.

Appeals dismissed.

Case #4.5: **LEMAY**, 90-EIC-1048 (Stewart)
Date of decision: December 7, 1990

Screening; discrimination

Alleged appellant (not present) had shown the specified Experience on her application. Unfair to screen her out when the 2 successful candidates had no more than she did.
Also alleged screening board member had discriminated against appellant because she is French-Canadian.

HELD: Appellant properly screened out, 2 successful candidates properly screened in. Whether or not screening board member had an opinion (to which he was entitled) re appellant's proficiency in English, there was absolutely no evidence he acted upon it.

Appeal dismissed.

Case #4.6: **LUCAS**, 88-21-EIC-125 (Vaison)

**Is appellant adequately assessed in view of satisfactory performance in position under competition? ---
Are criteria to assess oral communications biased against Black people?**

Appellant raised two main grounds for her appeal.

1. Biased Assessment

The Selection Board's emphasis on grammar and slang, when assessing her ability to communicate orally, constituted discrimination on the basis of race. She had been judged on "White standards", namely, the extent to which she spoke in line with grammatical rules of the English language.

The language mores of her Black culture had not prevented her from communicating effectively. For the past five years, she had been carrying out the duties of this CR-3 position, having no problems being understood by the public.

appeal **allowed.**

Case #4.7: LINDBLAD, 87-21-PEN-2X, -3X and -4X
Winnipeg, MB on 27 August 1987

Appointments without competition -- National Indigenous Development Program -- whether Department was obliged to compare the appellant's qualifications to those of the appointee

The Department entered into three agreements with the Public Service Commission respecting the terms and conditions for the participation of three individuals in the National Indigenous Development Program (NIDP). It was intended that these individuals, through one-year assignments, would develop the qualifications necessary for case management officer positions classified at the WP-3 group and level.
The Department created three new case management officer positions to which these individuals were appointed without competition at the end of their assignment, given that they received a favourable assessment from their respective managers.
These appointments were the subject of this appeal.
The appellant alleged that the appointments were not made according to merit and that the Department was obliged to consider her for one of the appointments as her qualifications made her a serious contender for the positions. The Department replied that the appointments had been made according to merit in the sense that they were appointments made according to all of the rules and regulations established by the Commission for the NIDP.

HELD: Since the three appointments under appeal have not been excluded from the operation of the *Public Service Employment Act*, the Department was required to abide by merit in staffing the positions. As the Department did not compare the appellant's qualifications to those of the three appointees and as the appellant had successfully performed identical duties for a period of one year, she appears to be a serious contender for the vacancies.
The Department's motivations, based as they were on affirmative action targets for natives and successful completion of a developmental assignment, do not, in themselves, guarantee that the appointments were in accordance with merit.

Appeal ALLOWED.

Case #4.8: HUSSAIN, 87-21-DND-25
Ottawa, ON 22 and 23 April 1987

Basic requirements -- education -- occupational certification -- definition of "acceptable engineering degree from a recognized university" -- whether refusal of Screening Board to accept appellant's engineering degree from a university in Pakistan constitutes an adverse impact discrimination -- whether appellant is eligible for membership in a professional engineering association

The appellant held a degree in mechanical engineering from the *University of Sind in Pakistan*. He alleged that he was the victim of adverse impact discrimination by reason of the

Screening Board having found that, as he had not acquired his degree in Canada, the United States or Great Britain, he did not meet the requirement that he hold an "acceptable engineering degree from a recognized university". The Department explained that the Screening Board had adopted the Canadian Council of Professional Engineers' definition of "recognized university".
The appellant further alleged that he possessed an alternative to that requirement, that was considered acceptable by the selection standards, since he was eligible for membership in the Association of Professional Engineers of Ontario. The Department replied that, although such eligibility constituted an acceptable alternative, there was no evidence that the appellant was indeed eligible for membership in the organization.

HELD: The education requirement, as interpreted by the Screening Board, complies with the applicable selection standards and does not discriminate against the appellant or a class of individuals so as to be prohibited by the Canadian Human Rights Act.
There is no evidence that the appellant's engineering degree is of comparable value to an engineering degree from a university recognized by the Canadian Council of Professional Engineers.
Furthermore, the appellant does not possess an occupational certification that constitutes an acceptable alternative to the required university degree.
The Professional Engineering Act of Ontario clearly states that applications for membership may be denied even to individuals such as the appellant who are graduate engineers.

