



**RACE, SEX AND MINORITY GROUP  
DISCRIMINATION LEGISLATION  
IN NORTH AMERICA AND BRITAIN**

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Introduction

Despite considerable problems of identification<sup>1</sup> reports on widespread discrimination in the workplace against minority groups, notably in relation to sex and race, continue to be made in North America and Britain. Thus in Canada, the Royal Commission on the Status of Women (1970), several studies done for the Ontario Rights Commission,<sup>2</sup> and surveys by the Canadian Civil Liberties Association<sup>3</sup> have directed our attention to the incidence of employment discrimination against minority groups. Similarly, Equal Opportunities Commission (EOC) Reports and Political and Economic Planning (PEP) Studies in Great Britain<sup>4</sup> and Congressional hearings in the United States have also suggested a prevalence of such discrimination. In this paper we concentrate mainly but not exclusively on race and sex discrimination in Canada, U.S.A. and Britain on the grounds that there is more evidence on the working of these parts of equal opportunities legislation in North America than other countries, whilst developments in

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<sup>1</sup> In economic terms discrimination may be defined as a situation in which one group has a taste for or aversion to association with another group. Thus discrimination may be regarded as a commodity for which a price will be paid. However, in attempting to ascertain how far such prejudice has worsened the occupational or pay position of a minority group we must hold constant other factors which will also influence the outcome. In practice this is an extremely difficult task leaving scope for various interpretations. See B. Chiplin and P.J. Sloane, Sex Discrimination in the Labour Market, McMillan, 1976, J.A. Boulet and J.C.R. Rowley, "Measurement of Discrimination in the Labour Market: A Comment", Canadian Journal of Economics, February 1977 and D.N. De Tray and D.H. Greenberg, "On Estimating Sex Differences in Earnings", Southern Economic Journal, Vol. 44, No. 2, October 1977.

<sup>2</sup> See for instance Wilson A. Head, The Black Presence in the Canadian Mosaic: A Study of Perception and the Practice of Discrimination against Blacks in Metropolitan Toronto, Ontario Human Rights Commission, September 1975.

<sup>3</sup> "Study shows job, real estate agencies are willing to screen out non-whites", The Globe and Mail, January 11, 1977, p. 4.

<sup>4</sup> W.W. Daniel, Racial Discrimination in England, Penguin, Harmondsworth, 1968; N. McIntosh and D.J. Smith, The Extent of Racial Discrimination, P.E.P. Broadsheet No. 547, London 1974 and D.J. Smith, Racial Disadvantage in Britain, Penguin Books, 1977.

Britain mirror those in the U.S.A. and Canada.<sup>5</sup> However, discrimination may also manifest itself in relation to age (young or elderly employees), marital status, religion, physical or mental incapacity, appearance and other characteristics. The question of which minority groups are to be protected by legislation is itself of some significance since any gain made by one group may impose corresponding losses on another.<sup>6</sup> Thus the failure of such legislation to be comprehensive, notwithstanding the fact that it is logically impossible for all groups in the labour market to suffer from discrimination, unless a decline in labour's share in the national income is so construed, is in itself discriminatory with respect to the excluded groups.

What then will determine which groups are covered? Much may depend upon the cohesiveness of the group and its ability to act as an effective pressure group in articulating its demands. Also a general acceptance that discrimination is not only widespread but significant in its effect will doubtful assist in acceptance of the case. But there is also reason to believe that the size of the group relative to the total population will be of some significance in this respect. First, politicians will be eager to gain the votes of minority groups (and particularly of women who comprise roughly half of the population). Even if some voters disapprove of minority rights legislation, such negative reactions may not be sufficient to lose the votes of this group, whilst the importance of such policies to minority groups may ensure their vote for the party which advocates them regardless of other policies.<sup>7</sup> Secondly, as Becker<sup>8</sup> has suggested the extent of discrimination may increase as the size of the

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<sup>5</sup> H. Street, G. Howe and G. Bindman, Street Report on Anti-discrimination Legislation, London, P.E.P., 1967.

<sup>6</sup> See, for instance, P. Doeringer and M.J. Piore, Internal Labour Markets and Manpower Analysis, D.C. Heath, Lexington, Mass., 1971.

<sup>7</sup> G. Tullock, The Vote Motive, Hobart Paperback No. 9, The Institute of Economic Affairs, 1976, refers to this form of political behaviour as implicit log-rolling.

<sup>8</sup> G.S. Becker, The Economics of Discrimination, 2nd edition, University of Chicago Press, Chicago and London, 1971.

minority group increases and becomes therefore more of a perceived threat to the majority group in terms both of job competition and a downward influence on the wage rates of particular occupations. Therefore it is important to consider the number of women and coloured workers the legislation in the three countries is designed to assist. Women constitute an important segment of the labour force in the three countries. Thus, in 1971, women comprised 32.8 percent of all employees (employed and unemployed) in Canada, 38.2 percent in the U.S. and 37.8 percent in U.K. In quantitative terms, there was 2.8 million women workers out of a total of 8.6 million in Canada, 32 million out of a total of 84.1 million in the U.S. and 8.5 million out of a total of 22.7 million in the U.K. The bargaining power of women in the labour force is, however, diminished by the fact that many of them work only on a part-time basis and the extent of unionisation is much lower than in the case of men. In the U.S.<sup>9</sup> there were 5.5 million black and other races males and 4.4 million black and other races females (compared to 48.6 white males and 30 million white females) in the civilian labour force in 1973.<sup>10</sup> In the case of Britain Smith concludes that the Census estimate of 1971 of 1.3 million non-white people in Britain originating from New Commonwealth Countries (but not necessarily born there) are reasonably accurate. This would amount to 2½ percent of the total population, but by 1974 the figure had risen to 2.9 percent. In line with the above, Richmond<sup>11</sup> estimates that there were approximately 930,000 coloured immigrants (first-generation) in U.K. and 404,000 in Canada in 1974. This represents approximately 1.8 percent of the total population in both cases. He points out that the fact that coloured immigrants have been established for sometime in both countries means that natural increase is an important source of growth, thus the total estimated coloured population of

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<sup>9</sup> In April, 1972, the black population numbered approximately 23.4 million and comprised 11.3 percent of the total U.S. population.

<sup>10</sup> Manpower Report of the President, April, 1974, Washington D.C., U.S. Government Printing Office.

<sup>11</sup> A.H. Richmond, "Black and Asian Immigrants in Britain and Canada: Some Comparisons", New Community (Winter/Spring, 1975-76).

Great Britain in 1971 was 1,385,600, of whom just over 63 percent were foreign born<sup>12</sup> and just under 37 percent U.K. born.<sup>13</sup> Comparable 1971 figures for Canada (excluding native and Eskimo) would be 350,000, of whom 63 percent were immigrants. Moreover, the recent increase in black and Asian immigration, despite limitations that might be placed in Canada in the future, will mean that natural increase will become increasingly important as a source of growth of the coloured population. It is interesting to speculate whether discrimination will be lower in the case of second generation than in the case of first generation immigrants. Adaptation to the cultural values of the host country and diminished language problems should certainly improve the employment prospects of the former group.<sup>14</sup>

In examining the use of law as a means of reducing discrimination it should be borne in mind that there are a number of possible alternative approaches including economic policies which rely on a system of taxes and/or subsidies and various social measures. There is also the question of which forms of behaviour should be made unlawful.<sup>15</sup> Thus if it is cost minimising to employ

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<sup>12</sup> The White Paper on racial discrimination issued in September 1975 states that "Ten years ago, less than a quarter of the coloured population had been born here: more than three out of every four coloured persons then were immigrants to this country, a substantial number of them fairly recent arrivals. About two out of every five of the coloured people in this country now were born here and the time is not far off when the majority of the coloured population will be British born." (paragraph 4). The paper goes on to suggest that there were 1.5 million coloured people in Great Britain, (paragraph 12, Racial Discrimination, Cmnd. 6234, H.M.S.O., London, September 1975).

<sup>13</sup> It is estimated that of the coloured people born overseas, 604,000 were in employment in U.K. and that another 250,000 in employment were born in the U.K. Trade Unions and Race Relations, T.U.C. Circular No. 152, on Industrial Language Training, 1976/77.