Appeal DISMISSED.

The last type of Appeals that we will examine are those specific to one target group - persons with disabilities. This category is singled out in the selection process because of two policies of Treasury Board and the PSC. First, a candidate in a selection process according to PSC policy must have his/her disability considered and accommodated in the tools used in the selection process. e.g. if a written exam is to be used as a screening tool, the person with a disability can have allowances for additional time, the exam

presented in alternative formats, or other accommodations that may assist in clearly defining the individual's skills and/or abilities. Secondly, the disability of the individual must not adversely effect the selection process if it can be demonstrated that the disability would not have a negative impact on the individual's ability to perform the duties if alternative means of preforming the duties could be available. Treasury Board has established a policy whereby adaptive technology for persons with disabilities must be provided if it can be demonstrated that the technology would assist the effectiveness and efficiency of the individual in the work place. Economics under such circumstances is not to be a consideration.

Case #5.1: **Crane and Rodgers,** 90-CAE-0042 (Vaison)
Date of decision: 3 March 1990

Whether candidate was fairly considered against the basic requirements ---
Whether hearing impaired appellant discriminated against

On behalf of one of the appellants, it was contended that the decision to screen him from the competition was indefensible, as another candidate with almost exactly the same background was screened in. In any event, it was argued that the appellant should have met the basic requirement issue.

On behalf of the second appellant, who was hearing impaired, it was contended that the failure of the department to provide hearing enhancing equipment at a written test designed to evaluate candidates on knowledge was unfair to the appellant.

While the department agreed that the other candidate alluded to had been ultimately screened into the competition (after initially having been rejected) the department was of the view that this person should have been screened out. In any event, the candidate in question sat and failed a written knowledge

test. The background of the appellant was similar to this candidate, and as a result should properly have been screened from the competition.

The department was of course aware of the hearing impairment of the appellant, as he had noted it on his application form and as he had been an employee of the department for some fifteen years. It was felt that hearing enhancing equipment was not necessary for a written knowledge test. The only oral interaction that took place at the test involved the invigilator reading a set of instructions to candidates, a set of instructions that all candidates had as the top page of their knowledge test in any event. There were no questions from candidates at the test, and no further remarks from the invigilator. The appellant failed to achieve the requisite passmark by a considerable margin, and no challenge has been directed to this.

Held: The explanations provided to the department are sufficient to rebut the contentions raised on behalf of the appellants.

Appeals dismissed.

Case #5.2: Thibodeau, 90-DND-0184 (Giffin)
Date of decision: 14 March 1990

Rated requirements --- written examination --- whether department properly accommodated dyslexic candidate

The appellant checked off the "yes" block on his application where it asked "if you are disabled, will you require any technical aids or special arrangements if called for an exam or interview?" Asked to specify, he added "Dyslexic - May take a bit longer to do written test." Next, the appellant was advised in writing that he had met the basic qualifications, that a written knowledge examination had been scheduled for a particular date, time and place and that failure to present himself might result in his disqualification. The appellant wrote the examination in the same manner and under the same conditions as did the rest of the candidates, failed the examination and was not considered further in the competition.

It was alleged that the merit principle and Treasury Board policy required the department to accommodate the appellant's learning disability in a number of ways. The department stressed that in his application the appellant had indicated the accommodation required and that the time allotted for the examination was more than adequate given that the appellant responded to all of the questions and left after an hour and ten minutes of a two and one-half hour examination.

Held: The appellant's application for employment should have alerted staffing personnel that the candidate may be subject to a condition which could also affect his written communications to the department. Consequently, it was imprudent to conclude without speaking to the appellant that his disability in relation to a proposed written examination need only be accommodated by additional writing time. However, the appellant did not even attempt to argue, let alone demonstrate, that he had difficulty understanding and acting on the specific information in this examination. In the end, it appeared that the department's assessment process, brief questions and expected answers in a time period double that required by any of the candidates, did meet the appellant's real need for accommodation, despite its failure to comply with the Treasury Board policy on disabled candidates.

Appeal dismissed.