<sup>14</sup> We should not neglect the possibilities of discrimination against non-coloured immigrant workers. In 1971 there were, for instance, 963,045 Irish born resident in Great Britain and it is estimated that immigrants, including workers born in the Irish Republic, account for about 6 percent of all those economically active in the U.K. See Unit for Manpower Studies, The Role of Immigrants in the Labour Force, Department of Employment, 1977.

<sup>15</sup> Thus one lawyer has suggested that "a mass of rules defining a mass of loopholes is the worst possible basis on which to educate the reluctant members of society into acceptance of general statements of approved standards of conduct." R.W. Rideout, "More Loopholes than Law; The Sex Discrimination Act", Bankers' Magazine, October 1976.

one group rather than another, i.e. there is no prejudice in the form of aversion to a group as such should this selectivity be permitted or prohibited? How far, for instance, should language problems be regarded as a legitimate reason for not employing immigrants in certain jobs?<sup>16</sup> Is the same legal apparatus appropriate for all forms of discrimination or should there, for instance, be separate approaches to race and sex discrimination? These are some of the issues which it is necessary to focus upon in assessing the role of law in alleviating discrimination in employment.

### The Role of Legislation

In their first annual report (April 1967) the Race Relations Board in Britain summarized the role of legislation as follows:

- (i) A law is an unequivocal declaration of public policy.
- (ii) A law gives support to those who do not wish to discriminate, but who feel compelled to do so by social pressure.
- (iii) A law gives protection and redress to minority groups.
- (iv) A law thus provides for the peaceful and orderly adjustment of grievances and the release of tensions.
- (v) A law reduces prejudices by discouraging the behaviour in which prejudice finds expression.

The first two and the last of these objectives are mainly concerned with the effect of legislation upon people in a position to discriminate, including both employers and co-workers. To the extent that behaviour is based upon traditional prejudices, legislation and education might be regarded as complementary, but it is difficult to know upon which of these the main emphasis should

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<sup>16</sup> Smith, op.cit., found that 27% of all Asians in a national survey covering England and Wales spoke English only slightly and 15% not at all. Whilst there are some jobs for which this might not be an insurmountable problem the restriction of such workers to a narrower range of occupations must operate to their disadvantage.

be placed. The third and the fourth objectives are concerned with redressing the grievances of minority groups in the event of only partial success in relation to the other objectives.

While these objectives are useful as benchmarks, it is important to realise that such legislation is limited in its scope and even in the absence of such limitations is unlikely by itself to eliminate discrimination. As Lester and Bindman<sup>17</sup> have suggested legislation is aimed at the majority of community who are ordinarily law abiding and does not restrain the determined law breaker. Secondly, law will be relevant only if the economic and social environment enables people to develop their abilities and compete for opportunities on more or less equal terms. In the absence of equal access to education and training, this might not be possible. Finally, it is not enough to enact such legislation. It must be effectively implemented.

#### Equal Employment Legislation

The scope of the legislation in the three countries is summarised in Table 1. In the United States, the equal employment opportunity legislation has five separate components: (a) title VII of the Civil Rights Act of 1964, as amended in 1972; (b) Presidential Executive Orders 11246, 11375, 11141, and 11758; (c) Equal Pay Act of 1963 and its extended coverage of executive, professional and administrative employees in 1972; (d) Age Discrimination in Employment Act of 1967; and (e) Rehabilitation Act amendments (sections 500 and 503) of 1974.

In Canada, the federal and provincial human rights legislation prohibits discrimination in employment. In addition, each jurisdiction in Canada has enacted laws (either as part of the human rights statutes or separately) which require equal pay for equal work without discrimination on the basis of sex. As of March 1978 the federal legislation requires equal pay for work of equal value (consistent with I.L.O. convention no. 100).

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<sup>17</sup> Anthony Lester and Geoffrey Bindman, Race and Law, Longman, London, 1972.

TABLE 1 PROHIBITED GROUNDS FOR DISCRIMINATION IN EMPLOYMENT IN U.S.A., CANADA AND BRITAIN

<u>U.S.A.</u>	<u>CANADA</u> <sup>1</sup>	<u>BRITAIN</u> <sup>6</sup>
Race	Race	Race
Religion	Religion	Colour
Colour	Colour	National Origin
National Origin	Nationality	Nationality
Age <sup>7</sup>	Ancestry	Ethnic Origin
Sex	Place of Origin	Sex
Mental and Physical Handicaps <sup>8</sup>	Age	Marriage
	Sex	
	Marital Status	
	Political Opinion or Belief <sup>2</sup>	
	Physical Handicap <sup>3</sup>	
	Sexual Orientation <sup>4</sup>	
	Conviction for which Pardon has been obtained <sup>5</sup>	

1 In Canada, British Columbia enumerates grounds but these are not meant to be limiting.

2 In the case of human rights codes of Manitoba, British Columbia, Newfoundland and Quebec.

3 Applicable in Nova Scotia, New Brunswick and Prince Edward Island and in Bill C-25 under Federal Jurisdiction.

4 Discrimination against homosexuals is prohibited; for example, in employment, housing and access to public facilities in the province of Quebec as of December, 1977.

5 Prohibited ground under federal jurisdiction, effective as of March 1st, 1978.

6 Sex and Marriage are proscribed under the Sex Discrimination Act.

7 Under Age Discrimination in Employment Act of 1964 (46-65 years), and Executive Orders.

8 Under Rehabilitation Act amendments of 1974, as well as under Presidential Executive Order 11758.

In Britain equal pay and equal opportunities legislation with respect to women (and married persons), became fully operational at the end of 1975. The first of these makes it unlawful to discriminate in terms of wages and conditions, while the second makes it unlawful for an employer to discriminate on account of sex or marriage in relation both to potential benefits (e.g. opportunities for recruitment, training and promotion) and to actions which may be detrimental to employees (e.g. short-time working or dismissals). Similarly, race relations legislation was first applied to employment in 1968<sup>18</sup> and has recently been

<sup>18</sup> The 1965 Race Relations Act was limited to discrimination on grounds of race, colour or ethnic or national origin in certain places of public resort.



considerably extended in coverage under the Race Relations Act of 1976 to bring it more into line with the sex discrimination legislation.

#### Prohibited Grounds and Coverage under the Laws

In the U.S., race, colour, sex, religion, national origin and age, are the main prohibited grounds for discrimination in employment. Title VII of the Civil Rights Act applies to employers, unions, employment agencies (public and private), and joint labour/management committees controlling apprenticeship or other training programmes. Discriminating on the basis of race, colour, religion, sex, national origin with regard to any employment condition, including hiring, firing, promotion, transfer, compensation, and in admission to training, or apprenticeship programmes is prohibited. This is the most significant law affecting both private and public sector employers and institutions of higher learning with 15 or more employees. The Presidential Executive Orders apply to federal government contractors and subcontractors, including construction contractors. In addition to the prohibited bases of discrimination enumerated above, age (no specified ages) as well as physical and mental handicaps are also considered illegal under the Executive Orders. Under the Age Discrimination Act employers and unions with 20 or more workers, employment agencies and all levels of governmental agencies are prohibited from discriminating on the basis of age (40-65).

In Canada,<sup>19</sup> the prohibited grounds for discrimination in employment include race, religion, colour, nationality, ancestry, place of origin, age, sex, sexual orientation, marital status and conviction for which pardon has been granted. Three provinces (New Brunswick, Nova Scotia, and Prince Edward

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<sup>19</sup> In Canada, unlike Britain and the U.S.A., the federal labour laws cover employment in designated industries or undertakings and thus affect only a small percentage (5-10 percent) of the labour force. The provincial governments have full jurisdiction in matters of employment in undertakings employing more than 90 percent of Canada's labour force.

Island) and the Canadian Human Rights Act have also included physical handicap as a basis for discrimination in employment. Generally, the relevant statutes apply to employers, employment agencies and trade unions and, in some jurisdictions, to self governing professions. Discrimination is prohibited with respect to advertising, terms and conditions of employment, including promotion, transfer, and training.