Case #5.3: **McDonald**, 90-RCM-0404 (Girard)
Date of decision: June 11, 1990

Whether certain questions proper to assess candidate with dyslexia

The appellant indicated on his application form that he had "mild dyslexia", and he also informed the Selection Board of his disability at the interview. The appellant claimed that his assessment in relation to two of the knowledge questions was unfair and unreasonable since this was the type of question which caused him difficulty. He alleged that the Selection Board should have taken his dyslexia into consideration when considering and assessing his knowledge. He also alleged that the Selection Board already knew of his appeal when they assessed his abilities.

Held: While it is burdensome or uncomfortable for the appellant to be required to constantly explain his dyslexia, more is required in response to a question of that nature than a statement to the effect that one is dyslexic.

The Appeal Board notes that its role is not to conduct a second assessment of the candidate but to determine whether the assessment tools, as used, can be seen as being reasonably capable of allowing for a relative assessment. In this case, the Selection Board has exercised its discretion within its authority and there is no basis for its intervention.

With regard to the appellant's contention that his abilities were assessed after the appeal was filed, even if the Appeal Board were to accept this argument, and all of his other contentions, it would not be mathematically possible for him

to surpass the overall scores attained by the proposed appointee.

Appeal dismissed.

Case #5.4: G., 88-21-EIC-187 (Rosenbaum)

Fair assessment (language diagnostic test)

Performance on Language Diagnostic Test
Three candidates, including G., met all rated requirements.
G. was awarded the highest marks and underwent the language diagnostic test. She received a negative prognosis, i.e. she did not have the potential to reach, within the given constraints, the level of proficiency in French for the position.

Handicap Impacts on Test Results - G. argued that her potential to reach the required level in French was improperly assessed. The test she took did not consider her handicap. She had been discriminated against because of her handicap.

Testing Should Consider Handicap - The Appeal Board noted that G. was not aware, at the time of the diagnostic test, that she had a disability. Accordingly, it was understandable that the test was administered without any accommodation for her handicap. However, when the Public Service Commission (which administers the test) became aware of G.'s handicap, it was obliged to remedy what effectively consisted of unintentional discrimination against her.

APPEAL ALLOWED.

Case #5.5: LABELLE, 90-MOT-0670R (Baillie)
November 13, 1990

- ***Physical incapacity***
- ***Bad faith of Department***

The appellant underwent a spinal cord operation in 1983. Six months later, he was declared able to work without any restrictions. According to the Fire Chief (Mirabel Airport), he performed all of the duties of his position without any major problems from 1984 to July 1989.
Nevertheless, the Fire Chief terminated his employment because an evaluating medical officer of the Department of National Health and Welfare had restricted his duties on November 3, 1988. These restrictions were imposed after reviewing the file and consulting a neurosurgeon who had examined the appellant Both physicians testified at the appeal hearing; in their

opinion, the risk of a relapse made it vital to prevent the appellant from working as a firefighter.
The appellant maintained that he was perfectly able to perform the duties of his position and had always performed all of the related tasks without any problems. A neurosurgeon testified for the appellant and concluded that, from a medical standpoint, the appellant was perfectly able to perform all the duties of his position.

HELD: The Appeal Board was of the opinion that the Department has erred in a manner similar to bad faith. Imposing medical restrictions on an employee did not suddenly render him unable to perform the duties of his position. The appellant worked for six years without any problems and the Appeal Board found that the facts supported the expert witness produced by the appellant, since his expert opinion was consistent with the observations of the appellant's immediate supervisor.

Appeal ALLOWED.

Case #5.6: **COUTURE**, 1983 ABD [4-4] 3.2(g)-1 (Gervais)

Release for incapacity - fireman identified as colour-blind

The appellant had satisfactorily performed the duties of fireman for approximately twenty years. During a required yearly medical examination, the appellant's colour blindness was recognized and brought to the department's attention. Later, the provincial authorities were notified and they amended the appellant's driver's license to establish a set limit on the weight of vehicles which he was entitled to drive on provincial roads. The *Department of National Defence* then cancelled the appellant's permit to drive an emergency vehicle (fire truck) on the military base where he was employed. The department considered that the appellant's colour blindness threatened his safety and the safety of others in the event of an emergency because he might have difficulty distinguishing colours.

HELD: The department did not clearly demonstrate the exact nature of the colour blindness in terms of what colours the appellant could and could not distinguish. In the result, the evidence on file fails to support the department's conclusion that the appellant cannot carry out the duties of a fireman. It is true that the amendment to the appellant's provincial driver's license imposes new restrictions upon him when driving on provincial roads. However, that task involves less than 5 per cent of his duties and the inability to complete that one task is not sufficient cause to conclude that he is incapable of performing the duties of his position.

It was unreasonable for the department to revoke the appellant's permit to drive on the base merely because his provincial license had been amended.
Furthermore, this action promoted an unequal treatment of federal employees since the provincial regulations on driving licenses vary from province to province.

Appeal ALLOWED.

Through the process of reviewing Appeals we are examining the fairness and justness of the Appeal process. Two items of importance become relevant, first, management attitudes towards employees, and second, an increase of cases dealing with bias and discrimination since the late 1980's. By this increase of such cases one can assume one of two things; a) management in the selection process are reverting to more preferential treatment of specific candidates or b) as a result of the awareness campaign about equity and rights of employees, employees are no longer willing to allow prejudicial treatment of others at the expense of their own careers. It is this writer's contention that the latter is the most likely assumption to the current situation of increased appeals in these categories.

PS-2000 REVIEWED

Fair and just management practice is the direction in which the public service is moving. Equity in the selection process is becoming more relevant. These principles are specified throughout the proposals of the PS-2000 recommendations and pursuant action.

Prime Minister Brian Mulroney, on December 12, 1989 announced an initiative to renew the Public Service of Canada. The objective of this initiative, Public Service 2000 (PS-2000), was to enable the Public Service to provide the best possible service to Canadians into the 21st century. This initiative included the work of ten high level senior management task forces. The final report of the tenth task force was released on November 14, 1990. As stated by the Prime Minister:

> "...An efficient and highly-motivated Public Service benefits all Canadians. Since 1984, significant improvements have been made to the delivery of services and to the way in which government is organized and managed. The Public Service today does more work with fewer people and at less cost than it did five years ago.
>
> Significant change is necessary to the way in which the Public Service is managed if it is to continue to be as effective as possible in the context of continuing fiscal restraint. This initiative is intended; therefore, to foster a highly-qualified, professional and non-partisan Public Service imbued with a spirit of efficient service to the public.
>
> This process of change and renewal will reflect close consultation with public service unions and with interested groups outside government.

> Legislation to give effect to these changes will be brought forward during the current session of this parliament..."[57]

The Public Service is to be modernized to meet changing conditions, and provide better services to Canadians within an institution that offers the opportunity to build satisfying careers. This need for change has been strongly encouraged and endorsed by the Auditor General in his most recent audit. The challenge for PS-2000 was identified recently as:

> "Challenge is to decide the extent to which the public service should adhere to the major principles of career public service relating to political neutrality, merit, open versus closed competitions, and career planning.
>
> ...It is a vision of a new public service culture that is results-oriented and client-oriented and that is based on the precepts of service, innovation, people, and accountability."[58]

The Prime Minister has directed the President of the Treasury Board, the Hon. Robert de Cotret, and the clerk of the Privy Council and Secretary to the Cabinet, Paul Tellier, to be responsible for the implementation of the initiative. In addition, the Chairman of the Public Service Commission, Huguette Labelle; the Secretary of the Treasury Board, S. Clark; and several deputy ministers are also closely involved.

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[57]Rt. Hon. Brian Mulroney, Press Release. Office of the Prime Minister; December 12, 1989.

[58]Kenneth Kernaghan, "Career Public Service 2000: Road to Renewal or Impractical Vision?", Canadian Public Administration. vol 34 #4, Winter 1991, p. 551.

Mr. Tellier has been supported by John Edwards, a career public servant and former Public Service Commissioner, who was appointed Manager, Public Service 2000, effective December 12, 1989.

The ten specialized task forces were to review and make recommendations for change related to:

- the government's employment and personnel management regime being made less complicated and burdensome for managers and employees, through the reduction of central administrative controls; giving deputy ministers greater freedom to manage their departments with clearer accountability for results.