In Great Britain, the prohibited grounds are race, sex, marriage, colour, nationality, ethnic origin and national origin. The statutes (e.g. Sex Discrimination and Race Relations Acts) prohibit discrimination against contract workers, partners in a firm of six or more (partners), and apply to trade unions, employers organisations, qualified bodies, vocational training bodies, employment agencies and the Manpower Services Commission and its two agencies - the Training Services Agency and the Employment Services Agency. Discrimination is prohibited with respect to recruitment and in access to training and promotion.<sup>20</sup> The few exceptions include cases where "genuine occupational qualifications" apply. In the case of women these include models, actors, toilet attendants, hospital and prison staff, personal welfare counsellors and

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<sup>20</sup> Separate provisions relate to Northern Ireland. In addition there is also a Fair Employment (N.I.) Act 1976 which makes unlawful religious and political discrimination in employment. Its jurisdiction applies only to firms employing more than 25 workers but after three years the Act will apply to all employees. In an analysis of the 1971 Census of Population the Fair Employment Agency found that Roman Catholics were under-represented in the main areas of employment and in higher paying jobs. Thus in shipbuilding and machine engineering the total of Catholics was 4.8 percent, whilst Protestants totalled 89.5 percent. In construction Catholics make up 55 percent of the manual labour force but held only 18 percent of managerial jobs. (See Fair Employment Agency, An Industrial and Occupational Profile of the Two Sectors of the Population in Northern Ireland, Belfast, January, 1978.) It is not clear why protection against religious discrimination has not been extended to the rest of the United Kingdom in view of allegations of its presence elsewhere (including the West of Scotland).

jobs to be performed abroad in a country where law of custom requires discrimination. In the case of race the exceptions are rather narrower.

### Interpretation of Anti-Discrimination Laws

#### (a) Definition

To understand the practical implications of equal opportunities legislation, it is necessary to understand how "discrimination" is defined in law. In the U.S.A., the concept has been redefined on three occasions since World War II.<sup>21</sup> Initially, discrimination was defined as "prejudicial treatment", that is, harmful acts motivated by personal antipathy toward the group of which the target person was a member. However, since it is difficult to prove intent to harm, discrimination came to be defined in the courts as "unequal treatment". Under this second definition, the law was interpreted to mean that the same standards (job requirements and conditions) should be applied to all employees and applicants. In other words, the employer was allowed to impose any requirements provided that it was imposed on all groups equally. Yet many of the most common requirements, such as education and testing, had unequal effects on various groups, even though they were imposed on all groups alike. Thus there was a tendency for minorities to remain at the bottom of seniority lists and to suffer more than proportionate unemployment. In recognition of such concerns, the U.S. Supreme Court articulated the third definition of employment discrimination in Griggs V. Duke Power Co. in 1971, when the concept of indirect discrimination was first articulated. The Court struck down employment tests and educational requirements that screened out a greater percentage of blacks than whites on the grounds that such practices had the consequence of excluding blacks disproportionately, and because they bore no relationship to the jobs in question.<sup>22</sup>

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<sup>21</sup> See A.W. Blumrosen, "Strangers in Paradise; Griggs and Duke Power Co. and the Concept of Employment Discrimination", Michigan Law Review, November 1972.

<sup>22</sup> H.C. Jain and J. Ledvinka, "Economic Inequality and the Concept of Employment Discrimination", Labor Law Journal, September, 1975.

Thus, the motivations of the employer who discriminated do not matter. What is important is the effect of an act or a policy rather than reasons underlying it. The fact that a person "did not mean to discriminate" or was motivated by good intent is not an excuse under the law. Both the Sex Discrimination (1975) and the new Race Relations Act (1976) in Britain seem to have borrowed and adopted this definition of indirect discrimination from the U.S.A. Similarly, the recently enacted Human Rights Act in the federal jurisdiction in Canada includes the provision of indirect discrimination.

(b) Enforcement

Under the British Sex Discrimination Act (1975) and the Race Relations Act (1976) aggrieved individuals must bring proceedings in industrial tribunals with the possibility of assistance from one of the relevant commissions, Equal Opportunities Commission (EOC) in the case of complaints regarding sex and marriage and the Commission for Racial Equality (CRE) in the case of charges based on race, colour, nationality, ethnic or national origin and also the possibility of action by a Conciliation Officer of the Advisory Conciliation and Arbitration Service. In addition to the stress put on conciliation,<sup>23</sup> a novel procedure allows the prospective complainant to require the respondent to answer a number of basic questions on prescribed forms which may be used for the purpose of both asking and replying to such questions; any reply or lack of it is admissible in evidence before an industrial tribunal.

Freed from the obligation to process each complaint, which the Race Relations Board was obliged to do under the 1968 Act, EOC and CRE are now given strategic functions which empower them to investigate a company's or an industry's employment practices, to issue non-discrimination notices enforce-

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<sup>23</sup> The procedure is that a copy of any complaint filed with an industrial tribunal must be sent to the Advisory Conciliation and Arbitration Service. An officer of that service can seek to promote a settlement prior to the complaint being processed by an industrial tribunal. Moreover, conciliation can also be attempted on behalf of a prospective complainant, that is, before a formal complaint is filed.

able through the civil courts, to follow up in case of persistent discrimination, and to demand the production of relevant information. Also enforcement proceedings concerning discriminatory advertisements can be initiated only by the two Commissions. These strategic functions are the most important part of the (two) Commissions' role as direct enforcement agencies under the two Acts.<sup>24</sup> In respect to strategic investigation the British legislation is based on the U.S. experience. In the U.S., there are several precedents of strategic investigations and findings of discriminatory practices leading to settlements on corporate wide basis. The Equal Employment Opportunity Commission (EEOC), has, for example, secured massive conciliation agreements with the larger, more visible firms such as AT & T and industry agreements such as that with the steel industry.<sup>25</sup> In the case of title VII of the Civil Rights Act in the U.S., an aggrieved individual has the option of taking individual action through the courts or without the assistance of the E.E.O.C., or file a complaint with the state equivalent of the E.E.O.C. or the E.E.O.C. itself. In addition, the various federal agencies (under Executive Orders) including the E.E.O.C. can initiate strategic investigations of employers.

In Canada, although Human Rights Commissions in some provinces may file a complaint or commence an investigation on their own initiative, court cases or

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<sup>24</sup> Thus W.B. Creighton, "Enforcing the Sex Discrimination Act", The Industrial Law Journal, March 1976 finds "However effective enforcement by individual complaint might be, it can have only a marginal effect upon the broader problems of sex based discrimination in employment and in society as a whole. This being so, it is all the more necessary that there should be some agency which can adopt a more broad based approach to the problem, and which can, ultimately, take effective remedial action in order to enforce its findings".

<sup>25</sup> H.C. Jain, "Affirmative Action in Practice: A Prototype for Canadian Action", Human Relations, Vol. 15, 1975, and H.C. Jain and B.O. Pettman, "The Impact of Anti-discrimination Legislation on the Utilisation of Minority Groups: The American Experience", International Journal of Social Economics, Vol. 3, No. 2, 1976.

massive conciliation agreements, typical of the U.S. are rare.<sup>26</sup>

In one respect, the British and the Canadian enforcement procedures are similar. In both of the countries, most complaints are settled at the conciliation stage. For example, in Ontario, since the inception of the Human Rights Code and the Commission in 1962, only 99 Boards of Inquiry were appointed out of 9,775 formal cases as of the end of March 1977.<sup>27</sup> The British Race Relations Board's experience (under the 1968 Act) has been similar. For instance, the number of occasions on which the Board started county proceedings was few in proportion to the number of complaints. To take one year by way of example, 1973, 885 complaints were received, 130 opinions of discrimination were formed, and settlements or assurances were secured in 102 cases.<sup>28</sup> In only seven of the remaining cases (involving four respondents) were county court proceedings brought.<sup>29</sup>

While there are the above mentioned similarities in the matter of dealing with complaints by the two commissions, there are vast differences in their respective powers of enforcement. In the federal and Ontario jurisdictions a human rights officer can enter the premises of anyone associated with the

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<sup>26</sup> One of the exceptions is the Human Rights Commission of British Columbia: In 1973, the Commission, upon receipt of 342 complaints from female hospital workers, was able to get a settlement from the Minister of Health and the Hospital Employees Union which covered 8,000 employees throughout the Province. The agreement provided that over the lifetime of the collective agreement, all forms of discrimination against female employees in pay, training, and promotional opportunities, will be abolished. In addition, equal pay was given to not only those who could prove that they were doing substantially the same work as men but also to those earning less than the male base rate, Gail, C.A. Cook, editor, Opportunity for Choice: A Goal for Women in Canada, Information for Canada, Ottawa, 1976.