- the roles of central agencies including personnel and administrative systems; control throughout the government being clarified and simplified.

- innovative ways to encourage efficiency and improve program delivery to be developed.

The Government has stated its commitment to maintaining the integrity, the excellence and the professionalism of the Public Service as a strong Canadian institution - an institution that is representative of a Public Service that is

efficient and responsive to the changing needs of the country; and a responsible Public Service that is equipped with the tools it needs to meet the challenges of the next century.

Over the years, the Public Service has been tasked to satisfy the demand for many new programs and services; and in recent years it has had to do so within a climate of increasing fiscal restraint and with a significant reduction in personnel. This task has been made even more difficult by traditional institutional structures
and controls that do not encourage efficiency or improvements in service to the public. The complexity of the administrative regime governing the Public Service has been recognized as a serious problem for several decades. The need for simplification, greater devolution of authority and responsibility, and increased efficiency, is more pronounced now than ever before.

To prepare for the challenge of the 21st century; and to allow for effective functioning, in the context of continuing restraint, fundamental changes are required to the ways in which the Public Service is structured and managed. The public service represents a smaller percentage of the national work force than in the U.S., the U.K. or Australia. In Canada, employees of the public service are starting to consider their employment as a life-long career.

> "In Canada a career public service is commonly viewed as one that is composed of persons who have spent or intent to spent, all or most of their working life in government and who remain in office with a change of government because they are permanent employees, appointed on the basis of merit rather than political appointees.
>
> ...Moreover, the belief underlying the reforms proposed in the PS-2000 White Paper is that "a professional, career Public Service, capable of attracting and retaining Canadians of talent, commitment and imagination, is essential to Canada's national well-being" (p. 63)."[59]

The Government has also taken specific steps to ensure that the Public Service is more representative of Canada and Canadians.

Increasing numbers of women have been attracted and promoted to the highest levels of the Public Service; and the Government has made a strong legislative commitment to the recognition of both official languages within the Public Service and in services offered to the Canadian public. To encourage greater representation, there has been a new emphasis on consultation with interested groups outside the Public Service. In new venues, such as the Public Policy Forum, senior representatives of business and labour have begun to work with senior officials toward a better understanding of each other's perspectives and roles. Joint Councils between target group organizations and high level

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[59]Kenneth Kernaghan, "Career Public Service 2000: Road to Renewal or Impractical Vision?", Canadian Public Administration. vol 34 #4, Winter 1991, p. 552-553.

officials in the bureaucracy meet to plan and develop guidelines for initiatives for equity of employment.

Steps to improve efficiency are being taken in the context of broader changes in the operations of government, notably in how the government is organized to deliver services to Canadians, and in what services are to be provided by government. Recent initiatives include:

- the privatization of Crown corporations.

- the decentralization of functions and services to the regions (the Atlantic Canada Opportunities Agency and the Department of Western Economic Diversification).

- changes in how government is managed (through the program known as Increased Ministerial Authority and Accountability).

- a net reduction in federal expenditure on administrative overhead.

The present context of fiscal restraint requires the creation of a more business-like environment for the efficient management of scarce resources. A less complicated system inside government will further reduce the administrative

overhead and free public servants to be more responsive and efficient in serving Canadians. As the public service looks towards the 21st century, PS-2000 attempts to develop its culture and responsiveness towards both the employees and its clients.

> "The new culture will be results-oriented and client-oriented, based on management principles falling into the four categories of service, innovation, people and accountability...Various measures will also be taken to improve the government's relations with public service unions and there will be more emphasis on public service values and ethics and a firm commitment to the pursuit of employment equity and respect for cultural diversity.
>
> ...Indeed, the Commission argues that "when employment equity becomes an integral part of all staffing activities and qualified candidates from all groups have an equal opportunity to compete for positions in the Public Service, it may then be said that the merit principle is being effectively applied."
>
> ...If a new public service culture is to be created and a career in the public service is to be an attractive prospect, politicians must send a clear signal that innovation and risk-taking will be rewarded and mistakes will be tolerated."[60]

PS-2000 is therefore a dynamic proposal for the change of the public service. It proposes changes that would see the culture of the public service management moving from one of control to one that encourages risk taking by its employees. Its vision incorporates the principles of merit and equity as

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[60]Kenneth Kernaghan, "Career Public Service 2000: Road to Renewal or Impractical Vision?", Canadian Public Administration. vol 34 #4, Winter 1991, p. 554-572.

essential parts of the selection process and as elements of career building.But this was a management driven exercise that did not take into consideration in its construct or design the views and thoughts of the employees to whom it will most effect or, the views of the public interest to whom the employees service. During the second reading of Bill C-26, the Bill to enact the recommendations of PS-2000, the opposition in the House raised grave concern. The Hon. Mrs. Shirley Maheu, MP for Saint-Laurent - Cartierville, stated;

> "The government has failed to achieve in this so-called reform a means of meeting the challenges of the future. We must have public consultations where the interests of the public, of the employees and of the government can be melded into a policy that truly meets the needs of all Canadians."[61]

Needless to say, the Members of the Opposition expressed their dissatisfaction with the Government promoting this Bill and invoking Closure on such a sensitive issue as the well-being of the Public Service. Deep concern was expressed about the process (behind closed doors), and allowing such limited time for debate in the House. Concern was raised in regard to this Bill being:

- A management driven exercise without the direct involvement of the employees whose lives will be affected, without the direct involvement of the public

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[61]Hon. Mrs. Shirley Maheu, House of Commons Debates, Ottawa, Friday February 21, 1992, p. 7455.

and without the direct involvement of Parliamentarians and after the expenditure of millions of dollars on this exercise, would insist that it be reported back to the House by the end of March;

- A contradiction of everything that has to do with labour management partnerships;

- 90% at least, not acceptable to those who represent the employees of the Government of Canada (Union contribution);

- A blanket permission to contract out without any process of accountability and without any policy on contracting out;

- A Bill that leaves everything to be done by regulation following the passage of the Bill;

- The undermining of the merit principle;

- A departure from equity and fairness in employment and promotion in the Public Service nor on accountability to Parliament and accountability to the public for how its human and financial resources are being used;

- The right of employees to a fair hearing when they feel their rights have been abused and their opportunities in the Public Service jeopardized;

- The diminution of service to the public; and,

- Politicization of the public service.

It was stated by the Hon. Mrs. Marlene Catterall, member for Ottawa West, that what Canada and the Public Service need is process and practice that would form the basis of partnership between management and unions. She stated that she did not see this in the initiative of PS-2000, further stating,

> "... countries best able to contend with economic change are those that have a tradition and commitment to strong labour management partnerships..."[62]

These sentiments were also expressed by the Hon. Mr. Gilbert Parent, member for Welland-St. Catharines - Thorold with deep concern over what the passing of this Bill would mean for the Public Service and the people of Canada. Although this is a Bill that looks good on paper, the process followed is a concern to many politicians. They express concern that

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[62]Hon. Mrs. Marlene Catterall, House of Commons Debates, Ottawa, Friday, February 21, 1992, p. 7457.

inequity could exist if the passage of the Bill is forced in its present form.

> "...this Bill leaves all but original hiring and limited promotions to the discretion of managers, while opening the door to patronage and favouritism and punitive measures based on a manager's personal likes or dislikes, or to the whims of the Government of the day...Employment Equity is so vague and discretionary as to be almost meaningless...this particular provision requires no accountability...these attitudes often unconscious keep target group members lumped in the lower echelons of the Public Service..."[63]

Another striking point of concern in Bill C-26, is that it moves the responsibility for appeals from the Public Service Employment Act, and the control from the Public Service Commission to the Financial Administration Act, and under the direct control of the Treasury Board. One might wonder why this would be a concern, if it were not for the fact that the Treasury Board is considered the employer. Therefore, in this situation, the employer is taking on the responsibility of being its own 'watchdog'.

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[63]Hon. Mr. Gilbert Parent, House of Commons Debates, Ottawa, Friday, February 21, 1992, p. 7459.

CONCLUSIONS

Equality, or the equal treatment of individuals, is a matter of degree in which one interprets their own state in relation to others. In today's society in Canada, attempts are being made to change the inequalities of the past between groups. We only have to examine the daily newspaper to count numerous cases of inequalities that occur.