<sup>27</sup> See Daniel G. Hill, "The Role of a Human Rights Commission: The Ontario Experience", University of Toronto Law Journal, Vol. 19, 1969 and Annual Reports, 1970-1974.

<sup>28</sup> The annual figure of complaints has fluctuated in the region of 1,000 in each year since 1968 (through 1973), In the fiscal year 1970-71, opinions of unlawful discrimination were formed in only 9.1% of employment cases while in the previous year, the figure was 6.4% (Lester & Bindman, op.cit.). There have been approx. 7,000 complaints in the whole life of the Board (1968-1976).

<sup>29</sup> G. Bindman, "Law and Racial Discrimination: The New Procedures", New Community, Autumn, 1975.

Complaint without a warrant, except when the place is actually being used as a dwelling. He can order employment applications, payrolls, records, documents, writings and papers relevant to the inquiry to be produced for investigation, and he may remove these for the purpose of making copies or extracts. He can also make inquiries relevant to the complaint of any person separate or apart from another person. According to Hill,<sup>30</sup> the former chairman of the Ontario Human Rights Commission, "Essentially the Ontario process requires a judicious blending of the 'velvet glove', and 'iron fist' approaches." In actual practice, this means that the officer investigating a complaint "concentrates rather less on the issues of legal guilt than on the issue of effectuating a satisfactory settlement," Hill continues. Thus, the Human Rights officer combines both the function of investigation and conciliation, with an emphasis on settlement. This is probably the reason why in Canada, where the Ontario legislation has been the prototype of statutes in most other jurisdictions, the strategic functions of massive conciliation agreements, class action suits and pattern or practice suits, which are typical of the U.S., have not been in evidence, although recent class action suits in the employment discrimination area in Ontario might change that situation.

In Britain, on the other hand, it is widely recognised that the Race Relations Board (under the 1968 Act) had been unable to exercise its conciliation machinery in order to obtain information on its own initiative. Its enforcement powers were circumscribed in a number of important respects, most notably in relation to securing cooperation of those who were under investigation and obtaining production of documents, as well as to the circumstances under which the courts could be asked to intervene, and the relief which might be obtained.<sup>31</sup> This is the reason why the Board in its entire existence considered 7,000

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<sup>30</sup> op.cit.

<sup>31</sup> 1975 White Paper, op.cit. (paras. 28-47).

complaints but rejected most of them in the end.<sup>32</sup>

Learning from the U.S. experience Britain incorporated strategic functions in the recent statutes, which give extensive enforcement functions to the two commissions. In the U.S., prior to its receipt of enforcement powers in 1972, the Equal Employment Opportunity Commission (EEOC) had to settle charges of employment discrimination by conciliation and persuasion. During its first five years, the EEOC received more than 52,000 charges of which 34,145 were recommended for investigation. In 63 percent of these the Commission found evidence of a discriminatory practice. In less than half of these cases, however, was the Commission able to achieve a totally or even partially successful conciliation. In other words, the respondent refused to change his or her employment or referral policies to resolve alleged unlawful practices.<sup>33</sup>

(c) Guidelines, Court decisions, consent decrees and other decisions

In the United States there are two principal agencies that administer the equal employment and affirmative action programmes. The former programme, under title VII of the Civil Rights Act of 1964 as amended in 1972, is enforced by the Equal Employment Opportunity Commission (EEOC) while the latter, under various Presidential Executive Orders, is carried out by the Office of Federal Contract Compliance (OFCC) of the U.S. Department of Labour. These agencies have issued detailed guidelines to employers interpreting the legislation. These guidelines include discrimination related to sex, religion and national origin; selection procedures; pre-employment inquiries, overall affirmative action programme, obligation of contractors (by the OFCC). The U.S. courts

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<sup>32</sup> For instance, The Race Relations Board was unable to compel the attendance of witnesses, or the production of documents or other information for the purposes of an investigation. In the absence of such a power, the Board had to rely upon information provided by an individual complainant or other witnesses and the voluntary cooperation of those against whom complaints had been made. Except in bringing legal proceedings if conciliation failed, the Board had no power to require unlawful discrimination to be brought to an end, and the discriminator had no obligation to satisfy the Board that he had altered his conduct so as to comply with the law.

<sup>33</sup> See Jain and Pettman, op.cit.



have interpreted the law in such a way that these guidelines, which favoured the increased utilisation of minority groups and women, have been upheld.<sup>34</sup>

This has had a dramatic impact on hiring and promotion procedures and practices by employers as well as in the rationalisation of the personnel and human resources function in organisations.

These guidelines interpreting the laws have affected all the primary personnel practices. In recruitment, active recruitment of minorities and females is required. Advertisements must be adapted to legal requirements. In selection for hiring, testing seems to be the key concern. Interviews and application forms, as well as paper and pencil and skill tests must be made valid and reliable. Job descriptions, job specifications and performance appraisals must also be analysed for relevance. Of special concern are education and experience requirements set at too high a level. In the case of selection for transfer, training, promotion, layoff, recall and termination, special efforts must be made to train and promote minorities and women. The EEOC and OFCC take a special interest in upward mobility and seniority. Thus, performance appraisals as predictors of performance at higher levels are being closely scrutinised. In pay and benefits, equal pay for equal work is carefully observed and benefits must be equal. Similarly, discriminatory working conditions are not allowable.

In 1971 the United States Supreme Court upheld the EEOC guidelines regarding test validation. In *Griggs V. Duke Power Company* case, for instance, the Court declared that no test used for hiring or promotion is valid under the statute if it operates to exclude minorities and if it cannot be shown to be related to job performance. Thus, if a test results in a greater rejection rate of minorities than the majority, a prima facie case is made for adverse impact. The adverse impact, in the first place, is sufficient to demonstrate

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<sup>34</sup> Chief Justice Burger of the U.S. Supreme Court in the *Griggs V. Duke Power Co.* case declared that the EEOC guidelines should be given 'great deference' in interpreting Title VII.

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potential discrimination. Thus, if blacks and/or females score lower on the average than the majority white males on a test, there are usually differential rejection rates and, consequently, a potential for unfair discrimination. The adverse impact in of itself is not sufficient, however, to outlaw tests. The second aspect of the Court's decision is that if such a test (that operates to exclude minorities) cannot be shown to be related to job performance, the practice is prohibited. Thus, the employer must show that tests that lead to adverse effect are in fact related to successful performance on the job.<sup>35</sup>

This makes business necessity the prime criterion in hiring and promotion decisions. Contrary to the popular belief in the business community in the U.S. that all testing is illegal and industry's decreasing reliance on tests,<sup>36</sup> the Court made it clear that the process of testing was legal and encouraged it. For example, Chief Justice Burger stated in the Duke Power Company case that "Nothing in the Act precludes the use of testing or measuring procedures...."

The U.S. Supreme Court reaffirmed its deferential treatment of the EEOC guidelines requiring validation standards for tests in the Albemarle Paper Co. V. Moody case in 1975.

In Canada, most jurisdictions forbid employers from asking either in an application form or in an employment interview information, directly or indirectly, concerning prohibited grounds of discrimination. However, specific guidelines from the Human Rights Commissions are generally lacking. Even where these guidelines are available, as in the case of Ontario, they have generally not been subjected to test in the Board of Inquiry hearings or settlements. For instance, in Ontario, the Human Rights Commission has issued a guide for employers and employees regarding employment application forms and interviews

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<sup>35</sup> See Zedeck, Sheldon and Tenopyr, Mary L., "Issues in Selection, Testing and the Law", in Equal Rights and Industrial Relations, (editors, Leonard Hausman et al, Industrial Relations Research Association, Madison, Wisconsin, 1977.

<sup>36</sup> Wall Street Journal, September 3, 1975.

under the Ontario Human Rights Code. The Commission draws a distinction between pre-employment and post-employment inquiries. In some cases, a question which could be construed as a violation of the code, if asked of an applicant before he has been hired, may be appropriately asked after hiring so long as the information is necessary, for instance, for personnel record keeping and is not used for discrimination in employment on the restricted grounds.

According to the guide, the following inquiries are prohibited at the pre-hiring stage; Race or colour: race, colour, complexion, colour of eyes, and colour of hair; creed: religious denomination or customs, recommendation or reference from clergyman; Nationality, ancestry, place of origin: birth-place, birth or baptismal certificate, place of birth of parents, grandparents or spouse, national origin. In addition, employers are prohibited from asking information about (a) clubs and organisations which would indicate race, creed, colour, nationality, ancestry or place of origin; (b) name and address of closest relative; (c) willingness to work on any particular religious holiday; and (d) military service (outside Canada) among other inquiries. Request for information about race, creed, colour, age, sex, marital status, nationality, ancestry or place of birth can be made, however, if they are bona fide occupational qualifications and requirements for the position or employment.

In Britain, the Race Relations Board, under the Race Relations Act of 1968, has issued guidelines but they were more similar to the guidelines described above (for Ontario) given the recognition that they may have no legal effect and may not be binding on the courts. These guidelines were issued to advise employers about the racial balance provisions under the 1968 Act. This much criticised provision, which allowed employers to discriminate in favour of members of a racial, ethnic or national group in order to preserve a reasonable balance of workers of different racial, ethnic or national groups, has been repealed under the new Race Relations Act of 1976.

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Decisions of the Boards of Inquiry in Canada by prohibited grounds of employment discrimination

In Canada cases have touched upon a number of aspects of discrimination. Thus considerations such as (a) lack of female accommodation, toilet and wash-room facilities (Jean Tharp v Lornex Mining Corporation Ltd.) (b) male dominated work (c) marital status (Kerry Segrave v Zellers Ltd.) (d) work being too physically demanding (for a female); and (e) working alone in the evenings for women (Betty-Anne Shack v London Driv-Ur-Self Ltd.) are no longer relevant for claiming exemption under Canadian Human Rights Legislation.

The most significant and interesting of these cases is Kerry Segrave v Zellers Ltd. (September 22, 1975). The complainant alleged that he was refused employment and training because of his sex and marital status by Zellers Ltd. The applicant arranged for an interview with Zellers in response to an advertisement in the Hamilton Spectator for personnel manager trainees and credit manager trainees. He was interviewed by a female management trainee who told him that only women held the position of personnel manager and that the salary would not be attractive for a male; her district manager had told her that "... we could get an executive at half price by getting rid of men." She also told him that they did not hire men because women would not go to them with their problems. The applicant then expressed interest in the credit manager trainee position. He was given a preliminary interview for the position, but was not processed further because of his "undesirable" marital status. He had been divorced three months ago and Zellers took this as a "a sign of instability in his background which could cross over into his business life as well." The Board of Inquiry ordered that Zellers direct its personnel managers that in all hiring practices men and women should be treated equally, and that all references to marital status in the selection steps be deleted. Zellers was ordered to be prepared to submit any current directives guiding the hiring of personnel to the Ontario Human Rights Commission. They were also ordered approved personnel agency to administer the employment tests to Mr Segrave who, if he passed the tests, was to be offered a job and compensated for his

period of unemployment as well as for general damages.

In Ontario, a revision of the human rights code is underway in order to deal with important issues that remain unresolved. The Ontario Human Rights Commission invited briefs and conducted a number of public hearings throughout the Province in the summer of 1976 to uncover these concerns. The main issues appear to be: (a) additional prohibitions to the existing grounds for discrimination extending to features such as sexual orientation, physical and mental disability, language difficulties and possession of a criminal record; (b) independent status for the Commission - separate from the Ministry of Labour - similar to the Ontario Ombudsmen's office; and (c) additional funding and resources for the Commission in order to implement the code effectively. Not only in Ontario but in Canada as a whole, the Human Rights Commissions are likely to face problems of interpreting and reinterpreting (where they have already faced these issues) the prohibited grounds such as nationality, creed and sexual orientation. The problems of Canadian citizenship in university hiring, lack of Canadian experience in a variety of jobs, religious holidays and work schedules, performing of abortions against one's religious beliefs, and homosexuals' right to employment are likely to keep these issues alive.

#### Equal Opportunities Legislation in Britain

Since the Sex Discrimination Act has at the time of writing only been operating for just over two years and the Race Relations Act for only just over one year, it is perhaps premature to ascertain the long-run effects of the legislation, but the level of applications to industrial tribunals has been at a persistently low level in comparison to these under other labour laws including notably those relating to unfair dismissals. In 1976 there were only 243 applications under the Sex Discrimination Act compared with 1,742 under the Equal Pay Act,<sup>37</sup> whilst the corresponding figures in the first six months of

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<sup>37</sup> See "Equal Pay and Sex Discrimination: Outcome of Applications to Industrial Tribunals in 1976", Department of Employment Gazette, May 1977.

1977 were 115 and 387.<sup>38</sup> In 1976 roughly one quarter of cases under the Sex Discrimination Act were brought by men, thirteen related to indirect discrimination, thirteen to discrimination against married persons and seven to allegations of victimisation against individuals making use of the legislation. Nearly all applications related to alleged discrimination against employers including 64 relating to applications for employment, 102 to questions of promotion and training and 75 to actions to the detriment of workers including dismissals. In line with the preference for conciliation in the British legislation just over half of the applications were cleared without the need for a tribunal hearing and roughly one third of these cases heard were successful. The generally low level of applications could conceivably be the result of lack of knowledge of the law by employees, the relative absence of discrimination or the difficulties of obtaining proof. However, in its first annual report the Equal Opportunities Commission<sup>39</sup> suggests that there has been a growing resentment by employers at the excessive burden of legislation in the manpower field as a whole and allied to this is a feeling that Equal Pay and Opportunities legislation is a luxury in a time of economic recession which must be subordinate to other goals. Further with rising unemployment the reluctance of individuals to exercise their rights under the legislation is increased.

Early cases before industrial tribunals confirmed that (a) there is no protection for single persons under the legislation (b) sex discrimination in job advertising is prohibited (c) physical stamina and (d) efficiency in work can favour men in employment (e) commuting distance from job can disqualify a female applicant (f) an employer cannot discriminate against women, compared to men, over terms and conditions of employment such as hours of work per week or overtime work, and (g) an employee can be dismissed for a breach of staff rules even though the specification did not apply in precisely the same manner

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<sup>38</sup> See Department of Employment Gazette, September 1977.

<sup>39</sup> Equal Opportunities Commission 1976 (The First Annual Report), H.M.S.O., May 1977.

to men. It should be born in mind, however, that industrial tribunal decisions do not create a legal precedent and more reliance is to be placed on the findings of the Employment Appeals Tribunal (E.A.T.).

In some cases there has been a problem in identifying whether a matter should be considered under the Sex Discrimination Act or the Equal Pay Act. Thus in Simpson v National Carriers neither party was certain whether free travel facilities were contractual and thus subject to the Equal Pay Act or non-contractual and thus subject to the Sex Discrimination Act. In the event the tribunal determined it was the latter. In Peake v Automotive Products EAT ruled that rights under the Equal Pay Act and under the Sex Discrimination Act were mutually exclusive. It has also been confirmed in Read v Tiverton Council and Ball that managers and others in positions of authority over employees can be personally sued for the offence of aiding an unlawful act. Another importance issue is that of the burden of proof. In Oxford v Department of Health and Social Security and Moberly v Commonwealth Hall (University of London) EAT found that the burden of proof could be shifted from the applicant to the respondent once an act of discrimination and the fact that one party to the act was female and the other male had been established.

One of the most contentious decisions so far occurred in Peake v Automotive Products Ltd. when the Court of Appeal reversed an earlier EAT judgment and held that the employer did not violate the Sex Discrimination Act by allowing women to leave work according to custom and practice five minutes earlier than men. This ruling was based upon the fact that the rule was made in the interests of safety and orderly working and a net difference of 2½ days in the working year was negligible. This decision based upon notions of chivalry led the draftsmen of the Act to suggest that both the letter and the spirit of the Act were offended and that its operation would be thrown into disarray.<sup>40</sup>

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<sup>40</sup> Mr Francis Bennion in a letter to The Times, 15th July, 1977. He concurs with the EAT judgment that instinctive feelings based on notions of chivalry "are likely to be the product of ingrained social attitudes, assumed to be permanent but rendered obsolete by changing values and current legislation."