> "... one has only to examine the ways in which various social values are applied in practice through morality, law or religion, to uncover an irreducible plurality of viewpoints and of goals. Such a plurality does not allow us to aim at a unique truth which applies at all times to everyone, but instead only at a complex account which may help us to understand that plurality of cultures, ideologies, religions and philosophies. This plurality implies a diversified approach to the idea of equality as an approach to just actions or the ideal vision of a just society."[64]

Treatment of individuals in the selection process of the Public Service of Canada has been cited to be unfair and thus, unjust. Principles of employment equity are to foster and encourage a Public Service that:

- is professional, highly-qualified, representative, non-partisan and imbued with a mission of service to the public.

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[64]Ch. Perelman, Justice, Law, And Argument, Boston: D. Reidel Publishing Company, 1980, p. 87.

- recognizes its employees as assets to be valued and developed.

- places authority and accountability in the hands of front line managers.

- provides scope for different organizational forms to meet differing needs, but in the context of a single Public Service.

Traditionally, managers in the selection process looked for candidates that best reflected their attraction template. Characteristics that were different triggered stereotype images and represented factors of risk. Risk was translated into economic terms which normally meant that such a risk was not effective for their Branch or department.

In the selection process, within the public service, 'appeals' act as a check on the discretionary power of managers to avoid preferential treatment of candidates. A problem still exists in the system as a conservative interpretation of 'fair treatment' does not in many cases take into consideration cross-cultural differences.

The new initiative of Treasury Board to allow 'merit' to be used as a criterion to 'promote from within without

competition' while still remaining with the undefined concept of 'best qualified' can lead to increased distortion of 'fair' and 'just' treatment of employees.

In more recent years we have seen an increase of Appeals based on bias and discrimination. This is believed to be a result of greater awareness of equity and rights on the part of employees. This is a clear indication that employees are not willing to allow managers to deny rights of some to the advantage of others.

PS 2000 is a management driven initiative. It did not include unions in the development of the recommendations that are incorporated in the reports. Unions are expected to be involved in the policy development for the implementation of the recommendations. Bill C-26, during its second reading on February 21, 1992, received strong opposition based on the process under which it was derived. There are claims that because there was no open consultation with representatives of the employees, no general public input, no opportunity for parliamentarians to contribute, and generally a closed door discussion process, that PS-2000 is not representative of what may be currently required to foster the development of the Public Service. Canada being a diverse country,it demands input from a number of credible sources to produce legislation that is considered representative of the greater public interest.

If PS 2000 recommendations are followed, equity could be reflected in the practice of the selection process. Such a process would increase representation of target groups by holding managers accountable for a fair and just practice. Other recommendations would see a reversal of the representation from one target group person for three non-target group persons in training programs to three target group persons for every two non-targeted persons, as a means of allowing target group representatives to catch up. However, in the policy statement coming out of Treasury Board, the interpretation of the initiative into action is being left to the power of the departments. As I have pointed out in the Transport Canada example, the action that is taken does not indicate an accountability situation, the department simply outlined processes to be followed. Managers are only responsible to ensure that workplans and process are maintained. They are not responsible to ensure that representation is increased. This situation further illuminates the position being taken by the Opposition during the second reading of Bill C-26.

The Public Service through the initiatives of the employment equity programs of the PSC are slowly increasing the representation of targeted groups. However, voluntary compliance to numerical targets is not working. One may conclude that the numerical targets were set unreasonably

high, although this response does not explain the increase in cases of bias and discrimination experienced by the Appeals Directorate of the PSC.

It is evident that the most senior management of the public service is in support of equity in its ranks. We see this through the initiatives of programs, policies, and process that is implemented to ensure equity. It is also evident that the 'rank and file' of the public service is no longer willing to permit their rights as defined under equity to be put aside for the preferential treatment of special groups. This is apparent through the increase of appeals from recent years. Where the difficulty seems to be is in the middle ranks of management. The Public Service might want to consider a vigorous management program targeted to this segment.

Where equity is protected through the Appeal process, it is imperative that the Board members become totally aware of the implications of equity. They must understand the complexities of bias and discrimination as they relate to attitudes of management. They must also be skilled in the identification of bias and discrimination and means of their eradication. This is particularly important as decisions made by these Boards could have major impacts on the careers and lives of the appellants.

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