The concept of indirect discrimination has proved to be a troublesome one for the tribunals. In order for this to occur the proportion of the minority who can comply with a requirement must be considerably smaller than that of the majority group, but no guidance is given on the precise form of statistical evidence. In Meeks v N.U.A.A.W. national sex and employment groups were accepted as showing that fewer women than men were able to work on a full-time basis, whilst in Price v Civil Service Commission all men and women in the relevant age group was the focus of comparison. In the latter case the plaintiff challenged the Commission's upper age limit of 28 years for entry into the executive grade partly on the grounds that far fewer women than men could comply with the rule, since many of the former in the 20's age group were involved in the raising of children. The Commission had contended that all women could comply in the sense that child bearing and rearing was voluntary. On appeal EAT ordered a re-hearing of the case and instructed the tribunal to determine which were the appropriate men and women whose ability to comply with the rule was to be compared and whether a considerably smaller proportion of women could comply in practice. After conceding the above the Commission then attempted to show that the rule was justifiable in order to achieve a balanced age structure in the Service. The tribunal considered, however, that alternative methods of achieving this result (such as computerised manpower planning) had not been examined and consequently recommended that best endeavors should be made to eliminate the age bar by 1980. This case illustrates the fact that though age discrimination is not unlawful as such in Britain the different age structure in employment between men and women may give rise to indirect sex discrimination under the law. Similarly, in Turton v McGregor Wallcoverings Ltd., the tribunal found that the employer had committed indirect discrimination by providing enhanced redundancy compensation to employees over 60 years of age when women were required to retire at 60 and men at 65. The employer's defence that the payments were contractual and related to death or retirement, both excluded under the Act, were rejected by the tribunal. However no award of compensation could be made as this is excluded under the Act where indirect



discrimination is unintentional.<sup>41</sup> Another type of indirect discrimination was at issue in Steel v Union of Post Office Workers and the General Post Office where a negotiated rule which based seniority on 'permanent' service operated to the detriment of postwomen who could not hold 'permanent' appointment prior to 1975. The plaintiff who had worked for the Post Office for over 14 years was passed over for a vacant 'walk' in favour of a man with only two years service. EAT suggested that a distinction should be made between a requirement which is necessary and one which is merely convenient, the availability of alternative approaches being a relevant consideration in the latter case.

Proof of discrimination in relation to job interviews may be particularly difficult. In Saunders v Richmond-upon-Thames Borough Council EAT found that it was not unlawful to put special questions to one sex only, although this might be used as evidence of discrimination in relation to final choice. Here a well qualified woman applicant for the job of golf professional was passed over in favour of a male applicant. Questions put to her concerning her ability to control troublesome men and to get a response from them, amongst others, were held to be permissible. Such is the subjective nature of employee selection that it would appear that statistical evidence on probability of appointment for particular groups on the basis of a reasonable sample will be in many cases essential in order to prove hiring discrimination.

It is too early to assess the impact of the new race relations legislation and the work of the Commission for Racial Equality in Britain, but it is possible to assess the work of the Race Relations Board (R.R.B.) over the period 1968-1976. Between the period June 1971 to June 1976 there were 2561 employment cases other than those disposed of by means of industry machinery but the percentage of cases where discrimination was found exceeded 20% only in 1975 (20.9%). By far the

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<sup>41</sup> In a case supported by the EOC, Roberts v Cleveland Area Health Authority EAT upheld a tribunal finding that a requirement for women to retire at an earlier age than men was not in itself unlawful, being in this case a 'provision in relation to death or retirement'.

largest number of complaints concerned recruitment. In its final report<sup>42</sup> the RRB noted that since February 1972 there had not been a single finding that a dismissal was unfair because of racial discrimination, nor even that this was one of the reasons this led the Board to state that

"this reinforces our fears that complainants will have considerable difficulty in establishing their cases, when under the new legislation complaints or unlawful discrimination in the employment field have to be brought before Industrial Tribunals."

According to the Department of Employment in addition to the above the industry machinery received 1006 complaints of discrimination between November 1968 and June 1976 and disposed of 752 cases, but only 20 opinions of unlawful discrimination were formed. This led the RRB to conclude that the experiment of using industry panels to deal with complaints of racial discrimination had failed and should not be repeated.

One of the more significant cases investigated by the RRB concerned the Mansfield Hosiery Mills. Between May and November 1972 the RRB carried out investigations into the company and the union following complaints by an Asian employee that Asian employees were being denied opportunities for promotion to building jobs. The local conciliation committee of the RRB formed the opinion that both the company and the union had committed unlawful discrimination. After a one week strike of unskilled Asian bar-loaders in October 1972 the company agreed to promote two Asians, but this was resisted by white kitting operatives. A further strike followed, but on a return to work in November the Asians discovered that the company had recruited 41 white trainee knitters during the strike and a further stoppage of work occurred supported by the National Union of Hosiery and Knitwear Workers. The Government subsequently set up a Committee of Inquiry<sup>43</sup> which recommended that selection of trainee knitters should be "based on merit regardless of race, colour, creed or ethnic and national origin."

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<sup>42</sup> Report of the Race Relations Board, January 1975 - June 1976, H.M.S.O., 1976.

<sup>43</sup> Report of a Committee of Inquiry into a dispute between employees of the Mansfield Hosiery Mills Ltd., Loughborough and their employer (Chairman - Mr K. Robinson), H.M.S.O., 1972.

On the basis of a test agreed by all parties 28 Asian and 21 white applicants were subsequently promoted to various knitting job vacancies in January 1973 but this outcome was only reluctantly accepted by white knitters who refused to train any of the newly upgraded trainees. A Commission on Industrial Relations investigation of the industrial relations of the company in 1973<sup>44</sup> concluded that part of the problem related to the fact that union representation of the Asians at plant level was limited by the failure of non-Asians to vote for Asians on shop committees, the reluctance of Asians to offer themselves for election and the language problems faced by a number of the Asian workforce. Whilst recognising that part of the problem arose from the unwillingness of some Asians to accommodate themselves to the informal rules of the industrial relations system, the C.I.R. suggested that specific management policies on equality of opportunity were required in order to reduce the scope for racial discrimination. This case emphasises the fact that racial discrimination may be as much to do with the attitude of employees as with those of the employers and may be more apparent in areas where large numbers of minority group workers are employed rather than where they are comparatively absent.

#### Consent Decrees and Court Cases in the U.S.

The EEOC has concentrated in recent years on securing massive conciliation agreements with the larger, more visible firms such as the American Telephone and Telegraph Company (AT & T) and industry agreements such as that with the steel industry. In addition, pattern or practice court suits involving job inequality throughout an entire employment system as well as class action suits affecting an entire class of employees are on the upswing. Thus, the emphasis, in terms of enforcement efforts, seems to be on system wide (company wide or industry wide) job discrimination; this means concentration on large, visible

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<sup>44</sup> C.I.R. Report No. 76, Mansfield Hosiery Mills, H.M.S.O., 1974.

employers. Smaller firms remain virtually untouched except for the complaint process. In an attempt to reduce its vast complaint backlog, the EEOC is also attempting to have complainants reconciled with their organisation.

A consent decree is an out of court settlement which is granted judicial approval and protection by the courts. The A T & T settlement represents the largest settlement ever made in the U.S. and was negotiated and signed by the company, the OFCC and the EEOC. It covers all of the A T & T's 24 operating companies, and 700 establishments within the Bell system. It is a landmark case since it demonstrates what an Affirmative-action programme via court settlement actually means in terms of statistical goals and timetables for a large private employer with 771,000 employees (including 401,000 women). Prior to the settlement, the vast majority of employees at A T & T worked in sex-segregated job classifications. For example, in the Bell system, males constituted 98.6% of all A T & T craft workers on December 31, 1971, while 96.6% of all office and clerical employees were women. The 1973 settlement, concluded after two years of public hearings and negotiations, included an undertaking by the company to make a one-time back payment of 38 million dollars immediately to 13,000 women and 2,000 men who claimed to be victims of discrimination and 23 million dollars of immediate pay increases to 36,000 employees because of allegations of prior discrimination in job placement. In addition, the A T & T agreed to future wage increases which were expected to amount to \$200 million for the six-year decree, ending in 1979. Specific remedial steps for upgrading all qualified college-trained women were also included. The unions attacked the A T & T's 1973 consent decree on the ground that the decree's "affirmative-action override"<sup>45</sup> conflicted with provisions in their collective agreements with the company concerning competitive seniority in transfer and promotion.

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<sup>45</sup> This allows the company to override greater seniority and greater qualifications to promote a basically qualified person in order to meet annual targets on the way to attaining a long-range goal.

The U.S. Court of Appeals for the Third Circuit rejected this contention, as well as the union's arguments that the decree is inconsistent with Title VII and the Due Process Clause of the Fifth Amendment.

The A T & T has been able to meet most of its numerical targets by aggressive recruitment, training, and development of women and minorities and holding managers accountable "for meeting EEO (equal employment opportunity) goals and for giving equal weight to EEO as to other business objectives".<sup>46</sup>

A further major consent decree case occurred in the steel industry. Nine of the largest steel companies and the United Steelworkers of America entered into two major out-of-court settlements, with the EEOC, OFCC and the Dept. of Justice in April 1974. The first decree covers employment practices regarding production and maintenance personnel, whilst the second covers employment practices in management positions.

The decrees provide five mechanisms to remedy the effects of past discrimination:

- (i) continuous service in plant (rather than in a particular dept.) as a measure of seniority;
- (ii) transfer rights, providing members of aggrieved classes with an opportunity to transfer to a different unit or department;
- (iii) pay rate retention, permitting transferred employees to retain their former rate of pay (if it is more favourable) when they transfer, until the pay rate in the new unit equals the rate in the old unit;
- (iv) hiring and promotion goals, and
- (v) a backpay fund of approximately \$31 million.

to some 40,000 minorities and women who were alleged to have been discriminated against on the basis of race, sex or national origin.

Other consent decrees have been signed by a large number of organisations which include Uniroyal, Standard Oil of California, Bank of America, United Air

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<sup>46</sup> World of Work Report, May 1977.

Lines and others.

"Class action" suits or charges can be filed on behalf of a large number of persons, in addition to the individual actually filing the charge. This ability to file a class action suit has been helpful in enlarging the scope of both investigation and remedies to cover all persons "similarly situated" who have suffered as a result of the same practices. Such actions are possible under all of the laws and regulations prohibiting discrimination. One notable example was the class action suit filed on behalf of discriminatees by an employee of the Bowman Transportation Company. In this case, the essential fact that the company had discriminated against black workers in hiring, transfer, and discharge was not in dispute. To circumvent the Civil Rights Act, the company introduced a "buddy system" whereby no new driver would be hired without the sponsorship of a driver who would train him. Blacks were not sponsored, and blacks hired for other jobs were not transferred to over-the-road positions. A collective bargaining agreement with the union perpetuated the discriminatory practices. In this case, the Supreme Court of the United States declared that the remedy for the in-hire discrimination is the employment of the discriminatees with full seniority, back to the date of their application for work. This is but one example of a number of cases brought by an individual employee and decided in favour of the affected class of employees in a particular company or industry. The basis for retro-active seniority is that merely to order an employer to recruit a job applicant, who has been refused employment unlawfully, as a new employee, rather than requiring seniority retro-active to the date at which the applicant was first refused employment, falls short of a 'make whole' remedy. It has also been ruled however that Title VII of the Civil Rights Act should be construed to permit the assertion of plant-wide (as opposed to departmental) seniority only with respect to new job openings, and that white male incumbents should not be bumped out of their jobs even by blacks or women with greater plant-wide

seniority."

Thus, in enforcing the anti-discrimination legislation in the U.S.A., the courts have provided for drastic remedies including back pay, hiring quotas, reinstatement of employees, abolition of testing programmes, 'affirmative action override' of seniority provisions in collectively negotiated agreements (as in the A T & T case), creation of special recruitment or training programmes and others.

#### Affirmative Action or Positive Discrimination and Reverse Discrimination

These actions by the courts in the U.S. have led some critics to charge that affirmative action programmes have either led to or have the potential of reverse discrimination against the majority. Further, there has been some confusion as to the meaning of concepts such as affirmative action or positive discrimination and reverse discrimination and it is necessary to analyse these concepts in the context of anti-discrimination laws in the three countries.

The British legislation (both the Sex Discrimination Act and the new (1976) Race Relations Act) as well as the Canadian Human Rights legislation in several jurisdictions<sup>48</sup> permit positive discrimination in favour of women and coloured groups; in both cases, positive discrimination is allowed but not required of employers. For instance, the British Acts contain provisions allowing employers and training organisations to provide special training facilities to members of such groups and to encourage them to take advantage of opportunities for doing

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<sup>47</sup> However, in another case, McAleer v A T & T a qualified but less senior female employee was promoted over a male. The District of Columbia federal district court held that McAleer should be paid damages by the company (A T & T), but that he should not get his promotion because that would interfere with A T & T's fulfilment of its consent decree to advance minorities and women. This apparently contradictory finding is now moot since the case was settled out of court, but the issues raised by the decision remain. See Theodore, S.J. Purcell, "Management and Affirmative Action in the Late Seventies", in Equal Rights and Industrial Relations, editors L. Hausman et al, IRRA, Madison, Wisc., 1977.

<sup>48</sup> 1976 Human Rights in Canada, Labour Canada, Ottawa, 1976.

particular work.<sup>49</sup> While the relevant Canadian statutes permit Human Rights Commissions of several jurisdictions to approve special programmes designed to promote the welfare of minority groups, in actual practice the approved programmes have resulted in the provision of counselling and training opportunities for women and the native people. For example, this has been the case within the public sector employment at the federal as well as the Ontario government level.<sup>50</sup> Several large Canadian business organisations such as the Royal Bank of Canada, Canadian National and Bell Canada<sup>51</sup> have also established special programmes to promote and accelerate training and promotional opportunities for women.

In the U.S., Executive Orders require affirmative action on the part of federal contractors and federally assisted construction contractors. This requirement, involving contractors with 50 or more employees and a contract of \$50,000 or more, to take affirmative action means the setting of goals and timetables for minority employment in job categories where minorities and women have been under-utilised. The numerical goals, according to the guidelines issued by the U.S. Department of Labour, should be significant, measurable, attainable, and specific for planned results. The failure to develop and implement an acceptable affirmative action programme within a specified time could result in cancellation or termination of existing contracts. It is estimated that at least a third of America's work force is employed in enterprises which are involved in some way with government contracts.

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<sup>49</sup> This can lead to problems of interpretation. Local authorities in Britain have been put under a statutory obligation in the Race Relations Act 1976 to eliminate unlawful discrimination (Section 7(a)). In the pursuit of this objective Camden Council announced in January 1976 that it would encourage ethnic minority groups to seek employment in fields where they could use their special knowledge and experience in the service of the community by such means as advertisements in the local ethnic minority press and by providing special training for ethnic minorities. However, the chairman of the relevant committee was quoted in the Times (27/1/78) as stating that if two people of equal ability but of different colour apply for a job we will pick the coloured person because coloured persons are so under-represented at the moment. Such positive discrimination does not appear to be allowable under the Act.

<sup>50</sup> Kay Eastham, "Women on the Move; Affirmative Action for Women from Employees in Ontario", The Canadian Business Review, Spring, 1976.



The concepts of the 'relevant labour market area' and 'underutilisation' are obviously crucial to the implementation of affirmative action programmes. The Executive Revised Order No. 4 issued in December 1971 lists several criteria that contractors should consider in determining the appropriate utilisation rates of minority groups and women on the basis of the relevant labour market area. The Order suggests several features for the relevant labour market area. These include the size of minority population or occupied and unemployed workforce within the labour area surrounding an establishment relative to the total population or workforce; availability of minorities with the requisite skill either within the immediate labour market area or the area in which the contractor can reasonably recruit; the availability of promotable minority employees within the contractor's organisation; the anticipated expansion, contraction and turnover in the labour force; presence or otherwise of training bodies capable of providing requisite skills for minorities and the degree of training the contractor is reasonably able to undertake as a means of making all job classifications available to minorities. These criteria provide by no means unambiguous guidelines and the courts have fallen back on a number of criteria including the percentage of blacks in the total population of a city, Standard Metropolitan Statistical Area, State or Region.

This is because the available statistics, as supplied either by the Census or the Labour Department are extremely inadequate. For example, the Census data are dated. Moreover, in the official surveys an "unemployed worker" is defined as one who is "able and willing to work". What is needed, from an employer's point of view, is a redefinition of the "unemployed worker" as one who is "qualified and willing to work", at a specific kind of job at a particular rate of pay.

For certain professional groups, the relevant labour market may be the number qualified in the economy as a whole. Here goals are aligned with the number or percentage of qualified women and minorities available, not in terms of their general representation in the population. For example, women receive

about 23 percent of the doctorates awarded in psychology in the U.S.A. and research indicates that 91 percent of women with doctorates work. Furthermore, approx. 23 percent of the psychologists listed with the National Register of Scientific and Technical Personnel are female. Thus, if there were no women or subsequently less than 23 percent women in a University's department of psychology, "under-utilisation" would presumably exist. Such a presumption based on crude statistical analysis, has been upheld in the courts. Indeed statistics such as these can be, and have been, used a prima facie evidence of discrimination during litigation.

It is not surprising, therefore, that critics have charged that goals have turned into quotas and industry has increasingly reacted to this. For instance, Sears, Roebuck and Co.'s Mandatory Achievement of Goals (MAG) Programme states, "The basic policy will be at the minimum to fill one out of every two openings with a minority man or woman of whatever races are present in your trading/hiring area ..."<sup>52</sup> Similarly, one Bell Company spokesman says, "Every management meeting we run, the first thing we get hit with is: "We're running a quota system!"<sup>53</sup>

Other charges levelled against affirmative action programmes in the U.S. include preferential treatment of minorities and women due to federal pressures to hire and promote not only the qualified but the qualifiable, the cost of mounting an affirmative action programme, and trade unions' unhappiness over the court ordered as well as the EEOC and the OFCC negotiated affirmative action overrides of collectively bargained seniority rights.

The government agencies and others in favour of affirmative action programmes have defended them on the grounds of (a) "institutional racism", since the requirement of a high school diploma, or a grade in a test is often unrelated to the job and disproportionately affects blacks and other minorities; and (b) past discrimination. They contend that (i) the aim of numerical goals is not punitive and employers are not required to fire anyone; (ii) goals do not

constitute preference when undertaken to remedy past discriminatory practices; (iii) they (goals) do not require employers to give preferences to minorities and women. Instead, they require employers to end giving preference to majority (white) males; and (iv) the obligation to meet the numerical goal is not absolute. The employer must be able to demonstrate, (when unable to meet the goal), good faith efforts to recruit minorities and women; that job criteria were job related; and that the criteria were equally applied to all workers. However, the dilemma has perhaps been most clearly indicated in a much publicised case outside the employment field. In Bakke v The Regents of the University of California, the California Supreme Court found that a special admission programme to the Davis Medical School was unconstitutional. Bakke, a white man, was one of 2,000 applicants for 100 vacancies, but failed to gain entry although 16 minority group applicants gained acceptance with lower marks on account of a quota designed to help such students. Thus, the failure to distinguish between the contradictory objectives of equal employment and equal opportunity poses a legal dilemma.

To summarise, while in the British and the Canadian legislation, there is some provision for affirmative action or positive discrimination with the intent to increase the supply of qualified coloured and women workers to compete effectively against the white workers and to redress past discrimination in this manner, the U.S. Executive Orders require employers to submit numerical goals to eliminate past discrimination by actively recruiting and staffing via internal transfer, training, promotion, etc. of minority and women workers. The current controversy in the U.S. over the use of quotas as opposed to the more flexible numerical goal does have certain lessons for British and the Canadian policy makers.

### Conclusions

Legal remedies are necessary but not sufficient tools to eliminate institutional discrimination in employment. This is because the evolution of law and legal principles is a slow process; the case-by-case approach adopted thus far

in Canada and Britain and in seniority cases in the U.S. illustrates this point. Moreover, legal approaches are also limited because they operate only on the demand side of the labour market and do little to influence labour supply. Thus, simply lowering racial and sexual barriers to employment and advancement cannot ensure an adequate supply of qualified people to take advantage of these new opportunities.

An important issue in the use of law in this area is whether the same laws and enforcement agencies can deal with different forms of discrimination. In North America the tendency to uniformity of approach has perhaps been greater than in Britain. Title VII of the Civil Rights Act covers various types of discrimination including that relating to race, sex and age. However, there are also separate Age, Equal Pay and Re-habilitation Acts in the U.S.A. Similarly in Canada the human rights legislation and provincial Human Rights Commissions concern themselves with several forms of discrimination, though there is separate legislation relating to pay. In Great Britain by contrast separate Acts relate to race and to sex and separate enforcement agencies (C.R.E. and E.O.C.), though the legislation is virtually identical in the two cases and the policy has been to harmonise the two areas without actually merging them. In relation to sex and race in particular one can point to some fundamental differences.<sup>54</sup> Men and women are equal in numbers, combine in families and are geographically spread equally, whilst the races are frequently unequal in numbers, and geographically isolated; female participation in the labour force and the inducement to acquire human capital is lower than that of men, whilst these features are much more similar in the case of different races. Differences on the supply side of the

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<sup>54</sup> See for instance B. Chiplin and P.J. Sloane, *op. cit.*, and R.M. White, "Does Race Equal Sex?" *New Community*, Vol. V, No. 4, Spring/Summer 1977. The latter suggests that "whereas to remove racial discrimination in Britain is merely to incorporate more people into an otherwise largely unaltered cultural and political order, to remove sexual discrimination is a much larger and fundamental enterprise, for it requires the re-ordering of more areas of life and the alteration of more beliefs and attitudes than it is easy to imagine."

market suggest, therefore, that without fundamental social changes including changes in family relationships the potential of legislation in removing labour market inequality is much less in the case of sex than of race. Whether these differences imply that the form of legislation must be different, if the latter is to operate in its most efficient manner, remains, however, to be determined.

There is a major enforcement problem as far as the use of law as an anti-discriminatory weapon is concerned. In the U.S.A. the emphasis has been placed on system wide enforcement through such devices as pattern or practice and class action court suits, whilst in Canada human rights officers have the right to entry into an establishment without warrant and can demand relevant documents. In Britain, by contrast, the emphasis is placed on individual complaint. As Lustgarten<sup>55</sup> has noted it is difficult in this situation to prove that any single act was the consequence of discrimination, though evidence concerning an employer's hiring practices in general would influence the tribunal or court's attitude to the evidence put forward by the employer. The problem arises from the fact that employers generally have a monopoly of knowledge concerning a particular appointment or promotion. Most employers do not keep records of applicants for particular posts and though it appears that complainants can seek information on the qualifications though not the names of successful applicants, reliance on memory rather than statistical data is a serious problem given the time lags involved before the employer has to divulge information. The problem would appear to be more acute in the case of race rather than of sex, since where records are kept it is unusual for employers to classify their workforce by race. Lustgarten makes a plea for an obligation to be placed on the employer to provide statistics on the workforce by area of residence, though there are problems in determining the relevant labour market area as far as any individual employer is concerned. As outlined above the U.S.A. criteria

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<sup>55</sup> Laurence Lustgarten, "Problems of Proof in Employment Discrimination Cases", The Industrial Law Journal, June, 1977.

used to determine the presence of discrimination or otherwise have included the percentage of blacks in the total population of a city, Standard Metropolitan Statistical Area, State or region. Problems arise, however, from the possibility of employers locating in predominantly white areas to facilitate discrimination or from the effect of past discrimination if the employer's own records of area of recruitment are the basis of evaluation. In view of these difficulties it may be preferable to base evidence on the success rate of coloured applicants relative to white or female relative to male with given characteristics both in relation to hiring and promotion. Reliance on such statistics does, however, imply some tendency towards affirmative action, or positive or reverse discrimination with implied unfavourable treatment towards individuals who are passed over as a consequence. This violates the welfare economics rule that unambiguous improvements in welfare can only occur when some individuals are made better off without others being made worse off. As outlined above, there does, however, seem reason to prefer the British and Canadian voluntary programmes of positive discrimination to the U.S. affirmative action programme with implied social costs of allocative inefficiency when available supplies of minority labour at various skill levels are in short supply. This conclusion is reinforced by the finding that the employment effects of affirmative action programmes in the U.S.A. are quantitatively small.<sup>56</sup>

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<sup>56</sup> See G.H. Hildebrand et al, "A Symposium evaluating the Impact of the Affirmative Action Programme", Industrial and Labor Relations Review, Vol. 29, No. 4, July 1976.

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